



Exorcising the Shades of *The Siskina*

Introduction

In *Broad Idea International Ltd v Convoy Collateral Ltd*¹, the Privy Council clarified that a court may grant a freezing injunction in what appear, at least in principle, to be an exceedingly wide range of circumstances. In doing so, the Privy Council sought to “lay to rest” certain of the shades of an earlier decision of the House of Lords in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA (“The Siskina”)*², which shades, it was said, had “haunted this area of the law for far too long”.³

Factual Background

To set the decision in context, it is necessary to provide just a basic outline of the facts. The appellant sought freezing injunctions in the BVI against the first respondent, Broad Idea (a company incorporated in the BVI), and the second respondent, Dr Cho, who owned 50.1% of the shares in Broad Idea and who was resident in Hong Kong. The appellant had also brought proceedings claiming damages against Dr Cho in Hong Kong.⁴

1. [2021] UKPC 24, hereafter “Broad Idea”.

2. [1979] AC 210.

3. *Broad Idea*, [120], per Lord Leggatt, giving the judgment of the majority of the Board.

4. Such that the point of the freezing injunctions sought in the BVI was to ensure that there were assets in that jurisdiction against which the appellant could, eventually, seek to enforce any judgment in its favour.

5. [70].

6. *Mercedes Benz AG v Leiduck* [1996] AC 284.

The freezing injunction against the second respondent, Dr Cho

In order for the BVI court to have jurisdiction over Dr Cho, the appellant had to effect service on him. Of course, given that Dr Cho was not in the BVI, the appellant first had to obtain permission to serve him out of the (territorial) jurisdiction. Upholding the decisions of both the court at first instance and the Eastern Caribbean Court of Appeal, the Board⁵ determined that the appellant was not entitled to the permission which it sought. Briefly – and here endorsing the conclusion to which the House of Lords had come in *The Siskina* and an earlier decision of the Privy Council itself⁶ – the Privy Council confirmed that the Eastern Caribbean Civil Procedure Rules did not contain a provision allowing for a claim form to be served out of the territorial jurisdiction where the only relief sought against the prospective defendant was a freezing injunction. The BVI court did not have personal jurisdiction over Dr Cho; the appellant was unsuccessful in its attempt to get a freezing injunction against him.

For those who would seek to obtain a freezing injunction in an English court, the drafting of Practice Direction 6B, paragraph 3.1(5) and Section 25(1) of the Civil Jurisdiction and Judgments Act 1982 provide a means of escape from the Board’s conclusion on this point in *Broad Idea*. However, for those who wish to seek such injunctive relief from courts in countries – like the BVI – which have chosen to couch their civil

procedure rules in terms materially similar to those of Order 11 of the (old) English Rules of the Supreme Court, this conclusion clearly restricts the circumstances in which such relief is available. The only way to change the picture now is for the legislator in those countries to remake the civil procedure rules in question.

The freezing injunction against the first respondent, Broad Idea

In contrast to Dr Cho, the appellant could (and did) serve Broad Idea as of right in the BVI. In consequence, the Privy Council had to determine whether a BVI court could grant a freezing injunction where: (i) the court had personal jurisdiction over Broad Idea; (ii) no substantive proceedings had been brought against Broad Idea in the local court possessing jurisdiction; and (iii) the freezing injunction was sought in support of a claim pursued in a foreign court.⁷

The Board determined that a BVI court could, in principle, grant a freezing injunction in the circumstances just stated and, in doing so, endorsed the conclusions reached by the BVI High Court in *Black Swan Investment ISA v Harvest View Ltd*⁸

7. *Broad Idea*, [71].

8. BVIHCV 2009/399 (unreported: 23 March 2010).



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and the Eastern Caribbean Court of Appeal in *Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd*.⁹ As the Board held, a court which could grant an injunction in circumstances where it appeared to the judge that it was “just and convenient” to do so enjoyed a wide-ranging power, which power “was not confined to proceedings in which substantive relief is claimed” before that court.¹⁰

Had the Board left matters there, the judgment would have been a welcome one for practitioners in the BVI but perhaps of limited wider significance. The Board did not, however, leave matters there. Instead, having recognised that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money, the Board decoupled the grant of a freezing injunction from the need to show an existing cause of action.¹¹ To put that point another way, and with specific reference to the facts before the Board, that the appellant could only show a good arguable case that it would obtain a judgment in its favour in Hong Kong, which judgment it could then seek to “enforce” by bringing an action on it at common law in the BVI, was no impediment to the BVI court’s granting a freezing injunction.

9. HCVAP 2010/028 (unreported: 26 September 2011).

10. *Broad Idea*, [76].

11. *Ibid*, [90].

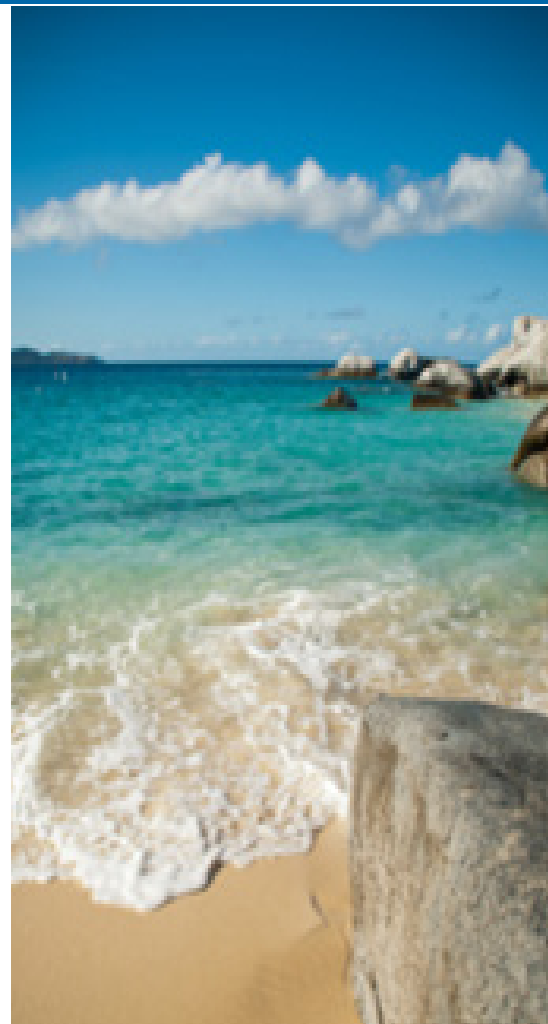
The test for freezing injunctions now

In the light of its conclusions, the Board then restated the test governing the grant of a freezing injunction. Hence, a party may obtain a freezing injunction where:

- a) it 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;
- b) the respondent holds assets (or is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such judgment could be enforced; and
- c) there is a real risk that, unless enjoined, 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 left unsatisfied.

Conclusions

While the Board, unanimously, dismissed the appeals, the majority’s statements on the law governing the grant of freezing injunctions are likely to be highly significant in England and elsewhere. The minority judgment made clear that the appellant had sought an order that the Privy Council depart from *The Siskina* and its own previous decisions and direct that the UK Supreme



Court follow that departure. If courts in England and Wales follow the reasoning of the majority in *Broad Idea*, those seeking a freezing injunction or resisting the grant of one will likely have to keep in mind the following points:

- the Privy Council’s widening of the first limb of the test (which widening did not commend itself to all members of the Board) likely makes it easier for applicants to satisfy that first limb. Correspondingly, the protection previously afforded to a respondent seemingly has been weakened;



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- even so, it is unclear what exactly will be required to satisfy the first limb. Will it, for instance, be necessary for an applicant to adduce evidence of foreign law before an English court in order to demonstrate a good arguable case that the foreign court will grant to the applicant a judgment enforceable through the process of the English court? If an applicant is required to do that, such requirement will (almost certainly) increase the costs and time spent in obtaining a freezing injunction; and

- given the widening of the first limb of the test, the court's focus is now likely to fall much more squarely on the third limb of the test, reasserting its place at the "heart and core" of the court's grant of a freezing injunction.



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