# FREEZING IN THE CARIBBEAN

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**"Black Swan BVI;**

**Siskina must die;**

**Freestanding Mareva;**

**Test from Ninemia;**

**Privy Council states the law;**

**We can't take it any more!"**

**("We Didn't Start the FIRE" – With apologies to Billy Joel)**

There has been more heat than light in the area of freezing injunctions in the British Virgin Islands (the "BVI"), in particular in recent years so it comes as a welcome relief that the Privy Council have cast a cold eye over the law in Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24 (the "Judgment"). The Judgment is, as recognised by his Lordship Sir Geoffrey Vos, "ground-breaking" (para. 221).

Although the Judgment provides definitive clarity in relation to some points of uncertainty in the BVI not all of the same points arise in relation to other Caribbean jurisdictions, such as the Cayman Islands. Nevertheless, their Lordships' statement in the Judgment as to the purpose and scope of interim relief will undoubtedly be useful and relied upon for its general statement that the court is able to modify existing practices to provide effective remedies in changing circumstances, and its more specific, purposive, approach to the use of freezing injunctions.

The background to the Judgment is as follows: the claimant (appellant), Convoy Collateral Limited, sought a freezing injunction in the BVI in support of ongoing proceedings in Hong Kong against the defendant (second respondent), Mr Cho. The Hong Kong proceedings were capable of resulting in a judgment for damages equivalent to US$92 million. A freezing injunction was sought against both Broad Idea International Limited ("Broad Idea") (the first respondent), a BVI company in which Mr Cho held a 50.1% stake, and Mr Cho personally. Whilst Broad Idea was a company incorporated in the BVI, Mr Cho was habitually resident in Hong Kong.

The Privy Council was asked to consider two questions:

1) whether, under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the "EC CPR") the court has power to authorise service on a defendant outside of the jurisdiction of a claim form in which a freezing injunction is the only relief sought (the "Service Out Issue"); and

2) whether the High Court of the BVI has power to grant a freezing injunction against a party over which it has personal jurisdiction, to assist enforcement of a prospective (or existing) foreign judgment (the "Freezing Issue").

This article will focus on the Freezing Issue. Nevertheless, it is noteworthy that the Privy Council found that, regarding the issue of service out of the jurisdiction, the House of Lords' judgment in The Siskina must prevail in circumstances where the wording of the EC CPR is materially similar to the English rules of court which were applicable at the time of The Siskina.

**EC CPR 7.3(1)(b) provides that "A claim form may be served out of the jurisdiction if a claim is made (…) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction".**

As a consequence, the court could not authorise service out of the jurisdiction on Mr Cho. The Privy Council noted that "if a wrong turning has been taken, the appropriate means to getting the law of the BVI back on track is by amending the EC CPR" (para. 2 of the Judgment). In this regard the Privy Council found that the appellant could not be "third time lucky".

In relation to the Freezing Issue, Lord Leggatt (in ghostbusting mode) said the following: "The shades of The Siskina have haunted this area of the law for far too long and they should now finally be laid to rest." With those words, the Privy Council ended the 44-year reign of the House of Lords decision in Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA [1979] AC 210, better known as "The Siskina". The Siskina was authority for the proposition that the court had no power to grant an interlocutory injunction unless it was ancillary to a cause of action. In that regard, the Privy Council stated that: "the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound" (para. 120 of the Judgment).

The Privy Council found that The Siskina was inconsistent with section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the "BVI Act"), which was applicable in the circumstances of the Broad Idea proceedings. Section 24(1) of the BVI Act gives the BVI Supreme Court (High Court) the power 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 (…)". Lord Leggatt noted that it would be difficult to cast the power to grant an interlocutory order in wider terms, and that (in any event) there was no limit on the power of the courts with equitable jurisdiction to grant injunctive relief, except where restrictions had been imposed by statute.

Consequently, Lord Leggatt concluded that, in circumstances where the BVI Act did not impose limits on the court's power to grant a freezing injunction, any impediment could only be based on established practice.

Moving on to consider 'established practice', Lord Leggatt concluded that on the basis of a "true analysis" freezing injunctions are not ancillary to a cause of action, in the sense of a claim for substantive relief (para. 83 of the Judgment). Instead, the purpose of the injunction is "to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced" (para. 89). Once this is appreciated, "there is no reason in principle to link the grant of such an injunction to the existence of a cause of action" (para. 90). What matters is "that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought" (para. 92).

Although Sir Geoffrey Vos considered the Privy Council's decision ground-breaking, he also deemed the majority's decision obiter, on the basis of the Judicial Committee's unanimous decision in relation to the Service Out Issue. Indeed, for future purposes the Judgment became 'superfluous' to the BVI insofar as the legislature of the BVI had, by the time the Judgment was handed down, intervened to provide the Eastern Caribbean Supreme Court statutory powers to grant interim relief in support of proceedings commenced in a foreign jurisdiction (per s. 24A(1) of the BVI Act).

Similar developments had previously occurred in the Cayman Islands where s. 11A of the Grand Court Act was enacted as a consequence of the Cayman Islands Court of Appeal decision in VTB Capital plc v Universal Telecom Management [2013] 2 CILR 94. Consequently, in the Cayman Islands, the ability of the Grand Court to grant freezing injunctions in aid of proceedings commenced in foreign jurisdictions, has been established for some time insofar as such proceedings are capable of giving rise to a judgment which may be enforced in the Cayman Islands. Nevertheless, the Privy Council's decision will undoubtedly be highly persuasive and eagerly followed in circumstances where there is a practical need for effective remedies in a world where assets are increasingly easily dissipated.