

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0026

BETWEEN:

BROAD IDEA INTERNATIONAL LIMITED

Appellant/Respondent

and

CONVOY COLLATERAL LIMITED

Respondent/Applicant

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mr. Gerard St. C Farara, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Richard Morgan, QC with him, Ms. Rosalind Nicholson and Mr. Murray Laing for
the Appellant/Respondent

Mr. Paul McGrath, QC with him Mr. Jonathan Addo and Ms. Lucy Hannett for the
Respondent/Applicant

2020: July 14;
July 31.

*Civil appeal — Motion for conditional leave to Her Majesty in Council — Section 3(2) of Virgin Islands (Appeals to the Privy Council) Order 1967 — Whether proposed appeal to Her Majesty in Council raises question of great general or public importance or otherwise –
– Whether proposed appeal entirely lacking in merit or hopeless — Application for stay or injunction pending determination of proposed appeal — Whether a stay of execution should be granted in relation to Court of Appeal’s judgment pending the determination of the proposed appeal — Whether injunction which was set aside by Court of Appeal should be continued or granted afresh pending the determination of the proposed appeal*

JUDGMENT

- [1] **WEBSTER JA [AG.]:** There are two applications before the Court by the applicant, Convoy Collateral Limited, namely: (1) a notice of motion for conditional leave to appeal to Her Majesty in Council against the decision of the Court of Appeal delivered on 29th May 2020 (“the leave application”); and (2) an amended notice of application for an order staying the order and judgment of the Court of Appeal, or for an order that the freezing order granted against the respondent, Broad Idea International Limited, by Adderley J on 30th July 2019 (“the Adderley Freezing Order”) be continued, or for a fresh injunction in the same or similar terms as the Adderley Freezing Order, in each case pending the determination of the proposed appeal to the Privy Council.

Background

- [2] The applicant, Convoy Collateral Limited (“Convoy”), is company incorporated in Hong Kong as a part of the Convoy Group of Companies. The group provides financial, planning and asset management services in Hong Kong, Macau and China.
- [3] The respondent, Broad Idea International Limited (“Broad Idea”), is a Virgin Islands company. Dr. Cho Kwai Chee Roy (“Dr. Cho”), is a Hong Kong national residing in Hong Kong. He is the majority shareholder of Broad Idea, holding 50.1% of its issued shares. Mr. Francis Choi Chee Ming (“Mr. Choi”) is the holder of the remaining 49.9% of the issued shares of Broad Idea. The directors of Broad Idea are Dr. Cho, Mr. Choi and Dr. Cho’s brother, Mr. Kevin Cho. Broad Idea holds 18.85% of the shares of Town Health International Medical Group Ltd. (“Town Health”), a Cayman Islands company continued in Bermuda and listed on the Hong Kong Stock Exchange.
- [4] On 18th December 2017, Convoy commenced proceedings against Dr. Cho and others in the High Court of Hong Kong in Claim No. 2922/2017 claiming *inter alia* damages for breaches of fiduciary and other duties owed by Dr. Cho to the Convoy

Group. Mr. Choi was not a party to this claim when it was filed. He later applied to be joined as a defendant to refute the allegations of wrongdoing that were made against him in the pleadings.

[5] On 14th February 2018 Convoy filed Claim No. 399/2018 against Dr. Cho and others in the High Court of Hong Kong claiming substantial damages. Mr. Choi is not a party in claim.

[6] On 2nd February 2018, Convoy applied *ex parte* in the Commercial Court of the Virgin Islands for freezing orders against Broad Idea and Dr. Cho in support of the proceedings in Hong Kong Claim No. 399/2018 against Dr. Cho, and for permission to serve Dr. Cho outside the jurisdiction. The application was heard by Chivers J [Ag.] on 9th February 2018 and he made the following orders:

(i) that Broad Idea be restrained until the return date from dealing with or diminishing the value of its shareholding in Town Health or registering any dealings whatsoever with the said shares up to a value of US \$75,583,490.03;

(ii) that Dr. Cho be restrained until the return date from taking any steps to dispose of or diminish the value of his assets within the BVI, including his shareholding in Broad Idea, up to a value of US \$75,583,490.03;

(iii) that Dr. Cho disclose his BVI assets to the legal representatives of Convoy; and

(iv) that Convoy is permitted to serve Dr. Cho outside the jurisdiction at his address in Hong Kong or failing that at Broad Idea's registered agent in the BVI.

[7] On 25th February 2018, Convoy applied to continue Chivers J's orders. Dr. Cho applied to set aside the orders against him. The orders against Dr. Cho (orders (ii) to (iv) above) were set aside by Adderley J in April 2019. Adderley J's order was

confirmed by the Court of Appeal in a separate appeal.¹ Convoy did not pursue the 25th February 2018 continuation application. On 27th March 2019, it issued and served a fresh application seeking a freezing order against Broad Idea in support of the proceedings in Hong Kong against Dr. Cho in Claim No. 399/2018. That application was heard by Adderley J in June 2019. On 30th July 2019 Adderley J granted a freezing order against Broad Idea restraining the company from recording or recognising any transactions regarding the issued shares of the company, and from disposing of or dealing with or diminishing the value of its assets within or outside the Territory of the Virgin Islands (“the BVI”) up to a value of US \$75,583.490.03.

The Appeal

- [8] Broad Idea appealed against the judge’s order. The main issues that arose on the appeal were summarised by Pereira CJ at paragraph 13 of the Court of Appeal’s judgment:

“At the heart of this appeal is the issue of whether the learned judge had jurisdiction to grant the freezing order against Broad Idea, in the circumstances where Convoy has not raised any cause of action and has not pursued any substantive proceedings against Broad Idea in the BVI or Hong Kong or anywhere else, and whether any such jurisdiction extends to granting a freezing order in support of foreign proceedings to which Broad Idea is not a party (‘the Jurisdiction issue’). Assuming that the learned judge had jurisdiction, the issue of whether he properly exercised his discretion to grant the freezing order arises for determination (‘the Exercise issue’).”

- [9] The Court of Appeal decided both issues in favour of Broad Idea. On the ‘Jurisdiction issue’ the Court decided that in an application under section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**² (the “Supreme Court Act”), which is the source of the Court’s power to grant interlocutory injunctions, including injunctions freezing a person’s assets in the jurisdiction in support of proceedings brought within or outside the jurisdiction, there must be a claim or cause of action asserted by the claimant (Convoy) against the defendant whose assets are

¹ See [2020] ECSCJ No. 109, BVIHCMAP2016/0030 (delivered 30th March 2020).

² Cap. 80 of the Revised Laws of the Virgin Islands 1991.

to be frozen (Broad Idea). In the jargon of interlocutory injunctions, Broad Idea is a non-cause of action defendant (or “NCAD”), and Dr. Cho, being the person against whom the substantive claims have been made in Hong Kong, is the cause of action defendant (or “CAD”). The object of the proceedings against Broad Idea in the BVI was to freeze its assets and prevent the registration of any dealings with its shares by Dr. Cho so that the assets and shares would be available to satisfy any money judgment if Convoy succeeds in the proceedings in Hong Kong against Dr. Cho. In coming to its decision on jurisdiction, the Court of Appeal rejected the principle that had been forged at common law in the BVI, starting with the decision of Bannister J [Ag.] in **Black Swan Investment I.S.A. v Harvest View Limited et al**,³ that the court has the power to grant a freestanding freezing injunction against an NCAD who is subject to the court’s jurisdiction in support of claims outside the jurisdiction against a CAD. The Court of Appeal overruled the decision in **Black Swan** and, with it, what had become known as the “Black Swan jurisdiction”.

[10] On the ‘Exercise issue’ the Court decided that even if it had jurisdiction to grant a freezing injunction against Broad Idea, there was no sufficient evidentiary basis for the trial judge’s conclusion that Broad Idea was merely holding assets to which Dr. Cho was beneficially entitled (the Town Health shares) or that Broad Idea was simply a look-through company or money box serving the interest of Dr. Cho.

[11] The Court of Appeal allowed the appeal and set aside the freezing injunction against Broad Idea, making the following orders as set out in the Certificate of Result of Appeal:

- “1. The appeal against the order of the learned judge is allowed;
2. The freezing order made against Broad Idea on 30th July 2019 is set aside;
3. Broad Idea is entitled to its costs on Convoy’s 25th February 2018 application, such costs to be assessed by the court below if not agreed within 21 days;

³ [2010] ECSCJ No. 357, BVIHCV2009/0399 (delivered 23rd March 2010).

4. Having prevailed on the appeal, Broad Idea is entitled to its costs in the court below to be assessed by the court below, if not agreed within 21 days;

5. Convoy shall bear Broad Idea's costs in this appeal in an amount to be assessed which shall be no more than two-thirds of the assessed costs in the court below; and

6. There shall be an enquiry in the Commercial Court, within 30 days of the date of this judgment, as to whether Broad Idea has suffered any damage as a result of the freezing order."

The leave application – the jurisdiction issue

[12] On 17th June 2020, Convoy applied under section 3 of the **Virgin Islands (Appeals to the Privy Council) Order 1967**⁴ ("the 1967 Order") for conditional leave to appeal to the Her Majesty in Council against the decision of the Court of Appeal. It is common ground that the proposed appeal is against an interlocutory decision of the Court of Appeal and therefore that leave is required under section 3(2). That section reads:

"Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases –

- (a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
- (b) such other cases as may be prescribed by law for the time being in force in the Virgin Islands."

[13] To satisfy the requirements of section 3(2)(a), Convoy must show that the question involved in the proposed appeal is either of great general or public importance, or otherwise, that should be submitted to Her Majesty in Council. Convoy can succeed on either limb of the subsection, and a single question may qualify under both limbs.

[14] The meaning of the expressions 'great general or public importance' and 'or otherwise' has been extensively litigated in the courts of the Commonwealth Caribbean. In terms of what amounts to a question that is of great general or public

⁴ S.I. No. 234 of 1967.

importance, reference is often made to **Martinus Francois v The Attorney General**⁵ where Saunders JA (now president of the Caribbean Court of Justice) said at paragraph 13 of his judgment, that:

“Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘great general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.”

The guidance from Carrington JA [Ag.] in **Pacific Wire & Cable Company Limited v Texan Management Limited & Others**⁶ is also helpful. At paragraph 11 of his judgment, the learned judge referred to the tests in section 3(2)(a) and stated:

“The wording of these tests has been framed in wide terms so that this court has a broad discretion to deal with each application and to consider each question of a proposed appeal on its merits. However, this discretion must be exercised judicially and, in our view, this requires that this court should, as a general rule, strive to act consistently in applying the test to grant leave so that it is in accordance with its current practice and that of other courts of appeal whose discretion is exercised under the equivalent rules, bearing in mind that the jurisdiction of our highest court of appeal is being invoked.”

[15] Mr. McGrath, QC relied on several factors which, in his submission, made the questions involved in the proposed appeal to the Her Majesty in Council of great general or public importance. For ease of reference, and with no disrespect, I have summarised his points as follows:

- (i) the abolition of the so-called “Black Swan jurisdiction”, which has been a part of the law and practice of the BVI for the last 10 years, will have a draconian effect on the practice of law in the Territory concerning the tracing and recovery of assets of suspected fraudsters;
- (ii) the retrospective effect of the decision could also impact current cases before the court and cases already decided based on the Black Swan jurisdiction;

⁵ [2004] ECSCJ No. 126, Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004).

⁶ [2008] ECSCJ No. 109, British Virgin Islands HCVAP2006/0019 (delivered 6th October 2008).

- (iii) the Court of Appeal's decision is contrary to previous cases decided by the Court where the Black Swan jurisdiction was considered – the cases are **Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited et al**⁷ and **Tsoi Tin v Tan Haihong et al**;⁸
- (iv) there are serious and difficult issues of law involved in the proposed appeal and the clarification or determination of the issues will have a wider significance than merely determining the private rights between the parties to the present dispute; and
- (v) it is only the Privy Council that can reconsider the majority decision in **Mercedes-Benz A.G. v Leiduck**,⁹ and bring the law in this important area more in line with modern developments.

[16] Mr. McGrath continued that even if the test of great general or public importance was not met (which he disputes), the proposed appeal would fall into the 'or otherwise' category in section 3(2)(a) of the 1967 Order. The phrase 'or otherwise' was considered by the Court of Appeal of Jamaica in **Olasemo v Barnett Ltd.**¹⁰ In a dissenting judgment, Wolfe JA opined:

"Clearly, the phrase 'or otherwise' was added by the legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land. The phrase 'or otherwise' does not *per se* refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their lordships' Board for guidance on the law. The matter requiring the guidance of their lordships' Board may be of an interlocutory nature, but it does not follow that every interlocutory matter will come within the rubric 'or otherwise'."

⁷ [2011] ECSCJ No. 219, Territory of the Virgin Islands HCVAP2010/0028 (delivered 26th September 2011).

⁸ [2014] ECSCJ No. 23, BVIHCMAP2013/0023 (delivered 5th February 2014).

⁹ [1996] AC 284.

¹⁰ (1995) 51 WIR 191, 201.

The judgment of Wolfe JA in **Olasemo v Barnett Ltd** was cited with approval by Carrington JA [Ag.] in **Pacific Wire**.

- [17] Finally, Mr. McGrath referred to the fact that the authorities establish that the Court of Appeal must also be satisfied that the underlying grounds of appeal have merit, referring to the dictum of Saunders JA in **Martinus Francois** which I will deal with below.¹¹
- [18] Mr. David Morgan, QC, who appeared for Broad Idea, while not conceding that the proposed appeal is one of great general or public importance, or otherwise, which ought to be referred to Her Majesty in Council, did not strenuously dispute that the proposed appeal may have some element of public importance. His submissions centred around the point made by Mr. McGrath to the effect that this Court must be satisfied that the proposed appeal has merit. I agree with this statement of principle and I will deal with it below.
- [19] As to whether the proposed appeal raises a question of great general or public importance, I have had regard to the fact that the Black Swan jurisdiction has been a part of the practice of law in the BVI for 10 years without challenge before this case; that overruling the Black Swan jurisdiction is likely to have an effect on past and pending decisions of the Court; and that there are important questions of law involved in the proposed appeal. I have also considered that in coming to its decision, this Court was constrained to proceed in accordance with the principle of *stare decisis* and was bound to follow the majority decision of the Privy Council in **Mercedes Benz**. The Privy Council will have no such constraints and may very well want to revisit its decision in **Mercedes Benz** in the context of how the law has developed since that decision was delivered in 1995. In all the circumstances, I am satisfied that the proposed appeal to the Privy Council involves questions of great general or public importance or otherwise, that could benefit from guidance from the Territory's highest appellate body.

¹¹ See paragraphs 27 – 29 below.

The leave application – Chabra considerations and sufficiency of evidence

[20] I now turn to Mr. Morgan's main objection to the granting of leave to appeal to the Privy Council. The essence of his submission is that even if the Privy Council can be persuaded that the BVI court has jurisdiction to grant a freezing injunction against an NCAD (Broad Idea), on the particular facts of this case it should not do so in the exercise of its wide discretion under section 24 of the Supreme Court Act. This is because Convoy has failed to discharge its burden of providing evidence to satisfy the Court that Dr. Cho had a sufficient interest in the assets of Broad Idea to make those assets susceptible to execution of any money judgment awarded against him in the Hong Kong proceedings. Mr. Morgan contends that without such evidence, the judge should not have granted the injunction and the Court of Appeal was correct in setting aside his decision on this point. If the matter were to proceed to the Privy Council, the Board will be obliged to dismiss the appeal on this ground only. The fact that the Court may have had jurisdiction to grant the injunction against Broad idea, and/or that there may be questions of great general or public importance, is not sufficient to send the matter to the Privy Council because the Board does not hear academic appeals. Therefore, leave should not be granted.

[21] To appreciate Mr. Morgan's objection, I will have to deal briefly with one aspect of Convoy's claim before the Commercial Court. The claim for injunctive relief against Broad Idea was based on the **Black Swan** decision as well as the principles developed in **TSB Private Bank International SA v Chabra and another**.¹² To obtain a **Chabra**-type freezing order against an NCAD (Broad Idea), Convoy had to satisfy the Court by clear evidence that the asset owned by Broad Idea (the Town Health shares) was owned beneficially or controlled by Dr. Cho, and that the said shares would be amenable to execution of a judgment obtained in the Hong Kong proceedings against Dr. Cho by virtue of his ownership or control of the shares. This evidence is essential because the essence of **Chabra** relief is that the court is allowing a judgment creditor to execute a judgment in its favour against assets

¹² [1992] 2 All ER 245.

owned by a third party against whom no claim is made and no judgment has been entered.

[22] To support the claim for **Chabra** relief, Convoy relied on evidence that Dr. Cho has been involved in various activities to put his assets beyond the reach of his creditors to make them judgment-proof in the event that the court enters a money judgment against him in the Hong Kong proceedings. As the argument goes, if Convoy is successful in the Hong Kong proceedings, it may be necessary to execute any money judgment against the assets of Broad Idea (the shares in Town Health). It is therefore necessary to restrain Broad Idea from dealing with or disposing of its assets because any unjustified disposal could result in the loss of the Town Health shares for execution.

[23] It is correct that there is no claim against Broad Idea and no wrongdoing has been alleged against the company itself, either in the Hong Kong proceedings or in the BVI. However, this is not essential to obtain **Chabra** relief. Convoy's case for a freezing injunction is based on the evidence that Dr. Cho controls Broad Idea and by extension the Town Health shares, and because of his alleged use of offshore companies to hold his assets, and the allegations of dishonesty and low commercial morality in his dealings, he is likely to cause Broad Idea to dissipate its assets. The learned judge relied on this evidence to find that Broad Idea was nothing more than a "money box" of Dr. Cho. The judge therefore continued the injunction against Broad Idea in the terms outlined above.

[24] However, this Court reversed the judge's findings on the issue of Broad Idea being a **Chabra** defendant because the evidence did not satisfy the requirement that Broad Idea was acting as a mere nominee for, or "money box" of, Dr. Cho. At paragraphs 57 and 58 of the Court of Appeal's judgment, the Chief Justice found that:

"In my view, the evidence could not properly support such a conclusion. The evidence as to the legal and beneficial ownership of the shares held by Broad Idea in Town Health was not controverted. Neither was the legal and

beneficial ownership of Broad Idea's shareholding as being held in the proportions, as earlier stated, by Dr. Cho and Mr. Choi. Further, the statement by Mr. Choi in his evidence in the court below to the effect that he was essentially a passive shareholder in Broad Idea and left its management to Dr. Cho did not provide a sufficient basis, in view of the other evidence, for the conclusion that Broad Idea was merely holding assets to which Dr. Cho was beneficially entitled.

[58] In addition, the decision in **Linsen International Ltd. v Humpuss Sea Transport PTE Ltd.** [*fn. 24: [2012] 1 BCLC 651*] makes it clear that in order for Convoy to avail itself of **Chabra** relief, Broad Idea's assets must first be amenable to some process of execution to satisfy any judgment obtained by Convoy against Dr. Cho. For reasons which shall be explained later in this judgment, that precondition to **Chabra** relief cannot be satisfied. In the premises, the learned judge would therefore have been precluded from relying on the **Chabra** jurisdiction as a basis for granting the freezing order against Broad Idea."

[25] The Chief Justice's conclusion represents the unanimous decision of the Court of Appeal and Mr. Morgan submitted that this conclusion is not only correct, but is sufficient to satisfy this Court that even if Convoy can persuade the Privy Council that the Court has jurisdiction to grant **Black Swan** or alternatively **Chabra** relief to Convoy, the Board will undoubtedly agree with the Court of Appeal that based on the evidence presented by Convoy the '...precondition to Chabra relief cannot be satisfied'.¹³ The appeal would therefore be academic and for that reason, only, should not be submitted to the Board for consideration. The effect of Mr. Morgan's submission is that the Court of Appeal's additional duty to ensure that appeals that are entirely lacking in merit, or are purely academic, are not sent on appeal to the Privy Council, is directly engaged.

[26] Mr. Morgan did not support his position by reference to any decided cases.

[27] Mr. McGrath disagreed with Mr. Morgan's submission and the finding by the Court of Appeal and posited that there was sufficient evidence before the learned judge for him to have concluded, as he did, that Convoy was entitled to a freezing injunction against Broad Idea on the **Chabra** principles.

¹³ Paragraph 58 of the judgment of the Court of Appeal.

[28] The only guidance that we have been referred to on how to deal with an application for leave to appeal where the application is said to be lacking in merit is the **Martinus Francois** case that was cited in Mr. McGrath's skeleton arguments. In that case, the Court of Appeal was reviewing the grounds of the application for conditional leave to appeal. In considering whether the appeal involved a question of great general or public importance, the Court noted that the decision on appeal dealt with issues of how the Government spent its money. Having considered the evidence, Saunders JA said at paragraph 11:

"These may all be matters of great political importance. But they are not, none of them, issues that concern Courts of law...The judges [who heard the appeal] all thought that, so far as legal questions were concerned the case had no merit."

Saunders JA continued at paragraph 12 of the judgment:

"For an appellate Court to come to the unanimous view that the litigant's case was entirely lacking in merit but nonetheless still turnaround and conclude that the case raised an issue of great importance would represent an unacceptable leap in logic."

Finally, after referring to the what he described as the most critical aspect of the case, namely, the Minister's power to approve the disputed spending by the Government, Saunders JA stated 'if that question were answered in the affirmative, as it was by all the members of this Court, then this was a hopeless case'.¹⁴ The Court of Appeal dismissed the application for leave to appeal.

[29] In my opinion **Martinus Francois** is distinguishable from the application before this Court. Saunders JA noted that the issues on appeal related to the way the Government spent its money, and while they may be of political importance, they were not matters for the courts. As such the proposed appeal was 'entirely lacking in merit' and 'a hopeless case'. The situation in this case is different. The Court of Appeal found that the evidence did not support the grant of an injunction on **Chabra** principles. This was an evaluative exercise and the Court of Appeal was very clear

¹⁴ See paragraph 14 of *Martinus Francois v The Attorney General* [2004] ECSCJ No. 126, Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2020).

in its finding that the evidence was not of the required standard. However, the trial judge was persuaded to come to the opposite conclusion. Convoy will be able to say on appeal, as it has submitted to this Court, that the Court of Appeal erred in its assessment of the evidence and that this is a basis for challenging the refusal of the **Chabra** relief. While this Court has, by a unanimous decision, concluded that the evidential basis for making the findings of fact upon which the learned judge granted an injunction based on **Chabra** principles was simply lacking, we accept that it is a matter which is, at minimum, arguable before the Board. In this respect, it cannot be said that the proposed appeal is entirely without merit or is a hopeless case.

- [30] The threshold that an applicant is required to satisfy in an application for conditional leave to appeal to Her Majesty in Council under section 3(2)(a) of the 1967 Order is that the question on appeal is one that, by reason of its great general or public importance, or otherwise, ought to be submitted to the Privy Council. In my judgment Convoy has met this threshold and the proposed appeal is not entirely without merit or hopeless. I would therefore grant conditional leave to appeal on the usual conditions.

Stay pending appeal

- [31] The Court of Appeal delivered its judgment on 29th May 2020. The Court allowed the appeal and, among other things, discharged the freezing order granted against Broad Idea by Adderley J on 30th July 2019 (“the Broad Idea freezing order”). On 30th May 2020, Convoy applied for a stay of the Certificate of Result of Appeal and the judgment of the Court of Appeal pending the determination of its intended appeal to the Privy Council. Alternatively, Convoy has sought that the Broad Idea freezing order be continued pending the determination of the intended appeal to the Privy Council.
- [32] On 7th July 2020, Convoy filed an amended application adding as a further alternative to a stay, an application for a fresh injunction on similar terms to the Broad Idea freezing order.

[33] The essence of the stay application is that now that Broad Idea is free to deal with its assets, Convoy is concerned that those in control of the company (Dr. Cho and his associates) will take steps to transfer its sole asset, the Town Health shares, out of the company, or take other steps to diminish the value of Dr. Cho's shares in Broad Idea, with the ultimate result that execution of any judgment obtained in the Hong Kong proceedings against Dr. Cho's shares in Broad Idea will be of little or no value.

[34] Convoy's contentions have been recognised and endorsed by a recent judgment of the Court of Appeal in Hong Kong. The High Court in Hong Kong had found in March this year that Convoy had not established a real risk of dissipation of assets by Dr. Cho and dismissed Convoy's application for a freezing order against him. On 16th June 2020, the Court of Appeal in Hong Kong reversed that decision. The Court found that there was a real risk of unjustified dissipation of assets by Dr. Cho and granted a worldwide freezing injunction against him. The freezing injunction is in strong terms. It restrained Dr. Cho from, among other things, disposing of or dealing with or diminishing the value of any of his assets, whether within or outside Hong Kong. The injunction stated specifically that:

"This prohibition includes (but is not limited to) the following assets in particular; (i) The shares in Broad Idea International Limited, a company incorporated in the British Virgin Islands, registered or held in the name of Roy Cho, or their net sale money."

I will return to the terms of this injunction.

[35] The starting point in considering this aspect of the case is that a company is entitled to deal with its assets in the normal course of its business and should not be restrained from doing so except for good reason, for example, a real fear, supported by cogent evidence, that those in control of the company will dissipate the assets other than in the normal course of business (**Mobil Cerro Negra Ltd v Petroleos De Venezuela SA**).¹⁵ Further, an appeal does not operate as a stay and a

¹⁵ [2008] All ER (Comm)1034, per Walker J at paragraph 41.

successful litigant is entitled to the fruits of its success notwithstanding the filing of an appeal against the decision.¹⁶

[36] Convoy's case is that the Court of Appeal in Hong Kong, which has primary jurisdiction over Dr. Cho, has now found that there is a real risk of unjustified dissipation of assets by Dr. Cho. He is the majority shareholder, but not the only shareholder of Broad Idea, and is one of its three directors. He is said, by the Convoy, to be the person who controls the company and, as such, there is a real possibility that he will cause Broad Idea to dispose of its sole asset or diminish its value. Broad Idea should therefore be restrained from dealing with or disposing of its assets by a stay of execution or the grant of a new injunction so that Convoy's proposed appeal, if successful, will not become nugatory.

[37] Broad Idea objects to the stay or a fresh injunction. I agree with Broad Idea for the following reasons:

(i) Dr. Cho resides in Hong Kong and is subject to the jurisdiction of the courts of that country. The injunction granted by the Court of Appeal in Hong Kong restrains Dr. Cho from disposing of or dealing with or diminishing the value of the shares in Broad Idea. Consistent with Convoy's argument that the value of the Broad Idea shares derive their value from the Town Health shares, any action by Dr. Cho to diminish the value of the Town Health shares could be considered a breach of the Hong Kong injunction and make him liable to be proceeded against for the breach. Therefore, Convoy has some protection, by the Hong Kong injunction, from Broad Idea disposing of its asset. This would be more so in circumstances where, if Convoy is correct, Dr. Cho is the person who controls Broad Idea.

(ii) There is no evidence that Broad Idea has dealt with its assets in a manner that suggests unjustified dissipation. The only known

¹⁶ See Rule 62.19 of the Civil Procedure Rules 2000.

transaction of recent vintage is the Share Repurchase Agreement dated 20th November 2018 between Mr. Choi and Broad Idea by which Broad Idea agreed to repurchase Mr. Choi's 49.9% shareholding in exchange for 49.9% of Broad Idea's shareholding in Town Health. The agreement was disclosed to the Court.

- (iii) The stay or fresh injunction would have the continued effect of restraining Mr. Choi from dealing with his shares in Broad Idea in circumstances where Convoy did not apply for an injunction against him in the BVI or in Hong Kong. Furthermore, the Hong Kong injunction was granted in Hong Kong Claim No. 399/2018 and Mr. Choi is not a party to that action. Related to this point is that a stay which also effectively restrains Mr. Choi would give Convoy more protection than it has from the Hong Kong courts, Convoy not having sought such protection against Mr. Choi in either set of Hong Kong proceedings. Accordingly, Mr. Choi is not under any restraint by the Hong Kong court.
- (iv) Broad Idea is not solely owned by Dr. Cho nor can it be said to be his alter ego. Furthermore, the contention that Board Idea is Dr. Cho's "money box" or is beneficially owned by him or is being used to hold his assets in Town Health, has not been satisfactorily made out on the evidence before the Court. Therefore, on the general principles stated above that Broad Idea is entitled to conduct its business and deal with its assets, and to enjoy the fruits of its success in this Court, in circumstances where there can be no judgment against it in favour of Convoy in the Hong Kong proceedings or in the BVI, is decisively the better of the two arguments.

[38] The decision to grant or refuse a stay or an injunction pending appeal is entirely within the discretion of the court balancing the various considerations outlined in the preceding paragraphs. I am satisfied, having considered the evidence and submissions of counsel, that the balance in this case favours the refusal of the stay

of paragraph 2 of the Certificate of Result of Appeal and the refusal of a new injunction.

Payment of costs

[39] I note that Broad Idea has incurred significant costs to date, and additional costs will be incurred for the appeal. This Court awarded Broad Idea the costs of Convoy's 25th February 2018 application, and the costs of the appeal and in the court below. Convoy's application for a stay includes a stay of the assessment and payment of the costs awarded by this Court. In considering this part of Convoy's application, I note that section 7 of the 1967 Order provides that, before ordering the payment of any money, the Court dealing with the application for conditional leave should require the receiving party to provide good and sufficient security for the payment. This includes an order for the payment of costs. The issue of Broad Idea providing security for receiving payment of its costs was not canvassed with counsel at the hearing, and at this stage I would not order a payment of any part of the costs (when assessed). However, I would not order a stay of the costs orders which would have the effect of staying the assessment of those costs. Broad Idea, may, if it so wishes, proceed with the assessment of the costs and make such application as it sees fit at a later stage.

[40] During the hearing before this Court, Mr. Morgan raised the issue of Broad Idea receiving a payment on account of its costs. CPR 69B.13 authorises the Court, upon application by the receiving party, to order the paying party to make a payment to the receiving party on account of the costs to be paid upon assessment. The procedure requires an application by the receiving party supported by a schedule of costs. The Court was not directed to an application by Broad Idea for a payment on account as required by CPR 69B.13. The Court was directed to a one-page 'schedule of costs' exhibited to the Fourth Affidavit of Mr. Choi.¹⁷ That document is not a schedule of costs. It reads like a statement of account from Broad Idea's solicitors and it does not contain the details required by CPR 69B.13. In the

¹⁷ Updated Hearing Bundle, Tab 8 at page 108.

circumstances, I am not minded to treat Broad Idea's request as an application for a payment on account of costs and I make no order thereon.

- [41] For completeness, the enquiry into damages ordered at paragraph 6 of the Certificate of Result of Appeal is stayed.

Disposal

- [42] I would make the following orders on the two applications before the Court:
- (1) The application for conditional leave to appeal to Her Majesty in Council is granted upon the following conditions:
 - a. the applicant within 90 days of the date hereof do enter into good and sufficient security in the sum of five hundred pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;
 - b. within 90 days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the records, the settling of such records with the solicitors for the respondent to this application, and the certification of the record by the Registrar of the Court of Appeal;
 - c. the record shall be prepared in accordance with rules 18 to 20 of the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009** and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
 - (2) The applicant shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has

been given within the time prescribed by this Order to the satisfaction of the Registrar.

- (3) The application for a stay of paragraph 2 of the Certificate of Result of Appeal, setting aside the freezing order granted against Broad Idea by Adderley J on 30th July 2019, is dismissed.
- (4) The application for a new injunction in similar terms to the freezing order granted against Broad Idea by Adderley J on 30th July 2019 is dismissed.
- (5) The application for a stay of paragraphs 3 – 5 of the Certificate of Result of Appeal pending the determination of the appeal to the Her Majesty in Council is dismissed.
- (6) Paragraph 6 of the Certificate of Result of Appeal is stayed pending the determination of the appeal to the Her Majesty in Council.
- (7) Costs of the application for a stay of the orders of the Court of Appeal to Broad Idea to be assessed by a judge of the Commercial Court if not agreed within 21 days.

- (8) Costs of the application for leave to appeal to be costs in the appeal to the Her Majesty in Council.

I concur.

Dame Janice M. Pereira, DBE

Chief Justice

I concur.

Gerard Farara, QC

Justice of Appeal [Ag.]

By the Court

Chief Registrar