FREEZING ORDERS: CASTING OFF THE SHACKLES OF *THE SISKINA*?

*Paul S. Davies**

I. Introduction

Injunctions may be granted 'in all cases in which it appears to the court to be just and convenient to do so'.[1] This flexible formulation has been consistently invoked to allow the courts scope to develop the law to reflect modern advancements. But although the power to grant an injunction can now be found in statute, it is important to note that it is not 'a solecism to refer to the power deriving from the inherent jurisdiction of the court'.[2] As Lord Scott put it in *Fourie v Le Roux*, '[t]he power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court Act 1981 and its statutory predecessors. It derives from the pre-Judicature Act 1873 powers of the Chancery courts, and other courts, to grant injunctions'.[3]

Despite some initial confusion,[4] the law was not ossified by the Judicature Acts.[5] On the contrary, the law on injunctions has continued to evolve, and is an important weapon in the armoury of commercial litigators. All injunctions are powerful equitable remedies, not least since their breach is sanctioned by contempt of court, but one of the most eye-catching recent developments concerns the growth of freezing injunctions over the past fifty years.[6] The modern law on freezing injunctions shows how creative and flexible the equitable jurisdiction can be in response to the challenges posed in the context of large-scale international fraud, and this has been illustrated by the recent decision of the Privy Council in *Broad Idea v Convoy Collateral Ltd*.[7] That decision is the focus of study in this chapter. The background to the dispute will first be outlined, before analysing the judgments and their

* Professor of Commercial Law, UCL; Barrister, Essex Court Chambers. I was instructed by the appellants in the appeal to the Privy Council in *Broad Idea v Convoy Collateral Ltd*, but all views expressed, and any errors, can only be attributed to me. I am grateful to those who participated at the conference for their comments and questions, and in particular Paul McGrath KC and Ryan Turner. I am also very thankful for the generous support of the Leverhulme Trust through a Philip Leverhulme Prize.

[1] Senior Courts Act 1981, s 37(1).

[2] *UL v BK* [2013] EWHC 1735 (Fam), [2014] Fam 35 [14] (Mostyn J).

[3] *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320 [25].

[4] *Holmes v Millage* [1893] 1 QB 551 (CA) 557 (Lindley LJ); *Morgan v Hart* [1914] 2 KB 183 (CA) 191 (Buckley LJ). cp *Malmesbury Railway Co v Budd* (1876) 2 Ch D 113 (Ch); *Beddow v Beddow* (1878) 9 Ch D 89 (Ch).

[5] *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2009] QB 450 [141]–[147] (Lawrence Collins LJ).

[6] The first case to recognise this injunction was *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 (CA) although for some time they were known as '*Mareva* injunctions' after one of the early cases that first recognised it, involving a ship of that name: *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 (CA).

[7] [2021] UKPC 24, [2022] 2 WLR 703.

wider ramifications in both England and Wales and offshore jurisdictions. Freezing orders continue to be an increasingly potent weapon in commercial litigation.

II. Freezing Injunctions in the Privy Council

In *Mercedes Benz AG v Leiduck*,[8] the Privy Council refused to grant a freezing order to restrain a defendant in Monaco from dissipating his assets in Hong Kong. Lord Nicholls began his judgment by saying: 'The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.'[9] Unfortunately, the majority of the Board disagreed with Lord Nicholls.

A quarter of a century later, the Privy Council re-visited this problem of 'black holes' in *Broad Idea v Convoy Collateral Ltd*.[10] The Board unanimously held that, on the facts, no freezing orders should be granted, but a bare majority (4:3) held that Lord Nicholls' dissenting judgment should be (partly) adopted and that the court does have the power, at common law, to grant a freezing order even where there is no pre-existing cause of action against the defendant within the jurisdiction of the court. Lord Leggatt, who gave the leading judgment,[11] thought that the contrary view which had been favoured by the House of Lords in *Siskina (Owners of Cargo Lately Laden on Board) v Distos Cia Naviera SA*[12] should no longer be followed, and concluded that '[t]he shades of *The Siskina* have haunted this area of the law for far too long and they should now finally be laid to rest'.[13]

This enlightened approach of the majority is welcome. In the context of sophisticated international fraud, it is increasingly common for the substantive dispute to be heard in one jurisdiction, whilst the defendant's assets are located in another.[14] It is important that freezing orders be available to support claimants and frustrate fraudsters. Even the minority judgment in *Broad Idea*, given by Sir Geoffrey Vos,[15] recognised that Lord Leggatt provided an 'erudite and compelling exposition of how, rationally, the common law affecting the grant of freezing and other interlocutory injunctions ought to have developed had *The Siskina* been decided differently'.[16] Lord Leggatt's judgment is likely to become a central reference point when considering the juridical foundation of freezing orders. However, further litigation may

[8] [1996] AC 284 (PC).
[9] ibid 305.
[10] (n 7).
[11] With which Lord Briggs, Lord Sales and Lord Hamblen agreed.
[12] [1979] AC 210 (HL).
[13] *Broad Idea* (n 7) [120].
[14] See, eg, Lord Neuberger's Foreword to the sixth edition of S Gee, *Commercial Injunctions*, 6th edn (London, Sweet & Maxwell, 2016) xiii-xv.
[15] With which Lord Reed and Lord Hodge agreed.
[16] *Broad Idea* (n 7) [220].

be required to establish that the majority approach in *Broad Idea* represents the law in England and Wales.

A. The Appeals

Convoy Collateral Ltd ('CCL') appealed two decisions of the Eastern Caribbean Court of Appeal ('ECCA') of 2020. Both emerged from the so-called 'Enigma Network' of companies, said to be part of a massive fraud carried out in Hong Kong. CCL is alleged to be one of the largest victims of the fraud.

CCL sought a freezing order in the BVI against Dr Cho, a resident of Hong Kong. Dr Cho was a director of Broad Idea International Ltd ('Broad Idea'), owning 50.1 per cent of the company. Broad Idea's only asset was a shareholding in Town Health International Medical Group Ltd ('Town Health'), a company originally incorporated in the Cayman Islands, continued into Bermuda, and listed on the Hong Kong Stock Exchange. Dr Cho was a director of both Town Health and CCL's parent company, Convoy Global Holdings. Both these companies were named as members of the Enigma Network, and, following the allegations of fraud, Dr Cho was removed as director of the former and resigned as a director of the latter.

CCL successfully obtained an *ex parte* freezing injunction to restrain Dr Cho from disposing of, dealing with or diminishing the value of his shares in Broad Idea.[17] CCL also obtained permission to serve its application on Dr Cho in Hong Kong. This decision was subsequently set aside upon Dr Cho's application, and the ECCA dismissed CCL's appeal.[18]

A freezing order was also sought to restrain Broad Idea from disposing of, dealing with or diminishing the value of its shareholding in Town Health.[19] Although CCL did not have a cause of action against Broad Idea itself, it is well-established that a freezing order may be granted under the *Chabra* jurisdiction[20] against a 'non-cause of action defendant' where the person injuncted holds or controls assets against which a judgment against the primary defendant could potentially be enforced. The freezing order was granted against Broad Idea at first instance, but set aside by the ECCA.[21]

B. The Decision of the Privy Council

The ECCA insisted that the court had no power to grant an injunction in situations where CCL did not have a pre-existing cause of action in the BVI against either Dr Cho or Broad Idea. This 'power issue' is at the heart of the decision of the Privy Council, and the reason why an enlarged panel of seven judges was convened. The majority disagreed with the

[17] Dr Cho was also enjoined from disposing of, dealing with or diminishing the value of his assets within the BVI up to US$75.5m, and from effecting any changes, variations or amendments to any agreement or trust in relation to which his shares in Broad Idea were held: *Broad Idea* (n 7) [131(ii)].
[18] BVIHCMAP2016/0030 (30 March 2020).
[19] Up to a value of some US$75.5m; Broad Idea was also enjoined from registering, or causing to be registered, any change in the ownership of Dr Cho's shares in Broad Idea: *Broad Idea* (n 7) [131(i)].
[20] So-called after the leading case: *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 (Ch).
[21] *Broad Idea International Ltd v Convoy Collateral Ltd* BVIHCMAP 26/2019 (29 May 2020).

approach of the ECCA in principle, but on the facts both appeals were unanimously dismissed.

CCL could not obtain a freezing order against Dr Cho because CCL could not serve Dr Cho out of the jurisdiction. The relevant provisions of the procedural rules concerning service out were drafted in materially similar terms to those which were applicable in *The Siskina* and *Mercedes Benz*, in which the House of Lords and Privy Council, respectively, had held that the injunction gateway did not allow a free-standing claim for a freezing injunction to be served out of the jurisdiction. Lord Leggatt declined an invitation to interpret the rules more broadly, memorably saying that '[t]he common law does not operate on a principle of third time lucky'.[22]

Broad Idea could also not be injuncted because there was no proper evidence to support the judge's finding that there was a good arguable case that the shares in Town Health held by Broad Idea are beneficially owned by Dr Cho. Indeed, at the time the freezing order against Broad Idea was originally granted, there was no freezing order against Dr Cho restraining him from dealing in any way he chose with his controlling shareholding in Broad Idea.[23] As Lord Leggatt observed, '[i]n circumstances where Dr Cho remained free to dispose of or deal in any other way with his shares in Broad Idea, there was no justification for seeking to prevent conduct which would indirectly diminish the value of those shares. There was therefore no justification for granting a freezing injunction against Broad Idea which was designed to maintain the value of Dr Cho's shares in Broad Idea'.[24]

C. The 'Power Issue'

The Board was split on the question of whether the court has the power to grant free-standing freezing orders. The controversy surrounding this 'power issue' stems from *The Siskina*. That case involved a dispute between the owners of *The Siskina* and the owners of cargo which had been carried on board. *The Siskina* sank, and the only asset against which a judgment in favour of the cargo owners could potentially be enforced was the proceeds of the ship's insurance policy with London underwriters. The cargo owners feared, quite reasonably, that the insurance monies would be paid to the shipowners and deposited in another jurisdiction, depriving the cargo owners of an effective remedy. They therefore sought a freezing order, but first had to establish that they could serve a writ outside the jurisdiction. RSC Order 11, rule 1(1)(i), permitted service of a writ out of the jurisdiction with leave of the court 'if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction'. The House of Lords, allowing the shipowners' appeal,[25] interpreted this provision narrowly. Lord Diplock famously said:[26]

---

[22] *Broad Idea* (n 7) [67].
[23] Such an injunction has now been granted by the Hong Kong court: see ibid [113].
[24] ibid [112].
[25] Lord Denning had given the leading judgment in the Court of Appeal, and 'although well used to reversals by the House of Lords' (as Lord Leggatt put it: *Broad Idea* (n 7) [7]) he later wrote that 'they were never so disappointing as this one', since the decision was unjust to the cargo owners: AT Denning, *The Due Process of Law* (Oxford, OUP, 1980) 141.
[26] *The Siskina* (n 12) 256. Lord Diplock also thought that section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (see now section 37(1) of the Senior Courts Act 1981) which put on a statutory

> The words used in sub-rule (i) are terms of legal art. The sub-rule speaks of 'the action' in which a particular kind of relief, 'an injunction' is sought. This presupposes the existence of a cause of action on which to found 'the action'. A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.

These remarks have been regularly cited, but their significance has been exaggerated and divorced from the context of the decision. The *ratio* of *The Siskina* was limited to the service out issue – in respect of which it was followed in both *Mercedes Benz* and *Broad Idea*. Lord Diplock himself admitted that it was not necessary to consider 'the wider question of what restrictions, whether discretional or jurisdictional, there may be' upon the court's power to grant injunctions.[27] In *Broad Idea*, the Board rightly recognised that *The Siskina* did not decide, as part of its *ratio decidendi*, that a pre-existing cause of action was required for a freezing order to be granted. As a result, the majority was free to conclude that no such bar to equitable relief existed.

Indeed, *The Siskina* itself was grounded upon unsteady foundations. For instance, Lord Diplock relied upon the decision of the Court of Appeal in *North London Railway Co v Great Northern Railway Co*[28] for the proposition that the High Court, since the Judicature Acts, 'has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment'.[29] But that is not what *North London Railway* decided. As Lord Collins has forcefully pointed out, *North London Railway* placed no substantive restrictions on a court's ability to grant injunctive relief.[30] The jurisdiction to grant equitable relief remains very broad.

It should also be remembered that *The Siskina* was decided by the House of Lords at a very early stage in the development of freezing orders.[31] The very first decisions of the commercial court granting *Mareva* injunctions (as they were then called) had only been decided a few years previously,[32] and there was a sense that this 'nuclear weapon'[33] should be treated with caution. Yet freezing orders are now regularly granted and are crucial in ongoing attempts to defeat increasingly sophisticated fraudsters. Lord Leggatt pointed out four major

---

footing the court's ability to grant an injunction, should be also be interpreted restrictively, since '[t]hat subsection, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary': *The Siskina* (n 12) 254.

[27] *The Siskina* (n 12) 254.

[28] (1883) 11 QBD 30 (CA).

[29] *The Siskina* (n 12) 256.

[30] *Masri v Consolidated Contractors International (UK) Ltd (No 2)* (n 5) [141]–[147]; *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 [56]. See too *Broad Idea* (n 7) [43]–[47] and [143]–[147].

[31] *Mercedes Benz* (n 8) 308; *Fourie* (n 3) [30]; *Broad Idea* (n 7) [11].

[32] *Nippon Yusen Kaisha* (n 6) 1095; *Mareva Cia Naviera SA* (n 6); *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (The Pertamina)* [1978] QB 644 (CA).

[33] *Bank Mellat v Nikpour* [1985] FSR 87 (CA) 92 (Donaldson LJ).

developments since *The Siskina*:[34] i) freezing orders can be granted in aid of a judgment already given against the defendant (which cannot be seen as ancillary to a cause of action); ii) freezing orders can be granted against non-cause of action defendants;[35] iii) section 25(1) of the Civil Jurisdiction and Judgments Act 1982 was enacted to provide that the High Court 'shall have power to grant interim relief … where proceedings have been or are to be commenced';[36] iv) worldwide freezing orders have become commonplace.

As the law has developed, individual Law Lords have expressed doubts about 'whether the law as laid down by *The Siskina* (as subsequently modified) was correct in restricting the power to grant injunctions to certain exclusive categories',[37] and the House of Lords has on multiple occasions softened the impact of *The Siskina*.[38] For example, in *Castanho v Brown & Root (UK) Ltd* Lord Scarman held that 'the width and flexibility of equity are not to be undermined by categorisation'.[39] Interestingly, Lord Diplock agreed with Lord Scarman, and emphasised 'our principles of a "wide and flexible" equity' in *British Airways Board v Laker Airways Ltd.*[40] A decade later, in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,[41] the House of Lords granted an interim injunction to restrain the defendants from suspending work on the Channel Tunnel, even though the injunction was not sought in aid of a claim for substantive relief which the court had jurisdiction to grant since the substantive dispute was to be resolved by arbitrators. Lord Browne-Wilkinson astutely observed that '[g]iven the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England'.[42]

The narrow approach adopted in *The Siskina* has largely been circumvented in subsequent cases and is inconsistent with the equitable roots of the injunction. What is now section 37 of the Senior Courts Act 1981 has always been cast in very broad terms; since 1873 Parliament has consistently passed legislation that the court has power to grant injunctions when it is 'just and convenient' to do so.[43] The development of freezing orders,[44]

---

[34] *Broad Idea* (n 7) [13]–[21].
[35] *Chabra* (n 20).
[36] This was originally limited to the Contracting States to the Brussels Convention, but was expanded in 1997 to proceedings commenced or about to be commenced anywhere in the world: Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302).
[37] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) 343 (Lord Browne-Wilkinson) echoing the doubts previously expressed by Lords Goff and Mackay in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24 (HL) 44.
[38] Compare the decision of the Court of Appeal in *The Veracruz I* [1992] 1 Lloyd's Rep 353 (CA): see section III(C) below.
[39] [1981] AC 557 (HL) 573. See too *South Carolina Insurance* (n 37); *Channel Tunnel Group* (n 37).
[40] [1985] AC 58 (HL) 95.
[41] (n 37).
[42] ibid 341, cited in *Broad Idea* (n 7) [28]. See too *Fourie* (n 3).
[43] See the predecessors to Senior Courts Act 1981, s 37(1): Judicature Act 1873, s 25(8); Supreme Court of Judicature (Consolidation) Act 1925, s 45.
[44] And see too the development of 'notification injunctions' which require the respondent to give notice of any dealings with or disposal of assets or other transactions that fall within the scope of the order: *Candy v Holyoake* [2017] EWCA Civ 92, [2017] 2 All ER (Comm) 513.

search orders,[45] website-blocking orders,[46] third-party disclosure orders,[47] and injunctions to restrain the presentation or advertising of a winding-up petition where this would be an abuse of the process of the court,[48] for example, demonstrates that the law can continue to develop incrementally to grant injunctions in novel situations which are not necessarily based on a distinct underlying right the claimant enjoys against the defendant. However, care must be taken before suggesting that the 'jurisdiction' to grant injunctions has expanded. As Lord Scott pointed out in *Fourie v Le Roux,* 'jurisdiction is a word of some ambiguity'.[49] In the strict sense, jurisdiction to grant an injunction exists whenever the court has personal jurisdiction over the party against whom the injunction is sought. But jurisdiction is, confusingly, often also used in a looser sense simply to mean that the court's power to grant an injunction must be exercised in accordance with principle and rules of precedent. This latter usage of 'jurisdiction' is best avoided.[50]

In the context of freezing orders, the approach of the majority in *Broad Idea* is particularly welcome since '[i]n the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted'.[51] Lord Leggatt noted that '[t]he situation in *The Siskina* where a defendant's assets are situated in a country other than that in which the substantive proceedings are taking place was comparatively uncommon in commercial litigation in 1977 but is now normal';[52] the facts of *Broad Idea* are a good example of this.

---

[45] *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

[46] *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658, [2017] 1 All ER 700 (appealed solely on the issue of costs: [2018] UKSC 28, [2018] 1 WLR 3259); *Google Inc v Equustek Solutions Inc* 2017 SCC 34, [2017] 1 SCR 824.

[47] *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 (HL); *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033; see too the 'closely-related' (per *Broad Idea* (n 7) [49]) *Bankers Trust* orders: *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (CA).

[48] *Bryanston Finance Ltd v De Vries (No 2)* [1976] Ch 63 (CA).

[49] *Fourie* (n 3) [25]. Lord Scott quoted the following remarks of Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 (CA) 563: 'The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, ie, that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances.'

[50] In *Broad Idea* (n 7) [57], Lord Leggatt thought 'it would be difficult to improve on the following passage in Spry, *Equitable Remedies*, 9th ed (2014), at p 333:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."'

This passage from Spry was also quoted with approval in *Broadmoor Special Health Authority v Robinson* [2000] QB 775 (CA) [20] (Lord Woolf MR); *Cartier* (n 46) [47] (Kitchin LJ); see too *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1339, [2013] FSR 9 [72] (Sir Robin Jacob).

[51] *Linsen International Ltd v Humpuss Transportasi Kimia* [2011] EWCA Civ 1042 [17] (Lord Neuberger MR).

[52] *Broad Idea* (n 7) [60].

III. The Impact of *Broad Idea*

A. The Basis of Freezing Orders

The majority sensibly based the award of freezing orders[53] upon the 'enforcement principle': 'the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment'.[54] This explains why there is no need (*contra* Lord Diplock in *The Siskina*) to try to assimilate freezing orders with 'ordinary' interlocutory injunctions which are awarded according to the *American Cyanamid* principles.[55] The claimant's right which is protected is not the right on which the substantive cause of action is based. Rather, the claimant's right is one to have a (usually prospective) judgment or order (from whatever jurisdiction) enforced through the court's process.

The minority seemed unwilling to engage in this debate about the rationale of freezing orders.[56] Sir Geoffrey Vos instead chose to 'echo'[57] the comments of Lord Millett in *Mercedes Benz* that '[i]deally … the first step would be to ascertain, not only what a *Mareva* injunction does, but also how, juristically speaking, it does it. This should be straightforward, but is not. After only a few years the development of a settled rationale was truncated by the enactment of [section 37(3)].[58] This did not, as is sometimes said, turn the common law *Mareva* injunction into a statutory remedy, but it assumed that the remedy existed, and tacitly endorsed its validity'.[59]

It is undoubtedly true that the quick enactment of section 37(3) meant that the courts could simply rely upon the statute rather than elucidate the principles underpinning relief through incremental developments in case law. But it remains important to be clear about the basis of freezing orders, since that helps to establish the appropriate parameters of the power to grant relief – including the *Chabra* jurisdiction, and what assets can be the subject of freezing orders. The majority's explanation is clear, compelling, and consistent with earlier authorities both in this jurisdiction[60] and Australia,[61] for example. The minority appeared to think that revisiting the basis for freezing orders could 'throw the common law into

---

[53] The judgments in *Broad Idea* refer to both 'freezing orders' and 'freezing injunctions'; whether freezing orders are best characterised as a (sui generis) injunction requires further consideration beyond the scope of this note, but see generally P Devonshire, 'Freezing Orders, Disappearing Assets and the Problem of Enjoining Non-Parties" (2002) 118 *LQR* 124.
[54] *Broad Idea* (n 7) [85].
[55] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
[56] *Broad Idea* (n 7) [213].
[57] ibid.
[58] '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 that jurisdiction.'
[59] *Mercedes Benz* (n 8) 299.
[60] Eg, *Fourie* (n 3) [2] (Lord Bingham); *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64, [2015] 1 WLR 4754 [13] (Lord Clarke), adopting the language of Beatson LJ in the Court of Appeal: [2013] EWCA Civ 928, [2014] 1 WLR 1414 [34]. See too Lord Nicholls in *Mercedes Benz* (n 8).
[61] *Cardile v LED Builder Pty Ltd* (1999) 198 CLR 380 (HCA); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36, (2015) 258 CLR 1.

uncertainty',[62] but this is highly unlikely. Rather than sowing the seeds for uncertainty, the majority's persuasive explanation of the law ensures that freezing orders are grounded upon a stable juridical basis, which can only make the law more predictable.

B. The Ratio of Broad Idea

The minority suggested that 'the majority's ground-breaking exposition of the law of injunctions will not, as a matter of precedent, be binding on lower courts, but will be powerful obiter dicta'.[63] By contrast, Lord Leggatt insisted that '[t]he majority of the Board considers that it is both necessary and important on this appeal to confront and decide the power issue'.[64] Of course, the Board itself cannot determine what constitutes *ratio decidendi* or *obiter dicta*;[65] this must be worked out through subsequent cases.

The minority approach rests upon the basis that both appeals could be dismissed on their facts without deciding the 'power issue', discussion of which was therefore not necessary for the outcome of the case. However, the majority of the Board considered that it was first necessary to decide whether a free-standing injunction could, in principle, be granted, since that issue is logically prior to consideration of the *Chabra* jurisdiction, for example. The majority drew an analogy with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[66] where the conclusion that, on the facts, the defendant had successfully disclaimed responsibility for its misrepresentation did not prevent the House of Lords from deciding the important point of principle that there can be liability in tort for a negligent misrepresentation in the absence of a contract between the parties.

The narrow view of the minority may leave the law in an unsatisfactory state. In the BVI, free-standing injunctive relief had been granted over a decade earlier in *Black Swan Investment ISA v Harvest View Ltd*.[67] Bannister J explicitly preferred the reasoning of Lord Nicholls in *Mercedes Benz*, and granted a freezing order against BVI companies said to be controlled by an individual against whom proceedings had been brought in South Africa. *Black Swan* was supported by the ECCA in *Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd*.[68] Yet in *Broad Idea* the ECCA held that *Black Swan* and *Yukos* (and the numerous decisions applying their approach) were wrong: following *The Siskina* and the majority in *Mercedes Benz*, Pereira CJ held that, 'as undesirable as it may be perceived in modern day international commerce',[69] the BVI court had no 'subject matter jurisdiction' to grant a freezing injunction otherwise than in aid of proceedings claiming

---

[62] *Broad Idea* (n 7) [213] (Sir Geoffrey Vos MR who also expressed the concern that the majority would 'seek to unwind its development back to 1996', but this is unconvincing: see section V below).
[63] *Broad Idea* (n 7) [221] (Sir Geoffrey Vos MR).
[64] ibid [120].
[65] Interestingly, in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 (HL) 979 Lord Diplock said that in *The Siskina* the House of Lords 'had occasion to confirm as a matter of ratio decidendi the well-established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, was confined to injunctions granted for the enforcement or protection of some legal or equitable right', but the suggestion that this was part of the ratio is obviously difficult to support: see *Broad Idea* (n 7) [23].
[66] [1964] AC 465 (HL).
[67] BVIHCV 2009/399 (23 March 2010).
[68] HCVAP 2010/028 (26 September 2011).
[69] *Broad Idea* (n 7) [50].

substantive relief in the BVI. If the comments on the 'power issue' in the Privy Council are truly *obiter dicta* only, it would be very unfortunate if the comments in the ECCA were to mean that the *Black Swan* jurisdiction was killed off. But perhaps, if the treatment of the 'power issue' in the Privy Council was *obiter*, then so too were the comments in the Court of Appeal. As a result, *Black Swan* and *Yukos* should remain good law. And the guidance of the Privy Council should still be followed to establish that (i) the comments of the *The Siskina* on the 'power issue' were themselves obiter and should not be followed; and (ii) courts have the power to grant injunctive relief whenever it is 'just and convenient', which may well involve granting freezing orders where there is no pre-existing cause of action.

However, since the majority viewed these elements as necessary steps in their reasoning as regards the appeal against Broad Idea, it may be better to consider them to be part of the *ratio*,[70] and it is suggested that courts are likely to adopt this view. In practice, this difference between *obiter dicta* and *ratio decidendi* is only likely to matter for other jurisdictions which are bound by the Judicial Committee of the Privy Council as their apex court: it is not likely to be of great importance in the BVI itself, since legislation was brought into force at the start of 2021 to put free-standing freezing orders on a statutory footing.[71] Unless there is a binding appellate decision which clearly states that free-standing freezing orders cannot be granted,[72] courts will be free to follow the interpretation of the Privy Council in *Broad Idea* that the 'power issue' was not part of the *ratio* in either *The Siskina* or *Mercedes Benz.*

C. The Impact in England and Wales

The guidance of the Privy Council will naturally be considered to be persuasive in England and Wales. The interpretation of *The Siskina* in particular is likely to prove influential. Any perceived need to circumvent the supposed restrictions laid down in *The Siskina* regarding the 'power issue' was without proper foundation and should not be repeated.[73]

However, the decision in *Veracruz Transportation Inc v VC Shipping Co Inc (The Veracruz I)*[74] renders the law in England and Wales more uncertain. A ship was about to be delivered in a defective condition to the buyer. The purchase price would be the only asset of the seller against which the buyer's claim for damages could be enforced, and the risk of that asset being dissipated was high. Nevertheless, the Court of Appeal held that it could not grant a freezing order as a result of *The Siskina*: the claimant's cause of action had not yet arisen.

The Veracruz I is generally seen as problematic. As Sir John Megaw recognised in the case itself, 'I see no valid reason, in logic or practical convenience in the interest of justice, why jurisdiction should not exist … But we are precluded by authority from so deciding

---

[70] See, eg, *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2019] 3 WLR 33 [48]–[59] (Leggatt LJ).
[71] Section 3 of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020 inserted a new section 24A into the Eastern Caribbean Supreme Court Act 1969 which provides that '[t]he High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction'.
[72] cf *The Veracruz I* (n 38) in England, considered in section IV below. In *VTB Capital plc v Universal Telecom Management* [2013] 2 CILR 94, the Cayman Islands Court of Appeal essentially supported the approach already taken in *Black Swan*.
[73] cf *Fourie* (n 3).
[74] (n 38).

…'.[75] Once *The Siskina* is properly understood not to mandate such a conclusion, it is understandable why Lord Leggatt concluded in *Broad Idea* that 'the time has long since come to state unequivocally that the practice followed in *The Veracruz I* is likewise unsound in principle, unfit for modern commerce and should no longer be adopted'.[76]

But does this decision of the Privy Council trump the earlier decision of the Court of Appeal? Until recently, this question would have been summarily answered in the negative: *Broad Idea* concerns the law of the BVI, and cannot alter the law of England and Wales. However, in *Willers v Joyce*[77] the Privy Council, for apparently pragmatic reasons,[78] held that 'provided that the point at issue is one of English law, the members of that panel can, if they think it appropriate, not only decide that the earlier decision of the House of Lords or Supreme Court, or of the Court of Appeal, was wrong, but also can expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England and Wales'.[79] This was, in itself, remarkable and it remains to be seen how it will be applied.[80] It is suggested that the majority in *Broad Idea* stopped a little short of 'expressly directing' English courts to follow *Broad Idea* rather than *The Veracruz I*: saying it 'should no longer be adopted' is not quite a direction 'not to follow' the Court of Appeal.

As a result, it would appear that *The Veracruz I* remains good law in England and Wales, although it undoubtedly rests upon shaky foundations. Its reasoning is wholly dependent upon an out-of-date reading of *The Siskina*, which pulls the rug out from under the decision. It is likely to be challenged soon enough,[81] and a leapfrog appeal to the Supreme Court may be possible.[82] No doubt some principled arguments may be made in favour of *The Veracruz I*; for instance, perhaps the defendant should remain free to deal with their property as they wish unless and until an obligation to pay the claimant arises.[83] But blanket rules such as those favoured in *The Siskina* and *The Veracruz I* take an unduly narrow view of the freezing order jurisdiction. The other checks on freezing order relief – most significantly, that the claimant has a good arguable case as to the merits of the substantive action and that there is a real risk, if no injunction is granted, that assets against which a judgment could be enforced will be removed or dissipated[84] – can ensure that injunctions are only granted when 'just and convenient' to do so. Artificial bars on the equitable jurisdiction are inappropriate.[85]

---

[75] ibid 361, cited by Lord Leggatt in *Broad Idea* (n 7) [98]; see too 360 (Nourse LJ); L Collins, 'The Legacy of the Siskina' (1992) 108 *LQR* 175.

[76] *Broad Idea* (n 7) [100]. Leggatt J had previously expressed the same view at first instance in *Kazakhstan Kagazy plc v Zhunus* [2016] EWHC 1048 (Comm), [2016] 4 WLR 86 [56]–[58], although he recognised that he was bound by the appellate decisions (overturned on appeal, since the right to institute proceedings had already arisen on the facts: [2016] EWCA Civ 1036, [2017] 1 WLR 1360).

[77] [2016] UKSC 44, [2018] AC 843.

[78] ibid [19].

[79] ibid [21] (Lord Neuberger).

[80] P Mirfield, 'A Novel Theory of Privy Council Precedent' (2017) 133 *LQR* 1.

[81] cf *Mercedes Benz* (n 8) 314 (Lord Nicholls).

[82] Administration of Justice Act 1969, ss 12–16 (as amended by the Criminal Justice and Courts Act 2015).

[83] cf A Zuckerman '*Mareva* Injunctions and Security for Judgment in a Framework of Interlocutory Remedies' (1993) 109 *LQR* 432.

[84] *Broad Idea* (n 7) [101]. Note too that the claimant will normally have to give the usual undertaking in damages.

[85] Lord Leggatt explicitly rejected two further potential bars on freezing order relief: (i) that the judgment must be one of the domestic court; and (ii) that the judgment should be against the respondent: *Broad Idea* (n 7) [102].

It is to be hoped that *The Veracruz I* will soon be definitively jettisoned in this jurisdiction too.

IV. The Injunction Getaway

The decision of the Privy Council not to allow service out is understandable. Since the applicable procedural rules were introduced in materially similar terms to those at issue in *The Siskina* and *Mercedes Benz*, it may be inferred that they were intended to bear the meaning that the case law had already established.[86] As Sir Geoffrey Vos observed, '[t]he whole thrust of these rules is that service out is in respect of claim forms and statements of claim',[87] and CCL had not issued a claim form to serve out upon Dr Cho.

Nevertheless, as a matter of policy, it is unsatisfactory for the court to be able to award a free-standing freezing order, but not to be able to grant service out of the jurisdiction. It will often be the case that assets are located in offshore jurisdictions (such as the BVI) but the defendant is elsewhere. And given the speed at which assets can be moved around jurisdictions by increasingly sophisticated fraudsters,[88] it is important to be able to serve a claim form abroad. Any presumption against service out has substantially lessened in force since *The Siskina* and *Mercedes Benz* were decided;[89] as Briggs has observed, '[t]he world is much smaller than it used to be, and out of the jurisdiction is really not so far away as once it was'.[90]

The onus is therefore on offshore jurisdictions[91] to modify their civil procedure rules to permit the service out of free-standing freezing orders.[92] It is to be hoped that this will be achieved quickly. Yet not all rules committees move with great haste; this may be an area where different jurisdictions end up (through a combination of extraneous factors) with different rules.

V. Conclusion

The decision of the majority in *Broad Idea* will be welcomed in offshore jurisdictions. After all, the ECCA only departed from *Black Swan* with great reluctance. In the latter decision, Bannister J presciently observed that[93]

---

[86] *Broad Idea* (n 7) [69].
[87] ibid [196], having analysed the relevant provisions in Parts 7 and 8 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.
[88] *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65 (CA) 92 (Neill LJ): 'The transfer of funds from one jurisdiction to another grows ever more speedy and the methods of transfer more sophisticated'.
[89] See, eg, *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 [53] (Lord Sumption).
[90] A Briggs, 'Service Out in a Shrinking World' [2013] *LMCLQ* 415.
[91] In England and Wales, service out is clearly possible: CPR PD 6B, para 3.1(5).
[92] Interestingly, the Jersey courts had already expressly departed from *Mercedes Benz* as regards service out of the jurisdiction: *Solvalub Ltd v Match Investments Ltd* [1998] ILPr 419 (Jersey CA); *Krohn GmbH v Varna Shipyard (No 2)* (1997) 1 OFLR 482 (Royal Court of Jersey); *State of Qatar v Al Thani* [1999] JLR 118 (Royal Court of Jersey). The Privy Council did not follow the Jersey approach, but that does not necessarily mean that the Jersey courts need to change their approach given the different (Norman) influences upon their legal system: see, eg, BVIHCMAP2016/0030 (30 March 2020) at [29].
[93] *Black Swan* (n 67) [15].

> … there are sound policy reasons why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant such orders in aid where necessary. The business of companies registered within such jurisdictions is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here in circumstances where, in all probability, they would be unable to obtain permission to serve them abroad - thus presenting them with an effective brick wall or double bind of the sort so deplored by Lord Nicholls in *Mercedes Benz*.

Awarding free-standing freezing orders can therefore help to advance the reputation of a jurisdiction, and is in accordance with principles of comity.[94] The minority in *Broad Idea* was anxious not to 'put the clock back to 1977'[95] by departing from *The Siskina*, but that is the wrong way around:[96] sticking steadfastly to *The Siskina* when the law has moved on in important ways over the past 45 years would be to put the clock back. The majority's recognition of modern developments and the practical utility of freezing orders in an increasingly international commercial context helps to keep the law up-to-date. The minority feared that the majority's approach could create uncertainty, but – beyond wrinkles such as the status of *The Veracruz I* in England and Wales – it is difficult to understand why this should be so, and no concrete examples are given. Any fraudster who has deliberately squirreled away assets in an offshore jurisdiction might be disappointed to find that the courts in those jurisdictions can now freeze their assets, for instance, but that hardly seems a cause for concern.

Indeed, Sir Geoffrey Vos recognised that 'there could, in an appropriate case, be power at common law … to grant an interim or *Mareva* injunction against a defendant … where there was either (a) an actual or threatened substantive claim against that defendant in foreign proceedings or in arbitration … or (b) a sustainable claim on *Chabra* grounds that the defendant within the jurisdiction is the creature or money box of a defendant against whom there is an actual or threatened foreign claim or arbitration'.[97] His Lordship did not fundamentally disagree with the 'ground-breaking'[98] substantive conclusions of the majority, but rather insisted that they were not necessary for the resolution of appeals.[99] This should not deflect future courts from following the path taken by the majority. The equitable jurisdiction to grant injunctive relief is very broad and should not be 'straitjacketed'[100] by *The Siskina*. It is to be hoped that the majority in *Broad Idea* has sunk *The Siskina* on the 'power issue', and

---

[94] See, eg, *Solvalub Ltd v Match Investments Ltd* (n 92) [30]–[31] (Sir Godfray Le Quesne QC); *Channel Tunnel Group* (n 37) 341 (Lord Browne-Wilkinson); *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) 827 (Millett LJ).
[95] *Broad Idea* (n 7) [203] (Sir Geoffrey Vos MR).
[96] ibid [115].
[97] ibid [218].
[98] ibid [221].
[99] This perhaps illustrates the conservative approach to incremental developments through the courts previously advocated by Sir Geoffrey Vos: see, eg, G Vos, 'Preserving the Integrity of the Common Law' (Lecture to the Chancery Bar Association, 16 April 2018).
[100] *Cartier* (n 46) [54] (Kitchin LJ).

that the ability to serve out free-standing freezing orders will soon be available in all jurisdictions through amendments (if necessary) to civil procedure rules.