

A CASE STUDY IN FREEZING INJUNCTIONS:
CONVOY COLLATERAL

HON. MR. JUSTICE K. NEVILLE ADDERLEY
JUSTICE OF APPEAL

Slide 2: Orthodox Injunction Questions

- (1) Is there a serious question to be tried?
- (2) If there is a serious question to be tried then further related questions are
- (3) Would damages be an adequate remedy for a party injured by the grant of an injunction, or failure to grant one, and If not, where does the “balance of convenience lie?

Slide 3: Freezing Injunction Questions

- (1) Does the plaintiff have a good arguable case on a substantive claim over which the court has jurisdiction
- (2) Does the defendant have assets within the jurisdiction
- (3) Is there is a real risk of dissipation or secretion of assets which would render the plaintiff's relief nugatory

Where a *worldwide* freezing injunction is sought the plaintiff must in addition satisfy the court:

- (a) that there are no assets or insufficient assets within the jurisdiction to satisfy his claim, and
- (b) that there are assets outside the jurisdiction which can be engaged,

Slide 4: At the Commercial Court of the BVI

Claim No BVIHC (Com) 0019 of 2018 Convoy Collateral Ltd. v [1] Broad Idea International Ltd. [2] Cho Kwai Chee (also known as Cho Kwai Chee Roy) 2019: April 2,3,17 (service)

Claim No BVIHC (Com) 0019 of 2018 Convoy Collateral Ltd. v [1] Broad Idea International Ltd. [2] Cho Kwai Chee (also known as Cho Kwai Chee Roy) 2019, June 26, July 30, August 20 (injunction)

Judgment in these matters were rendered by myself

Slide 5: At the Eastern Caribbean Court of Appeal

- **BVIHAMAP2016/0030: Convoy Collateral Ltd v [1] Broad Idea International Ltd. [2] Cho Kwai Chee (also known as Cho Kwai Chee Roy) 2019:Oct 18, 2020: March 30 (service)**
- **BVIHCMAP2019/0026: Broad Idea International Ltd. v Convoy Collateral Ltd, 2019: Dec 9,10;2020May 29 (allowed appeal against injunction)**
- **On the service issue Judgment for the Court of Appeal was given by the Hon Mr. Justice Webster JA, and on the freezing injunction issue by the Hon Madam Dame Janice Pereira DBE, Chief Justice.**

Slide 6: At the Judicial Committee of the Privy Council

[2021] UKPC 24 Privy Council Appeal Nos:

0043 of 2020: Convoy Collateral Ltd. v [1] Broad Idea International Ltd. [2] Cho Kwai Chee (also known as Cho Kwai Chee Roy) and

0073 of 2020: Convoy Collateral Ltd. v [1] Broad Idea International Ltd.

The Privy council empanelled 7 judges instead of the usual 5. Judgment Oct 2021 for the majority was given by Lord Leggatt ,and for the Minority by Sir Geoffrey Vos Master of the Rolls.

Slide 7: The Case

There were two parts of the case:

- (1) The interpretation of the rules for the requirements for serving injunctions outside the jurisdiction and**
- (2) The requirements within the jurisdiction in order to freeze the assets of a defendant, intended defendant, or Chabra defendant**

The Chabra defendant would have no cause of action against it, but its assets would be considered legally available through a court process to satisfy the defendant's debts

Slide 8:

The Sequence

RITISH VIRGIN ISLANDS	HONG KONG
Broad idea Ltd.	Dr. Cho 50.1% of Broad Idea Ltd. Convoy Collateral Ltd
	18 Dec 2017 HCA 2922/2017 CCL v Dr. Cho et al sued for damages, equitable compensation etc. US\$75.5 million
9 Feb 2018, Chivers, J judgment (i) Injunction for up to US\$75.5 million (ii) permission to serve out	
	14 Feb 2018 HCA 399/2018 CCL v Dr. Cho + 60 others for damages, equitable compensation, account of profits up to HK \$715 million
4 Dec 2018 Dr. Cho's application to set aside Chivers J's order	
2 May 2019 Adderley, J set aside Chivers order for freezing injunction and service out	
2-3 April 2019 Adderley J hears new application by Convoy collateral for freezing order	
30 July 2019 Adderley J granted extended freezing order vs Broad Idea for up to US\$75.5 million	
24 Sept 2019 Broad Idea appealed Adderley J's freezing order	
30 March 2020 ECCA dismissed appeal vs Adderley J's service out order	
29 May 2020 ECCA allowed appeal vs Adderley J's freezing order over Broad Idea	
	16 June 2020 Hong Kong Court of Appeal imposes freezing injunction for up to HK \$769.5 million vs Dr. Cho. (set aside Harris J's Judgment where he had refused to grant freezing injunction
16-17 2021 JCPC heard appeal-Lords Reid,Hodge,Briggs,Sales, Hamblen, Leggatt, Sir Geoffrey Vos MR	
4 October 2021 JCPC gave Judgment (7 Judges) on Convoy's appeal.	

Slide 9: UK Jurisdiction

Section 37 of the Supreme Court Act 1981 as amended by The Senior Courts Act 1981 of The United Kingdom reads as follows:

“37. Powers of High Court with respect to injunctions and receivers:

- (1) The High Court may (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
- (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within the jurisdiction.

Slide 10: Turks and Caicos Jurisdiction for Injunction

The jurisdiction in the Turks and Caicos Islands to grant injunctions is conferred by the Civil Procedure Ordinance CAP 4.01 which is in the exact terms as the English provisions”

“Powers of Court with respect to injunctions

13. (1) The court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court to be just and convenient.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.
- (3) The power of the Court under subsection(1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within jurisdiction.

The practice is set out under Order 29 of the Civil Rules 2000 made 11 February 2011 by the Chief Justice Richard W. Ground, Q.C.

Slide 11: Purpose of Freezing Injunction.

The Enforcement Principle and the **expanded form of the enforcement principle**

...the interest protected by a freezing injunction is the right (usually a prospective one) to enforce through the court's process, a judgment or order for the payment of a sum of money,

but to do so without giving the claimant security for its claim or interfering with the respondent's right to use its assets for ordinary business purposes. This was labeled in the judgment as the "enforcement principle."

Lord Leggatt pointed out that this principle can in an expanded form apply to any conduct which would diminish the value of assets against which a judgment could potentially be enforced, even if that conduct does not involve dealing with those assets directly.

And he concluded that there seems no reason in principle why the **expanded form of the enforcement principle** should not be applied in an appropriate case to assets held by a "non-cause of action defendant".

Slide 12: The questions before the Court

In paragraph 1 of the judgment Lord Legatt stated that the Board was asked to decide the following questions:

- (i) Under the Eastern Caribbean Supreme Court CPR 2000 the court had power to authorize service on a defendant outside the jurisdiction of a claim form in which a freezing injunction was the only relief, in other words a free standing injunction, and**
- (ii) Where the High court of the British Virgin Islands has personal jurisdiction over a party, the court has power to grant an injunction against that party to assist enforcement through the court's process of an existing or prospective foreign judgment.**

Slide 13: Current Practice laid down by the JCPC

Lord Leggett summarized the current practice for granting a Freezing injunction as follows and I quote:

“101. In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has **power**- and it accords with principle and good practice- to grant a freezing injunction against a party (the respondent) **over whom** the court has personal jurisdiction provided that:

- i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
- ii) the respondent holds assets ...against which such a judgment could be enforced; and
- iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

He concluded:

“102. Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant **restrictions** on the availability in principle of the remedy...” (emphasis added)

Slide 14: Standard Clauses-White Book

Effect of Order 2C-78

- (1) A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
- (2) A Defendant which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees, or agents or in any other way.

Third Parties 2C-79

- (1) ***Effect of this Order.*** It is a Contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of the Order. Any person doing so may be sent to prison, fined, or have his assets seized.
- (2) ***Effect of this Order outside England and Wales.*** The terms of this Order do not affect or concern anyone outside the jurisdiction of this Court until it is declared enforceable or is enforced by a Court in the relevant country and then they are to affect him only to the extent they have been declared enforceable or have been enforced UNLESS such person is:
 - (a) a person to whom this Order is addressed or an officer or an agent appointed by power of attorney of such a person; or
 - (b) a person who is subject to the jurisdiction of this Court and (i) has been given written notice of this Order at his residence or place of business within the jurisdiction of this Court, and (ii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this Order.
- (3) Set off by Banks. This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the Defendant before it was notified of the Order.
- (4) Withdrawals by the Defendant. No bank need enquire as to the application or proposed application of any money withdrawn by the Defendant if the withdrawal appears to be permitted by the Order.

Slide 15: RECEIVERS: Civil Procedure Ordinance CAP 4.01

Powers of Court with respect to receivers

9. (1) The court may by order (whether interlocutory or final) a receiver in all cases in which it appears to the Court to be just and convenient to do so.

(2) Any such order may be either unconditionally or on such terms and conditions as the court thinks just.

The court has power to appoint a receiver in aid of a Mareva injunction, but will not appoint such a receiver over non-residents in relation to assets outside the jurisdiction unless it is satisfied it will be recognized in the local court.

In the English Court of Appeal case of **JSC BTA Bank v Ablyazov** [2010] EWCA Civ 1141 it was stated that the appointment will be justified “*in cases where there is a measurable risk that, if it is not granted, a defendant will act in breach of the freezing order or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be given against him. If, therefore the method by which a defendant beneficially holds his assets is transparent, a receivership order may well not be necessary.*”

They concluded at [18] that whether there is a measurable risk is primarily a matter of judgment in the light of the ascertainable facts which the judge familiar with the case is in a by far the best person to make and the Appeal court will be reluctant to interfere.

Slide 16:What Norwich Pharmacal applicant must establish

In Upmann v Elkan (1871) L.R. 12 Eq. 140, Lord Romilly M.R. said :

” if through no fault of his own a person gets mixed up in the tortious act of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers”. This principle was endorsed by the House of Lords in Norwich Pharmica v Customs and Excise commissioners [1974] A.C. 133; [1973] 2 All E.R. 943, HL. It has been relied on and developed in a number of subsequent cases and must be borne in mind in any account of the law of discovery of documents.”

▪ The person seeking Norwich Pharmacal relief must establish the following :

- (1) A wrong has been committed or there is an arguable case that a wrong has been committed**
- (2) The discovery defendant became mixed up in the wrongdoing so as to facilitate the wrongdoing,**
- (3) The information is necessary to establish that a wrong has been committed or to identify the wrongdoers,**
- (4) The discovery defendant is able or likely to be able to provide the information**

Slide 17: A NORWICH PHARMACAL ORDER IS AN INJUNCTION

In **A,B,C,& D v E** HCVAP 2011/001 the Eastern Caribbean Court of Appeal through Justice of Appeal Janice Periera, as she then was, held that notwithstanding that a Norwich Pharmacal order is a specific type of order directed to a party who may not be said to be a wrongdoer, and in respect of which no other cause of action may exist, such an order, by virtue of its import and intent is an injunction.

It was recognized as such by the Privy Council in Lord Leggatt's speech in *Convoy Collateral*.

Slide 18: A NORWICH PHARMACAL ORDER CAN BE MADE AGAINST FINANCIAL SERVICES PROVIDERS.

In **JSC BTA Bank v Fidelity Corporate Services Limited & Ors** HCVAP 2010/035

This was a case where JSC BTA Bank **applied for Norwich Pharmacal** and ancillary relief in the form of information and documents in their custody, possession or control against the seven discovery defendants. The proceedings in the British Virgin Islands were brought by the Bank in aid of one of the UK proceedings against Mr. Mukhtar Ablyazov and another to recover funds extracted from the bank in the sum of US\$ 1 billion which led in part to it being declared insolvent by the regulatory authority in Kazakhstan. The recovery was to go toward partly settling the claims of creditors in a debt restructuring scheme of over US\$ 11 billion being undertaken by the Almaty Financial Court in Kazakhstan. The bank alleged that Mr. Ablyazov and Mr. Zharinbetov, his assistant, were involved in a scheme of misappropriation by which over US\$1 billion was extracted from the Bank in 2008 under bogus loans purportedly created by fictitious transactions facilitated by nominee companies as vehicles for the benefit of Ablyazov who was dismissed as the Bank's chairman and was allegedly the majority owner through nominee companies. Their defence in the UK was a denial of the allegations. They also had freezing orders against them in the commercial court of the UK.

Slide 18 Cont'd: A NORWICH PHARMACAL ORDER CAN BE MADE AGAINST FINANCIAL SERVICES PROVIDERS.

The Court of Appeal allowed an appeal against the trial judge's refusal to grant the Norwich Pharmacal Order, and held, granting the application

1. That the relief sought was necessary and proportionate in all the circumstances to permit the bank its undoubted right to proceed both in law and in equity against those who set up the companies and those that were presently in possession of the defrauded funds

2. that the defendant trust companies and registered agents, by virtue of their role in providing registered agent services to the companies, a role which is voluntary, could not on any view be considered mere onlookers. The companies that they formed and maintained facilitated, although innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the bank. This placed them under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the bank as the injured party in discovering the wrongdoers.

3. that the further evidence of their defence in England was relevant because they both took the position that they lacked knowledge or control over the nominee entities and therefore it could reasonably be expected that no information regarding who were the instructing or controlling minds behind the entities would be forthcoming. The defendant trust companies and registered agents by virtue of the services rendered together with the due diligence information they were mandated by law to collect as registered agents would be expected to have such information, as well as bank mandates resolutions to operate their accounts

4. The respondents were entitled to their costs.

Slide 19: THE SCOPE OF NORWICH PHARMACAL RELIEF HAS BEEN EXPANDED

In **A and R (Registered Agent)** Claim No. BVIHCM2019/0079 English and BVI authorities are cited which further expand the courts' jurisdiction to make a Norwich Pharmacal order:

- in aid of foreign proceedings,
- it is not confined to where there has only been tortious wrongdoing and is now available where there has been contractual wrongdoing,
- and is not limited to cases where the identity of the wrongdoer, is unknown. Relief can be given where the identity of the wrongdoer is known, but where the claimant requires a missing piece of the jigsaw.
- Further the third party need not be an innocent party; he may be a wrongdoer himself.