

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2017/0226

BETWEEN:

[1] JTRUST ASIA PTE. LTD.

Claimant/
Respondent

and

**[1] MITSUJI KONOSHITA
[2] A.P.F. GROUP CO., LTD**

Defendants/
Applicants

Appearances:

Mr. Vernon Flynn, QC, with him Mr. Peter Ferrer, Ms. Lucy Hannett and Ms. Marcia McFarlane
for the Claimant

Mr. Stephen Midwinter, QC, with him Mr. Christopher Bromilow for the Defendants

Mr. Iain Tucker, with him Ms. Catherine O'Connell for the Receivers

2020: March 5;
June 3;
July 7;
August 19.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the judgment of the Court on the Defendants' application filed on 19th February 2020 to discharge a freezing order and receivership order. Those orders had been made in support of claims commenced in this jurisdiction. When the claims were stayed on grounds that this jurisdiction is not the appropriate forum for determination of the disputes, the freezing and receivership orders were continued. A claim was pursued in Singapore. There are also proceedings on foot in Thailand. In Singapore, the High Court had also granted injunctive relief pending trial. Upon trial, the action was dismissed. Flowing from this, the injunctive relief granted by the Singapore High Court would consequently fall away. The

injunctive relief was continued on a temporary basis pending determination of an application before the Singapore Court of Appeal.

- [2] The Defendants' discharge application came before this Court on 5th March 2020. During preparation of the judgment and indeed only a few days before it was ready for delivery, the parties brought to the Court's attention three new matters:
- (1) the Singapore Court of Appeal's decision dated 1st June 2020 to continue injunctive relief in Singapore pending an appeal from the judgment upon trial;
 - (2) our Court of Appeal's decision in **Convoy Collateral Ltd v Broad Idea International Limited et al.**¹ ('**Convoy Collateral**'), and
 - (3) our Court of Appeal's decision in **Broad Idea International Limited v Convoy Collateral Limited**² ('**Broad Idea**').
- [3] At a directions hearing the parties were then directed to file written submissions on the effect, if any, of these matters and a further oral hearing was held on 7th July 2020.
- [4] This judgment thus takes the form of two parts. First this judgment will address the matters raised on 5th March 2020. Then it will address the further matters raised and argued on 7th July 2020. As I shall explain below the new matters do not affect the outcome of this application. In this Court's judgment the freezing order and receivership order should be maintained until further order.

The hearing on 5th March 2020

- [5] The Defendants argued that the terms of the stay have been fulfilled by reason of the Singapore trial judgment and, since the claims were dismissed, the freezing and receivership orders should be discharged.

Background

- [6] The Claimant ('JTrust Asia') commenced these proceedings in the Territory of the Virgin Islands ('BVI') on 21st December 2017. By way of an extremely basic summary, the Claimant

¹ BVIHCMAP2016/0030 (unreported, delivered 30th March 2020, to take effect from 1st April 2020 at 12:01 p.m.).

² BVIHCMAP2019/0026 (unreported, delivered 29th May 2020).

claims an amount of approximately US\$95 million from the Defendants. The Claimant alleged that the Defendants had misappropriated this sum for the First Defendant's benefit, as well as for the Second Defendant's benefit as the First Defendant's nominee and conduit for the First Defendant's fraud.

- [7] For background purposes only, and without making any findings of fact, the Claimant is a company incorporated in Singapore. It invested monies on five occasions in a company called Group Lease Public Company Limited ('Group Lease') that is listed on the Thai stock exchange. The investments took place between March 2015 and September 2017. As a result, the Claimant came to hold 8.01% of the issued share capital, US\$180 million in convertible debentures, and Thai Bhat 2.4 million in 500,000 units of warrants, in Group Lease.
- [8] The Claimant alleges that on 16th October 2017 the Thailand Securities and Exchange Commission announced that it had filed a criminal complaint against the First Defendant, Mr. Mitsuji Konoshita ('Mr. Konoshita'), for committing fraud, misappropriating Group Lease's assets and falsifying Group Lease's accounting records. Mr. Konoshita was or is a director of Group Lease and was its Chief Executive Officer until 16th October 2017. The essence of the alleged fraud was that some 38% of Group Lease's consolidated profits derived ostensibly from interest on a number of purported loans. These loans were said to be high-interest, under-collateralized, short-term loans to two groups of borrowers in Singapore and Cyprus respectively. The total of the loans was about US\$95 million. Allegedly, Mr. Konoshita was the controller and ultimate beneficial owner of one of the Singapore borrowers and of all the Cyprus borrowers, making the purported loans a circular fraud, a dishonest and abusive practice known as 'round-tripping'.
- [9] The Claimant claimed that the purpose of the loans was to defraud investors in Group Lease, by procuring their investments by overstating and thus misrepresenting Group Lease's real income.
- [10] There was also an alleged investment in a Sri Lankan company associated with Group Lease which appeared significantly to over-value the Sri Lankan company.
- [11] The Second Defendant ('APF') is a BVI company. It is allegedly a nominee of Mr. Konoshita, as well as a holding company through which he operates a number of investments. It also

holds the controlling stake in Group Lease. In its Amended Statement of Claim filed in these proceedings, the Claimant accuses the Second Defendant of assisting in the misappropriation of the Claimant's funds by receiving, concealing and/or laundering some or all of the funds in question.

- [12] The Claimant claimed that it had relied upon representations made by Mr. Konoshita as to the purportedly sound basis for investing in Group Lease, and also upon Group Lease's accounts, which the Claimant says were intentionally misstated by Mr. Konoshita.
- [13] The Claimant seeks a declaration that the US\$95 million be held upon trust for the benefit of the Claimant, consequential relief, and various permutations of relief that would see the Defendants liable to pay the Claimant that amount of money.
- [14] The Claimant asserted that the Defendants knew that the Claimant's money had been paid over as an investment in Group Lease and so the First and Second Defendants knowingly received them in breach of trust and/or they had obtained these monies by fraud.
- [15] The Claimant thus asserts that it has a substantive claim before this Court against both the First and the Second Defendants. The Second Defendant is not presented as a non-cause of action Defendant.
- [16] On 13th February 2018 the Claimant obtained a worldwide freezing injunction in support of its claim here over the assets of both Defendants. After some variations the amount frozen was set at US\$45million. The injunction required the Defendants to provide details of all their assets by a deadline. On 5th July 2018 the Claimant obtained a receivership order over the assets of APF. Mr. Nicholas Gronow and Mr. John Ayres were appointed as joint and several receivers, for the purpose of identifying, protecting, preserving and (if appropriate) recovering the assets of APF. The grounds for the appointment of receivers were primarily that Mr. Konoshita had been in a state of continuous contempt of the asset disclosure orders contained in the freezing order, and that he had the means and capability to dissipate his assets and had demonstrated an inclination and capacity to do so. Also on 5th July 2018, this Court continued the worldwide freezing order.

- [17] The Defendants applied to have the freezing and receivership orders set aside. Both were ultimately upheld by the Court of Appeal in a judgment dated 18th December 2018. Upon that appeal, four issues fell for determination: whether JTrust Asia had a good arguable case, whether the *ex parte* order should have been discharged on grounds of material non-disclosure, whether there was a real risk of dissipation of the Defendants' assets, and whether costs should have been granted to the Defendants. Issues of the Court's jurisdiction, that is, its powers, were not raised.
- [18] In late 2018 the Defendants applied for a stay of these proceedings on grounds that the BVI is not the appropriate forum for the trial of this claim. That application was determined by the Honourable Justice Adderley on 16th April 2019. The Court granted the stay. The Court also set aside service of the Claim Form outside the jurisdiction on Mr. Konoshita.
- [19] For the purposes of the present application, the reasons why the stay was granted are found only in the transcript of the Court's oral decision. I was not provided with the evidence in support of the stay application. The transcript is nonetheless sufficiently clear on this point. Adderley J. cited that the Defendants had 'put forward two more convenient fora, namely Singapore as their first choice and then Thailand'.³ He continued, that 'the Claimant has not shown that the BVI is clearly an appropriate forum for a trial and the Applicant has shown that there are two alternative venues which are more suitable, namely Singapore and Thailand'.⁴ He then narrated that he had taken into consideration a number of factors, including that the governing law of the investment agreements was either Singaporean or Thai law⁵ upon an examination of the pleadings in Singapore, the BVI and Thailand, as well as a perusal of the agreements;⁶ furthermore, that the alleged wrongdoing took place in a number of countries and that the 'center of gravity of the dispute was either in Singapore or Thailand'.⁷
- [20] The focus of this part of Adderley J.'s decision was not so much upon where the disputes might eventually be determined but more upon the fact that the BVI was not the appropriate forum.

³ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 4 lines 3 to 5.

⁴ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 4 lines 10 to 14.

⁵ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 4 lines 19 to 21.

⁶ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 4 lines 22 to 24.

⁷ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 4 line 25 to page 5 line 3.

- [21] The order made on 16th April 2019 reflected simply that the claim was stayed. It did not say that it was stayed in favour of Singapore, or Thailand, or both. The order also did not make any provision concerning when or upon what eventuality the stay might come to an end.
- [22] The Court also maintained the freezing injunction and receivership. In the order, the freezing and receivership orders were stated to continue until further order. It provided no more than that. Neither Adderley J. nor the order explicitly stated that the freezing and/or receivership orders would continue until the happening of a certain event in either or both of Singapore or Thailand, or elsewhere. Mr. Konoshita gave evidence in his Seventeenth Affidavit filed on 18th June 2019 at paragraph 5 that '[f]ollowing the stay of the proceedings, the freezing injunction and receivership orders continue in force solely in support of the proceedings commenced by JTA against me in Singapore'. This position appears nowhere upon the face of the transcript of the hearing on 16th April 2019 nor in the order.
- [23] The fate of the freezing and receivership relief was addressed entirely orally by all concerned at the hearing on 16th April 2019. It is thus not surprising that the arguments and ensuing decision were not as fulsome as would otherwise undoubtedly have been the case.
- [24] The fate of the freezing and receivership orders was nonetheless the subject of oral submissions advanced on both sides. The Claimant had indicated that if the Court would not continue the freezing and receivership orders as a condition of the stay, the Claimant would apply for them to be re-imposed on a **Black Swan**⁸ basis. The Defendants again sought to have the freezing order and receivership set aside, on the basis that the claim in the BVI was effectively at an end. In the event, the Claimant was not required to, and did not, make an application for **Black Swan** relief, as the Learned Judge continued the extant freezing and receivership orders as a condition of the stay. The Defendants have taken the position that the freezing and receivership orders were continued on the **Black Swan** basis, but I do not think that is right. Adderley J. appears to me to have intended to continue this relief as a condition of the stay. He reasoned:
- “Not to make it a condition would put the Claimant in a position where they would have to start all over to satisfy the requirements for a receiver and so on and so forth and we’ve gone to that already.”⁹

⁸ Following this Court’s decision in *Black Swan Investment I.S.A. v Harvest View Limited et al.* BVIHCV2009/0399 (Unreported, delivered 23rd March 2010).

⁹ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 16 lines 2 to 6.

And:

“My instinct is to make it a condition of the discharge. It makes it clean and clear what’s still in place. In other words, the stay does not affect either the extant injunction nor the point of the receiver. That would be my decision.”¹⁰

Adderley J. did not add to or qualify this further. There was no other basis, than as a condition of the stay, that the freezing and receivership orders were continued.

- [25] The Claimant relied upon the BVI High Court’s decision in **Marble Point Energy Ltd. V Multiperils International Inc.**¹¹ as authority that a freezing injunction can be ordered to continue as a condition of a stay of proceedings in the BVI. Rule 26.1(2)(q) of the Civil Procedure Rules 2000 (‘CPR’) is however clear that the Court has power to order a stay, and CPR 26.1(3) is clear that the Court can impose conditions upon its orders. The possible conditions are not stated as a closed category.
- [26] Neither side addressed Adderley J. on whether a first instance trial decision in Singapore dismissing the claims against Mr. Konoshita should be treated as requiring the freezing and receivership orders to be discharged. Adderley J. made no pronouncement upon that question either. Indeed, there is no sign in the transcript that his mind was consciously applied to it.
- [27] Adderley J. did give an indication as to why he considered it appropriate to exercise his discretion to continue the freezing and receivership orders. Whilst alluding to unidentified ‘considerations’ which underlay the granting of those orders in the first place, he expressly mentioned that there was ‘the question of dissipation of assets’.¹²
- [28] The order entered on 16th April 2019 stated in terms that the freezing and receivership orders ‘are continued until further order’. It was not framed in terms of the original orders falling away and a new set of orders being imposed on a different (**Black Swan**) basis.
- [29] The Claimant brought claims in Singapore and in Thailand. In Singapore, the Claimant had also obtained a local (as opposed to a worldwide) freezing order against Mr. Konoshita in

¹⁰ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 17 lines 3 to 8.

¹¹ BVIHCV2006/0238 at paragraphs [50] to [53] (Joseph-Olivetti J).

¹² Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 7 line 21.

support of its claim there. In that claim the Claimant sued Mr. Konoshita and seven other defendants. APF was not one of them. Nor was the Thai company, Group Lease Public Company Limited.

[30] The claim was tried in the Singapore High Court. The claim was dismissed, on the basis, primarily, as I understand it from my reading of the judgment, that the Claimant had not made out its case that Group Lease's financial statements had been prepared with a dishonest intent and that the Claimant had not made out its claim in deceit against Group Lease and Mr. Konoshita. The trial judge was not persuaded that the Claimant had relied upon Group Lease's financial statements prior to making its investments.

[31] The Defendants' evidence in support of its application here is that the Singapore High Court dismissed an application by the Claimant to continue the Singapore injunction pending an appeal. As the claim was dismissed the Singaporean injunction would logically fall away. However, discharge of the injunction was temporarily stayed to give the Claimant an opportunity to ask the Singapore Court of Appeal to continue the injunction pending determination of its appeal from the Singapore judgment. The parties told me that the Claimant's continuation application was due to be heard by the Singapore Court of Appeal some time in February or March 2020. The practical effect was that the Singapore freezing order against Mr. Konoshita had been continued, albeit on an interim basis, as at the time the matter came before me on 5th March 2020.

The Applicants'/Defendants' contentions

[32] The following were the Applicants'/Defendants' contentions at the hearing of the discharge application on 5th March 2020.

[33] Mr. Midwinter, QC, Learned Queen's Counsel for the Defendants, argued that the BVI Court had stayed the claim in favour of a trial in another jurisdiction. The transcript of the hearing at which this Court stayed these proceedings records that 'it [i.e. the claim] should go to Singapore or Thailand to be heard'.¹³

¹³ Transcript of Chamber Proceedings, Tuesday, 16th April 2019, 2:30 p.m. to 3.08 p.m. page 10 lines 15 to 17.

- [34] The Applicants argued that what the trial jurisdiction might have been is irrelevant. It happens to have been Singapore. The claim has now been tried. The claim was dismissed. The First Defendant Mr. Konoshita was found not to have been dishonest. Moreover, it was found that the Claimant had not relied upon certain representations by the Defendants which the Claimant alleged had been false. Although the Claimant has filed an appeal, the prospects of the Singapore Court of Appeal overturning the trial court's findings of fact are slim.
- [35] The Applicants further contended that if the Claimant was now to apply for a freezing order and receivership order in the BVI in support of the appeal it could not be said that the Claimants have a good arguable case. This Court needs to be satisfied that there continues to be a good arguable case on the merits for the freezing and receivership orders to be maintained. Mr. Midwinter, QC, had no authority to support this submission, but he considered that it was 'such an obvious proposition'. He submitted that the key question here is whether the Claimant can still show that he has a good arguable case, being one of the conditions for the grant of a freezing order. The question is whether the conditions for a freezing order are still satisfied. The mere fact that the Claimant has filed an appeal in Singapore does not mean that the Claimant has a good arguable case.
- [36] The Singapore judgment entails that the freezing order and receivership order in the BVI had been granted on a false basis that the Claimant had a good arguable case. Since the orders had been granted on a false basis they ought to be discharged. The Defendants say that the orders had been granted following breach of the Claimant's duty of full and frank disclosure, because the falsity of the basis upon which the orders had been obtained has only been revealed by the trial of the action. The submissions used to justify the orders in the first place have been shown to have been wrong.
- [37] Another way of looking at the matter is that the Singapore judgment has brought about a change of circumstances. The Claimant could not properly obtain a freezing order and/or a receivership order now.
- [38] Because the conditions for a freezing order and receivership no longer exist the Defendants can apply to discharge those orders.

- [39] Moreover, since the claim has now been tried, and dismissed, the purpose of the BVI freezing order and receivership order has come to an end.
- [40] The claim which the Claimant had brought in the BVI had been added into the Singapore proceedings by amendment to the proceedings there, after the claim had been stayed here. Consequently, the judgment in Singapore also determined the claim filed here. The Singapore judgment is *res judicata* in respect of the matters determined therein.
- [41] For a receivership order, the requirements are stricter than for a freezing order, as the relief is more draconian. So even if the freezing order might remain, the receivership order should be discharged.
- [42] This Court has to conduct its own inquiry whether or not to continue the worldwide freezing and receivership orders. This Court should not simply stay in step with the approach adopted in Singapore to maintain the freezing order pending the appeal. Indeed, the Singapore trial judge had rejected that there were grounds to continue the Singapore freezing order. This Court should thus take its own view.
- [43] It so happens that the Claimant has also brought legal proceedings in Thailand, but there is no evidence about those proceedings before this Court for the purposes of this application. Thus, says Mr. Midwinter, QC, apart from the fact that there are such proceedings, I formally know nothing about them. Mr. Midwinter, QC, though, proffered information from the Inner Bar table that the allegations of fraud levelled by the Claimant are the same as those dismissed in Singapore, so there is no good arguable case in Thailand either.
- [44] The Applicants argued that if the Claimant contends that the freezing and receivership orders should stay in place because there are ongoing proceedings in Thailand, then the Claimant has the burden of persuading this Court that that is so. With no evidence before this Court concerning the Thai proceedings, there are no evidential grounds upon which this Court should continue those orders. The burden is not on the Defendants to prove a negative.
- [45] The Applicants urged that it would not be just and convenient to maintain the freezing and receivership orders. The Defendants have suffered harm by having been wrongly made subject to those orders. They have had an enormous impact upon their life and ability to do

business. There is a great likelihood of a real injustice if the orders are continued. The share price of the key asset, a company called Showa, has fallen significantly by millions of dollars due to the freezing and receivership orders.

- [46] If, though, the Court desires to continue the orders, it should increase the level of fortification already provided, of US\$500,000. The parent company of the Claimant has plenty of money, but the Claimant's willingness to obey court orders and honour financial orders against it will depend upon the willingness of its parent. The fortification should be increased to a sum worth some millions of dollars. The figure of US\$27.5million was mentioned. If the Claimant wants to maintain the freezing and receivership orders it should be required to put up a sensible sum of money to do so.

The Respondent's/Claimant's contentions

- [47] Mr. Flynn, QC, Learned Queen's Counsel for the Claimant, submitted that Mr. Midwinter, QC, was wrong, for the reasons summarized below.
- [48] The existence of a good arguable case should not be treated as a pre-condition for the continuation of the BVI freezing and receivership orders because different considerations applied to a continuation as opposed to a grant:
- (1) The purpose of this Court's continuation of the freezing and receivership orders, whilst staying the proceedings here, was to assist proceedings abroad.
 - (2) The freezing and receivership orders were continued as a condition for ordering the stay of the BVI proceedings. They were not continued as stand-alone injunctions of the **Black Swan** type. They were continued as part of the Court's broad discretion to impose conditions upon ordering a stay of proceedings. These proceedings have been stayed, not struck out or dismissed. They remain extant.
 - (3) As the BVI freezing and receivership orders were imposed to assist overseas proceedings, this Court must have regard to the fact that in Singapore the Singapore freezing order was maintained on an interim basis, pending determination by the Singapore Court of Appeal of the Claimant's application to have the freezing order

extended pending an appeal. There is every good reason for the BVI Court to remain in step with the Singapore courts, which have in effect maintained their local freezing order.

- (4) Because the Singapore freezing order was continued on an interim basis past the first instance trial phase, it would not be right to treat the trial in Singapore as the cut-off point.
- (5) The Singapore freezing order is narrower in scope than the BVI worldwide freezing and receivership orders, dealing just with Singapore assets. If the BVI freezing and receivership orders are discharged now, this would leave the Claimant exposed to possible dissipation of assets not caught by the continuing Singapore freezing order, and thus possible irremediable harm if the Singapore Court of Appeal overturns the judgment at first instance. On this basis, it is just and convenient to continue the BVI freezing and receivership orders, if perhaps only for the relatively short time until the Singapore Court of Appeal determines the Claimant's extension application.

[49] Mr. Midwinter, QC's analysis ignored the fact that there are also extant Thai proceedings. The BVI freezing and receivership orders were continued to assist eventual proceedings in Thailand as well. The circumstances of the case include that Adderley J. continued the freezing order and receivership order as a condition of the stay in the BVI, as an aid to eventual proceedings not just in Singapore but also Thailand; thus this Court cannot treat the need for assistance as at an end just because a trial has taken place and the claim has been dismissed at first instance in one of those two jurisdictions. Since those proceedings are ongoing, it would not be just and convenient to discharge the BVI orders now.

[50] It was not for the Claimant to put forward evidence of the Thai proceedings to show that the BVI freezing and receivership orders should continue even though the claim has already been determined in Singapore, as submitted by the Defendants. Rather, it should be the other way around: since it is the Defendants' application, it is for them to demonstrate that the BVI freezing and receivership orders should be discharged in all the circumstances of the case. It is thus for the Defendants to put forward evidence concerning the Thai proceedings, including Thai law in relation to *res judicata*, and the merits of the underlying claim, to demonstrate that the effect of the Singapore decision is such that Claimant has no good arguable case in Thailand. Yet, says Mr. Flynn, QC, no evidence about the Thai proceedings has been included

in the discharge application. The Defendants focus entirely on the Singapore proceedings. There is no material before me on which the Court can conclude that there is no good arguable case in Thailand.

- [51] The mere filing of a discharge application does not mean that the Court is required to proceed as if it is considering whether a freezing or receivership order should be granted afresh. Upon an application for a freezing or receivership order, the evidential burden is on the party who wants such an order. Upon a discharge application, the evidential burden is reversed, in that it is on the respondent to the freezing or receivership order to persuade the Court that such an order should be discharged.
- [52] This Court's stay order was made in favour of the totality of proceedings in Singapore, not just trial at first instance. In Singapore, the interim freezing order did not automatically fall away and it has been kept in place. It makes no sense to drop the freezing order here whilst it has been kept in place in Singapore. That would risk rendering a favourable judgment of the Singapore Court of Appeal nugatory, which would be contrary to justice.
- [53] The freezing and receivership orders had not been obtained on a false basis, by reason of the fact that the Claimant has been adjudged at trial not to have had a good case against the Defendants. An adverse judgment should not be treated as a factor in deciding whether or not the Claimant had presented a good arguable case in support of its application for interim relief. Hindsight is not the right perspective in this regard. Indeed, the Defendants had previously applied to have the interim relief set aside on grounds of alleged breach of the duty to give full and frank disclosure and they failed in this regard both at first instance and in the Court of Appeal.
- [54] The Court must also consider the balance of harm – whether to discharge the interim relief now, thereby possibly causing irremediable by setting the freezing and receivership orders aside, or to wait a few more week pending determination of the proceedings before the Singapore Court of Appeal.
- [55] Mr. Flynn, QC, countered Mr. Midwinter, QC's argument that the receivership order at least should be discharged, being a more draconian type of order with stricter conditions applying, by observing that in this case the Court had considered a receivership order appropriate because

there had been a history of non-compliance with the freezing order. The Singapore judgment did not change that.

- [56] No increase in fortification would be appropriate. The purpose of fortification contemplates a breach of an undertaking. An adverse judgment is not a factor for revisiting the amount of fortification. It is not a change of circumstances, because it is always inherently contemplated that an adverse judgment may be entered against a party's case.

Discussion (1)

- [57] Having considered both sides' arguments at the hearing on 5th March 2020, I have concluded that I prefer Mr. Flynn, QC's submissions at that hearing. Unless I mention otherwise, I adopt his reasoning. Mr. Midwinter, QC's submissions were compelling and tightly reasoned, but in my respectful judgment they contained fatal flaws.
- [58] The first fatal flaw with the Defendants' argument lies in the basic principle that an applicant who wishes a freezing or receivership order to be discharged has the burden on showing the Court that the ends of justice will be served by doing so. This applies here. Clause 2 of the Order dated 16th April 2019 provided that the freezing and receivership orders 'are continued until further order'. Orders are typically made upon an application. The filing of an application seeking the discharge of an injunction does not of itself operate to shift the burden of proof upon the Claimant to show that a freezing order or receivership order should be made afresh or continued. As the freezing order, and the subsequent receivership order, were granted pursuant to the Court's powers under section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,¹⁴ ('the **Supreme Court Act**') to do so whenever it is 'just or convenient', the Defendants must now show that the circumstances of the matter are such that it is no longer just or convenient for the freezing or receivership orders to be maintained.
- [59] I am also not persuaded that the Singapore judgment amounts to a change of circumstances such that the Claimant now has to show that the relief should be continued. I explain why in more detail below, but the main reason is that the Defendants adduce no evidence whatsoever to show that legal proceedings in Thailand no longer require to be supported by such relief.

¹⁴ Cap 80, Revised Laws of the Virgin Islands 1991.

- [60] It is indisputably part of the present factual matrix that the BVI claim was stayed in favour of legal proceedings elsewhere. Upon the application for a stay the Court was informed of two more suitable *fora*, Singapore and Thailand. The transcript of the hearing on 16th April 2019 indicates that the Learned Judge considered pleadings in both those proceedings. Those are not before me now. It is uncontroversial that there are proceedings still on foot in Thailand. More than that I do not directly know. The Defendants' information, given in submissions from the Inner Bar table, that the allegations of fraud levelled by the Claimants are the same as those dismissed in Singapore is something I must disregard as it was not contained in evidence before me.
- [61] The Defendants did not ignore the Thai proceedings, but they discount them on the basis that the stay had been pending trial of the claim the Claimant had brought in this jurisdiction and that trial has now taken place, in Singapore. That is however too restrictive a view. I have seen no evidence about the status, nor content of the claim, nor identity of the parties in the Thai proceedings. The Court also has no basis for assuming that the Singapore judgment is *res judicata* of matters in the Thai proceedings. So I do not know that I can discount or ignore them. Nor do I have any sense whether or not there is a continuing good arguable case in Thailand.
- [62] Indeed I can infer from the fact that Adderley J considered Thailand to be a more appropriate forum for trial of the claim than the BVI, following his review of the Thai pleadings, that there is a relationship between the claim commenced in the BVI and the proceedings in Thailand. Adderley J appears to have considered that relationship to be sufficiently strong to rule that the BVI proceedings should be stayed with Thailand being a more appropriate forum for a trial. Moreover, Adderley J did not expressly continue the freezing and receivership orders only in support of the proceedings in Singapore. He did not say that the freezing order and/or receivership orders should continue until judgment upon trial in the first jurisdiction that would render such a judgment. He did not say that there was no basis for continuing them in support of the Thai proceedings. I conclude from these factors that Adderley J intended to continue the freezing and receivership orders with a purpose of aiding not just the Singapore proceedings but also the Thai proceedings.

- [63] Consequently, to persuade the Court that the freezing and receivership orders should be discharged, the Applicants would have to show that it is no longer just and convenient to maintain a worldwide freezing and receivership order in support of the proceedings ongoing in Thailand, quite apart from whatever might be the position in Singapore. It was incumbent upon the Applicants to adduce evidence to that effect, but they have not. So far as I can tell, it remains just and convenient to continue the relief, if for no other reason than to continue supporting the Thai proceedings. The Court is not in a position to find that the ends of justice would be served by withdrawing the interim relief that supports both the Singapore and Thai proceedings. On that basis alone, in my judgment the Court ought to decline to make the order sought.
- [64] Adderley J clearly assumed he had jurisdiction to continue the freezing receivership orders. None of the parties appear to have submitted otherwise on 16th April 2019, nor taken issue with this upon appeal. In light of the adversarial nature of legal proceedings in our legal system, the correct approach, it seems to me, is thus to treat the parties as having accepted, for the purposes of hearing on 16th April 2019 and any subsequent opportunity for an appeal, that the Court had jurisdiction to continue injunctive relief.
- [65] Completely separately and independently of the above reasons, I respectfully do not agree with Mr. Midwinter, QC's submissions in relation to his contentions that there is continuing need for a good arguable case and that there had never been a good arguable case in the first place.
- [66] I shall take the last point first. The flaw in the Defendants' argument is that just because a court has dismissed a claimant's case after a trial does not mean that the claimant did not have a good arguable case beforehand.
- [67] It is well settled that for the purpose of applying for freezing order relief the good arguable case a claimant must show is
- "...a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success."¹⁵

¹⁵ *Ninemia Marine Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1984] 1 All ER 398 at 404 d (Mustill J).

- [68] In other words, an arguable case may be sufficient to engage the Court's freezing injunctive powers, but fail at trial. The test is not that a claimant must show he has a perfect prospect of success. Nor is it that he has to show a strong case. The fact that the Claimant lost at trial in Singapore has no bearing on whether it had a good arguable case when the Claimant originally applied for these orders.
- [69] There is a second reason why the Defendants' argument is flawed: the need to show a good arguable case is a threshold requirement to engage the Court's jurisdiction before it can consider whether it is just and convenient to grant injunctive relief or appoint a receiver. Once that threshold has been crossed and an injunctive order has been made, it is the same considerations of justice and convenience which determine whether the order should be discharged.
- [70] The need for an applicant to show a good arguable case has been described as a 'threshold' requirement as follows:
- "A "good arguable case" is no doubt the minimum which the plaintiff must show in order to cross what the judge correctly described as the "threshold" for the exercise of the jurisdiction."¹⁶
- [71] It is also instructive to remind ourselves of why such a threshold requirement exists. The court will not deploy its powers at the mere asking of all comers. There has to be some good reason and a legal basis for a court of law to intervene in the affairs of others by way of an interlocutory injunction. To seek an interlocutory injunction (a less draconian type of relief than a freezing order), an applicant must at least show that he has a serious issue to be tried that is not frivolous or vexatious in order to invoke the aid of the court.¹⁷ In the English House of Lords case **American Cyanamid Co. v Ethicon Ltd.**, Lord Diplock explained that
- "[The English Court of Appeal] considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's legal rights."¹⁸

¹⁶ *Ninemia Marine Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1984] 1 All ER 398 at 415 d - e (Kerr LJ).

¹⁷ *American Cyanamid Co. v Ethicon Limited* [1975] AC 396 at 407 G – H (Diplock LJ).

¹⁸ *American Cyanamid Co. v Ethicon Limited*. [1975] AC 396 at 405 E – F (Diplock LJ).

- [72] Lord Diplock did not disagree with this proposition propounded by the English Court of Appeal. His disagreement was with the strength of the case that the claimant had to show, or at least how it should be formulated. The English Court of Appeal had thought that it should be a *prima facie* case. As is well known, the threshold criterion for an interlocutory injunction was settled as a serious issue to be tried.
- [73] It is also well settled that since freezing and receivership relief are generally more stringent forms of injunctive relief than interlocutory injunctions which simply forbid a person from doing something, the threshold is set higher for freezing orders, at the level of a good arguable case. As stated by Lord Millet in **Lewis v Freighthire Ltd**:¹⁹ '[a] stronger case must be shown than would justify relief of a less stringent kind'.
- [74] Once the 'good arguable case' threshold has been crossed, the Court is then able to exercise its powers under section 24 of the **Supreme Court Act**.
- [75] It is, I think, telling that the Defendants' Learned Queen's Counsel was unable to point to any authority that a good arguable case had to continue to exist. I am inclined to think that is because it is not the law.
- [76] I do not think that is the law because a good arguable case is a requirement designed to trigger a court's ability to come to the aid of a party. Once the requirement has been satisfied, or the threshold crossed, a different set of criteria comes into play. In the terms of section 24 of the **Supreme Court Act**, these criteria are the demands of justice and convenience.
- [77] Of course, if the party who has the benefit of injunctive relief no longer has a case, then it would generally not be just or convenient for the relief to be maintained. The injunction would no longer serve its purpose and it would be contrary to the purpose of the injunctive jurisdiction to keep it in place.
- [78] The question then is when does a claimant no longer have a case? The Defendants say it is when a claim has been tried and a judgment has been entered such that the matters adjudicated upon are *res judicata*. But this argument ignores that the party whose claim has

¹⁹ Unreported EWCA 1st February 1999.

been dismissed has a right of appeal and that it is possible that an appeal might succeed, even if the chances of success might be slim. As was the case in Singapore, the trial was conducted by a court of first instance, before a single judge. The mechanisms of justice allow for the possibility that the single judge fell into error. In the present case the Claimant has already begun the appeal process. The Defendants have not shown that the Claimant's case on appeal is hopeless as at 5th March 2020. As at that date the Claimant still had a case which might succeed.

[79] Considerations of justice and convenience entail that all the circumstances need to be taken into account. This calls for a broader enquiry than just looking to see whether the claim has succeeded or failed at first instance. We must also ask ourselves whether the injunctive relief that had been granted had been intended narrowly to support a particular set of legal proceedings until a certain event takes place, or more broadly to support legal proceedings more generally to prevent an eventual judgment being rendered nugatory. In my view, the fact that the order of 16th April 2019 simply provided that the freezing order and receivership relief should continue until further order is indicative that it was intended to support legal proceedings more generally. That the Claimant has begun the appeal process with some prospect of success is also a consideration that cannot be overlooked. It cannot be overlooked that the Singapore courts continued the freezing order there pending determination of an application for it to be continued. That is indicative that the Singapore courts considered it appropriate to continue protecting the Claimant in the meantime despite the disadvantages Mr. Konoshita might suffer thereby. The first instance judgment and the findings that are currently *res judicata* might still be set aside. If in the meantime the interim relief is discharged and the assets dissipated, any successful appeal would be purely academic. That would not serve the ends of justice.

[80] I agree with Mr. Flynn, QC, that justice and convenience in this case favour maintaining the worldwide freezing order and receivership because if these are discharged any successful appeal in Singapore might be rendered nugatory. It is in my view entirely commensurate with justice and convenience not to discharge those orders at this point. I draw support for this view from the fact that the Singapore courts, which apply principles derived from English law, also saw no technical obstacle in maintaining the Singapore freezing order on an interim basis even though the Singapore High Court had dismissed the claim.

- [81] In considering the justice and convenience whether or not to discharge the freezing and receivership orders, I have taken into account the Defendants' submission that these orders have and continue to cause much harm. That is a consideration that needs to be weighed in the balance with other factors, such as the chances of success upon appeal. I readily accept that the Claimant's chances of succeeding in having trial court findings of fact set aside might be slim, on the basis that a Court of Appeal applying principles derived from English law will not lightly disturb a lower trial court's findings of fact. But equally, solid evidence of harm is lacking. The freezing and receivership orders have previously already been upheld by this Court and the Court of Appeal. The balance of harm will have been considered then and found not to outweigh the benefits of maintaining the orders. There is no evidence that anything in this regard has changed. I have no evidential material to go on for making a finding that, taking all factors in the round, the harm that will be caused by leaving the freezing and receivership orders in place will outweigh the benefits of doing so.
- [82] Mr. Midwinter, QC, argued that even if the freezing order is maintained, I ought to discharge the receivership order, as the requirements for obtaining receivership orders are more stringent than for freezing orders. I indicated at the hearing on 5th March 2020 that as far as this Court is concerned, in this case the freezing and receivership orders will stand or fall together. I stand by that view. The factual and procedural history of this matter inspires no confidence that the Defendants will honour their Court ordered obligations unless backed by a receivership order. If the freezing order remains, the receivership order will be indispensable.
- [83] I also do not agree with Mr. Midwinter, QC, that the orders ought to be discharged on the basis that the Claimant had been in breach of its duties of full and frank disclosure at the *ex parte* hearing. Mr. Midwinter, QC, says the falsity of the Claimant's case has only now been revealed through the trial. He needs to be able to say that to overcome the difficulty that his clients had had an opportunity to argue full and frank disclosure points at the *inter partes* hearing. Those arguments took the Defendants nowhere upon that occasion. Mr. Midwinter, QC's argument is an argument after the event, advanced with the benefit of that 'wonderful thing', hindsight. Yet if the Defendants at the *inter partes* hearing could not see any of the alleged points which we are told were revealed by the judgment, so as to have raised the breach of full and frank disclosure objection in their regard then, the Claimants cannot reasonably have been expected to have raised them either.

- [84] This submission overlooks the fact that it is almost always inherent in contested litigation that one party – here the Claimant – might fail to succeed on its case at trial, possibly for a complex combination of reasons.

Fortification

- [85] I accept Mr. Flynn, QC's submission that a contrary judgment does not entail an increased risk that a claimant will breach his undertaking in damages. I accept his argument that a contrary judgment is not a change of circumstances with regard to fortification, because it is always inherently contemplated that an adverse judgment may be entered against a party's case. The Defendants have not adduced evidence that there is now a greater risk that this Claimant will breach its undertakings unless fortification is increased than there was before.
- [86] For these reasons the Defendants failed to persuade the Court at the hearing on 5th March 2020 that it is just and convenient for the freezing and receivership orders to be set aside.

The hearing on 7th July 2020

1. The Singapore Court of Appeal decision dated 1st June 2020

- [87] On 1st June 2020 the Singapore Court of Appeal ('SGCA') delivered a ruling²⁰ on an application by JTrust Asia to continue freezing order relief pending an appeal from the trial judge's judgment upon trial. The SGCA determined that JTrust Asia had a good arguable appeal and that as at the date of the application before it there was a real risk of dissipation. Indeed, the SGCA found that there was a heightened risk of dissipation, citing conduct of Mr. Konoshita in these proceedings.²¹ The SGCA reinstated the domestic (i.e. limited to Singapore) freezing order that had been made by the court below against Mr. Konoshita and the worldwide freezing order against the first defendant in those Singapore proceedings, Group Lease Holdings Pte Ltd.²² The SGCA noted that this Court has appointed a receiver over APF, describing this as

²⁰ JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2020] SGCA 54 on Summons No. 21 of 2020.

²¹ JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2020] SGCA 54 on Summons No. 21 of 2020 at paragraph 95 (Chong JA).

²² JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2020] SGCA 54 on Summons No. 21 of 2020 at paragraph 103 (Chong JA).

‘the personal investment vehicle’ of Mr. Konoshita.²³ APF is not a party to the Singapore proceedings.

- [88] The Claimant argued before this Court that the SGCA intended its domestic injunction in respect of Mr. Konoshita to work in harmony with this Court’s worldwide freezing injunction.
- [89] In support of this contention the Claimant points to the fact that the SGCA had determined in an earlier ruling to grant the Claimant a freezing order against Mr. Konoshita with domestic effect only, to dovetail with this Court’s worldwide freezing order, in circumstances where the Claimant had not sought recognition of this Court’s worldwide freezing order in Singapore.²⁴ The SGCA reinstated this freezing order by its ruling of 1st June 2020.²⁵
- [90] The Claimant contends that this Court’s worldwide freezing injunction secures vital assets owned by the Defendants. No other proceedings involve APF and therefore the Claimant is reliant on this injunction to preserve its position on enforcement.
- [91] The Claimant contends therefore that it is in the interests of justice that this Court’s worldwide freezing injunction and receivership order be continued until the Claimant’s substantive appeal can be resolved by the SGCA.
- [92] The Claimant further submits that the SGCA’s finding of a good arguable appeal scotches any notion pressed by the Defendants here that the Singapore trial judgment vindicated Mr. Konoshita with regard to his alleged fraud.
- [93] The Defendants disagree. The Defendants argue, in sum:
- (1) Where the Claimants are seeking continuation of the worldwide freezing order and receivership relief, it is important that the Court ‘steps back’ and considers matters in the round:

²³ JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2020] SGCA 54 on Summons No. 21 of 2020 at paragraph 95 (Chong JA).

²⁴ JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd, Mitsuji Konoshita and Cougar Pacific Pte Ltd [2018] SGCA 27, Civil Appeal No. 46 of 2018 at paragraphs 109 to 116 (Chong JA).

²⁵ JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others [2020] SGCA 54 on Summons No. 21 of 2020 at paragraph 103 (Chong JA).

- a. In Mr. Konoshita's case freezing relief is available and already in place in Singapore, and further freezing relief could and should be obtained there;
 - b. The substantive proceedings are taking place in Singapore;
 - c. The claims have failed at trial;
 - d. No substantive proceedings have been pursued against APF anywhere;
 - e. The receivership order in particular is causing the Defendants real harm in affecting the management of the trading companies in which APF owns shares;
 - f. The fact that the SGCA has maintained the freezing order against Mr. Konoshita pending appeal is a reason why continuation of relief in this Court is unnecessary and inappropriate.
- (2) The SGCA decision dated 1st June 2020 is only interlocutory, whereas the trial decision is final and binding on the merits, establishes *res judicata* and is entitled to recognition in this Court even if it is appealed.
 - (3) The Claimant's position is protected by the SGCA's decision of 1st June 2020.
 - (4) The Singapore High Court's judgment upon trial materially alters the balance of evidence on the question of whether or not there is a good arguable case against Mr. Konoshita or APF. The SGCA on the contrary has considered only the Claimant's version of events in its case on appeal.
 - (5) Nothing in the SGCA's decision of 1st June 2020 affects the position of APF. The Claimant chose not to commence proceedings against APF in Singapore, nor anywhere else. Its assets are frozen and in the hands of receivers despite no substantive claim being pursued against it anywhere and the case against its shareholder has been dismissed at trial. That is an extraordinary basis upon which that relief should be continued against it.
 - (6) The Court must weigh the risk of harm being caused to innocent respondents against the risk of harm to the Claimant if relief is not continued.
 - (7) There is no legitimate reason why the Claimant should need relief from this Court when it can obtain, and has obtained, interim relief from the SGCA.

2. Convoy Collateral and Broad Idea

- [94] A sufficient consideration of **Convoy Collateral** and **Broad Idea** requires me not just to state the principles elucidated by the Court of Appeal's judgments but more fundamentally also to recall their reasoning.
- [95] The Court of Appeal in **Convoy Collateral** held that the Court does not have jurisdiction to grant a free standing freezing order in support of foreign proceedings against a person who is not subject to the Court's jurisdiction.²⁶
- [96] This is because the Court does not have an extraterritorial jurisdiction conferred by CPR 7.3(2)(b) to permit service outside the jurisdiction on a foreigner to a claim for a freestanding injunction, restraining the foreign defendant from dealing with his assets within the jurisdiction pending the conclusion of proceedings brought against him in another jurisdiction.²⁷ By a freestanding injunction, it is meant an injunction which does not support a substantive claim brought in this jurisdiction.
- [97] Where a foreigner is not subject to the Court's jurisdiction and has not submitted to it, the fact that the foreigner has, or arguably has, assets within the jurisdiction is not sufficient to give the Court power under CPR 7.3(2) to serve him outside the jurisdiction.²⁸ What is also needed is a claim based upon a legal right which the foreigner can be called upon as a defendant to answer before this Court, of a kind falling within CPR 7.3(2).²⁹ This is because the purpose of CPR 7.3(2) is to authorise service on a person, who would not otherwise be compellable to appear before this Court, of a document requiring him to submit to the adjudication by the Court of a claim advanced in an action or matter commenced by that document.³⁰ In this regard the Court of Appeal cited and followed *dicta* of Lord Mustill in **Mercedes-Benz AG v Leiduck**.³¹

²⁶ *Convoy Collateral Ltd v Broad Idea International Limited et al.* BVIHMAP2016/0030 (unreported, delivered 30th March 2020, to take effect from 1st April 2020 at 12:01 p.m.) at paragraph [31] (Webster JA (Ag)).

²⁷ *Convoy Collateral Ltd v Broad Idea International Limited et al.* BVIHMAP2016/0030 (unreported, delivered 30th March 2020, to take effect from 1st April 2020 at 12:01 p.m.) paragraphs [16] and [18] (Webster JA (Ag)).

²⁸ *Convoy Collateral Ltd v Broad Idea International Limited et al.* BVIHMAP2016/0030 (unreported, delivered 30th March 2020, to take effect from 1st April 2020 at 12:01 p.m.) at paragraph [26] (Webster JA (Ag)).

²⁹ *Convoy Collateral Ltd v Broad Idea International Limited et al.* BVIHMAP2016/0030 (unreported, delivered 30th March 2020, to take effect from 1st April 2020 at 12:01 p.m.) at paragraph [18] (Webster JA (Ag)).

³⁰ *Convoy Collateral Ltd v Broad Idea International Limited et al.* BVIHMAP2016/0030 (unreported, delivered 30th March 2020, to take effect from 1st April 2020 at 12:01 p.m.) at paragraph [18] (Webster JA (Ag)).

³¹ [1996] AC 284 at page 301 F to G (Mustill LJ).

- [98] **Convoy Collateral** dealt with situations where a defendant is not already subject to the territorial or personal jurisdiction of the BVI court. The Court of Appeal distinguished this from cases where the Court already has jurisdiction over a defendant by dint of his residence, or, in the case of a company, its incorporation here. An example of such a case, where the respondent was incorporated here, was **Black Swan Investment ISA v Harvest View Ltd** ('**Black Swan**').³² Clearly, then, no permission to serve a claim form outside the jurisdiction is required. Consequently, that procedural hurdle does not need to be overcome before the court can take jurisdiction.
- [99] The Court of Appeal in **Broad Idea** held that the BVI court has no jurisdiction, absent statutory authority (which is indeed absent), to grant interlocutory injunctions in aid of litigation in a foreign country, even where the respondent is already subject to the BVI courts' territorial or personal jurisdiction.³³
- [100] This is because where there is no substantive claim pending for determination before the courts of this jurisdiction, the BVI court does not have 'subject matter jurisdiction'.³⁴ By subject matter jurisdiction, it is meant an enforceable cause of action against a defendant which the court has jurisdiction to enforce by final judgment. That cause of action must be raised in substantive proceedings or an undertaking must be given to commence such proceedings.³⁵ The Court of Appeal derived this summary of the law from English law authorities, at least one of which (a majority decision of the Privy Council in **Mercedes-Benz AG v Leiduck**³⁶) is binding upon the Court of Appeal.³⁷
- [101] Without subject matter jurisdiction, it does not matter if the Court has personal or territorial jurisdiction over the defendant, such as where a defendant has properly been served or he is

³² BVIHCV2009/0399 (unreported, delivered 23rd March 2010).

³³ **Broad Idea International Limited v Convoy Collateral Limited** BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [44] (Pereira CJ).

³⁴ **Broad Idea International Limited v Convoy Collateral Limited** BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraphs [14] to [22] (Pereira CJ).

³⁵ **Broad Idea International Limited v Convoy Collateral Limited** BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [22] (Pereira CJ).

³⁶ [1996] 1 AC 284.

³⁷ **Broad Idea International Limited v Convoy Collateral Limited** BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraphs [20] to [22] (Pereira CJ).

resident within the jurisdiction.³⁸ Nor does it matter that the defendant may directly or indirectly have assets within the jurisdiction, as in the case of **Black Swan**.³⁹ Simply put, without a substantive claim before our courts, our courts should not grant an injunction.

[102] In **Broad Idea** the Court of Appeal held that **Black Swan** had been ‘wrongly decided’.⁴⁰ There were three reasons for this.

- (1) In **Black Swan** there were no substantive claims brought in the BVI courts, contrary to the established English common law principles that recognise this as a requirement for the grant of interlocutory freezing order relief;⁴¹
- (2) Section 24 of the **Supreme Court Act**, properly construed both in light of jurisdictional principles enunciated in English case law authorities and in the context of both United Kingdom and BVI legislation, does not extend the courts’ powers to granting injunctions in support of foreign proceedings because such enabling legislation, similar to the United Kingdom Civil Jurisdiction and Judgments Act 1982, has not been enacted in the BVI;⁴²
- (3) The learned judge in **Black Swan** erred in following a minority dissenting judgment in **Mercedes-Benz v Leiduck**, whilst the majority decision was binding upon him under the principle of *stare decisis*.⁴³

[103] Briefly stated, therefore, for the BVI court to have the jurisdiction to grant freezing order and similar relief, the BVI court must both:

- (1) have substantive proceedings before it, or at least undertaken to be commenced, to which the relief would be ancillary (‘subject matter jurisdiction’); and
- (2) have territorial jurisdiction or be able to take personal jurisdiction over the defendant, through the proper exercise of the power under CPR 7.3 to grant permission for leave to serve a Claim Form outside the jurisdiction.

³⁸ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [20] (Pereira CJ).

³⁹ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [27] (Pereira CJ).

⁴⁰ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [45] (Pereira CJ).

⁴¹ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [38] (Pereira CJ).

⁴² *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraphs [39] to [44] (Pereira CJ).

⁴³ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraphs [30] and [35] (Pereira CJ).

Applicants' arguments on Convoy Collateral and Broad Idea

- [104] The Defendants/Applicants submit that the Court of Appeal judgments in **Convoy Collateral** and **Broad Idea** entail that 'it is not appropriate (or 'just and convenient') to continue the Freezing Order and/or the Receivership Order in this case'.
- [105] The Applicants submit that the requirement for there to be a substantive claim before this Court is a substantive requirement, not a technical one. In other words, whilst the Court has power pursuant to section 24 of the **Supreme Court Act** to grant injunctions, it should not do so where this requirement is lacking.
- [106] The Applicants apply the rationales of **Convoy Collateral** and **Broad Idea** to this case as follows.
- [107] Mr. Konoshita is resident outside the jurisdiction. Thus, the Court had no territorial jurisdiction over him. Permission was therefore required to serve a Claim Form on Mr. Konoshita outside the jurisdiction. Such permission had been given but following the stay of the BVI proceedings service of the BVI proceedings on Mr. Konoshita was set aside. Thus, the position reverted to the earlier one, that the BVI court currently has no territorial or personal jurisdiction over him. The freezing order that was continued as a condition of the stay can only have been continued in support of the Singapore proceedings or such other foreign proceedings that the Claimant might have chosen to bring in another foreign forum.
- [108] Consequently, applying **Convoy Collateral**, whereby the Court has no jurisdiction to grant a freestanding injunction against a person resident outside the jurisdiction in support of foreign proceedings, the Court should not grant and should not continue the freezing order against Mr. Konoshita.
- [109] Applying **Broad Idea**, whereby the Court has no jurisdiction to grant interlocutory injunctions in aid of litigation in a foreign country at all, the Court similarly has no jurisdiction to grant and should not continue the relief against Mr. Konoshita nor APF.
- [110] The Applicants submit that since the Court of Appeal has now clarified that these are orders the Court ought not to make, this is a powerful factor in favour of discharge. Tellingly, the

Applicants do not submit that the effect of these decisions is that the Court has no jurisdiction in terms of what they describe as a ‘technical’ sense to allow the orders to continue. They do not submit that lack of jurisdiction to have made or continued the injunctive relief on 16th April 2019 compels the Court now to discharge those orders.

[111] The Applicants contend that it is no answer to these objections that the freezing order was originally made in support of BVI substantive proceedings, because when service of those proceedings on Mr. Konoshita was set aside the only substantive claim against him is in a foreign forum. Thus, say the Applicants, continuation of the freezing order now is something that ought not be granted.

[112] The Applicants further contend that the fact that service was set aside distinguishes this case from others where proceedings are stayed. The Applicants do not contest (or at least, if they do, then they do so with no vigour) that the Court has the power to issue or continue interim injunctions where proceedings before it have been stayed. But, they argue, where service is also set aside, that deprives the Court of personal jurisdiction over the defendant and the freezing order then falls afoul of the requirements that the Court must have both subject matter and territorial or personal jurisdiction.

[113] The Applicants additionally argue that **Convoy Collateral** and **Broad Idea** amount to a material change of circumstances, thus enabling the Court to consider and exercise its discretion whether or not to grant or continue the injunctive relief afresh. The Applicants submit that **Convoy Collateral** and **Broad Idea** amount to a change in the law. The Applicants cite in support of this that the Court of Appeal stated in **Broad Idea**:

“...the Black Swan jurisdiction...has been the law in the BVI for the past 10 years and was hailed by the common law world as a welcome development.”⁴⁴

[114] The Applicants argued as follows:

“While it is often said that courts applying the common law do not ‘change’ the law but merely ‘clarify’ or ‘reveal’ what it has always been, that is a fiction that sometimes does not do justice to the truth. The Court of Appeal’s frank recognition that *Black Swan* “has been the law in the BVI for the past 10 years” is an accurate recognition that until the ‘clarification’ of the law provided in [**Broad Idea**], a submission that the BVI court lacked Black Swan jurisdiction would undoubtedly have been regarded as being wrong. It cannot fairly be said that the Defendant ‘could and should’ have asserted a lack of

⁴⁴ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 (unreported, delivered 29th May 2020) at paragraph [10] (Pereira CJ).

jurisdiction to continue the orders as the law was understood at the time, or to be an abuse to point to the radical change in the general understanding of the operation of BVI law that the decisions in the Convoy litigation have wrought.”

- [115] I have quoted this submission in full because it contains errors at a number of levels, as I will explain below.
- [116] The Applicants argue that the judgments in **Convoy Collateral** and **Broad Idea** have significantly altered the legal landscape; it would be taking a legal fiction to unrealistic and inappropriate lengths to suggest otherwise.
- [117] The Applicants argued for other alleged changes of circumstances:
- (1) Since submissions were made on 16th April 2019, service of the Claim Form on Mr. Konoshita has been set aside;
 - (2) Mr. Konoshita’s success at trial in the Singapore proceedings on the merits means that the underlying factual landscape against which matters fall to be judged has changed significantly and it is appropriate that the Court considers all relevant legal and factual issues when deciding whether or not it is just and convenient to continue the freezing order. It would be absurd for the Court in considering whether the freezing order should be continued in light of the facts as they stand today to shut its eyes to factors tending to support the discharge of the freezing order now merely because some of those factors existed at an earlier time.
- [118] With respect to APF, the Applicants accept that it is resident in this jurisdiction. But, say the Applicants, as there is no substantive claim against APF before this Court by dint of the stay, nor indeed anywhere, it is caught by **Broad Idea**: the Court lacks subject matter jurisdiction to make any injunctive orders against APF. The Applicants say that it follows that the freezing order and receivership order against APF should be discharged in any event.
- [119] The Applicants argue that there is an additional change of circumstances in relation to APF, in that the Claimant decided after the hearing on 16th April 2019 not to commence substantive proceedings against APF in any forum. The absence of any substantive proceeding is thus (say the Applicants) a new point that could not have been taken before.

The Respondent's arguments on Convoy Collateral and Broad Idea

[120] The Claimant/Respondent says the following.

[121] **Convoy Collateral** and **Broad Idea** can be distinguished because there remain substantive proceedings before this Court. They have merely been stayed. They can be revived.⁴⁵ The BVI freezing order and receivership order are based upon the stayed claim and not the foreign proceedings. Moreover, in **Spiliada Maritime Corp v Cansulex** Lord Goff stated:

“[I]t would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum.”⁴⁶

[122] Whatever might be the case with Mr. Konoshita, this Court retains jurisdiction over APF, which was duly served within the jurisdiction and the Court has subject matter jurisdiction over it. The very fact that APF is not a party to the Singapore claim means that there are likely to be issues left unresolved by the Singapore claim and the BVI Court is the only forum in which those can be determined. Justice would not be served by the BVI Court continuing that stay against APF. Consequently, the necessary or proper party gateway for permission to serve Mr. Konoshita outside the jurisdiction remains available.

[123] On the facts, in circumstances where the SGCA has made it clear that it did not grant a worldwide freezing order against Mr. Konoshita because this Court has already done so, if this Court now discharges the freezing order, the Claimant would be forced to apply to the Singapore court for a worldwide injunction. Serious fraud allegations remain extant against both Mr. Konoshita and APF and there is a strong concern that Mr. Konoshita will dissipate his assets if the freezing order is discharged.

[124] **Convoy Collateral** and **Broad Idea** do not create a material change of circumstances. A change in the law is not a material change of circumstances. The Claimant relied upon the English Court of Appeal case of **Chanel Ltd v F.W. Woolworth & Co Ltd**⁴⁷ as authority that where the court has made an order (in that case a consent order), a subsequent change in the law is insufficient to upset that order.

⁴⁵ *Lambert v Mainland Market Deliveries Ltd* [1977] 1 WL. 825 at 834 H (Lawton LJ).

⁴⁶ [1987] 1 AC 460 at 483 D (Goff LJ).

⁴⁷ [1981] 1 WLR 485 at 492, 493 (Buckley LJ).

[125] Even if there has been a change of circumstances, the Respondent relies upon the English Commercial Court case of **IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp**⁴⁸ for a proposition that the Applicants cannot rely upon a change of circumstances to obtain a complete re-run of the Court's exercise of discretion, as that jurisdiction is kept within narrow grounds. Tomlinson J had this to say about how the court ought to approach a matter where the court has discretionary powers and an applicant wishes to invoke an alleged change of circumstances:

"73. ... Plainly a judge of parallel jurisdiction cannot entertain what is in effect an appeal. Similarly a change of circumstances cannot ordinarily justify a variation of an earlier order unless at the least the change in circumstances impinges on or relates to the reason for seeking the variation. There must be some causative link between the change in circumstances and the variation sought.

...

76. I do not consider that the change in circumstances should of itself be the occasion for a complete re-run of the exercise... Ordinarily a party should not in these circumstances be permitted to develop arguments or to deploy evidence which could equally well have been developed or deployed on the earlier occasion. Ordinarily a change in circumstances should most emphatically not be an excuse for a second bite at the cherry. Ordinarily, the court will simply be concerned to consider whether the exercise of discretion which appeared proper in the circumstances which obtained earlier remains proper in the *ex hypothesi*, significantly different circumstances. That ought not ordinarily to require any revisiting of the court's earlier decision as to the strength of the challenge of the award. That decision should have been reached on a brief consideration – see ...*Soleh Boleh*. The need to reconsider the discretion must not ordinarily be regarded as an opportunity to re-run the argument on the strength of the challenge."⁴⁹

[126] These pronouncements were expressly approved by the English Court of Appeal.⁵⁰

[127] **Convoy Collateral** and **Broad Idea** are forward looking in effect. They cannot be used to re-open the Court's previous decisions. The 'fiction' that courts do not change the law but clarify or reveal it is intended to prevent previous orders from being revisited whenever a decision is overturned.

⁴⁸ [2008] EWHC 797.

⁴⁹ [2009] 1 All ER (Comm) 611 at 640 e to f, 641 d to g (Tomlinson J).

⁵⁰ *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd* [2008] EWCA Civ 1157 at paragraph 24 (Tuckey LJ).

- [128] The continuation order was not reliant upon **Black Swan** principles. It was made as a condition of a stay of substantive proceedings issued against the Defendants in the BVI. The stay does not wipe away the claim.
- [129] The Court is entitled to impose conditions on a stay as a matter of discretion in any event.
- [130] The Singapore first instance judgment cannot be relied upon as a material change in circumstances. Even if it were, the approach of the SGCA, including reinstating the freezing order in Singapore, means that the situation has now come almost full circle. There remains a serious issue to be tried on appeal, the risk of dissipation remains high and the balance of convenience lies in continuing the BVI relief. Whilst the SGCA decision of 1st June 2020 is interlocutory and not binding upon this Court, it is highly material.
- [131] To the extent that the stay of the claim meant that the service out order on Mr. Konoshita was automatically discharged (or if there were any other complaint), the Defendants should have appealed the continuation order on the basis that the Court no longer retained jurisdiction over the First Defendant to impose a continued injunction, but they did not do so. Now it is too late for them to raise this, absent a material change of circumstances and absent new facts.⁵¹
- [132] The points made in **Convoy Collateral** and **Broad Idea** were open to the Defendants to make at the hearing on 16th April 2019, but they did not.
- [133] To the extent that the Court considers **Broad Idea** to be a material change of circumstances and the Court is minded to reconsider its previous order(s), the stay should be lifted as against APF and Mr. Konoshita should be joined as a necessary or proper party to the action. Service as against Mr. Konoshita was only set aside due to the stay and the corollary of the **Convoy Collateral** and **Broad Idea** decisions is that the substantive claim is liable to be resurrected in this jurisdiction.

⁵¹ Citing Gee: Commercial Injunctions (6th edn., Sweet & Maxwell Ltd 2016) at paragraph 21-057.

Discussion (2)

Applicants could have raised jurisdiction points but did not

- [134] The first flaw in the Applicants' submissions lies in their argument that it cannot fairly be said that they 'could and should' have asserted lack of jurisdiction at the hearing on 16th April 2019 on the grounds now enunciated in **Convoy Collateral** and **Broad Idea**. Why not, we can rhetorically ask. Those decisions did not visit themselves upon us out of nowhere or by some quasi-legislative diktat. Someone – a litigant like the Applicants – saw and took the jurisdiction points and ultimately persuaded the Court of Appeal that he was right. The Applicants could have done likewise. Instead, if they saw a jurisdiction argument along those lines, they allowed the opportunity to pass. It is no answer for the Applicants to say, as they do, that a submission that the BVI court lacked **Black Swan** or similar jurisdiction would undoubtedly have been regarded as wrong. That did not deter the successful litigant who took the jurisdiction points in **Convoy Collateral** and **Broad Idea**. I agree with the Respondent/Claimant that the Applicants could similarly have taken the point at the hearing on 16th April 2019 and, if dissatisfied with a decision of this Court, they should have appealed. They did not appeal on these points and are out of time for doing so. Thus, even if this Court's decision might have been wrong in the light of **Convoy Collateral** and **Broad Idea**, the Applicants are nonetheless bound by this Court's decision.

Alleged changes of circumstances

- [135] There is an exception to such finality if the Applicants can point to a change of circumstances or new material facts. It is patently obvious that this is why the Applicants focus upon this.
- [136] Thus, in order to invoke the reasoning in **Convoy Collateral** and **Broad Idea** as grounds for a fresh exercise of the Court's discretion, the Applicants had to establish that these two decisions themselves amounted to changes of circumstances. To do so, the Applicants sought to show that these decisions represented a change in the law. The Applicants seized upon an observation of the Court of Appeal in **Broad Idea** at paragraph [10] that '*Black Swan* "has been

the law in the BVI for the past 10 years”;⁵² as recognition from the Court of Appeal itself that it was now changing the law. To make good this argument, the Applicants denounced as an untrue fiction the notion that courts applying the common law do not ‘change’ the law but merely ‘clarify’ or ‘reveal’ what it has always been.

[137] The Applicants’ argument that the Court of Appeal decisions in **Convoy Collateral** and **Broad Idea** change the law is, however, wrong. On close analysis, they do nothing of the kind. In both cases what the Court of Appeal did was simply to identify established legal principles, apply them to the situations before it, and then reach legal conclusions in line with those principles. No appeals to fiction were required.

[138] The approach of the Court of Appeal can particularly clearly be seen from the Court of Appeal’s judgment in **Broad Idea**. The Learned Chief Justice specifically alluded to settled principles in paragraphs [16], [17], [18], [19], [20], [21], [22], [25], [33], [35], [36], [37], [38], [40], [41], [42], [43] and [45]. Having considered them, the Learned Chief Justice concluded that **Black Swan** had been, in her words, ‘wrongly decided’.⁵³ This expression is important. It necessarily implies that there is a ‘right’ interpretation that the Learned Judge in **Black Swan** could and should have reached. The law, as reflected in the settled legal principles the Learned Chief Justice had referred to, had been the same when **Black Swan** was decided as they are now. The High Court in **Black Swan** had applied the law incorrectly. The *ratio* of **Black Swan** was perceived to have been the law until it was overruled in **Broad Idea**. But it was not the law. As a High Court decision, it was not a decision that was technically binding upon the High Court, but the High Court should generally have followed it unless there was a powerful reason for not doing so. As stated by Lord Neuberger in **Willers v Joyce & Anor (Re: Gubay (deceased) No 2)**⁵⁴ in relation to the doctrine of *stare decisis*:

“9. So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63, para 59. I would have

⁵² *Broad Idea International Limited v Convoy Collateral Limited* BVIHCP2019/0026 (unreported, delivered 29th May 2020) at paragraph [10] (Pereira CJ).

⁵³ *Broad Idea International Limited v Convoy Collateral Limited* BVIHCP2019/0026 (unreported, delivered 29th May 2020) at paragraph [45] (Pereira CJ).

⁵⁴ [2016] UKSC 44 (20 July 2016) at paragraph 9 (Neuberger, P).

thought that Circuit Judges should adopt much the same approach to decisions of other Circuit Judges.”

- [139] That **Black Swan** was wrong would, in my judgment, have been a powerful reason for this Court to have departed from it, had the Learned Judge been persuaded that that was the case on 16th April 2019. The fact that **Black Swan** had been followed and applied very many times since was a reason for not departing from it, but – and this is an important qualification that requires no authority to support it - repetition of an error or an abuse, or the efflux of time, does not make something that is wrong right. If it was wrong, it remained wrong, and it had been open to the High Court, and certainly the Court of Appeal, and indeed incumbent upon them, to depart from it.
- [140] To the extent that **Black Swan** purported to develop the law, that is to say, to make law, the Court of Appeal ruled in **Broad Idea** that this had not been a development that had been open to the Learned Judge to make.
- [141] Consequently the law was not changed by **Broad Idea**. Rather, **Broad Idea** upheld it.
- [142] I will refrain from deciding whether the overruling of a decision can amount to a change of circumstances as a matter of legal principle. The Respondent referred to only one case in this regard. Neither side argued this point fully. There may be other precedents pointing the other way. For present purposes I am satisfied that **Convoy Collateral** and **Broad Idea** do not, in the context of this case, amount to material changes of circumstances.
- [143] The Applicants’ second submitted change of circumstances was that after submissions were made on 16th April 2019, service of the Claim Form on Mr. Konoshita was set aside. This submission takes such force it may have from the fact that after Mr. Konoshita and APF had had their opportunity to be heard in relation to continuation of the injunctive relief, the Court set aside service of the Claim Form on Mr. Konoshita. There are a number of problems with this submission. First, the Court made the order it did on 16th April 2019 having heard the parties’ submissions. Any complaint the Applicants might have had about that order should properly have been the subject of an appeal, but the Applicants did not avail themselves of their right. Secondly it is circular to say that the Court’s own order is a change of circumstance that the same Court should take into account in order to engage upon a fresh exercise of its discretion.

If that were right, there would be no limit to the Court's ability to revisit its own orders, repeatedly, *ad infinitum*. Thirdly, even if the fact that the Court set aside the permission to serve out amounted to a change of circumstances, the Applicants have waited an inordinate period of time, some fourteen months from 16th April 2019 to June 2020, to raise this. It is no answer for the Applicants to say that they had no reason to raise this until **Convoy Collateral** was decided by our Court of Appeal, because the Applicants themselves could have taken the point on appeal from the order of 16th April 2019 but they did not do so.

[144] The third alleged change of circumstances relied upon by the Applicants is Mr. Konoshita's success at trial in the Singapore proceedings on the merits. For the reasons set out above in the section addressing the matters before the Court on 5th March 2020, I have found that this event was not sufficient grounds for discharging the injunctive relief. It was also material then that the Singapore courts had temporarily continued the injunction in that jurisdiction. It is highly material now that the SGCA has ruled (albeit that decision does not bind this Court) that the Claimant has a good arguable appeal and that there remains a real risk of dissipation, and indeed a heightened risk at that. These are all factors that must be weighed together. The binding nature of the judgment upon trial does not cancel out the fact that the Claimant has been found, and indeed by a higher court, to have a good arguable appeal and that there is a heightened real risk of dissipation. If Mr. Konoshita's success at trial must be taken into consideration as a material change of circumstances, so must the temporary continuation in Singapore of the injunctive relief there, and so must the ruling of the SGCA on 1st June 2020, and so must the approach taken by the SGCA to ensure its orders to dovetail with the relief already in place here. The balance of convenience then comes heavily down in favour of not discharging the freezing order, in my judgment.

[145] Whilst it is open to this Court to discharge the freezing order against Mr. Konoshita in the BVI and thereby to compel the Claimant to apply to the Singapore courts to make a worldwide freezing order, that would make no sense in circumstances where this Court is not compelled to discharge the BVI freezing order. It would also be positively harmful, and contrary to justice and convenience, if this Court were to discharge the BVI freezing order before the Singapore courts have themselves put a worldwide freezing order in place. I appreciate Mr. Konoshita would probably like that result, but it would be unjust and inconvenient for this Court to give him an opportunity to dissipate, however short, in circumstances where this Court does not have to.

- [146] Thus in relation to Mr. Konoshita, in my respectful judgment the Applicants have not persuaded me that there has been any material change of circumstances warranting discharge of the freezing order that applies to Mr. Konoshita.
- [147] In relation to APF, the Applicants allege an additional change of circumstances in that the Claimant decided after the hearing on 16th April 2019 not to commence substantive proceedings against APF in any forum.
- [148] An immediate difficulty with this submission is that it is impossible to say on the evidence before the Court when this alleged change occurred. Commencing proceedings elsewhere was simply not done. The alleged change resulted in no change. That is a curiosity not easily reconciled with an alleged change of circumstances. But the Applicants submit that the change in circumstances was not that there had been no change, but that it had been brought about by what must have been a decision at some point after the hearing on 16th April 2019 not to commence proceedings against APF elsewhere. We can however ask ourselves why must such a decision have been taken after the order was made on 16th April 2019? It is possible that the Claimant could have decided upon this before the hearing on 16th April 2020.
- [149] There was no requirement laid down by the order of 16th April 2019 that the Claimant should commence proceedings elsewhere by a certain time or at all. Nor did the Court extract an undertaking to that effect. As such, the Claimant is not in breach of the order of 16th April 2019. The Claimant was simply not required to commence or pursue such proceedings elsewhere and it has been constant in not doing so.
- [150] Neither **Convoy Collateral** nor **Broad Idea** make such a lack a change of circumstances. The reasoning in **Broad Idea** would require a claimant, coming fresh to the Court, at least to undertake to commence or pursue proceedings in this jurisdiction before the Court will exercise its discretion to grant an injunction. But the Applicants cannot now complain that the Court's order of 16th April 2019 did not do so: it was open to the Applicants to take that point upon the order being made and their time for appeal from that order has long past.

Applicants' other arguments

- [151] The Applicants urge the Court to 'step back' and consider matters in the round. The Applicants portray the context for such a stepping back as being that the Claimants are seeking the continuation of the worldwide freezing order and receivership relief. With this submission the Applicants are subtly trying to shift the burden onto the Claimant to persuade the Court that the relief should be maintained. That is a wrong approach. The correct perspective is that it is for the Applicants to show that the relief ought to be discharged. Merely because they have filed an application for the relief to be discharged does not put the issue of whether the relief should be continued at large. Just because an applicant comes to the Court asking for relief to be discharged does not mean that the court must consider 'granting a continuation' of the relief. Rather, the relief will continue automatically unless and until the Applicants persuade the Court that it should be discharged. In the Applicants' way stands the obstacle that they could have taken jurisdiction points at the hearing on 16th April 2019 but did not, and they could have appealed but did not. I apologize for having repeated these points in several places in this judgment but they apply to several of the Applicants' submissions and are a complete answer to them.
- [152] The fact that there is already freezing order relief in place in Singapore in respect of Mr. Konoshita is no reason for discharging the freezing order here. The Singapore freezing order is domestic only. The BVI freezing order is worldwide. Discharging the BVI order would expose Mr. Konoshita's assets outside Singapore to dissipation.
- [153] It is also no grounds for discharge to say that further injunctive relief could and should be obtained in Singapore. It has not yet been obtained in Singapore so as to render the BVI relief obsolete. The SGCA has indicated that whilst the BVI relief remains in place the SGCA would only secure the position in Singapore with a freezing order limited to local effect. That is an entirely orthodox and restrained approach. I agree it suggests that if this Court were to discharge the relief here the SGCA could well supply the protection lost here, at least in respect of Mr. Konoshita (APF is not a party to the Singapore proceedings). But that would require this Court to discharge the relief here first, as well as the trouble and expense of a further application to the SGCA, which could well be opposed. The window for dissipation would then be wide open. Convenient for the Defendants that could well be, and perhaps precisely what they want, but it would not accord with the overall justice and convenience of the matter.

- [154] The Applicants place particular emphasis upon the fact that the Claimant's claims failed at trial, and that the judgment upon trial is binding as *res judicata*. The flaw with this submission is that this is only part of the picture. There are other factors that need to be given weight too. The trial was conducted by a court of first instance, by a single judge. The SGCA has ruled that the Claimant has a good arguable appeal, including in respect of the learned trial judge's treatment of factual evidence. The SGCA panel comprised more than one judge. The SGCA considered that there continues to be a real risk of dissipation and indeed a heightened one. There are also the Thai proceedings, about which nothing more has been said at the hearing on 7th July 2020. If, as the Applicants urge, this Court needs to consider the factual matrix in the round, these factors cannot be ignored as they are highly material.
- [155] In respect of APF, which appears to be used as Mr. Konoshita's personal investment vehicle, the Applicants submit it would be extraordinary for relief to be continued against APF in circumstances where no substantive proceedings have been pursued against APF anywhere; nothing in the SGCA's decision of 1st June 2020 affects the position of APF; the Claimant chose not to commence proceedings against APF in Singapore, nor anywhere else; its assets are frozen and in the hands of receivers despite no substantive claim being pursued against it anywhere and the case against its shareholder has been dismissed at trial. Seen through the lens of **Broad Idea**, it would indeed be extraordinary and impermissible for the Court to grant injunctive relief against APF if the claim brought against APF in the BVI is ignored. The Court would simply have no jurisdiction to make such orders. But this submission fails again on the basis that the Applicants could have taken jurisdiction points at the hearing on 16th April 2019 but did not, and they could have appealed but did not.
- [156] Moreover, although the case against its shareholder in Singapore has been dismissed at trial there, the Claimant has a good arguable appeal.
- [157] The Applicants repeat submissions that they made previously that the receivership order in particular is causing the Defendants real harm in affecting the management of the trading companies in which APF owns shares. The Applicants do not bring fresh evidence of such harm. There is no evidence that the harm is any greater now than it was previously, when such harm was not sufficient, upon a balance of prejudice, justice and convenience, to warrant

discharge of the receivership. The same reasoning applies also to in respect of the freezing order.

[158] The Applicants have suggested that the freezing order is causing harm to 'innocent' respondents. I note in this context that the Singapore High Court did not vindicate Mr. Konoshita's 'innocence' in respect of the fraud that the Claimant alleges was perpetrated by him. It merely found that the Claimant had not made out its case. The SGCA went further, and was satisfied that, on the available materials, the Claimant has an arguable case that Mr. Konoshita indeed perpetrated the alleged fraud. The bottom line is that there remains a heightened and real risk of dissipation, whether Mr. Konoshita is 'innocent' of the alleged fraud or not.

[159] The sum of the matter is that the SGCA decision of 1st June 2020 and the Court of Appeal's decisions in **Convoy Collateral** and **Broad Idea** are not grounds for discharging the injunctive and receivership relief previously granted by this Court. That relief will therefore be allowed to stand until further order.

[160] For completeness, although not necessary for determining this matter, I would observe that I agree with the Claimant that as a matter of principle where injunctive relief has been granted ancillary to substantive proceedings in this jurisdiction then the Court can continue such relief if the claim is stayed. I also agree with the Claimant that a stay does not 'wipe away' a claim – it remains extant and the Court retains power to make orders in respect of it. I agree with the Applicants, however, that where such a stay entails the setting aside of permission to serve a defendant outside the jurisdiction, the Court should not continue such relief as against that defendant. That is because withdrawal of the permission to serve the defendant means the Court relinquishes the personal jurisdiction it took over the defendant. The Court then no longer has personal jurisdiction over such a defendant. The decision in **Convoy Collateral** renders it impermissible for the Court to grant injunctive relief in respect of someone over whom the Court has no jurisdiction.

[161] Accordingly I will dismiss the application.

Costs

[162] I see no reason to depart from the usual consequence that costs follow the event. The Defendants shall jointly and severally pay the Claimants' costs of the application, to be assessed if not agreed within twenty-one days.

[163] I take this opportunity to thank learned counsel for their assistance during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar