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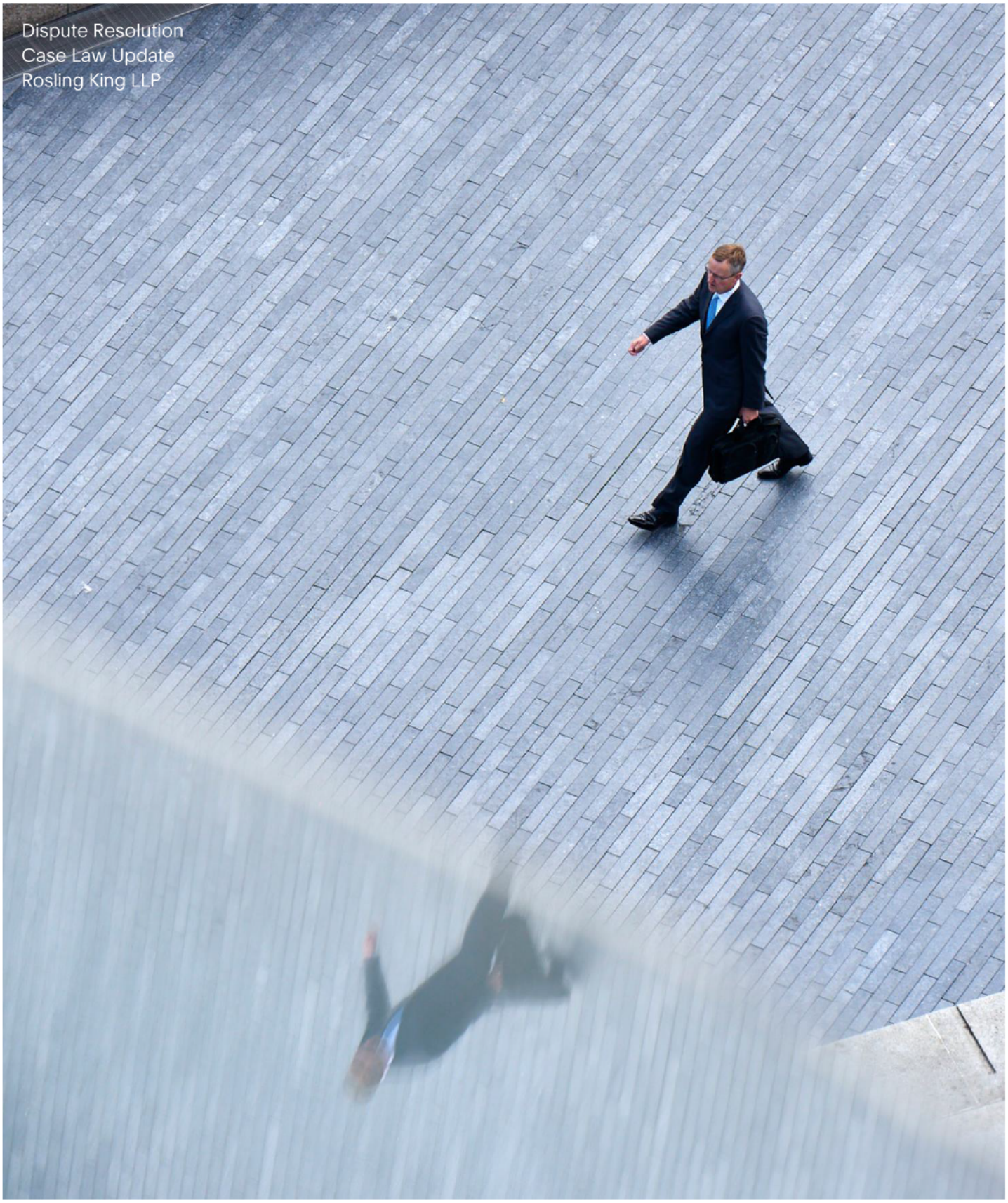
Dispute Resolution Case Law Update Rosling King LLP



Convoy Collateral Ltd v Broad Idea International Ltd & Anor [2021] UKPC 24

The recent majority judgment of the enlarged Board of the Privy Council (the "**Board**"), delivered by Lord Leggatt, presents a detailed account of the Court's powers in respect of freezing orders since the 1979 judgment of *The Siskina (Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210).* In his analysis on interim injunctions, Lord Leggatt gives a "*ground-breaking exposition*" that clarifies the law and in particular the test for freezing orders with an international element. The judgment displays clear commercial consciousness and provides useful guidelines for international litigators and parties who require injunctions to protect assets around the world.

Background

Substantive proceedings were brought in Hong Kong by Convoy Collateral Limited ("**CCL**") against an individual named Dr Cho. CCL sought interim injunctions in the British Virgin Islands ("**BVI**") against Dr Cho and Broad Idea International Ltd ("**Broad Idea**"), a BVI holding company which was 50.1% owned by Dr Cho.

The application for service out of the jurisdiction on Dr Cho was considered and failed, on the basis that the BVI Court did not have jurisdiction over him as an individual. However, as a BVI company, Broad Idea did fall within the Court's jurisdiction. Broad Idea argued that the Court, despite having personal jurisdiction over it, did not have jurisdiction to grant an injunction against it in relation to foreign proceedings. The Court of Appeal of the Eastern Caribbean Supreme Court (the "**Court of Appeal**"), considering a number of precedents including *The Siskina*, concurred with this interpretation and held that it did not have the power to grant a freezing order against Broad Idea in support of the Hong Kong proceedings. The Court of Appeal also affirmed the first instance decision that Dr Cho could not be brought within the jurisdiction of the BVI Court through service of a claim form abroad.

Decision of the Board

Due to the importance of these issues, an expedited hearing took place with seven Board members. Although not unanimous, the majority of the Board considered the modern commercial purpose of freezing orders in order to develop a practicable test for granting interim injunctions in such circumstances.

In respect of Dr Cho's position, the Board relied on *The Siskina and Mercedes Benz AG v Leiduck [1996] AC 284* to uphold the Court of Appeal's decision, and CCL was therefore

unable to serve Dr Cho out of the jurisdiction.

The Board also upheld the decision made by the Court of Appeal in respect of Broad Idea, although on fundamentally different grounds. Whilst the Court of Appeal considered that it lacked the power to subject Broad Idea to an interim freezing injunction, the Board found that it did have the power to do so (although on the facts of the case, there was no basis for an order against Broad Idea).

Abandoning Outdated Principles

Lord Leggatt's exploration of *The Siskina* was commercially focused and realistic in its practical application of the law. First, he dismissed its current relevance on the basis that the decision is "*not merely undesirable in modern day international commerce but legally unsound*". Lord Diplock in *The Siskina* required substantive proceedings in England for the court to grant an interim injunction, stating that a freezing order necessitated "*the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant*". Lord Leggatt opposed this notion on the basis of the changing nature of international trade and asset holding, to invite parties in international proceedings to utilise freezing orders.

He further considered major developments in the law since *The Siskina* judgment, with emphasis on the widening of the Court's power introduced in England and Wales through section 25(1) of the Civil Jurisdiction and Judgments Act 1982 (the "**1982 Act**"). This development was noted by Mr Justice Hoffman in *Bayer AG v Winter (No 2) [1986] FSR 357* and reconsidered by Lord Leggatt here, where he noted that "*[i]t would be unjustifiable insularity for an English or other domestic court to put obstacles in the way of a claimant who wishes, with the court's aid, to enforce a foreign judgment against a defendant's assets*".

The Enforcement Principle

Lord Leggatt clarified the test for the granting of an injunction on just and equitable grounds. Specifically, he said that the Court is able to grant a freezing order against a party over which the Court has personal jurisdiction where:

(i) the applicant has a good arguable case in support of a money judgment that is or will be enforceable by the Court;
(ii) the respondent has assets against which such judgment could be enforced; and
(iii) there exists a real risk that the value of those assets would be impaired, leaving the

judgment unsatisfied, should the injunction not be granted.

The test emphasises the breadth of the Court's power in relation to freezing orders, as Lord Leggatt confirmed that *"there are no other relevant restrictions on the availability in principle of the remedy"*. In dismissing the idea that there may be other restrictions, Lord Leggatt dealt explicitly with the availability of injunctions against third parties, as part of the Court's '*Chabra*' jurisdiction. He also referred to the fallacy that a domestic judgment is required for the granting of a freezing order, stating that *"there is no requirement that the judgment should be a judgment of the domestic court"*.

Crucially, Lord Leggatt considered freezing orders to fall into their own category, separate from other interim injunctions. Freezing orders are key tools in ensuring enforcement of substantive judgments, whereas other interim injunctions generally reflect the substantive relief sought in the proceedings, albeit on an interim basis. The nature of freezing orders means that they could be described as falling under the "enforcement principle". Lord Leggatt dismissed the "cause of action" requirement relied upon in preceding cases. Specifically, in *The Siskina*, the House of Lords considered that the power to grant a freezing order only arose where the relief supplemented a claim for final, substantive relief (cause of action). In this latest decision, the Board found that a cause of action was only valuable insofar as it indicates that a judgment in need of monetary enforcement will be, or has been, granted.

Commentary

As far as England is concerned, litigators seeking freezing orders in support of foreign proceedings have long been able to rely on Section 25 of the 1982 Act, but the 1982 Act does not apply in other jurisdictions and this case is therefore of critical importance to lawyers and their clients involved with fraud and asset tracing claims which have an international dimension.

Along with offering exceptional clarity to litigators and parties, Lord Leggatt's judgment sets a standard that will allow the law to develop and expand to meet the challenges presented by frauds that are increasingly complex and global in nature. By looking at the rapid development of the international commercial environment, Lord Leggatt has set a path to allow the law to continue to evolve along this commercial trajectory.

For further information, please contact Hannah Sharp or the Partner with whom you usually deal.