'Exceptional Circumstances': Who Is the Proper Guardian of the Interests of Stakeholders in an Insolvent Company, Its Officeholders or Creditors?

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Synopsis

In the recent case of *Parles A.S. et al v Winsley Finance Limited*,[1] ('*Parles*') the British Virgin Islands High Court (the 'BVI Court') has confirmed that it has the necessary jurisdiction to grant *Chabra* relief (i.e. a freezing injunction over the assets of a person against whom the claimant has no cause of action) on the application of unsecured creditors in aid of intended or extant foreign insolvency proceedings.

In her first written judgment following her appointment as a Judge to the BVI Court, the Honourable Justice Mangatal conducted a careful and detailed analysis of the powers available to the BVI Court to grant injunctive relief in support of foreign proceedings following the recent statutory changes and the landmark decision of the Judicial Committee of the Privy Council in *Broad Idea International Ltd v Convoy Collateral Ltd*[2] ('*Broad Idea*'). Amongst other things, the judgment considers whether foreign insolvency proceedings constitute 'proceedings' for the purposes of British Virgin Islands ('BVI') law; the extent to which relief should be granted on the application of a creditor, rather than an officeholder; and the relevance of whether the foreign insolvency proceedings are or will be located in a jurisdiction which falls outside of the BVI statutory recognition and assistance regime.

Traversing a number of commonwealth authorities, the BVI Court noted that it would only be in exceptional cases that freezing orders would be made at the behest of creditors rather than officeholders. Mangatal J found that the proper party to seek interim relief in support of insolvency proceedings would typically be the officeholder, usually a provisional liquidator, who, as the guardian of the interests of the insolvent company's stakeholders, is best placed to make an independent judgment as to the wisdom of such proceedings.

This is an important decision for the BVI and other common law jurisdictions, as it demonstrates the growing power and willingness of courts to actively intervene and protect the interests of parties, in both commercial and insolvency proceedings. It also however hints at the difficulties an officeholder from a country that falls outside the BVI statutory assistance regime may face when seeking interim relief.

Black Swan, Broad Idea, and a brief history of injunctive relief in support of foreign proceedings in the BVI

Before addressing the *Parles* decision, it is helpful to briefly set out how the relevant statutory and common law regimes governing the granting of injunctive relief have developed in the BVI.

The BVI Court's statutory powers to grant injunctive relief traditionally derive from section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap. 80) ('Supreme Court Act'). Section 24 of the Supreme Court Act provides, in material part, that:

> 'A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the [BVI] Court or of a judge thereof in all cases in which it appears to the [BVI] Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the [BVI] Court or Judge thinks just'.

Absent any statutory wording to the contrary, the prevailing view prior to 2010 was that freezing injunctions and other forms of injunctive relief were only available in the BVI where there was a substantive cause of action in the jurisdiction, meaning that it would not be possible to obtain injunctive relief in support of wholly foreign proceedings. Whereas other jurisdictions which have enacted statutes which give the courts the power

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1 BVIHCM 2022/0123; unreported, 29 March 2023.
2 [2021] UKPC 24.

to grant injunctive relief (for example, the Civil Jurisdiction and Judgements Act 1982 in the United Kingdom), the BVI legislator did not enact any comparable legislation – the result being that the BVI was out of step with other certain common law jurisdictions.

However, in 2010, this position changed. In the landmark decision of *Black Swan Investment I.S.A. v Harvest View Limited* ('*Black Swan*'),[3] the BVI Court found that notwithstanding the absence of an express statutory right, it lay within the Court's discretion and power to grant injunctive relief in support of foreign proceedings where the respondent was within the *in personam* jurisdiction of the BVI Court. The BVI Court of Appeal subsequently affirmed the existence of this power in *Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Limited* ('*Yukos*').[4]

Following the decisions in *Black Swan* and *Yukos*, the position stayed broadly static, with the BVI Court relying on its common law powers. Although the enactment of the Arbitration Act, 2013 provided a statutory basis upon which the BVI Court could grant injunctive relief in support of foreign arbitral proceedings, no steps were taken by the BVI legislature to put equivalent powers regarding foreign court proceedings on a statutory footing.

However, in May 2020, the established orthodoxy was shattered. In *Broad Idea,*[5] the Court of Appeal found that the jurisdiction to grant interlocutory injunctions under section 24 of the Supreme Court Act was a statutory one, which was premised on the existence of underlying substantive proceedings. In the absence of such proceedings, the BVI Court had no jurisdiction to grant an interlocutory injunction. Further, the BVI Court of Appeal examined whether the BVI Court has jurisdiction to grant interlocutory injunctions in aid of foreign proceedings. The BVI Court of Appeal noted that section 24 made no reference to the grant of injunctions in aid of foreign proceedings and whereas in other common law jurisdictions, such as the United Kingdom and the Cayman Islands, the respective legislatures have made express statutory provisions to empower courts to grant injunctions in aid of foreign proceedings, the BVI Legislature had not given the court such power. The BVI Court of Appeal held that, given the historical statutory jurisdiction underpinning the grant of such interlocutory relief, the BVI Court had no jurisdiction to grant interlocutory injunctions in aid of foreign proceedings.

Following the decision of the BVI Court of Appeal, an appeal was made to the BVI's ultimate appellate Court, the Judicial Committee of the Privy Council (the 'Privy Council'). Pending the Privy Council's hearing and determination of that appeal, on 7 January 2021, the BVI legislature enacted an amendment to the Supreme Court Act, inserting a new section 24A. Section 24A provides in material part that:

1. The BVI Court may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction;
2. On an application for such relief, the BVI Court may refuse to grant such relief if, in the opinion of the BVI Court, (i) there is no jurisdiction (save for section 24A) in relation to the subject matter of the foreign proceedings; and (ii) it is inexpedient for the BVI Court to grant such relief; and
3. For the purposes of section 24A, 'interim relief' includes any relief which the BVI Court has power to grant in proceedings relating to matters within its jurisdiction, as well as an order against a non-cause of action defendant ('NCAD').

As a consequence, the ability of the BVI Court to make orders for injunctive relief in support of foreign proceedings was codified into law.

Shortly thereafter, on 4 October 2021, the Privy Council gave its decision in *Broad Idea*. In his leading judgment for the majority, Leggatt LJ directed that the granting of a freezing injunction is not contingent on the existence of substantive (extant or prospective) domestic proceedings.

In his judgment, Leggatt LJ referred to the 'enforcement principle' and explained that, in respect of both cause of action and non-cause of action defendants:

> '[the] key question is whether the assets are or would be available to satisfy a judgment through some process of enforcement'.

Leggatt LJ concluded that a court has the power to grant injunctions against a party that owns or controls assets available for enforcement over whom the court has personal jurisdiction if it is just and equitable to do so – finding that such an injunction may be granted where:

1. The applicant has already been granted, or has a good arguable case for being granted, a judgment or order for payment of a sum of money that is or will be enforceable through the court's process;
2. The respondent holds assets (or is liable to take steps to reduce the value of assets outside the ordinary course of business) against which such judgment could be enforced; and
3. There is a real risk without an injunction, the respondent will deal with the assets (or reduce their value) outside the ordinary course of business,

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3 BVIHCV (Com) 2009/399.
4 HCVAP 2010/028.
5 [2021] UKPC 24.

which would impair the availability or value of assets so the judgment would be left unsatisfied.

The outcome of the Privy Council's finding, is that the Court's jurisdiction to grant injunctive relief in support of foreign proceedings is not derived from, or contingent upon, statute, but is a power that already vests with the Court.

The corollary of this is that at the present time, the BVI Court benefits from both the express statutory powers under section 24A of the Supreme Court Act, and the wide ranging common law powers as confirmed by the Privy Council in *Broad Idea*. However, given these developments are reasonably recent, there remains a number of unanswered questions as to how far the BVI Court's powers can (and should) extend. The *Parles* matter is an examination of these very points.

Parles A.S. et al v Winsley Finance Limited

In summary, the proceedings concern the continuation of an interim freezing order granted by the BVI Court in July 2022 against a BVI incorporated company called Winsley Finance Limited ('Winsley'). The freezing order was granted upon the application of Parles A.S. ('Parles'), a company incorporated in the Czech Republic; and an individual named Mr Perner. Parles and Mr Perner (together, the 'Applicants') claimed to be creditors of a Czech national named Mr Pernicka. Although Mr Pernicka's relationship with Winsley was disputed, the Applicants' position was that at all material times, Mr Pernicka was the sole owner of Winsley.

The freezing order against Winsley was granted on the basis that the Applicants would imminently thereafter be issuing civil proceedings against Mr Pernicka in the Czech Republic. It was argued that Winsley held assets that would be available for enforcement should those civil proceedings be successful, and accordingly it was appropriate to grant injunctive relief against Winsley as an NCAD under the *Chabra* jurisdiction,[6] so as to prevent dissipation.

Shortly after the granting of the freezing order, Mr Perner applied for and obtained the appointment of a 'exekutor' against Mr Pernicka in the Czech Republic – an exekutor being akin a receiver in common law jurisdictions (the 'Exekutor Proceedings'). Separately, Parles issued a civil claim against Mr Pernicka in the Czech Republic seeking repayment of its unpaid debt.

Following what appears to be a varied collection of civil and criminal claims and counterclaims in the Czech Republic, in December 2022, the Czech Court appointed an Interim Administrator over Pernicka – that office being roughly equivalent to a trustee in bankruptcy (albeit the appointment is on an interim basis only) (the 'Czech Bankruptcy Proceedings'). The Applicants, plus at least two further purported creditors of Mr Pernicka, Mr Kabátek and Mr Rybár (the 'Potential Applicants') submitted proofs of debt to the Interim Administrator in the Czech Bankruptcy Proceedings.

In the intervening period, the freezing order against Winsley remained in place pending the determination of a continuation application. Winsley opposed the continuation application and sought the discharge of the freezing order.

In parallel, the Potential Applicants sought permission to be joined as applicants to the proceedings in the BVI, relying on their standing as creditors in the Czech Bankruptcy Proceedings.

The Applications

In material part, the BVI Court was required to determine two main issues:

1. Whether to continue the freezing order against Winsley (the 'Continuation Application') which was considered in parallel with Winsley's application to set aside the freezing order; and
2. Whether to join the Potential Applicants as applicants to the proceedings (the 'Joinder Application').

Each application gave rise to interesting questions as to the Court's jurisdiction and the exercise of its discretion.

The meaning of Proceedings

It was common ground between the parties that the BVI Court could grant freezing orders in support of foreign proceedings. As noted above, the common law jurisdiction has been supplemented by the introduction of the statutory jurisdiction in section 24A of the Supreme Court Act, which includes the grant of relief against NCADs.

Following the enactment of section 24A of the Supreme Court Act, Wallbank J in *Claimant X v A TVI Company*[7] held that the BVI Court should follow the same two stage process adopted by the English courts when considering the equivalent English statutory provision (i.e. section 25 of the Civil Jurisdiction and Judgments Act, 1982), namely,

1. to consider whether the facts would warrant the relief sought if the substantive proceedings were brought in the BVI; and

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6 *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231.
7 BVIHC(COM) 2021/0037.

2. if the answer to that question is yes, then the second question to consider was whether, in the language of section 24A of the Supreme Court Act, the fact that the Court has no jurisdiction apart from that section (because the substantive proceedings are abroad) makes it inexpedient to grant the relief.

Mangatal J adopted that methodology in the current proceedings.

Winsley argued, *inter alia*, in relation to the Second Applicant, Mr Perner, that he had not brought any proceedings against Mr Pernicka and that the appointment of an 'exekutor' over Mr Pernicka's assets was akin to the appointment of an equitable receiver in the BVI and therefore did not amount to a substantive claim; rather the appointment was merely an execution process. In other words, Winsley put forward an argument that there were 'no relevant foreign 'proceedings' against Mr Pernicka engaging the jurisdiction under section 24A of the Supreme Court Act.

Winsley further submitted that Mr Perner would not be instituting proceedings in the Czech Republic against Mr Pernicka. There was therefore no basis to justify the grant of a freezing injunction in relation to Mr Perner and it should be discharged on the basis that there was not (and there would not be) a cause of action against Mr Pernicka, upon which a freezing order against Winsley could be founded.

As to the Proposed Applicants, Winsley submitted that they had brought no proceedings that a freezing injunction could potentially support given that the definitions of 'Proceedings' under section 2 of the Supreme Court Act does not encompass insolvency or bankruptcy proceedings.[8] In other words, the Czech Bankruptcy Proceedings were not 'Proceedings' within the meaning of the Supreme Court Act. The BVI Court therefore had no jurisdiction under section 24 and 24A of the Supreme Court Act or otherwise to grant the Proposed Applicant's freezing injunction relief.

In reply, Mr Perner submitted that the original freezing order was granted on the basis that the Exekutor Proceedings would be issued (and they were indeed filed three days after the original freezing order was granted). As well as the jurisdiction to grant the freezing order in connection with the Exekutor Proceedings, it was further submitted that a number of authorities support the position that the BVI Court also has jurisdiction to grant freezing relief in support of the Czech Bankruptcy Proceedings and that it was appropriate for the BVI Court to grant the Joinder Application.

First, Mangatal J held that it was 'clear' that both the Exekutor Proceedings and the Czech Bankruptcy Proceedings fall within the meaning of 'proceedings' for the purposes of the Supreme Court Act because they are 'plainly commercial matters and therefore fall within the ambits of the definition sections of the Act.' Accordingly, section 24A of the Supreme Court conferred jurisdiction on the Court to grant interim relief in support of foreign insolvency proceedings against NCADs.

In reaching her decision as to whether injunctive relief could be granted in support of foreign insolvency proceedings, Mangatal J noted that the enforcement principle (namely, whether the assets are or would be available to satisfy a judgment through some sort of enforcement) and whether a liquidator or trustee in bankruptcy is able to pursue a third party who has assets against which a judgment can be enforced, is a separate question to whether injunctive relief is available in support of insolvency proceedings.

Rather, Mangatal J, citing the reasoning of Briggs J in *HM Revenue & Customs v Clay Egleton et al* ('*Egleton*')[9] with approval, considered that although the purpose of a creditor's winding up petition is for the creditor to obtain payment of a debt owed by the company, this is not the same as a money judgment. Notwithstanding, this does not prevent a petitioning creditor from asserting that it is pursuing a cause of action for the purposes of conferring jurisdiction on the court to grant appropriate interim relief by way of freezing orders or otherwise.

Again referring to Briggs J's reasoning, Mangatal J noted that if successful, the creditor's winding up proceedings merely bring into existence a statutory scheme for getting in and distributing the assets of the company amongst its various stakeholders, of which the petitioning creditor is no more than a member of a class, namely, an unsecured creditor. It was posited by Briggs J and again repeated by Mangatal J, that the reason why freezing injunctions are not typically sought in relation to the assets of an insolvent company may perhaps be because the statutory provisions invalidating transactions and the advertising of a petition may afford the company's creditors with appropriate protection.

The question before the court is therefore a question of *discretion* rather than jurisdiction. In this regard, it was noted that it would only be in exceptional circumstances that a freezing injunction in support of insolvency proceedings would be ordered upon the application of a petitioning creditor rather than a provisional liquidator as it is the officeholder who is the guardian of the company's stakeholders and best placed to make an independent decision as to the wisdom of seeking interim relief. Accordingly petitioning creditors should not expect to be able to obtain freezing

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8 Section 2 of the Supreme Court Act, provides as follows: '"proceeding" includes action, cause or matter' and '"civil proceedings" means proceedings in any civil or commercial matters'.

9 [2006] EWHC 2313.

injunctions against judgment creditors of the company sought to be wound up in the ordinary course.

Mangatal J then went on to consider whether she should exercise her discretion to do so.

Principles to be applied

Managtal J derived the following principles from the authorities to which she was referred:

1. The law and practice regarding the granting of freezing injunctions has developed in many ways which have gone far beyond the practice that existed when a *Mareva* injunction was first granted in 1977 (see: *Broad Idea*).
2. The common law in relation to the jurisdiction under paragraph 24 of the Supreme Court Act, and the statutory powers set out in section 24A of the Supreme Court Act are of enormous breadth (see: *Broad Idea*).
3. There need not be a cause of action but there will generally be a judgment or an order of the Court to pay money (see: *Broad Idea*).
4. The law has evolved since the *Chabra* decision and freezing orders may be granted against NCADs without there being a rigid requirement to show that, at the time the order is sought, the third party is already holding or in control of assets beneficially owned by the defendant (see: *Cardile v Led Builders Pty L*imited ('*Cardile*')[10] and *Egleton*).
5. As part of the exercise that the Court has to carry out in deciding whether to grant freezing injunctions against NCADs that are not at the time in possession of assets, the Court has to ask itself whether there are real prospects that assets would be transferred or obtained by the NCAD in the future. The term 'assets' includes claims and expectancies (see: *Cardile*, *Egleton*, *Algosaibi v Saad Investments Co Ltd* ('*Algosaibi*')).[11]
6. The court needs to be satisfied of two matters before granting *Mareva* relief against an NCAD: first, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the Claimant (see: *Algosaibi*).
7. To satisfy the matters set out at paragraph 6 (above), the Court needs to be satisfied that there is good reason to suppose that either (i) the NCAD can be compelled (though some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD (see: *Algosaibi* and *Cardile*)
8. In summary, the Court needs to be satisfied that some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the NCAD may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor (see: *Cardile*).
9. Although the purpose of a creditor's winding up petition is for the creditor ultimately to obtain payment of a debt owed by the company, this does not equate to being a money judgment. However, the particular nature of the relief sought by means of bringing insolvency proceedings does not disable the petitioning creditor from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction on the court to grant appropriate interim relief, whether by way of freezing order or otherwise (see: *Egleton*).
10. However, the discussion of 'cause of action' has to be read subject to the learning in *Broad Idea*, the effect of which is to open the jurisdictional gates even wider. Combining the reasoning in *Egleton* and *Broad Idea* the BVI Court would have jurisdiction to grant freezing order relief on the application of a petitioning creditor because he is not disabled from asserting that he is pursuing a cause of action or in any event pursuing proceedings that are of a nature that confers jurisdiction on the BVI Court.
11. As a matter of discretion there are powerful reasons why, if freezing orders are to be obtained against potential judgment debtors of a company pending the making of a winding up order, it should be a provisional liquidator rather than a petitioning creditor who seeks and obtains such relief, the officeholders being the guardians of the interests of the insolvent company's stakeholders.
12. It would only be in exceptional cases that freezing orders would be made at the behest of creditors.

Applying the above principles, Mangatal J held that the Exekutor Proceedings gave the Court sufficient

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10 (1999), 198 CLR 380.
11 [2011] (1) CILR 178.

jurisdiction to grant a freezing order and she elected to exercise her discretion to do so because (i) such proceedings resulted in an order for payment of money; or (ii) alternatively, the relief sought by means of the Exekutor Proceedings did not disable Mr Perner from asserting that he is pursuing a cause of action or proceedings that confer jurisdiction on the BVI Court to grant appropriate interim relief. Accordingly, the Continuation Application was granted.

However, Mangatal J refused to grant the Joinder Application. She held that although the court may have jurisdiction to provide freezing relief in relation to creditors in insolvency proceedings, it ought not to exercise its discretion to do so in this case for the reasons set out in *Egleton* (e.g. on the basis that it would only be in exceptional circumstances that a freezing injunction would be granted on the application of a creditor rather than the officeholder).

Questions of recognition and assistance

The BVI Court also considered questions as to whether the Interim Administrator had standing to apply for a freezing injunction where he had not applied for common law recognition (and whether an application for an interim injunction in support of foreign insolvency proceedings would be an impermissible application for 'assistance' under the common law).[12]

Ultimately, Mangatal J held that because the Interim Administrator had not applied for common law recognition, it stood to reason that the BVI Court should not exercise its discretion in favour of the Proposed Applicants. As they had submitted their debts in the Czech Bankruptcy Proceedings, there was no proper basis on which the BVI Court could grant the Joinder Application.

Having dismissed the Joinder Application, the Court quite properly reduced the amount frozen to remove that relating to the Proposed Applicants: thus affirming that debts of third parties cannot be relied upon in support of injunctive relief.

The future

Having established that creditors can obtain injunctive relief in aid of foreign proceedings in *exceptional circumstances,* it will be interesting to see what other circumstances are deemed 'exceptional' and whether the threshold will be lowered over time as more creditors take action into their own hands.

It will also be interesting to see whether, in circumstances where the foreign officeholder either cannot bring an application or fails to obtain the relief sought, that will amount to the 'exceptional circumstances' which would allow an unsecured creditor to apply.

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12 Following the decision of the Court of Appeal of the Eastern Caribbean Supreme Court (Virgin Islands) in *Net International Property Limited v Adv. Eitan Erez (as Trustee in Bankruptcy for Rachel Sofer Sayag)* (BVIHCMAP2020/0010), an officeholder from an non-designated country is entitled to apply for recognition only and not assistance.