COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2020/CLE/gen/00976

IN THE MATTER OF THE RECIPROCAL ENFORCEMENT OF JUDGMENT ACT, 1924

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES OBTAINED IN CLAIM NO. CL/2019-000118 DATED 16 OCTOBER 2019 AND SEALED BY THAT COURT ON 21 OCTOBER 2019

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES OBTAINED IN CLAIM NO. CL/2019-000118 DATED 9 JUNE 2020 AND SEALED BY THAT COURT ON 11 JUNE 2020

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES OBTAINED IN CLAIM NO. CL/2019-000118 DATED 23 JULY 2020 AND SEALED BY THAT COURT ON 23 JULY 2020

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES OBTAINED IN CLAIM NO. CL/2019-000118 DATED 20 DECEMBER 2019 AND SEALED BY THAT COURT ON 21 JANUARY 2021

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES OBTAINED IN CLAIM NO. CL/2019-000118 DATED 23 JULY 2020 AND SEALED BY THAT COURT ON 21 JANUARY 2021

AND

IN THE MATTER OF AN ORDER OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES OBTAINED IN CLAIM NO. CL/ 2019-000118 DATED 7 SEPTEMBER 2020 AND SEALED BY THAT COURT ON 21 JANUARY 2021

BETWEEN

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

Plaintiff

AND

FAHAD MAZIAD RAJAAN AL-RAJAAN

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Courtney Pearce-Hanna and Ms. Philisea Bethel of Callenders & Co. for the Plaintiff
Mrs. Tara Archer-Glasgow with Mr. Audley Hanna Jr. and Mr. Trevor Lightbourn of Higgs & Johnson for the Defendant

Hearing Dates: 28 May 2021, 15 November 2021

Conflict of laws- Foreign judgment - Registration - Whether statute permitting registration of foreign judgment based on foreign judgment – Whether statute applies only to final and conclusive judgment – Public policy – Reciprocity - Grant of interlocutory injunctions – Whether a substantive cause of action is required for the grant of interlocutory injunction – Section 21 (1) Supreme Court Act – Whether the Supreme Court has jurisdiction to grant interlocutory injunction in aid of foreign proceedings

By Ex-Parte Originating Summons (the "OS") filed on 30 September 2020, the Plaintiff applied under the Reciprocal Enforcement of Judgments Act, 1924 (as amended) ("the Act") to register a worldwide freezing injunction against the Defendant to freeze assets which was granted by the English High Court in the Plaintiff's action against the Defendant in England. The OS was supported by the affidavit of Nicholas James Christopher Haworth filed on 6 October 2020 and the affidavit of Simone Morgan-Gomez filed on 27 November 2020. The OS was amended on 26 May 2021 to include a variation to the previous order. The variation orders in the English Court are dated 20 December 2019, 9 June 2020 and 7 September 2020.

In so far as the Defendant says that he does not oppose/resist the application and, is neutral, his attorneys have vehemently argued against the registration of the worldwide freezing order in the jurisdiction. They objected to the Plaintiff's application to register the worldwide freezing order for three primary reasons: (i) the worldwide freezing order is not registrable under the Act because it is an interlocutory and not a final and conclusive judgment on the merits of the underlying dispute; (ii) the lack of jurisdiction of the Bahamian Court to grant free-standing injunctive relief in aid of foreign proceedings; and (iii) there is no substantive cause of action against the Defendant in this jurisdiction, which is a fundamental condition for the grant of interlocutory injunctions per **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA ("The Siskina")** [1979] AC 210.

The Defendant also challenged the Orders sought on the grounds of (i) the First English Order does not relate to the assets of the Defendant or entities possessed with them as the Defendant is not within the jurisdiction and any registration of the Order lacks any intelligible means of enforcement in The Bahamas. Further, as one of the objectives of the Act is to achieve reciprocity with jurisdictions such as the United Kingdom, since the United Kingdom

would not permit the recognition of a foreign Bahamian interlocutory injunction, there would be no reciprocity in permitting the recognition of an injunctive order from the United Kingdom.

HELD: granting the Plaintiff's application to register the worldwide freezing order granted by the High Court of Justice of England and Wales with costs to the Plaintiff to be taxed if not agreed.

1. Section 3 of the Reciprocal Enforcement of Judgments Act provides for the registration of both final and interlocutory judgments and orders - **Convoy Collateral Ltd. v Broad Idea International Ltd. And Cho Kwai Chee** [2021] UKPC 24 applied; **Yearwood v Yearwood and Strategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence** [2021] 2 WLR 448 considered. It is therefore not necessary to consider the common law but the Act on its own terms and in the light of the purpose of the legislation; the Act permitted registration of a judgment given by a court which had adjudicated on the merits of the underlying claim.

2. The grant of interlocutory injunctions does not require a substantive cause of action **– Convoy Collateral Ltd. v Broad Idea International Ltd. And Cho Kwai Chee** [2021] UKPC 24 applied; **Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA ("The Siskina")** [1979] AC 210 disapproved; **Mercedes-Benz A.G. v Leiduck** [1995] 3 All ER 929 disapproved;

3. There is no reason why section 21(1) of the Supreme Court Act cannot be used to grant injunctions (final or interlocutory) in aid of foreign proceedings - **Convoy Collateral Ltd. v Broad Idea International Ltd. And Cho Kwai Chee** [2021] UKPC 24 applied;

4. The test to be applied in determining whether to register a foreign judgment or order is whether in the circumstances of the case, "it is just and convenient" that the judgment or order be enforced in The Bahamas: section 3 of the Act.

5. The Court is merely concerned with whether it is just and convenient to register a judgment under the Act which is not the same as the grant of a free-standing freezing injunction. The fact of the matter is that the Court is not granting a free-standing freezing injunction; the effect of registration on Bahamian public policy was clearly not a matter of ongoing or primary concern for Parliament.

6. Reciprocity does not mean equality in all respects or in all substantial respects between the laws of two countries: Dixon CJ in **Railway Comr. v. Romeo** [1962] ALR 579 relied upon. Indeed, there is reciprocity between the United Kingdom and The Bahamas because the Governor-General has declared it so.

JUDGMENT

Charles J:
Introduction

[1] Pursuant to section 3 of the Reciprocal Enforcement of Judgments Act, 1924 (as amended) ("the Act"), The Public Institution for Social Security ("the Plaintiff") applies to register a Worldwide Freezing Order ("WFO") and a Variation Order (collectively "the Orders") made by the High Court of England &

Wales (the "English High Court") against Fahad Maziad Rajaan Al-Rajaan ("the Defendant").

[2] The application, commenced by Ex-Parte Originating Summons ("the OS") and filed on 30 September 2020, was supported by the affidavit of Nicholas James Christopher Haworth filed on 6 October 2020 and the affidavit of Simone Morgan-Gomez filed on 27 November 2020. The OS was amended on 26 May 2021 to include a variation to the previous order. The variation orders in the English High Court are dated 20 December 2019, 9 June 2020 and 7 September 2020 respectively.

[3] Although the Defendant says that he does not resist/oppose the Orders and he remains neutral in these proceedings, his Counsel has vehemently challenged the application arguing against its registration once the Plaintiff satisfies the Court that it has the ability to enforce the WFO in The Bahamas in accordance with the laws of The Bahamas.

[4] For reason which will became more apparent momentarily, I will grant the Order sought by the Plaintiff to register and domesticate the Orders of the English High Court against the Defendant in the same manner as they would otherwise be enforceable had the Orders been made by this Court.

Background facts

[5] The background facts are agreed between the parties. The Plaintiff is a Kuwaiti public institution created and authorised by the law of Kuwait to operate the State of Kuwait's social security and pension system. The Plaintiff's usual place of business is in Kuwait.

[6] The Defendant was the Director General of the Plaintiff from 1994 to 2015. His last known place of abode or business is in London, United Kingdom.

[7] The Plaintiff commenced proceedings in England against the Defendant by Case No. CL-2019-000118 ("the English proceedings") claiming relief in respect of what it alleges are unlawful payments by various financial institutions and intermediaries of unauthorised secret commissions. They are alleged to have been procured by the Defendant. In a nutshell, the Plaintiff claimed to have a

proprietary claim against the Defendant. The Defendant denies the claims and challenges the basis on which the proceedings are brought.

[8] On 16 October 2019, the English High Court granted a WFO against the Defendant, freezing his assets worldwide and making certain disclosure orders. By the WFO, the Defendant is prevented from disposing any of his assets held (legally or beneficially) by the Defendant, or which are within his control anywhere in the world up to the value of $847.7 million. The application was done on notice to the Defendant.

[9] Subsequently, the English High Court varied the WFO to provide for the Defendant's payment of medical expenses and living expenses and to include additional assets to which the WFO applies.

[10] The Defendant consented to the Plaintiff seeking to enforce the WFO in The Bahamas. However, it is the Defendant's position that although he is entirely neutral, he has not consented to any order being made in The Bahamas *per se* and he has not consented to any order being made which is not lawful.

[11] The Defendant has significant assets in The Bahamas including $60 million in cash assets.

The issues

[12] The parties have agreed on the issues that the Court must decide namely:

1. Is the WFO is enforceable in The Bahamas under section 3 of the Act?
2. Does the Act imply an element of finality to constitute a judgment?
3. Whether the WFO (as varied) constitutes a judgment for the purposes of section 2 of the Act;
4. Is the scope of the Act is limited to execution?
5. If the Act is limited to execution whether a foreign interlocutory injunction is capable of execution under the Act?
6. If the WFO is deemed a judgment for the purposes of the Act, is it just and convenient in all the circumstances of the case to enforce it under the Act?

7. Whether there must be a cause of action in The Bahamas for the registration of any judgment including a foreign interlocutory injunction under the Act?

Statutory framework

[13] The Reciprocal Enforcement of Judgments Act, Ch. 77 (as amended) ("the Act") is an Act to facilitate the reciprocal enforcement of judgments, orders and awards in The Bahamas and other countries.

[14] Section 3 (1) of the Act gives judgment creditors the right to apply to the Supreme Court of The Bahamas to enforce judgments made outside of The Bahamas. It provides:

> **"Where a judgment has been obtained in a superior court outside The Bahamas, the judgment creditor may apply to the Supreme Court, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in The Bahamas and subject to the provisions of this section, order the judgment to be registered accordingly."**

[15] "Judgment" is defined in section 2 of the Act as:

> **"judgment means <u>any judgment or order</u> given or made by a court in any civil proceedings whether before or after the passing of this Act and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."** [Emphasis added]

[16] The Act was amended in 1999. Two significant amendments were made namely (i) the removal of the requirement that the judgment to be registered be for a sum of money and (ii) to include a few designated jurisdictions whose legislature provided for reciprocity with The Bahamas and not just the United Kingdom. Otherwise, where a judgment is obtained from a jurisdiction to which the Act does not apply, it is necessary to utilise the foreign judgment to form the basis of a new or fresh action within The Bahamas.

[17] The intention of Parliament must therefore be given effect. That is to say, to permit a judgment creditor the benefit of enforcing a judgment or order provided

that the requirements of the Act have been met. In conformity with the Act, it is therefore only within the express proscriptions of section 3(2) that this Court may deny a judgment creditor the benefit of the registration of a judgment under the Act.

[18] Section 21 (1) of the Supreme Court Act, Ch. 53 (the "SCA") confers upon the Supreme Court the power to grant injunctions, both interlocutory and final. It provides:

> **"The Court may by order (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."**

Approaching the issues

[19] The Court now turns to the issues which require determination. Learned Counsel Mrs. Archer-Glasgow and Mr. Hanna Jr. argued on behalf of the Defendant. The Defendant submitted that, at common law, the WFO is not registrable because (i) it is not a final judgment and (ii) there is no judgment debt associated with the WFO. The Defendant also argued that, as it is an interlocutory injunction, it is not a final judgment, based on the merits.

[20] The Defendant relied on **Cramin (as Personal Representative of the Estate of Jeffery D. Cramin, deceased) v. Bahamas Divers (1976) Company Limited and another** [2018] 1 BHS J. No. 161, in support of their assertion that the WFO is not enforceable in The Bahamas. As Mrs. Pearce-Hanna appearing as Counsel for the Plaintiff properly pointed out, **Cramin** was concerned with an application for enforcement under common law principles and it was not concerned with registration of a foreign order under the Act.

[21] The Defendant's reliance on the case of **Rapp v Brown** [1993] BHS J. No. 89 is equally unhelpful as **Rapp** concerned the enforcement of a non-registrable judgment from the United States which does not have a reciprocal enforcement relationship with The Bahamas.

[22] The issue of finality of a judgment was recently canvassed in the Privy Council case of **Yearwood v Yearwood** [2020] UKPC 26, emanating from the Court of Appeal of the Eastern Caribbean Supreme Court. It concerned an application

by a wife following financial remedy proceedings (post-divorce) to register certain English Orders in Antigua and Barbuda under their Reciprocal Enforcement of Judgments Act and enforce the payment of a lump sum of just over £4 million. The husband appealed the Order to the Court of Appeal, and thereafter, the Privy Council.

[23] One of the grounds of appeal in **Yearwood** was that the orders for the division of property and periodic payments were outside the Act as, in order to be registrable as a "judgment" under the Act, the judgment has to be final and that a financial remedy order did not satisfy that requirement.

[24] The Board determined that there was jurisdiction under the Act to order the registration of the orders, having found that the common law cases relied upon by the husband did not provide much assistance. At para 18 of the Opinion, Lady Black had this to say:

> **"The Board agrees that each of the two orders that the wife sought to register for enforcement constitutes a "judgment" as defined in section 2(1). It does not consider that it can derive much assistance, in determining what was intended to come within the definition of the term "judgment" in the Act from older common law cases… The Board therefore *focuses on the words of the definition in section 2(1)*. As there provided what is required is that there is a judgment or order in civil proceedings whereby a sum of money is made payable."** [Emphasis added]

[25] The Opinion of the Board in **Yearwood** was relied upon by the English Court of Appeal in the recent case of **Strategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence** [2021] 2 WLR 448 in support for what it considered the correct approach to interpreting the Administration of Justice Act, 1920, Part II (the "1920 Act"). Males LJ said at paras 47 and 48:

> **"47 In my judgment it is neither necessary nor productive to decide what answer the common law would give to the question whether a judgment on a judgment can be enforced by action if that question were now to arise. That is because, although they restate much of the common law position, neither the 1920 nor the 1933 Act purports to codify the common law. It was so held by Widgery J in *Société Cooperative Sidmetal v Titan International Ltd*[1966] 1 QB 828 so far as the 1933 Act is concerned and the position is the same for the 1920 Act. The right approach, in my judgment, is to consider the 1920 Act**

> **on its own terms and in the light of the purpose of the legislation as seen in the Report of the Committee chaired by Lord Sumner dated May 1919 (Cmd 251) ("the Sumner Committee Report") which led to its passing.**
>
> **48 Support for that approach can be found in the recent Privy Council case of *Yearwood v Yearwood* [2020] UKPC 26…."**

[26] In the present case, the principal focus must be upon the Act itself. Section 2 of the Act does not speak to final judgments but *"…any judgment or order given or made by a court in any civil proceedings…."*

[27] It seems to me that the Defendant's submissions that the Act implicitly requires that the foreign judgment must be final and conclusive and for a sum of money are untenable and must fail. The language of the Act is clear and unambiguous and Parliament's actions were purposeful and intentional when it passed the amendment in 1999.

[28] The next question which the Defendant advanced is that a foreign interlocutory injunction cannot form a cause of action in The Bahamas. Put differently, the Bahamian Court does not have jurisdiction to grant a free-standing injunction in aid of foreign proceedings.

[29] The Defendant contended that, even if the Act itself does not exclude interlocutory injunctions from being registered generally, to register the WFO would be contrary to section 21 of the Supreme Court Act which confers the power on the Supreme Court to grant injunctions (interlocutory or final). The Defendant next contended that, by its application, the Plaintiff is asking the Court to grant an interlocutory injunction in aid of foreign proceedings, which has been determined by Courts to be outside the scope of the provisions which are the statutory equivalent to section 21.

[30] In response, Mrs. Pearce-Hanna argued that the Defendant seeks, not to assist the Court, but to muddy the waters by raising issues which do not arise in the application before the Court. She contended that the Plaintiff is not looking to use a foreign interlocutory injunction to ground proceedings in The Bahamas. On the contrary, the Plaintiff is asking this Court to *register* an Order of the English High Court under the Act in order to permit the said Order to be enforced

in this jurisdiction. According to her, the Plaintiff seeks to bring the Defendant under the umbrella of this jurisdiction and this Court for the purpose of enforcement through registration.

[31] I agree with the Plaintiff that the relevant question is whether or not the WFO is enforceable by whatever means against local assets owned or controlled by the Defendant. It is only of ancillary concern that the Order sought to be registered is a worldwide freezing order.

[32] I also agree with the Plaintiff that the Defendant's assertion that an interlocutory injunction is incapable of being enforced under the Act is misconceived because section 2 of the Act clearly defines "judgment" as "*any judgment or order".*

[33] The Defendant further submitted that the Plaintiff had not applied under ordinary circumstances where the application is made under section 21.This is wrong. Since the first hearing of this application, the Privy Council in **Broad Idea International Ltd v Convoy Collateral Ltd and Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy)** [2021] UKPC 24 (conveniently **"Convoy Collateral"**) has made it clear that there is no difference between (i) "ordinary circumstances" where a freezing order is sought in a local Court as interim relief to final judgment of the substantive proceedings also brought in that local Court; and (ii) seeking a freezing order in anticipation of a future foreign judgment enforceable in the local Court on registration in that local Court. At para 95, the Board reasoned that:

> **"…In each case the injunction, if granted, is directed towards the enforcement of obligations to satisfy judgments which do not yet exist. In each case the question is whether there is a sufficient likelihood that a judgment enforceable through the process of the BVI court will be obtained, and a sufficient risk that without a freezing injunction execution of the judgment will be thwarted, to justify the grant of relief."**

[34] **Convoy Collateral** also addressed another of the Defendant's grounds for objecting to the registration of the WFO namely that there is no substantive cause of action in The Bahamas against the Defendant and therefore, the WFO sought to be registered is freestanding, which the Courts have long decided is not permissible: **Owners of cargo lately laden on board the vessel Siskina**

and others v Distos Compania Naviera SA ("The Siskina") [1977] 3 All ER 803.

[35] In my judgment, the Defendant's submission that there needs be a substantive cause of action in The Bahamas for an injunction in aid of foreign proceedings to be granted is misconceived based on the recent decision of the Privy Council in **Convoy Collateral.** The short answer is that while **Convoy Collateral** may not be binding on the Bahamian Court, it is highly persuasive and, therefore, the argument that the Bahamian Court cannot grant a free-standing injunction in aid of foreign proceedings is untenable and must fail. In fact, **Convoy Collateral** has now settled what was the law since **Meespierson (Bahamas) Ltd & Others v Grupo Torras SA and Another** [2000] 1 LRC 627.

[36] The Defendant's further arguments that (1) the foreign judgment must be something upon which the Court may issue "execution" and as an interlocutory freezing injunction does not award money, or any other thing that a judgment creditor can "get" it is not capable of execution and therefore, not, on the face of it, within the ambit of section 3(3)(b) of the Act and (2) that to register the WFO would be inconsistent with the principles of reciprocity seem to obfuscate the real issue in this case namely whether it is just and convenient to register the Orders made by an English Court under section 3 of the Act.

[37] In my opinion, I could end this discussion right here since the Plaintiff is not seeking a free-standing injunction to aid foreign proceedings where no cause of action exists but, in the event that I am wrong to do so, I shall carry on.

Convoy Collateral: Eastern Caribbean Court of Appeal ("EC Court of Appeal")

[38] I start off with the EC Court of Appeal decision in **Convoy Collateral** simply because Mr. Hanna Jr. (who argued this ground on behalf of the Defendant) relied heavily upon the Court of Appeal decision to support his contention that the Supreme Court does not have jurisdiction to grant interlocutory injunctions in aid of foreign proceedings.

[39] The appeal assessed the correctness of the Judge's exercise of jurisdiction to grant a freezing order against Broad Idea, a BVI Company, where Convoy Collateral had not sued Broad Idea in any part of the world. Broad Idea's chief

complaint was that the learned judge had no jurisdiction pursuant to section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act ("the BVI SCA") to grant a freezing order against Broad Idea in circumstances where Convoy Collateral had not raised any cause of action against Broad Idea and has not pursued any substantive proceedings against it in the BVI or anywhere else.

[40] Section 24 of the BVI SCA (similar to section 21 of our SCA) provides:

> **"...an injunction may be granted by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made wither unconditionally or upon such terms as the court or judge thinks just"**

[41] The EC Court of Appeal reaffirmed the well-established position set out in **The Siskina** that a cause of action is a prerequisite for the grant of an interlocutory injunction. The Court determined that the absence of a substantive cause of action against Broad Idea meant that Convoy Collateral did not satisfy that very fundamental condition. Counsel for Convoy Collateral contended that, notwithstanding **The Siskina**, the decision of **Black Swan Investment ISA v Harvest View Ltd** (BVIHCV2009/399 (unreported) 2010 supported his contention that the learned judge did have jurisdiction to grant a freezing order against Broad Idea even though there were no substantive proceedings against it.

[42] In **Black Swan,** Bannister J held that there was "*high authority that in the absence of a provision to the effect of section 25 (of the UK Civil Jurisdiction and Judgments Act 1982)* (the CJJA) *the Court may not grant a freezing order in aid of foreign proceedings against a defendant who is not subject to the Court's in personam jurisdiction."* But he also reasoned that the question of whether or not the Court *should* grant relief against a person that is subject to the Court's *in personam* jurisdiction, had been left open. Bannister J considered that the lacuna could be filled in the BVI, by adopting the approach of Lord Nicholls in **Mercedes Benz A.G. v Leiduck** [1995] 3 All ER 929, that in the case of a prospective money judgment, the Court should grant a freezing order over a person subject to the Court's jurisdiction if the freezing order would facilitate enforcement.

[43] That remained the position following the decision of the Court of Appeal in **Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd** (HCVAP 2010/028) 26 September 2011. In **Yukos**, the Court of Appeal rejected an argument that **Black Swan** had been wrongly decided, and accepted the principle that an injunction could be granted against a resident of the BVI that controls assets against which a foreign judgment could be enforced.

[44] The following decade saw repeated use of the **Black Swan** jurisdiction in the British Virgin Islands.

[45] However, the Court of Appeal concluded that **Black Swan** was wrongly decided. In delivering her written judgment, Pereira CJ (with whose judgment Webster JA agreed) and Blenman JA (who wrote a concurring judgment) said that the judge in **Black Swan** relied on the dissenting judgment of Lord Nicholls in **Mercedes-Benz** and misunderstood the judgment of Lord Mustill which he believed suggested that there need not be substantive proceedings to grant a freezing order. Pereira CJ did not agree with that interpretation of Lord Mustill's judgment. She said that the Court in **Fourie v Le Roux and Others** [2007] 1 All ER 1087 did say that, in the strict sense, it had power to grant an interlocutory injunction where it had personal jurisdiction over the person against whom the injunction was sought and that the court now had the power to grant interim relief in relation to proceedings that had been or were about to be commenced in a foreign state. Pereira CJ said, however, that she believed that the House of Lords came to that decision on the basis of the UK Civil Jurisdiction and Judgments Act 1982.

[46] The Court of Appeal agreed with Broad Idea's submission that the Court's jurisdiction under section 24 of the BVI SCA does not extend to granting injunctions in support of foreign proceedings in the absence of legislation which explicitly provides for it. Pereira CJ gave weight to the fact that legislatures had expressly provided for the jurisdiction to grant interim relief in support of foreign proceedings – the UK Civil Jurisdiction and Judgments Act, the Cayman Islands and the BVI Arbitration Act, she said, all expressly empower the Court to grant interim relief in aid of foreign proceedings and in foreign arbitration proceedings in the case of the latter. The reasoning was that if the court already had

jurisdiction to grant interlocutory injunctions in support of foreign proceedings at common law, the legislature would not have needed to enact them.

[47] The Court concluded that under section 24(1) of the BVI Act, the BVI Court has no "subject matter jurisdiction" to grant a freezing injunction otherwise than in aid of proceedings claiming substantive relief in the BVI. They considered that they were bound to reach that conclusion as in **The Siskina** and subsequent kindred cases. They expressly overruled **Black Swan** and stated that their own judgment in **Yukos** was not binding and was wrong.

[48] The EC Court of Appeal finally concluded that the jurisdiction to grant interlocutory injunctions in support of foreign proceedings is a statutory power and there being no legislation similar to the UK and the Cayman Islands, there was no jurisdiction to grant interlocutory injunctions in aid of foreign proceedings.

[49] The EC Court of Appeal's decision was appealed to the Privy Council.

[50] In the intervening period and during the pendency of the delivery of this Judgment, the Privy Council, on 4 October 2021 rendered its "ground-breaking" decision in **Convoy Collateral**. Since neither party had the benefit of the decision although Mr. Hanna Jr. graciously forwarded a copy to the Court and the Plaintiff, the Court invited both parties to make written submissions on this discrete issue. The Court then reconvened to hear the parties briefly on 15 November 2021. Nothing productive came out of that hearing as both parties maintained their respective views.

Convoy Collateral: Privy Council

[51] Convoy Collateral appealed and asked the Privy Council to depart from the House of Lords' decision in **The Siskina** and from the majority decision in **Mercedez Benz** to find that where the BVI High Court has personal jurisdiction over a party, the court has power to grant a freezing injunction against that party to assist enforcement through the court's process of a prospective (or existing) foreign judgment. In his dissenting judgment in **Mercedes Benz**, at p 314D, Lord Nicholls of Birkenhead said: ***"The law took a wrong turning in The Siskina, and the sooner it returns to the proper path the better."***

[52] The Board considered the circumstances in which the injunction sought against Broad Idea which were: (i) the local court had indisputable personal jurisdiction over the Defendant; (ii) there were no substantive proceedings brought against the Defendant in the local court; and (iii) there was a request for a freezing injunction in support of a claim pursued in a foreign court.

[53] The Board departed from the position of the landmark case of **The Siskina** and determined that the grant of interlocutory injunctions does not require a substantive cause of action and reversed the EC Court of Appeal's decision that section 24 (1) of the BVI Supreme Court Act could not be used to grant freezing injunctions in support of foreign proceedings.

[54] The Board determined that the language of section 24(1) did not mean that freezing injunctions are confined to proceedings where substantive relief is claimed in BVI. At para 76, Lord Leggatt stated:

> **"76.The notion that the power of the BVI court to grant a freezing injunction is confined to proceedings in which substantive relief is claimed in the BVI is not consistent with the language of section 24(1) of the BVI Act. That provision gives the High Court power to grant an injunction by "an interlocutory order ... in all cases in which it appears to the court or judge to be just or convenient that the order should be made ...". It would be hard to cast the power in wider terms than that. The EC Court of Appeal was persuaded by an argument that, in circumstances where section 24(1) makes no reference to the grant of injunctions in aid of foreign proceedings and no statutory provision similar to section 25 of the 1982 Act in the UK had been enacted in the BVI (although this has since changed), section 24(1) does not give the court power to grant such injunctions. This argument is similar to one rejected by the House of Lords in Channel Tunnel (see para 30 above) and must be rejected for the same reason. It puts the matter the wrong way round. The question is whether there is any justification for treating the words "in all cases" as excluding a case where an injunction is sought in aid of foreign proceedings. The absence of legislation conferring a more specific power is not a reason to do so. Nor can the fact that such legislation has been enacted in the UK and some other common law jurisdictions (well after the BVI Act was enacted in 1969) have any bearing on the meaning of section 24(1) of the BVI Act."**

[55] The words highlighted by the Board for why section 24(1) of the BVI Act should be interpreted generously are very similar to the Bahamian statutory equivalent which the Defendant in this case has incorrectly asserted precludes the Plaintiff from registering their judgment. The Board's reasoning was that the basis on

which the EC Court of Appeal determined that the Court's power was limited to where there was a substantive cause of action was flawed – there being no reference to the grant of injunctions in aid of foreign proceedings and the absence of statutory provision similar to section 25 of the 1982 Act in the UK. They said that the proper question for determining whether section 24 provided for freezing injunctions to be granted in aid of foreign proceedings was to ask where there was justification for treating the words "*in all cases*". The absence of legislation conferring a more specific power and the fact that the UK and other common law jurisdiction had it were not relevant considerations to determining whether the section so excluded aiding foreign proceedings.

[56] The Board disagreed with Lord Diplock's definition of "interlocutory" as one which "presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant". They rejected his reasoning that an order can only be interlocutory if it is made in anticipation of proceedings in which the claimant is seeking an order which will finally decide a substantive dispute between parties. They determined that interlocutory per the section does include an injunction sought in connection with a claim for final, substantive relief which is being pursued in proceedings before another court regardless of whether the relief claimed in those proceedings is relief the local court has jurisdiction to grant. At para 77, Lord Leggatt stated:

> **"…The term is perfectly apt to refer to an injunction sought in connection with a claim for final, substantive relief which is being pursued in proceedings before another court or tribunal and whether or not the relief claimed in those proceedings is relief which the High Court has jurisdiction to grant."**

[57] The premise of the Board's reasoning for departing from **The Siskina** on the point of having a substantive cause of action was the essential purpose of a freezing injunction, which they expressed is to facilitate the enforcement of a judgment or other order to pay a sum of money. Accordingly, they concluded, there is no reason to link the grant of such an injunction to the existence of a cause of action. At para 90, Lord Leggatt continued:

> **"Once it is appreciated that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money, it is apparent that there is no reason in principle to link the grant of such an injunction to the existence of a**

> **cause of action. It was not only Lord Nicholls who made this point in Mercedes Benz [1996] AC 284. Lord Mustill also did so in the judgment of the Board in the passages quoted at paras 84-85 above. Further, in rejecting an analogy which Mercedes had sought to draw with a quia timet injunction, Lord Mustill said, at p 303:**
>
> > **"The remedy [of a quia timet injunction] is knitted together with the rights [asserted in the action] and the threatened infringement of them. With a Mareva injunction the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected."**

[58] The only relevant question is whether there is sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court's power to freeze assets against which such a judgment, when obtained, can be enforced. At para 92, Lord Leggatt stated:

> **"In applying for a freezing injunction, the relevance of a cause of action, where there is one, is evidential: in showing that there is a sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court's power to freeze assets against which such a judgment, when obtained, can be enforced. That is the rationale for requiring the applicant to show a good arguable case; but there is no reason why the good arguable case need be that the applicant is entitled to substantive relief from the court which is asked to grant a freezing injunction. What in principle matters is that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought. It would be "a pointless insularity", in the phrase used by Hoffmann J in Bayer AG v Winter (No 2) [1986] FSR 357, 362 - or as Lord Nicholls said in Mercedes Benz [1996] AC 284, 311D, "a pointlessly negative attitude, lacking a sensible basis" - to limit the remedy to cases where the judgment is being sought in the territorial jurisdiction where the injunction is needed to preserve assets against which the judgment can be enforced.**

[59] The Board said that the approach taken by the EC Court of Appeal undercuts regimes which are intended to make the court's process for enforcing its own judgments available to enforce arbitration awards and foreign judgments. It used the example of the BVI Reciprocal Enforcement of Judgments Act and resoundingly stated that there is no difference between granting a freezing injunction in a jurisdiction where there are assets against which a foreign judgment has been given to prevent the frustration of the execution of that foreign judgment and where the initial proceedings are taking place in the High Court. To decline to grant the injunction in the former situation would be

unprincipled and contrary to the spirit and arguably the letter of the legislation providing for reciprocal enforcement. This is how Lord Leggatt puts it at paras 93 and 95:

> **"93. Such an approach would also undercut regimes which are intended to make the court's process for enforcing its own judgments available to enforce arbitration awards and foreign judgments. For example, under the Reciprocal Enforcement of Judgments Act 1922 and the Foreign Judgments (Reciprocal Enforcement) Ordinance 1964 in the BVI, a foreign judgment given in a country to which the legislation applies, on being registered in the High Court, has the same force and effect for the purposes of execution as if the judgment had been a judgment originally given in the High Court. Provided there are assets against which a judgment registered under this legislation could be executed through the process of the BVI court and a sufficient prospect that such a judgment will be obtained in the foreign court, there is just as much reason to grant a freezing injunction if it is needed to prevent execution of the judgment from being frustrated as there is where the initial proceedings are taking place in the High Court. Indeed, declining to assist where the proceedings are pending in the foreign court would not only be unprincipled but contrary to the spirit and arguably also the letter of the legislation providing for reciprocal enforcement.**
>
> **95. <u>There is no difference in principle between a case where a freezing injunction is sought in anticipation of (i) a future judgment of a BVI court in substantive proceedings brought in the BVI, (ii) a future judgment of a foreign court enforceable by the BVI court on registration in the BVI</u>, and (iii) a future judgment of a BVI court obtained in an action brought to enforce a foreign judgment. In each case the injunction, if granted, is directed towards the enforcement of obligations to satisfy judgments which do not yet exist. In each case the question is whether there is a sufficient likelihood that a judgment enforceable through the process of the BVI court will be obtained, and a sufficient risk that without a freezing injunction execution of the judgment will be thwarted, to justify the grant of relief."**[Emphasis added]

Application and analysis

[60] The Defendant's argument that the absence of a substantive cause of action in The Bahamas disqualifies the Plaintiff from any grant of an injunction must fail. Firstly, the Plaintiff is not applying for an interlocutory freezing injunction and, in any event, the Privy Council in **Convoy Collateral** made it clear that the longstanding principle that injunctions in aid of foreign proceedings require substantive causes of action is wrong.

[61] Similarly, Mr. Hanna's submission that the Court's jurisdiction under section 21 (1) of the SCA does not provide for injunctions to be used to aid foreign proceedings must also fail. In support of his contention, he relied heavily on the EC Court of Appeal in **Convoy Collateral**. However, the Privy Council has unequivocally stated that it could be used for that purpose. The language of the Bahamas SCA is sufficiently similar to justify the application of the Board's interpretation of the BVI Act. A large part of the Board's reasoning for the generous interpretation of the section was the presence of the phrase "*in all cases*", which is also present in the Bahamian SCA. Accordingly, there is no reason why section 21(1) should not be interpreted to provide for the grant of injunctions in aid of foreign proceedings.

[62] The Board's rationale for its interpretation was that the purpose of the law is to facilitate the avoidance of frustrating judgments of neighbour courts and not to make it difficult. In explaining why there was no reason to deny the use of freezing injunctions in aid of foreign proceedings, the Board used the BVI Reciprocal Enforcement of Judgments Act ("the BVI Act") as an example of a regime enacted specifically for the purpose of enforcing foreign judgments. They explained that the very purpose of that legislation is to facilitate the enforcement of foreign judgments and that there was no reason to refuse registration of a freezing order in the local jurisdiction where there are assets to avoid the frustration of that foreign judgment. The Board expressly stated that the BVI Act, which is similar to The Bahamas Act can be used to register a freezing injunction. Accordingly, it is clear that the Act applies equally to both interlocutory and final judgments. The WFO is not precluded from registration under the Act merely because it is an interlocutory as opposed to a final order.

[63] Despite what appears to be settled law by the recent Privy Council decision in **Convoy Collateral,** which overturned the EC Court of Appeal's decision, the Defendant still maintained their position that there is a lack of jurisdiction in the Bahamian Court to grant free-standing injunctive relief in aid of foreign proceedings and the *obiter dicta* of the majority on the power issue in **Convoy Collateral** ought not to be followed.

[64] In my considered opinion, the Bahamian Courts, as I do, would be highly persuaded to follow the Privy Council's reasoning on the "power issue" in **Convoy Collateral**.

Criteria for registration

[65] Section 3 of the Act identifies certain criteria which must be met prior to the registration of any judgment or order and identifies certain factors that proscribe the circumstances under which a judgment can be registered.

Judgment must be from an approved superior court

[66] The Orders were issued by the English High Court as part of duly constituted High Court proceedings.

Application to be made within 12 months

[67] It is undisputed that the present application satisfies this criteria.

Just and convenient

[68] The English High Court's Order granting the Plaintiff leave to pursue registration of the WFO in The Bahamas was made by Justice Jacobs with the consent of the Defendant on 23 July 2020. Not only did the Defendant not raise any objection to the Plaintiff's application seeking leave to enforce the Orders in this jurisdiction, but he *actively consented* to the same, the language of the Order reflecting "***AND UPON*** *the Claimant and the First Defendant by their respective legal representatives having agreed to the terms of the order set out below…"*

[69] As the Plaintiff correctly stated, the registration of the Orders will cause no harm or hardship to the Defendant. The Defendant will similarly not incur any further duty, liability or obligation by the registration of the Orders in this jurisdiction. The Plaintiff, however, will have the added security of being able to enforce the WFO in this jurisdiction where substantial cash assets (with a minimum value of $60 million dollars) are being held.

Enforceability of Judgment

[70] Pursuant to section 2 of the Act, judgment means "*any judgment or order given or made by a court in any civil proceedings … becomes enforceable in the same*

manner as a judgment given by a court in that place." Section 3(2) of the Act expressly states that:

> **"No judgment shall be ordered to be registered under this section if-**
>
> > **(e) the judgment debtor satisfies the registering court either that an appeal is pending or that he is entitled or intends to appeal against the judgment."**

[71] It appears that, under the Act, there is no requirement for the judgment or order to be a final judgment or order. Rather, it merely has to have "*become enforceable in the same manner as a judgment given by a court in that place.*"

[72] In the present case, the Orders have either been made by consent between the parties or are otherwise out of time to appeal. None of the Orders are the subject of any appeal. All of the Orders remain in effect, and remain enforceable within England.

Public policy

[73] In para 9.8 of their written submissions, the Defendant submitted that "*the granting of freestanding freezing injunctions is both contrary to Bahamian public policy and to the laws of this jurisdiction…*" The fact of the matter is that the Court is not granting a freestanding freezing injunction; the effect of registration on Bahamian public policy was clearly not a matter of ongoing or primary concern for Parliament.

[74] In any event, given the Privy Council decision in **Convoy Collateral**, I remain persuaded that this Court is able to grant a free-standing freezing injunction in aid of foreign proceedings despite the absence of specific legislation. I need not reiterate what I said earlier in this Judgment.

[75] To continue this discourse on the issue of public policy, the Plaintiff properly submitted that Parliament's concern for matters of public policy was limited to the underlying cause of action as can be seen by section 3(2)(f) of the exclusions to registration:

> **"No judgment shall be ordered to be registered under this section if -**

> **the judgment was in respect of a cause of action which for reason of public policy, or for some other similar reason could not have been entertained by the registering court."**

[76] By contrast, Section 6(3) of the Arbitration (Foreign Arbitral Awards) Act, 2009 explicitly provides that:

> **"Enforcement of a convention award may also be refused if the award is in respect of a matter that is not capable of settlement by arbitration or if it would be contrary to public policy to enforce the award."**

[77] Indeed, the bar set under the Act is not so high.

Lack of reciprocity

[78] The Defendant's secondary argument is that "*there would be no reciprocity in permitting the recognition of an injunction order from the United Kingdom*" because the United Kingdom would not permit the enforcement and recognition of a corresponding Bahamian Order. The Plaintiff correctly postulated that the Defendant's position is both accurate and inaccurate.

[79] It is a fact that the English Courts would not register a Bahamian Order in the same terms as this Court is being asked to do. They cannot. The 1920 Act limits the enforcement of any foreign judgment in the United Kingdom to a judgment for a sum of money. In an attempt to demonstrate their contention, the Defendant relied on **Standard Chartered Bank v. Zungeru Power Limited** [2014] EWHC 4714 where the Court held that an injunctive order made by a court in Nigeria was registered as an English judgment and the registration was subsequently discharged on application by the defendant because the 1920 Act is solely concerned with judgments for sums of money.

[80] However, notwithstanding the differences between the respective English and Bahamian legislation, reciprocity does not require equality. Reciprocity is defined in Jowitt's Dictionary of English Law, Second Ed. as "*mutuality,*" continuing:

> **"The term is used in international law to denote the relation existing between two States when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the other State."**

[81] Similarly, in **Railway Comr. v. Romeo** [1962] ALR 579, Dixon CJ explained reciprocity as:

> **"Reciprocity does not mean equality in all respects or in all substantial respects between the laws of two countries… There need be no equivalence between the measures of compensation. Probably there must be a uniformity in the provision which the law of the foreign country makes extending to… New South Wales with the provision which it makes for those who are within its own borders. That is the reciprocity which appears to be required."** [Emphasis added]

[82] There is reciprocity between the United Kingdom and The Bahamas because the Governor-General has declared it so. Pursuant to section 6 of the Act, the Governor General, being "*satisfied that reciprocal provisions have been made by the legislature*" of the United Kingdom by Order declared that the Act extended to and applied to the United Kingdom.

[83] Therefore, the submission advanced by the Defendant that there is a lack of reciprocity which may be considered contrary to it being just and convenient for the Plaintiff to obtain the relief sought, must fail.

Conclusion

[84] The language of the Act is clear and unambiguous. The Orders sought by the Plaintiff meet the criteria for enforcement under the Act, and it is just and convenient for this Court to order their registration in accordance with the Act which I now do. The Plaintiff, being the successful party in these proceedings is entitled to its costs to be taxed if not agreed.

Dated this 31st day of January 2022

Indra H. Charles
Justice