

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0017

BETWEEN:

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

Appellants

and

JTRUST ASIA PTE. LTD.

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara
The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Midwinter, QC for the Appellants
Mr. Vernon Flynn, QC with him, Mr. Peter Ferrer and Ms. Lucy Hannett for the Respondent
Mr. Hefin Rees, QC with him, Ms. Yegâne Güley for the Receivers of the Second Appellant

2021: February 22;
March 24.

Interlocutory appeal – Appeal against refusal of application to discharge worldwide freezing injunction and receivership order – Whether learned judge erred in refusing to discharge orders – Whether judge required on application to discharge to reassess whether claimant had a good arguable case – Whether learned judge properly determined whether there were material changes in circumstances warranting discharge of worldwide freezing and receivership orders – Whether decisions of Court of Appeal in Convoy Collateral Ltd v Broad Idea International Limited et al and Broad Idea International Limited v Convoy Collateral Limited amounted to a material change in circumstances

The first appellant, Mr. Mitsuji Konoshita, is a director and 51% shareholder of the second appellant ("A.P.F."), a company incorporated under the laws of the Territory of the Virgin Islands (or the "BVI").

On 21st December 2017, the respondent, JTrust Asia PTE Ltd. ("JTrust"), brought a claim against Mr. Konoshita and A.P.F. in the High Court of the Territory of the Virgin Islands (the "BVI Claim"). On 13th February 2018, JTrust obtained a worldwide freezing order against both Mr. Konoshita and A.P.F. in support of the BVI Claim ("the BVI WFO"); and on 5th July 2018, a receivership order over the assets of A.P.F. and Messrs Nicholas Gronow and John Ayres were appointed joint and several receivers ("the Receivership Order"). On 5th July 2018, the lower court continued the BVI WFO. An appeal against the BVI WFO and the Receivership Order was dismissed by this Court on 18th December 2018. JTrust was granted permission to serve the BVI Claim on Mr. Konoshita outside the jurisdiction. JTrust also filed proceedings against Mr. Konoshita and other defendants in Singapore and Thailand. The Singapore claim was commenced on 12th January 2018 by JTrust against Mr. Konoshita and other defendants seeking similar relief to that which was sought by JTrust in the BVI Claim. On 26th December 2017, prior to commencement of the Singapore claim, the Singapore High Court granted, *ex parte*, a freezing order against the assets of Mr. Konoshita in Singapore.

On 16th April 2019, the BVI Claim was stayed on grounds of *forum non conveniens*, the judge having accepted the respondents' argument that Singapore and Thailand were the more appropriate fora for the trial of JTrust's claim. As a condition of the stay, the BVI WFO and the Receivership Order were continued by the BVI court. The judge also set aside permission for service of the BVI Claim outside the jurisdiction on Mr. Konoshita. There was no appeal against this decision.

After a trial, the Singapore claim was dismissed on 12th February 2020 against Mr. Konoshita and the other defendants ("the Singapore First Instance Decision"). JTrust appealed. Discharge of the Singapore domestic freezing injunction against Mr. Konoshita was stayed temporarily by the Singapore High Court to enable JTrust to apply to the Singapore Court of Appeal to reinstate the domestic freezing order against Mr. Konoshita pending the determination of the appeal by JTrust. On 1st June 2020, the Singapore Court of Appeal in a written judgment determined that JTrust had a good arguable appeal and that, as of the date of the application, there was a heightened risk of dissipation of assets by Mr. Konoshita, and reinstated the domestic freezing injunction pending determination of JTrust's appeal. Also, on 30th March 2020 and 29th May 2020, this Court delivered its decisions in, respectively, *Convoy Collateral Ltd v Broad Idea International Limited et al* and *Broad Idea International Limited v Convoy Collateral Limited*. This is how matters stood when the learned judge delivered his reserved judgment on 19th August 2020, the subject of this appeal.

Upon the dismissal of the Singapore proceedings by the Singapore First Instance Decision, Mr. Konoshita and A.P.F. applied to discharge the BVI WFO and the Receivership Order on the grounds that the BVI Claim had been stayed in favour of the Singapore proceedings, and those proceedings had been resolved in favour of Mr. Konoshita by the dismissal of JTrust's claim; that there had been material changes in circumstances; and therefore there

was no basis on which to continue either order. The learned judge dismissed the discharge application and concluded that it was not just or convenient to discharge either the BVI WFO or the Receivership Order.

The appellants appealed. At the time of the hearing of this appeal, the Singapore Court of Appeal, Singapore's highest court, had allowed on 6th October 2020, JTrust's appeal and entered judgment in favour of JTrust jointly and severally against Mr. Konoshita and the other defendants in the sum of US\$70,006,122.49 and Singapore \$131,817.80 ("the Singapore Final Decision"). Subsequent thereto, JTrust commenced enforcement proceedings in BVI against Mr. Konoshita.

In the appeal, this Court considered: (i) whether the judge erred in taking into account that there were ongoing Thai proceedings when refusing the discharge application; (ii) whether the judge was required on the discharge application to assess afresh whether the respondent had a good arguable case; (iii) whether the judge ought to have discharged the BVI WFO on the basis that the Singapore proceedings were dismissed or that the order for service out of the jurisdiction on Mr. Konoshita was set aside; (iv) whether the Singapore First Instance Decision dismissing all claims against Mr. Konoshita was a material change in circumstances; (v) whether decisions of this Court in *Convoy Collateral Ltd v Broad Idea International Limited et al* and *Broad Idea International Limited v Convoy Collateral Limited* amounted to a material change in circumstances; (vi) whether the failure by JTrust to bring foreign proceedings against A.P.F. or to join A.P.F. to any foreign proceedings, was a material change in circumstances warranting the court below discharging the BVI WFO and Receivership Order against A.P.F.; and (vii) whether the judge was wrong to refuse to discharge the Receivership Order in circumstances where there were no ongoing substantive proceedings against A.P.F., the BVI Claim against A.P.F. having been stayed.

Held: dismissing the appeal and affirming the orders of the learned judge, with costs to the respondent in the appeal to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs below, if not agreed within 21 days, that:

1. It was the appellants' case, which was accepted by the judge, that Singapore and Thailand were the more appropriate fora for the trial of the BVI Claim. On that basis, the judge stayed the BVI Claim in favour of ongoing proceedings in both Singapore and Thailand. It was therefore not correct for the appellants to argue that the Thai Proceedings, which were and continue to be ongoing, were irrelevant to the question of whether the BVI WFO and the Receivership Order ought to be continued in favour of the ongoing Thai proceedings. The learned judge therefore did not err when he took into account the ongoing Thai Proceedings when refusing the appellants' discharge application and continued the BVI WFO and Receivership Order.
2. Proof of a 'good arguable case' is a threshold requirement for engaging the court's jurisdiction and discretion, and a necessary component of the court's determination of whether, in all the circumstances, it would be just and convenient to grant a freezing order. That threshold requirement having been met at the time JTrust applied for the BVI WFO, there was no requirement for the judge to reassess that requirement in order to determine whether the order ought to be discharged. The question for the court on an application to discharge a freezing order, is whether it

would be just and convenient to continue the order as made, or whether the justice of the case favoured its immediate discharge or that the order ought to be varied in some material respect. Accordingly, the learned judge was correct in his approach to determining the discharge application by deciding whether it was just and convenient in the circumstances to discharge the BVI WFO and Receivership Order.

Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap. 68 of the Laws of the Virgin Islands applied; Part 17 of the **Civil Procedures Rules 2000** considered; **Ninemia Marine Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)** [1984] 1 All ER 398 considered.

3. In setting aside permission to serve Mr. Konoshita out of the jurisdiction, the learned judge was satisfied that the BVI was not the more appropriate forum for the trial of the BVI claims. This is very different from a conclusion that the BVI court lacks jurisdiction to try the said claims or that there was no basis upon which the BVI court could exercise jurisdiction over Mr. Konoshita, the judge having previously been satisfied that the BVI Claim was an appropriate claim for service out on Mr. Konoshita under one of the 'gateways' in CPR 7.3 in circumstances where the BVI court has personal jurisdiction over A.P.F. The learned judge was accordingly correct in refusing to discharge the BVI WFO against Mr. Konoshita on the basis that the previous order for service out on Mr. Konoshita had been set aside.
4. The learned judge erred in not accepting that the Singapore First Instance Decision was a material change in circumstances warranting him deciding whether to continue the BVI WFO, in as much as that decision meant that the basis of any claim against Mr. Konoshita in the BVI, arising out of the same facts and allegations of fraud and misrepresentation, had been determined in favour of Mr. Konoshita. However, the learned judge's decision did not rest entirely on this incorrect conclusion. He went on to consider whether the Singapore First Instance Decision, when considered with other relevant circumstances, including the prospects of success of the appeal by JTrust against that decision, and the fact that the Singapore Court of Appeal had reinstated the Singapore freezing injunction against Mr. Konoshita, weighed against discharging the BVI WFO against Mr. Konoshita. In doing so, the learned judge adopted the correct approach and came to the correct conclusion that the interest of justice and convenience warranted continuing the BVI WFO against Mr. Konoshita.
5. The decisions of this Court in **Convoy Collateral Ltd v Broad Idea International Limited et al** and **Broad Idea International Limited v Convoy Collateral Limited** did not usher in any new law or new principles. Essentially, these decisions applied and were affirmatory of well-established legal principles. It was accordingly open to the appellants to raise or to rely on these principles in the court below in objection to the continuation of the BVI WFO and Receivership Order, but they did not. The learned judge therefore committed no error of principle or of law in adopting the approach which he did and in concluding that, in the circumstances of this case, the decisions in **Convoy Collateral** and **Broad Idea** did not amount to a material change in circumstances.

Convoy Collateral Ltd v Broad Idea International Limited et al [2020] ECSCJ No. 109 (delivered 30th March 2020) interpreted; **Broad Idea International Limited v Convoy Collateral Limited** [2020] ECSCJ No. 174 (delivered 29th May 2020) interpreted.

6. The judge did not err in refusing to discharge the Receivership Order against A.P.F. on the basis that there were no ongoing proceedings by JTrust against A.P.F. Importantly, while no proceedings were brought by JTrust against A.P.F. in Singapore, Thailand or in any other foreign jurisdiction, JTrust did pursue its claim in Singapore against Mr. Konoshita who is A.P.F.'s majority shareholder, in relation to essentially the same matters raised in the BVI Claim. Further, this point had not been raised by the appellants in their notice of application as a ground or as a material change in circumstances warranting the discharge of the BVI WFO and the Receivership Order against A.P.F. It would therefore not be fair or just for the appellants to now rely on this point as a ground for discharge of the said orders, in circumstances where the respondent would have had no opportunity to reply to it in by way of evidence before the learned judge.
7. The learned judge was correct to have refused to discharge the Receivership Order on the basis that the said order and the BVI WFO ought to stand or fall together. On the evidence, it clearly would not have been just or convenient to allow Mr. Konoshita the opportunity to dissipate his assets by discharging the BVI WFO or the Receivership Order while JTrust's appeal to the Singapore Court of Appeal was pending. The learned judge therefore properly exercised his discretion in this regard and there is no basis upon which this Court ought to set aside that ruling.
Alexandra Vinogradova v Elena Vinogradova et al BVIHCMAP2018/052 (delivered 30th July 2019, unreported) considered.

JUDGMENT

- [1] **FARARA JA [AG.]:** On 19th August 2020, a judge of the Commercial Division of the High Court in the Territory of the Virgin Islands (the "BVI"), in a full and well-reasoned written judgment, dismissed an application by the appellants (the defendants in the claim below) to discharge: (i) a worldwide freezing injunction granted by the court on 24th December 2017 against the assets and property of the first and second appellants ("the BVI WFO"); and (ii) the appointment of Mr. Nicholas James Gronow and Mr. David John Ayres as joint and several receivers of A.P.F. Group Co., Ltd, the second appellant ("the Receivership Order"). The appellants

were dissatisfied with the decision of the learned judge and have appealed to this Court.

Background

- [2] The first appellant, Mr. Konoshita, is a Japanese national and permanent resident of Singapore. The second appellant (“A.P.F.”) is a company incorporated under the laws of the BVI on 5th June 2008 and is therefore subject to the personal jurisdiction of the BVI courts. Mr. Konoshita is a director of A.P.F. and 51% shareholder of the company. Mr. Konoshita was a director and chief executive officer of Group Lease Public Company Ltd (“Group Lease”), a company incorporated in Thailand and listed on the Thai stock exchange. JTrust Asia PTE Ltd. (“JTrust”) alleges that A.P.F. is a holding company through which Mr. Konoshita operates a number of investments. A.P.F. holds a controlling stake in Group Lease. Mr. Konoshita was a director of Group Lease when certain investments, amounting to approximately USD \$210 million, were made by JTrust in Group Lease between March 2015 and September 2017. As a result, JTrust came to hold 8.01% of the issued share capital, USD \$180 million in convertible debentures and Thai Baht 2.4 million in 500,000 units of warrants in Group Lease (“the investment”).

The BVI Claim

- [3] The claim in the BVI (“the BVI Claim”) was commenced by JTrust on 21st December 2017 against both appellants, jointly and severally, for the sum of USD \$95,865,387.00. The BVI Claim is based on fraudulent misrepresentation, knowing receipt, dishonest assistance and breach of trust in relation to the investment. Permission to serve Mr. Konoshita out of the jurisdiction was obtained from the BVI court on 24th December 2017. The BVI WFO, originally granted *ex parte* by Adderley J, was varied by order of the court dated 13th February 2018, and continued by orders dated 22nd March 2018 and 16th April 2019. The Receivership Order was amended by consent on 24th October 2018 and continued by order of the court dated 16th April 2019. The appellants’ appealed the BVI WFO and Receivership Order. That appeal was dismissed, and the said orders affirmed by

this Court in a judgment dated 18th December 2018. The 18th December 2018 judgment was not appealed.

- [4] However, as matters developed, by the order of the Commercial Court dated 16th April 2019, Adderley J stayed the BVI Claim on grounds of *forum non conveniens* (“the stay order”). The stay of the BVI Claim was expressly made on the basis that the appellants had:

“...put forward two more convenient fora, namely Singapore as their first choice and then Thailand’ and that the BVI was clearly not ‘an appropriate forum for a trial and the [appellants] had shown that there are two alternative venues which are more suitable, namely Singapore and Thailand”.

- [5] It was common ground between the parties to this appeal that, as a condition of the stay order, Adderley J continued both the BVI WFO and Receivership Order ‘until further order’. This is borne out by the transcript of the *ex tempore* ruling of Adderley J delivered on 16th April 2019. It is also common ground that, at the time of the hearing and determination of the appellants’ stay application, there were proceedings on foot in both Singapore and Thailand which were commenced by JTrust against Mr. Konoshita and other defendants relating to the same or materially similar allegations of fraudulent misrepresentations and false accounting, and a trial date had been fixed for October 2019 in the Singapore proceedings. The stay order was not appealed by either party.

Singapore Proceedings

- [6] On 26th December 2017, on the *ex parte* application of JTrust, the High Court of Singapore, in Suit No. HC/S1212/2017 granted a freezing order over the assets of Mr. Konoshita in Singapore and a worldwide freezing order over the assets of Group Lease up to the sum of USD \$180 million (“the Singapore Freezing Orders”).
- [7] On 12th January 2018, JTrust commenced legal proceedings before the High Court in Singapore against Mr. Konoshita (and 7 other defendants) for the tort of conspiracy by unlawful means. It seems to be common ground that this claim was

subsequently amended by JTrust to add a claim for fraudulent misrepresentation allegedly made by Mr. Konoshita and the other defendants concerning the accounts of Group Lease, which are said to have induced JTrust to enter into the investment agreements and to make the investments which it did in Group Lease. In the Singapore proceedings, JTrust alleged that Mr. Konoshita had fraudulently inflated the apparent profits of Group Lease by causing it to enter into sham loan transactions with other companies at high interest rates.

- [8] After a trial in October 2019, the Singapore Claim was dismissed against Mr. Konoshita and the other Singapore defendants by judgment delivered on 12th February 2020 (“the Singapore First Instance Decision”). JTrust however appealed the following day and applied to the Singapore Court of Appeal (“SGCA”) to continue the Singapore Freezing Orders pending the determination of its appeal. By a written judgment dated 1st June 2020, the SGCA reinstated the freezing injunction against Mr. Konoshita, and the worldwide freezing injunction against Group Lease (“the SGCA Freezing Order Judgment”).
- [9] By a written judgment delivered 6th October 2020, the SGCA allowed JTrust’s appeal and granted its claim against the Singapore defendants, including Mr. Konoshita, jointly and severally, in the sum of USD \$70,006,122.49 and Singapore \$131,817.80 (“the SGCA Final Decision”). That decision is final as the SGCA is Singapore’s final court of appeal. We were informed during the hearing of this appeal, that JTrust has commenced proceedings in BVI against Mr. Konoshita to enforce the SGCA Final Decision..
- [10] It is important to note that the second appellant, A.P.F. Group Co., Ltd, was not made a party to either the Singapore or the Thailand proceedings brought by JTrust against Mr. Konoshita and others; and has not, as at the hearing date of this appeal, been sued by JTrust anywhere in the world.

Thai Proceedings

- [11] On 9th January 2018, JTrust commenced proceedings in Thailand against Mr. Konoshita and three other directors of Group Lease (case no. Por 83/2561 of the Thai Civil Court) claiming the sum of approximately USD \$254 million for the avoidance of the convertible debenture transactions and for wrongful acts, including deceit, by the defendants.¹ However, as noted at paragraph [43] of the judgment below, no documentary evidence was put before the learned judge below in relation to the discharge application as to the precise nature and progress of the Thai proceedings. However, it is noted that these proceedings 'were part-heard from August 2019 to October 2019 and set to resume in intermittent sittings from 19th January 2021 to 19th February 2021'.² Accordingly, apart from their existence, the judge knew precious little about the nature and progress of the Thai proceedings. This Court is in no better position. What seems clear is that the Thai proceedings were apparently on foot at the time of the stay order, and A.P.F. is not, and never was, a party to these proceedings.

Discharge Application

- [12] The appellants' discharge application was filed on 18th February 2020, shortly after the High Court in Singapore delivered the Singapore First Instance Decision dismissing the claim against Mr. Konoshita and the other defendants. In brief, the main ground on which the discharge application was made were that the BVI Claim having been stayed in favour of the Singapore proceedings, and those proceedings having been resolved in favour of Mr. Konoshita by the dismissal of all claims, the BVI WFO and Receivership Order cannot properly be continued and ought to be immediately discharged.
- [13] Before the learned judge, the appellants argued, *inter alia*, that the Singapore First Instance Decision and the respondent's apparent 'decision' not to pursue any claims anywhere against the second appellant, were singularly material changes in

¹ See paragraph 27 of the respondent's skeleton arguments.

² See paragraph 28 respondent's skeleton arguments.

circumstances, which required the immediate discharge of the BVI WFO and Receivership Order, as JTrust could no longer meet the standard of a 'good arguable case' against Mr. Konoshita. They also contended that, as permission to serve the BVI Claim on Mr. Konoshita out of the jurisdiction had been set aside by Adderley J on 16th April 2019, the BVI Claim could no longer be pursued against him, even if the stay were subsequently lifted. The appellants also argued that A.P.F., having not been joined in either the Singapore proceedings or the Thai proceedings as a defendant, there was no basis for continuing the Receivership Order, a most draconian remedy, against it. They also contended that although there had been an appeal from the Singapore First Instance Decision, the prospects of the SGCA overturning that decision on findings of fact were slim.

The Learned Judge's Judgment

[14] In an extensive judgment, the learned judge dismissed the appellants' discharge application in relation to both the BVI WFO and Receivership Order and awarded costs against the appellants, jointly and severally, to be assessed if not agreed within 21 days. The judgment is in two parts. In the first part of his judgment, the learned judge addressed the issues canvassed at the hearing of the application before him on 5th March 2020. In the second part, the judge addressed three 'new' matters which arose subsequent to the 5th March 2020 hearing and which were the subject of written submissions and oral argument on 7th July 2020. The learned judge's conclusion was that these new matters (the SCGA Freezing Order Judgment and the decisions of this Court in **Convoy Collateral Ltd v Broad Idea International Limited et al**³ and **Broad Idea International Limited v Convoy Collateral Limited**⁴) did not affect the outcome of the application.

[15] The learned judge held that the burden was on the appellants as applicants to show that it was no longer 'just and convenient' for the BVI WFO and Receivership Order to be continued or maintained. The judge was not persuaded that the Singapore

³ [2020] ECSCJ No. 109 (delivered 30th March 2020).

⁴ [2020] ECSCJ No. 174 (delivered 29th May 2020).

First Instance Decision amounted to a 'change of circumstances such that the [respondent] now had to show that the relief should be continued.' His main reason for so concluding, was that the appellants had not, in their discharge application, demonstrated that the Thai proceedings 'no longer require to be supported by such relief'.⁵

[16] The judge opined that it would be too restrictive a view to say, as the appellants had posited, that the stay of the BVI Claim was ordered pending the trial of the claim in Singapore, (which trial had now taken place, and the claims had been dismissed by the Singapore High Court), when the transcript of the hearing on 16th April 2019 revealed that Adderley J had made the stay order in favour of both the Singapore and Thai proceedings; and there was no evidence that the Singapore First Instance Decision was *res judicata* of the matters claimed in the Thai proceedings. Furthermore, Adderley J had continued the BVI WFO and Receivership Order in aid of both the Singapore and Thai proceedings. Accordingly, in the absence of any evidence from the appellants, the burden being on them, it remained just and convenient to continue the BVI WFO and Receivership Order 'if for no other reason than to continue supporting the Thai Proceedings'.⁶

[17] As to whether there was a continuing requirement for 'a good arguable case', the learned judge opined that because the respondent's case had been dismissed by the Singapore High Court, 'does not mean that the [respondent] did not have a good arguable case beforehand', that is, a case which is 'more than barely capable of serious argument'.⁷ Further, the fact that JTrust had lost at trial before the High Court in Singapore, 'has no bearing on whether it had a good arguable case when the [respondent] originally applied for [the BVI WFO and Receivership Order]'.⁸ Importantly, the test of a 'good arguable case' was a:

“...threshold requirement to engage the [c]ourt's jurisdiction before it can consider whether it is just and convenient to grant [the BVI WFO and the

⁵ Paragraph 59 of the learned judge's judgment.

⁶ Paragraph 63 of the learned judge's judgment.

⁷ Paragraphs 66 and 67 of the learned judge's judgment.

⁸ Paragraph 69 of the learned judge's judgment.

Receivership Order]. 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.”

The learned judge thought it was ‘telling’ that counsel for the appellants could not point to any authority that a good arguable case must continue to exist. He concluded and was satisfied that it did not. Indeed, before this Court, counsel for neither party has put before us any authority to that effect. This is despite their renewed efforts and searches.

- [18] The learned judge concluded that once the threshold of ‘a good arguable case’ had been met ‘a different set of criteria comes into play’.⁹ These criteria are, pursuant to section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,¹⁰ ‘the demands of justice and convenience’. The judge opined that:

“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 injunction jurisdiction to keep it in place.”

- [19] In considering the question of when a claimant no longer has a case, the learned judge, rejected the appellants’ argument and reasoned that the fact of judgment having been entered in favour of a defendant at first instance in a foreign forum such that matters adjudicated upon have become *res judicata*, is not conclusive, as that line of argument ‘ignores that the party whose claim has 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’.¹¹ He also opined that the appellants had not shown that the respondent’s appeal in Singapore was ‘hopeless’ and, as at the date of the hearing of the discharge application, the respondent might still succeed in its claim in Singapore.

⁹ Paragraph 76 of the learned judge’s judgment.

¹⁰ Cap. 68 of the Laws of the Virgin Islands.

¹¹ Paragraph 78 of the learned judge’s judgment.

[20] Accordingly, the learned judge concluded that the continuation of the BVI WFO and Receivership Order having been expressly made by Adderley J in support of 'legal proceedings more generally to prevent an eventual judgment being rendered nugatory', the respondent having appealed the Singapore First Instance Decision 'with some prospect of success', and the SGCA having reinstated the Singapore Freezing Orders, the principles of justice and convenience favoured continuing the BVI WFO and Receivership Order. Further, that if the orders were discharged, assets may be dissipated, and the Singapore appeal rendered nugatory. In reaching this decision, the learned judge also weighed any possible harm to the appellants in continuing the said orders, against the respondent's chances of success on appeal. He concluded that 'solid evidence of harm is lacking', and that there was no evidence that the harm that will be caused by leaving the BVI WFO and Receivership Order in place 'will outweigh the benefits of doing so'.¹² As to the continuation of the Receivership Order, the learned judge concluded that:

"The factual and procedural history of this matter inspires no confidence that the [appellants] will honour their [c]ourt ordered obligations unless backed by a receivership order. If the freezing order remains, the receivership order will be indispensable."

[21] In the second part of his judgment, the learned judge considered the effect on his determination of the discharge application of the SGCA Freezing Orders Judgment on the question of whether JTrust had a good arguable appeal, and specifically that court's findings that there was a 'heightened risk of dissipation' of the assets of Mr. Konoshita and Group Lease Holdings and, therefore, the Singapore Freezing Orders ought to be reinstated. The judge also considered the effect of this Court's decision in **Convoy Collateral** and in **Broad Idea**.

[22] In **Convoy Collateral** this Court found that a BVI 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 jurisdiction of the BVI court. In **Broad idea** this Court held that, absent any statutory authority, a BVI court does not have jurisdiction

¹² Paragraph 81 of the learned judge's judgment.

to grant interlocutory injunctions in aid of foreign litigation, even where the defendant/respondent is already subject to the BVI court's territorial or personal jurisdiction. This Court struck down the decision in **Black Swan Investment I.S.A. v Harvest View Limited et al**¹³ – the foundation of the so-called 'Black Swan' jurisdiction. The appellants argued that the decision of this Court in **Convoy Collateral** and **Broad Idea** amounted to a 'material change of circumstances' enabling the BVI court to decide afresh whether to continue the BVI WFO and Receivership Order.

[23] The learned judge opined that the decisions of this Court in **Convoy Collateral** and **Broad Idea** did not change the law or create new law. They were merely affirmatory of well-established principles which were applied to the particular facts of each case. Accordingly, in his view, the fact that the decision in **Black Swan** had been applied and followed over a period of 10 years by courts in the BVI, was irrelevant as it amounted to a repetition of an error of law, and the decision in **Broad Idea** merely upheld existing law. The learned judge however refrained from deciding whether, as a matter of general principle, this Court's decision to overrule the decision in **Black Swan** by **Broad Idea** 'can amount to a change of circumstances as a matter of legal principle'. He concludes that– '[f]or 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'.

[24] The learned judge also rejected the appellants' submission that the setting aside on 16th April 2019 of the order granting permission to serve the BVI Claim on Mr. Konoshita outside the jurisdiction was another material change of circumstances warranting the discharge of the BVI WFO against Mr. Konoshita. On this issue, the learned judge found that the appellants had not availed themselves of their right to appeal the order of Adderley J made on 16th April 2019. In his view, it was incorrect and 'circular' to say that the court's own order constituted a change of circumstance such that the court ought to take it into account in deciding whether to 'engage upon

¹³ [2010] ECSCJ No. 357 (delivered 23rd March 2010).

a fresh exercise of discretion'.¹⁴ Another basis for rejecting that submission, was that the appellants had been guilty of inordinate delay (some 14 months) in raising this issue.

[25] The learned judge also did not accept that the Singapore First Instance Decision was a material change in circumstances and relied on the fact that the SGCA had found that JTrust had a good arguable appeal when it reinstated the Singapore Freezing Orders, albeit on a temporary basis. The judge also found that it would be 'positively harmful, and contrary to justice and convenience' to discharge the BVI WFO before the Singapore courts have themselves put in place a worldwide freezing order. Accordingly, the learned judge was not persuaded that there was any material change in circumstances warranting the discharge of the BVI WFO against Mr. Konoshita.

[26] As to the appellants' point that there was no claim brought by JTrust anywhere against the second appellant, A.P.F., the learned judge concluded that no material change in circumstances had been established by the appellants. The learned judge seems to have reached this conclusion, in part, on the basis that it was 'impossible to say on the evidence before the [c]ourt when this alleged change occurred', as it had simply not been done.¹⁵ He posited that JTrust could have made that decision even before the 16th April 2019 order of Adderley J, which order itself did not lay down any requirement that the respondent/claimant must commence proceedings elsewhere within a specified period of time, a point which had been open to the appellants to take at the time the said order was being made. This meant, the judge reasoned, that the respondent/claimant was not in breach of the 16th April 2019 order. The judge also opined at paragraph [155] of the judgment:

"Seen through the lens of **Broad Idea**, it would indeed be extraordinary and impermissible for the [c]ourt to grant injunctive relief against APF if the claim brought against APF in the BVI is ignored. The [c]ourt would simply have no jurisdiction to make such order. But this submission fails again on the

¹⁴ Paragraph 143 of the learned judge's judgment.

¹⁵ Paragraph 148 of the learned judge's judgment.

basis that the [appellants] could have taken jurisdiction points at the hearing on 16th April 2019 but did not, and they could have appealed but did not.”

[27] On the burden of proof on the discharge application, the learned judge held that it was for the appellants ‘to show that the relief ought to be discharged’. It was not for the respondent to show why the reliefs ought to be continued, as they will continue automatically ‘unless and until the [appellants] persuade the [c]ourt that it should be discharged’.¹⁶ He also concluded that the fact that there exists the Singapore Freezing Order in respect of Mr. Konoshita, ‘is no reason for discharging the freezing order here’, as the former is domestic while the BVI WFO is worldwide. Furthermore, the freezing relief which had been obtained in Singapore against Mr. Konoshita would not have rendered the BVI WFO ‘obsolete’.¹⁷

[28] And at paragraph [159] the learned judge summarised his conclusions on these additional or new points as follows:

“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 [c]ourt. That relief will therefore be allowed to stand until further order.”

The Issues on Appeal

[29] In their notice of appeal the appellants rely on seven grounds, each with sub-grounds. In their written submissions on appeal, they posit six substantive issues for this Court’s consideration. These are: (i) the Thai Proceedings; (ii) the continuing need for a good arguable case; (iii) no jurisdiction over Mr. Konoshita; (v) the failure to pursue substantive proceedings against A.P.F.; and (vi) the Receivership Order. These issues/grounds were addressed *seriatim* by the respondent in their written submissions filed 22nd December 2020. I propose to deal with them in the same order.

¹⁶ Paragraph 151 of the learned judge’s judgment.

¹⁷ Paragraphs 152 and 153 of the learned judge’s judgment.

Issue 1 – The Thai Proceedings

- [30] The appellants submit that the learned judge erred when he concluded that Adderley J had continued the BVI WFO and Receivership Order in support of both the Singapore and Thai proceedings, and that it would be appropriate to continue these orders in support of the Thai proceedings, the Singapore proceedings having been dismissed by virtue of the Singapore First Instance Decision. They argued that this was a clear misunderstanding by the learned judge of what the court was doing when it continued interim relief in support of foreign proceedings as a condition of staying the BVI Claim. They submit that, in fact, the BVI court stayed the BVI Claim in favour of proceedings to be brought or continued by JTrust elsewhere in the world, be it in Singapore, Thailand or in any other country of JTrust's choosing. Furthermore, what Adderley J did by virtue of the 16th April 2019 stay order was to set aside permission to serve the Claim Form against Mr. Konoshita and to stay the claim against A.P.F. JTrust chose not to bring any claim in a foreign jurisdiction against A.P.F. The Singapore claim was amended to incorporate the BVI Claim against Mr. Konoshita, and that claim was dismissed. Accordingly, argues the appellants, the Thai proceedings are a 'red herring' and ought to have been ignored by the learned judge as being irrelevant, who erred in continuing the BVI WFO and Receivership Order in favour of the Thai proceedings.
- [31] In my view, this point is without merit. There can be no doubt that the appellants, in their stay application, contended that the BVI Claim had no connection with the BVI and that the more appropriate forum, the ones with which the claim in the BVI proceedings had its closest connection, was both Singapore and Thailand, where proceedings were already on foot by JTrust against Mr. Konoshita and other defendants. This is borne out by the grounds of the appellants' notice of application for the stay, and in their written and oral submissions before Adderley J. It is also clear that Adderley J accepted this as being the correct position in law and concluded that the BVI was clearly not the more appropriate or suitable forum for the trial of the BVI Claim and that both Singapore and Thailand, the former being the appellants' first choice jurisdiction, were clearly and distinctly the more

appropriate or suitable forum for the trial of the disputes in the BVI Claim. Accordingly, Adderley J stayed the BVI Claim in favour of ongoing proceedings in both Singapore and Thailand. It is therefore not correct to say that the Thai proceedings, which were and continue to be ongoing, are irrelevant to the question of whether the BVI WFO and the Receivership Order ought to be continued.

- [32] What is also pellucid, is that the learned judge did not base his decision not to discharge the BVI WFO and Receivership Order solely on the ongoing Thai proceedings, ignoring the appeal in the Singapore proceedings. The judge found that, the Singapore First Instance Decision having been appealed and the SGCA having reinstated the Singapore Freezing Orders against Mr. Konoshita and Group Leasing on the basis that JTrust had a good arguable appeal, it was just and convenient to continue the BVI WFO and Receivership Order. Accordingly, the learned judge continued the BVI WFO and Receivership Order in aid of both the Singapore claim on appeal and the ongoing Thai proceedings, effectively in support of the same proceedings in the same jurisdictions as was the basis upon which these interim reliefs had been continued as a condition of the stay order made 16th April 2019. In the premises, the learned judge did not err when he continued the BVI WFO and Receivership Order on the basis of the continuing Thai proceedings, having found that there was no evidence before him conclusive of the first instance decision in the Singapore proceedings being *res judicata*. This ground of appeal therefore fails and is dismissed. This leaves for separate consideration of whether the said orders ought to have been discharged as against A.P.F.

Issue 2 – Whether there is a continuing need for ‘a good arguable case’

- [33] The gravamen of the appellants’ complaint under this ground of appeal is that the Singapore High Court’s dismissal of the claim against Mr. Konoshita and the other defendants was a material change in circumstance, the effect of which was that, at the time of the hearing of the discharge application, the respondents could no longer demonstrate that they satisfy the ‘continuing requirement’ for having a ‘good arguable case’, and therefore the BVI WFO and Receivership Order ought to have

been immediately discharged by the learned judge. They argue that the Singapore First Instance Decision 'gave rise to a *res judicata* that was immediately binding on the parties – even if subject to appeal'.

[34] The appellants also submit that the learned judge erred as a matter of law and principle, in holding that it was not necessary to consider whether JTrust continued to have a 'good arguable case' and that it was appropriate to continue the BVI WFO and Receivership Order in support of the Singapore proceedings, even though JTrust's claim had been dismissed at trial. As to the absence of any authority to support the appellants' contention for a continuing requirement of a 'good arguable case', the appellants submit this was the correct legal position because 'the suggestion that a freezing order should be continued where a claimant had lost at trial appears to be extremely unusual'.¹⁸

[35] The appellants argue further that the learned judge applied the wrong test by asking whether it could be said that JTrust 'no longer had a case at all'. This 'test' was based upon no legal authority 'and resulted in a lower merits threshold being applied to continuation of a freezing order than would be applied to the grant or maintenance in place of much less draconian relief'.¹⁹

Discussion and Conclusion

[36] The BVI court's jurisdiction to make freezing orders is statutory. It rests in section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**. It is a discretionary remedy which may be granted only where the court determines that it is 'just and convenient' to do so. Part 17 of the **Civil Procedures Rules 2000** (the "CPR") sets out procedurally the manner in which this jurisdiction is to be invoked by applicants and exercised by the courts. CPR 17.1(i) and (j) expressly incorporates freezing orders into the family of interim remedies which may be granted by a court. CPR 17.2 provides that the court may grant interim remedies at

¹⁸ Paragraph 28 of the appellants' skeleton arguments.

¹⁹ Paragraph 29 of the appellants' skeleton arguments.

any time, that is, at any stage of the proceedings. Accordingly, the court may grant a freezing order before commencement of the claim in cases of real urgency or *ex parte* where the applicant has satisfied the court that there are good reasons for not giving notice or after delivery of judgment on the claim.²⁰

[37] Before deciding whether it is just and convenient to make the order sought, the court must first be satisfied that the applicant for the freezing order has made out 'a good arguable case'. This means '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'.²¹ The need to demonstrate on the evidence that the applicant for a freezing order has made out 'a good arguable case' is a threshold requirement for engaging the court's jurisdiction and discretion and a component of the court's assessment of whether, in all the circumstances, it would be just and convenient to grant the order sought.²² This much is settled law, and entirely uncontroversial. The burden rests on an applicant for a freezing injunction to satisfy the court on evidence that it has a 'good arguable case' against the respondent, and it is just or convenient for the court to grant a freezing order.

[38] A court has power to vary or to discharge any interim order, including a freezing order. This power is part of the court's inherent jurisdiction. Thus, once granted, a freezing order may be discharged or varied by the court upon application. On an application to discharge a freezing order, the burden rests on the party seeking to have it discharged – the applicant for discharge- to satisfy the court, on a balance of probabilities, that it ought to discharge the freezing order. No authority was cited before the learned judge, or before this Court, as to the applicable principles where a judge is considering an application to discharge a freezing order.

²⁰ See CPR 17.2 and 17.4.

²¹ *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398 at 404 per Mustill LJ.

²² *The Niedersachsen* per Kerr LJ at 415 d-e.

[39] In my view, the learned judge was correct in principle when he concluded that there was no continuing requirement for the applicant for a freezing order to demonstrate that it had 'a good arguable case', that is, one more than barely capable of serious argument', in order for the freezing order to be continued. That threshold requirement of a 'good arguable case' having been met to the satisfaction of the court at the time of the application for the order, there was no requirement for the judge to conduct an assessment anew or reassessment of that requirement in order to determine whether the order ought to be properly continued or not. The question for the court on an application to discharge a freezing order, is whether it would be just and convenient to continue the order as made or whether the justice of the case favoured its immediate discharge or that the order ought to be varied in some material respect. This burden rests on the applicant for the discharge or variation of the order, as the learned judge correctly held.²³

[40] In my judgment, the appellants' criticism of the learned judge's reference to where 'a claimant no longer has a case' as applying the wrong or a lower threshold test, is wholly misconceived. The short answer is that the learned judge applied no such test. The only test which the learned judge settled on in relation to a discharge application is that an applicant (the appellants) must satisfy the court that the demands of justice and convenience require that the court discharging the order.²⁴ At paragraph [77] the learned judge simply posited a situation where the beneficiary of an interim injunction 'no longer has a case', answering this question on the basis of whether it would generally not be just or convenient to maintain the relief:

"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." (Emphasis added)

²³ Paragraph 76 of the learned judge's judgment.

²⁴ Paragraph 76 of the learned judge's judgment.

- [41] At paragraph [78], the learned judge concluded that the appellants' argument that where a party no longer has a case once its claim has been tried and judgment entered dismissing the claim setting up a plea of *res judicata* ignores, in the present circumstances, that the unsuccessful party has a right to appeal which might succeed, and which may be rendered nugatory were the court to lift or discharge the freezing order before the appeal is finally determined. Likewise, at paragraph [79] the learned judge puts the matter in its broadest context in positing whether 'considerations of justice and convenience entail that all the circumstances need to be taken into account', in deciding whether the freezing order ought to be discharged.
- [42] In my view, the learned judge's approach to a consideration of the discharge application in the context of what is just and convenient was correct. This entailed the judge considering the prospects of JTrust succeeding on appeal and the Singapore First Instance Decision being overturned, as it now has. In doing so, the learned judge cannot be faulted for considering that the SGCA had reinstated the Singapore Freezing Orders against Mr. Konoshita and Group Leasing, having taken into account the existence of the BVI WFO and Receivership Order. Likewise, the learned judge quite correctly also took into account that in reinstating the Singapore Freezing Orders, the SGCA did so on the basis that JTrust had made out a 'good arguable appeal'.
- [43] I am also of the view that the learned judge was correct in not approaching the discharge application simply on the basis of whether JTrust continued to be able to make out a case that it had 'a good arguable case' against the appellants in the BVI Claim, the said claim having failed at first instance before the Singapore court. Both the BVI WFO and Receivership Order were continued by Adderley J as conditions of granting a stay of the BVI Claim in favour of proceedings on foot in Singapore and Thailand. Both proceedings were still on foot at the time of the hearing of giving judgment, albeit the Singapore proceedings had been dismissed, but were the subject of an extant appeal. The learned judge was entitled to consider all relevant

factors and circumstances, including the dismissal of the Singapore proceedings against Mr. Konoshita and the likelihood or possibility of the appeal succeeding or not, in deciding whether matters of justice or convenience required discharging the BVI WFO and Receivership Order or maintaining them pending the outcome of the appeal in Singapore. In this respect, the learned judge cannot be faulted in his application of the relevant principles to the discharge application and in determining not to discharge the said orders. Accordingly, this ground of appeal is without merit and must be dismissed.

Issue 3 – Jurisdiction over Mr. Konoshita

[44] The appellants argue that permission to serve out on Mr. Konoshita having been set aside by the order of Adderley J on 16th April 2019, the BVI court ceased to have any jurisdiction over him and the BVI WFO ought to have been set aside by the learned judge who committed a grave error in not doing so. They base this submission on the decision of this Court in **Convoy Collateral** which decided that the BVI court had no jurisdiction to grant a freestanding injunction in support of foreign proceedings against a respondent who is resident outside the jurisdiction, like Mr. Konoshita.²⁵

[45] The appellants argue that an injunction may be discharged by the court where it is satisfied that there has been a material change in circumstances.²⁶ This principle is not in dispute. However, they argue that the learned judge erred when he concluded that the Singapore First Instance Decision dismissing all claims against Mr. Konoshita was not a material change in circumstance justifying the judge taking a ‘fresh look’ at whether the BVI WFO should be continued or should be discharged against him. They argue that, in those circumstances, it could not have been just or convenient for the said order to be continued against Mr. Konoshita.²⁷

²⁵ Paragraph 31 of the appellants’ skeleton arguments.

²⁶ Gee on Commercial Injunctions, 6th Edition at para. 21-057 to 21-058.

²⁷ Paragraph 34 of the appellants’ skeleton.

Discussion

[46] At paragraph [59], the learned judge mused that he was not persuaded that the Singapore First Instance Decision ‘amounts to a change of circumstances such that the [respondent] now has to show that the relief should be continued’. I have already opined that the burden on a discharge application rests with the applicant, and it is not for the beneficiary of the injunction to show that it ought to be maintained. The possible effect of the Singapore First Instance Decision was given further consideration by the learned judge who, at paragraph [78], concluded that the appellants’ argument ignored the fact that the respondent had a right of appeal, which they had exercised, with some possibility of success in light of the findings of and reinstatement by the SGCA of the Singapore Freezing Orders on the basis that JTrust had a ‘good arguable appeal’ on the merits. Put another way, the fact that the claims in Singapore had been dismissed against Mr. Konoshita giving rise to a possible plea of *res judicata*, while an important factor to be weighed by the court, it was not the only important factor to be considered in determining whether the appellants, as applicants, had discharged the burden of showing that it was just and convenient that the BVI WFO ought to be discharged against Mr. Konoshita at this stage. Also, at paragraph [130], the learned judge states categorically that the Singapore First Instance Decision ‘cannot be relied upon as a material change in circumstances’. And even if it were, there still remained 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’.

[47] In my view, the setting aside by Adderley J of permission to serve Mr. Konoshita out of the jurisdiction was part and parcel of the judge’s decision to stay the BVI Claim on *forum non conveniens* grounds. In other words, where the BVI Claim was to be stayed on the basis that the BVI court would decline to accept jurisdiction, it would be incorrect as a matter of principle to maintain the order for service out against Mr. Konoshita. In doing so, Adderley J was satisfied that the BVI was not the more appropriate forum for the trial of the BVI claims. This is very different from saying that the BVI court lacks jurisdiction to try the said claims or that there was no basis

upon which the BVI court could exercise jurisdiction over Mr. Konoshita. As to the latter, Adderley J would have previously satisfied himself that the BVI Claim was an appropriate claim for service out on a foreign defendant under one of the 'gateways' in CPR 7.3 in circumstances where the BVI court exercised personal jurisdiction over the second appellant A.P.F.

[48] Accordingly, the learned judge was correct in not discharging the BVI WFO against Mr. Konoshita on the basis either that the claims in the Singapore proceedings (which had been amended to incorporate the claims in the BVI Claim) had been dismissed by virtue of the Singapore First Instance Decision or on the basis that the previous order for service out on Mr. Konoshita had been set aside. In fact, the latter decision and order had been made at the same time when Adderley J had stayed the BVI Claim and was, in that sense, not a material change in circumstances which ought to be weighed on the discharge application in determining whether it was just and convenient to maintain or to discharge the BVI WFO against Mr. Konoshita.

[49] Where the learned judge fell into error in my view is to not accept that the Singapore First Instance Decision dismissing all claims against Mr. Konoshita was a material change in circumstances warranting his deciding whether to continue the BVI WFO against Mr. Konoshita. The said decision was not just material it was of great significance since it meant, if it stood, that the basis of any claim against Mr. Konoshita in the BVI (or in Singapore) arising out of the same facts and allegations of fraud and misrepresentation, had been determined in favour of Mr. Konoshita. However, the learned judge's decision did not rest entirely on this incorrect conclusion. He went on, quite correctly, to consider whether the fact of the said first instance decision weighed with other relevant circumstances, including the appeal filed by JTrust, the reinstatement of the Singapore Freezing Orders by the SGCA, the finding of a 'good arguable appeal' made by the SGCA, and the continuing risk of dissipation of assets of and by Mr. Konoshita during any period when the BVI WFO was not in place with no corresponding worldwide freezing order being put in

place by the Singapore court, weighed against discharging the BVI WFO against Mr. Konoshita. In doing so, the learned judge adopted the correct approach and came to the correct conclusion that the interest of justice and convenience warranted continuing the BVI WFO against Mr. Konoshita.

[50] However, this determination must also be scrutinized in light of the decisions of this Court in **Convoy Collateral** and **Broad Idea**. At paragraph [134] the learned judge observed that these decisions 'did not visit themselves upon us out of nowhere or by some quasi-legislative diktat'.²⁸ In other words, one of the parties in these cases felt strongly enough to take the jurisdictional points which ultimately led to the decisions of this Court in both appeals. This is of course correct. The corollary to this point is that the appellants, in this matter, did not take these jurisdictional points when they had the opportunity to do so at the hearing on 16th April 2019. Also, they did not appeal the orders made continuing the BVI WFO and the Receivership Order, they are out of time for doing so, and are bound by the said decision of Adderley J. In fact, at the 16th April 2019 hearing there was no serious attempt made by the appellants to object to or to seek to discharge the BVI WFO and Receivership Order, both of which had previously been upheld by this Court on 18th December 2018. In my view, the learned judge was undoubtedly correct in these observations.

[51] The learned judge was also correct in concluding that the decisions of this Court in **Convoy Collateral** and **Broad Idea** did not usher in any new law or a new legal position, but were affirmatory of and applied well-established legal principles.²⁹ However, in my view, this approach glosses over, to some extent, the significance which the decisions in **Convoy Collateral** and **Broad Idea** represent both in the legal profession and in the practice before the courts in the BVI following the much-heralded decision of Bannister J in **Black Swan**. Also, while it is strictly correct to say, as the judge did at paragraph [134], that the 'points made in **Convoy Collateral** and **Broad Idea** were open to the defendants [appellants] to make at the hearing on

²⁸ Paragraph 134 of the learned judge's judgment.

²⁹ Paragraphs 137, 138 and 140 of the learned judge's judgment.

16th April 2019, but they did not', this would not have excluded from the court's consideration that these decisions make clear that the court did not have and never had either personal or subject matter jurisdiction over Mr. Konoshita in relation to or arising under the BVI Claim, which position differs from the then accepted legal position at the time of the 16th April 2019 hearing and decision to continue the BVI WFO.

[52] Having found that the law in BVI had not been changed or developed anew, but rather was stoutly upheld by the decision of this Court in **Broad Idea**,³⁰ the learned judge assessed that this point had not been fully argued before him and, accordingly, expressly refrained from deciding 'whether the overruling of a decision can amount to a change of circumstances as a matter of legal principle'.³¹ He was however, satisfied that 'in the context of this case' **Convoy Collateral** and **Broad Idea** do not 'amount to material change of circumstances'. The learned judge did not go on to give detailed reasons why he reached that conclusion. However, his reasons can be gleaned from the earlier parts of his judgment and his conclusion that these decisions, which he characterized as 'forward looking', did not change the law but applied existing and well-established principles to the facts of each case.

[53] In my view the judge came to the correct conclusion on this issue as a matter of principle. The **Convoy Collateral** and **Broad Idea** decisions did not materially change the law in BVI but were merely affirmatory of well-established principles. I note in passing that both decisions were appealed to the Privy Council and the appeals heard by the Board in February 2021. Where parties to litigation fail to take points available to them at certain stages or the proceedings, they ought not to be able to revisit orders made by the court which had not been appealed or appealed successfully just because they now wish to rely on other points or points which they now appreciate to be correct. This is so even where those points go to the jurisdiction of a court. If this were otherwise, there would be no end to litigation and

³⁰ Paragraph 141 of the learned judge's judgment.

³¹ Paragraph 142 of the learned judge's judgment.

litigants would be able to reopen issues at their whim and fancy, alleging so-called new or other points which were open to them when the matter was heard and finally determined. In my view, the learned judge committed no error of principle or of law in adopting the approach which he did and in concluding that, in the circumstances of this case, the decisions in **Convoy Collateral** and **Broad Idea** did not amount to a material change in circumstances. However, it may be that taking any material change in circumstances into account and weighing it against the correct position in law as pointing to the BVI court having no jurisdiction over Mr. Konoshita, a court would be driven to consider whether, and may have decided that it was just and convenient, to discharge the BVI WFO against him. In the particular circumstances of this case, based on the evidence before him, there were other good reasons or factors which informed the learned judge's decision not to discharge the BVI WFO against Mr. Konoshita, even in the face of the decisions in **Convoy Collateral** and **Broad Idea**.

- [54] As stated above, I too am satisfied that the BVI court's order setting aside service on Mr. Konoshita outside the BVI when the court stayed the BVI Claim in favour of the *forum conveniens* of Singapore and Thailand, was not a material change in circumstances warranting a reconsideration by the learned judge of the BVI WFO and its discharge. Accordingly, these grounds of appeal are not successful.

Issue 4 – Failure to pursue substantive proceedings against A.P.F.

- [55] This point was not raised by the appellants at the time of the stay application and during the first hearing on 5th March 2020. At that time, the appellants were aware that A.P.F. had not been made a party to either the Singapore or Thailand proceedings or proceedings in any foreign jurisdiction brought by JTrust, it not having been sued by JTrust in either proceeding at the time of the stay order on 16th April 2019. This point was first raised by the appellants in their submissions filed on 30th June 2020, prior to the second hearing on 7th July 2020. It is to the effect that the failure by JTrust to bring foreign proceedings against A.P.F. or to join A.P.F. as a defendant in either the Singapore or Thailand proceedings, was a material change

in circumstances warranting the court below discharging the BVI WFO and Receivership Order against A.P.F. This failure they contend is particularly egregious because both the BVI WFO and the Receivership Order are part of the court's nuclear arsenal, with the latter order being perhaps the most draconian and one which a court ought not lightly to make in the first place, or to continue where the justice of the case dictates its discharge.

- [56] It is factually correct that no proceedings have been brought by JTrust against A.P.F. anywhere in the world, except the BVI Claim which claim has been stayed on *forum non conveniens* grounds. It is also manifest that A.P.F. is a BVI incorporated company and therefore amenable to the personal jurisdiction of the BVI court. It is also notable that the BVI Claim was stayed in favour of then extant proceedings in Singapore and Thailand, and no attempt was made by JTrust, after the stay order, to join A.P.F. to either proceedings or to bring a claim anywhere against A.P.F. in a foreign country seized with jurisdiction over A.P.F. in relation to the matters alleged in the BVI Claim.
- [57] The appellants roundly criticize the learned judge's conclusions at paragraphs [147] and [148] of the judgment. There, the judge concluded that the stay order did not require JTrust to commence legal proceedings against A.P.F. in either Singapore or in Thailand within a specified period of time, as a condition of continuing the stay or the BVI WFO and Receivership Order. Accordingly, the judge concluded that JTrust was not in breach of the stay order in not (as yet) commencing proceedings against A.P.F. in any foreign jurisdiction. The learned judge also stated that it was difficult to point to an actual 'decision' by JTrust not to bring proceedings against A.P.F. or to the precise date when this alleged 'change in circumstances' occurred, whether before or after the stay order. The appellants say that the former point is a bad one and the latter is simply irrelevant.
- [58] The appellants submit that the learned judge ought properly to have asked himself the question whether it was an abuse of process for A.P.F. to rely on the fact that

JTrust had failed to commence any 'substantive' proceedings against it in any forum, as a ground for discharging the BVI WFO and Receivership Order against it. Had the judge done so, he would have concluded that it was not an abuse of process.³² The appellants stress that by continuing these draconian orders against A.P.F., it remains subject to interim orders that were continued in support of foreign proceedings when (a) no foreign proceedings have in fact been commenced; and (b) the BVI court lacks jurisdiction as a matter of law to grant or continue relief of that kind against A.P.F. In my view there is some force in these submissions.

- [59] On the other hand, the respondent submits that its failure to add A.P.F. to the proceedings in either Singapore or Thailand was not a material change in circumstances as it has been the position since the stay order was made on 16th April 2019. Furthermore, it took the appellants until 30th June 2020 (some 14.5 months) to raise this as an issue.³³ They submit also that the judge's conclusions at paragraphs [148] and [149] are entirely correct and appropriate and the appellants' criticisms of them unjustified.³⁴

Discussion

- [60] In my view the pertinent consideration was not whether the respondent had breached the stay order by not commencing legal proceedings against A.P.F. in any of the foreign jurisdictions, which it clearly had not. The more cogent point is that having obtained from the BVI court a continuation of the BVI WFO and Receivership Order against A.P.F. as a condition of the stay of the BVI Claim, on the basis that JTrust would be pursuing proceedings in relation to the issues in the BVI Claim before the courts in Singapore as a first choice and/or in Thailand as a second choice, JTrust had, some 12 months later, not brought any proceedings against A.P.F. in either foreign jurisdiction or elsewhere. Respectfully, it is also quite artificial to say that because one cannot point to a date when a 'decision' was made by JTrust

³² Paragraph 45 of the appellants' skeleton arguments.

³³ Paragraph 55 of the respondent's skeleton arguments.

³⁴ Paragraph 56 of the respondent's skeleton arguments.

not to pursue foreign proceedings against A.P.F., the failure to do so by the date of the hearing on the discharge application, cannot constitute a material change in circumstances.

[61] However, while this point or ground of criticism of the judge's approach and decision thereon, may have some traction at first blush and may constitute a material change in circumstances in another case, in my judgment, it does not withstand full scrutiny having regard to what transpired chronologically in the procedural history of the instant matter and the timing and way in which the appellants have sought to rely on this point.

[62] Firstly, at the time of the making of the stay order it was known to both sides that A.P.F. was not a party to either of the extant proceedings brought by JTrust against Mr. Konoshita in Singapore and Thailand, yet the BVI WFO and Receivership Order were continued on 16th April 2019 by Adderley J as a condition to granting the stay. Secondly, and the appellants did not seek an order of the BVI court requiring JTrust to commence or to join A.P.F. to the existing proceedings in Singapore or Thailand and to do so within a specified period, as a condition of the continuation of the BVI WFO and the Receivership Order. The third flaw in the appellants' argument is that A.P.F. is a company majority owned and controlled by Mr. Konoshita. Fourthly, A.P.F. is directly subject to the jurisdiction of the BVI court which decided to continue the BVI WFO and Receivership Order against A.P.F., which stay order and the said conditions, was not appealed by the appellants. Fifthly, this point had not been raised by the appellants in their notice of application as a ground or material change in circumstances warranting the discharge of the said interim orders, but was raised only after the first hearing and reservation of the court's decision, and then only by way of additional written submissions filed 30th June 2020.

[63] Sixthly, I agree with the learned judge's conclusion and with the submissions of the respondent, that there may be good reasons or a good explanation from the respondent as to why no claim against A.P.F. has been brought or A.P.F. joined in

any of the existing claims in Singapore or Thailand, such as would invite the judge to not consider this to be a material change in circumstances warranting the discharge of the BVI WFO and Receivership Order. As matters proceeded, the respondent did not have an opportunity to respond evidentially to this point or this ground of challenge raised in submissions filed after the first hearing on 5th March 2020, albeit it had initially filed evidence by affidavit in opposition to the discharge application. In my judgment, it would not be fair to the respondent for the appellants to seek to rely on this as a ground for discharge of the said orders, when no such ground had been foreshadowed by the appellants in their notice of application and in their written submissions filed in relation thereto, but only after the learned judge had reserved his decision. While it can be said that the point having been raised on 30th June 2020 the respondent did not seek directions of the judge to put in additional evidence speaking to its reason why A.P.F. had not been sued, except in the BVI Claim, as matters unfolded and in the face of no attempt by the appellants to amend the ground in their notice of application, this criticism is in my view of little substance.

- [64] This is not in any way to undermine or devalue the importance of the duty of domestic courts in holding a party, who has obtained one or more of these draconian interim orders made in support of foreign proceedings being commenced or continued in the more appropriate forum for the trial and determination of the matters in dispute between the parties in a claim brought in the domestic court having jurisdiction over one or more of the defendants, to the obligation or requirement to commence proceedings in the foreign court or courts in an expeditious manner and without undue or unexplained delay. The usual practice is for the domestic court to make such steps a condition of the granting of a stay of the domestic proceedings in favour of proceedings in the foreign forum and of the continuation of the freezing order or receivership order. And, where a party who has obtained a freezing order or a receivership order over a company delays in the commencement of proceedings before the foreign court in breach of the terms of the stay order in the domestic court, that may be a solid basis for the domestic court determining that

considerations of justice and convenience require that the said order or orders not be maintained or continued. In the instant matter, while no proceedings were brought by JTrust against A.P.F. in Singapore or in Thailand or in another foreign jurisdiction, it did pursue its claim in Singapore against Mr. Konoshita in relation to the same matters raised in the BVI Claim. The arguments on this issue accordingly fail.

Issue 5 – The Receivership Order

[65] The appellants in their submissions stress the draconian nature of the Receivership Order. They rely on the dicta of this Court in **Alexandra Vinogradova v Elena Vinogradova et al.**³⁵ There, Webster JA [Ag.] at paragraphs [48] and [52] referred to the draconian and potentially damaging effect of receivership orders and cautioned against too liberal an approach by the lower courts to granting such orders. That salutary caution and reminder, especially to a first instance court, was both timely and profound. The appellants submit that as there were no ongoing substantive proceedings anywhere against A.P.F. (the BVI Claim having been stayed), the continued inconvenience and interference with A.P.F.'s liberty in relation to its assets by maintaining receivers over it, is not justified.³⁶

[66] The learned judge addressed this issue at paragraphs [82] and [87] of his judgment. His statements there do not bear being repeated here. Suffice it to be said that the learned judge approached this issue on the basis that the BVI WFO and Receivership Order will stand or fall together. He remarked that if the BVI WFO stands, the Receivership Order will be indispensable. I agree. This reasoning by the judge is buttressed by the finding of the SGCA in its decision to reinstate the Singapore Freezing Orders that there was not just a real risk of dissipation of assets, but a heightened risk. Accordingly, as the learned judge, concluded it would not be just or convenient to give Mr. Konoshita an opportunity to dissipate his assets by discharging the BVI WFO or the Receivership Order. In my view, this was a proper

³⁵ BVIHCMAP2018/052 (delivered 30th July 2019, unreported).

³⁶ See paragraph 47 of the appellants' skeleton arguments.

exercise of the court's power and discretion and there is no basis upon which this Court ought to set aside that ruling. This ground of appeal therefore fails.

Disposition

[67] For the reasons given above, I would dismiss the appeal and affirm the orders of the learned judge made on 19th August 2020 dismissing the appellants' application filed 19th February 2020 with costs to the respondent. The respondent shall have its costs in the appeal to be assessed by a judge of the Commercial Court at no more than two-thirds of the costs below, if not agreed within 21 days.

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Vicki-Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]