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The BVI common law after Broad Idea

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The Judicial Committee of the Privy Council has recently handed down its heavily anticipated Judgment in the conjoined BVI appeals of Broad Idea International Ltd v Convoy Collateral Ltd and Convoy Collateral Ltd v Cho Kwai Chee.

A few key takeaways may be gleaned from the judgment

1. On the matter of the service out on a foreign defendant of a claim form in which a freezing injunction is the only relief sought, the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the "EC CPR") confer no such power on the BVI Courts. Accordingly, this apparent limitation in the EC CPR may only be remedied by their amendment.

2. Re-affirming the Black Swan jurisdiction (which has since been placed on a statutory footing) and departing from the dicta of the House of Lords in The Siskina, the Privy Council noted that a freezing injunction is not, on a true analysis, ancillary to a cause of action, in the sense of a claim for substantive relief, or at all. 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. Accordingly, there is no reason in principle to link the grant of such an injunction to the existence of a cause of action.

Summary

The common law in the BVI (and perhaps more generally) on the granting of freezing injunctions may be stated as follows (per Lord Leggatt at paras.101 and 102):

a) 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 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 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

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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.

b) Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:

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).

The full text of the Privy Council's decision may be found here.

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