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The Privy Council gives wings to the *Black Swan*: A welcome decision for litigants seeking to freeze assets and enforce foreign judgments

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Offshore jurisdictions – otherwise known as international financial centres ("**IFCs**") – have landed back on the front page of newspapers around the world. The Pandora Papers, the latest leak of millions of financial records, has unveiled how some of the world's elite have chosen to asset plan offshore.

Asset protection in IFCs such as the British Virgin Islands ("**BVI**") can be entirely legal, but these "offshore" jurisdictions are often abused by those looking to, among other things, become judgment proof in an untimely way, launder money and evade taxes.

So, how does a recent decision of the Judicial Committee of the Privy Council ("**Privy Council**") play into all of this?

The day after the Pandora Papers leak was exposed, the Privy Council released a ground-breaking decision that will serve as a critical tool for foreign litigants and judgment creditors who locate and need to freeze assets owned or controlled by defendants or judgment debtors in jurisdictions that appeal to that Court. As Canadian barristers and barristers around the world are looking for more arrows in their quiver to assist clients in multi-jurisdictional enforcement of judgments, the Privy Council has given a welcome hand.

The Convoy Collateral Appeals

In *Broad Idea International Ltd v Convoy Collateral Ltd* and *Convoy Collateral Ltd v Chee*, [2021] UKPC 24, two appeals emanating from the BVI, a seven-member Board of the Privy Council (the court of final appeal for the UK overseas territories, Crown dependencies and many Caribbean countries – several of which are IFCs) was faced with, among other things, an issue regarding the jurisdiction to grant freezing injunctions. More specifically, the Board considered whether the High Court of the BVI has the power at common law to grant a freezing injunction against a defendant when no substantive claim is made against that defendant in proceedings before the domestic court (the "**Power Issue**").

The relevant background facts can be dealt with summarily. The appellant Convoy Collateral Ltd (" **CCL**"), a Hong Kong company, brought proceedings in Hong Kong claiming damages and other substantive relief against the second respondent, Dr. Cho Kwai Chee Roy ("**Dr. Cho**"), the majority shareholder of the first respondent, Broad Idea International Ltd ("**Broad Idea**"), a BVI company. Substantive relief was sought against other defendants in Hong Kong, but not against Broad Idea.

In the BVI, CCL sought and obtained *ex parte* freezing injunctions against Broad Idea, which was subject to the territorial jurisdiction of the BVI Court, and Dr. Cho, who was not subject to territorial or *in personam* jurisdiction. No other substantive relief was sought in the BVI.

The two applications for freezing injunctions were heard separately and resulted in separate – but related – appeals to the Eastern Caribbean Court of Appeal ("**ECCA**"), and ultimately to the Privy Council.

The Power Issue

The Power Issue was central to the appeal related to the freezing injunction against Broad Idea. It is the Board's decision on this issue that is perhaps the most ground-breaking aspect of the case. Concurring in the result, the Board split 4:3 on the Power Issue.

The Power Issue goes back to a 2010 case before the BVI Commercial Court in *Black Swan Investment ISA v Harvest View Ltd* (BVIHCV 2009/399) (unreported) ("**Black Swan**"), where Bannister J held that he was not precluded from granting an injunction to protect a claimant's ability to enforce a money judgment, if and when obtained in foreign proceedings, against a BVI company.

Black Swan was upheld in 2011 by the ECCA in *Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd* (HCVAP 2010/028) (unreported) ("***Yukos***"). In *Yukos*, the ECCA rejected an argument that *Black Swan* had been wrongly decided and accepted the principle that a freezing injunction may be granted against a party resident in the BVI who controls assets against which a foreign judgment could be enforced.

However, in the instant *Convoy Collateral* appeals, the ECCA decided that (i) its own endorsement of the "*Black Swan* jurisdiction" in *Yukos* was not binding and was wrong, (ii) *Black Swan* should be overruled based on the House of Lords' decision in *The Siskina*[1] and subsequent authorities, and (iii) the injunction against Broad Idea should be set aside on the basis that a BVI court has no power to grant a freezing injunction against a BVI company except as ancillary to proceedings for substantive relief brought in the BVI.

The Board unanimously dismissed the appeal by CCL, and a majority specifically disagreed with the ECCA's reasoning and found it appropriate to decide the legal question arising under the Power Issue.

After a thorough review of the case law on injunctions dating back to 1977 when *The Siskina* was decided, Lord Leggatt, writing for the majority, endorsed the following passage from Spry on *Equitable Remedies*: "[t]he powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited". These unlimited powers have permitted the expansion of freezing injunctions "beyond their original confines" and resulted in the creation of new categories of injunctions in response to changing circumstances.

Lord Leggatt identified three major changes in circumstances since freezing injunctions were devised in the 1970s: (i) a transformation in the ease and speed with which money and other assets can be moved around the world, (ii) the globalization of commerce and economic activity and growth of multi-jurisdictional litigation and arbitration, and (iii) the growth in the use of offshore companies in jurisdictions such as the BVI.

Turning to the appeals before the Board and the Power Issue in particular, Lord Leggatt referred to the extremely broad statutory power given to the BVI High Court to grant an injunction by "an interlocutory order… in all cases in which it appears to the court or judge to be just or convenient that the order should be made".

Against this statutory backdrop and established case law on injunctions, Lord Leggatt summarized that an injunction could be granted (i) where substantive proceedings are taking place abroad, and (ii) against a "non-cause of action defendant" (e.g., a non-party), and that there is nothing precluding the grant of an injunction in a case where both are present. Taking this one step further, Lord Leggatt noted that "there is no principle or practice that prevents an injunction from being granted in appropriate circumstances against an entirely innocent party even when *no substantive proceedings against anyone are taking place anywhere*" [emphasis added].

Lord Leggatt noted that the "essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment".

Lord Leggatt summarized the current practice and articulated a three-prong, conjunctive test. A court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

(i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;

(ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

(iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

Lord Leggatt further explained that:

(i) There is no requirement that the judgment should be a judgment of the domestic court – the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.

(ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

(iii) There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal).

In the result, the majority of the Board held that the ECCA was justified in setting aside the freezing injunction against Broad Idea on the facts of the case, and, in strong *obiter dicta*, that the ECCA was wrong to hold that it was not open to the BVI court to grant a freezing injunction against Broad Idea because there were no substantive proceedings against Broad Idea or Dr. Cho in BVI.

Practical Implications

The Board's decision in the *Convoy Collateral* appeals will be helpful to any foreign litigant – including judgment creditors – seeking to freeze assets owned or controlled by people or companies domiciled in the BVI (and other countries over which the Privy Council has final appellate jurisdiction).

The Board's affirmation of the elasticity of equitable remedies to allow courts to be nimble enough to respond to changing technologies, globalization and offshore structures suggests that it is just a matter of time before we see new categories of injunctions. And while treasure troves of leaked documents may have utility for litigants, courts will continue to rely on their broad powers to ensure just and equitable outcomes.

[1] *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("***The Siskina***").

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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