When offshore meets onshore: a two-way street?

The Cayman Islands, Bermuda and the British Virgin Islands (BVI) continue to keep the Judicial Committee of the Privy Council (Privy Council) busy with difficult jurisprudential issues. Since *Willers v Joyce (No 2)*, the Privy Council can direct English courts to treat its decisions as the law of England and Wales (English law), even where this means departing from a decision of the Court of Appeal, the House of Lords or the Supreme Court (*[2016] UKSC 44*). In recent years, three Privy Council decisions have either clarified English law or effectively overruled it, and two of them include a *Willers v Joyce* direction.

These decisions suggest that the Privy Council will play an increasingly important role as offshore jurisdictions become home to crypto exchanges, token issuers and decentralised autonomous organisations (DAOs). Disputes involving these structures tend to be high in value and multi-jurisdictional, and they sometimes raise points of principle on which English law is unsettled or open to challenge.

Jurisdiction to grant injunctions

In *Broad Idea v Convoy Collateral Ltd*, a seven-judge board of the Privy Council (the board) clarified the equitable basis for granting an injunction and dispelled the idea that a substantive cause of action within the jurisdiction is a precondition, as *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA* had been understood to require (*[2021] UKPC 24; [1979] AC 210*) (*see box "The Siskina restriction"*).

Convoy Collateral Ltd (Convoy) brought claims in Hong Kong against Dr Cho, the majority shareholder of a BVI company, Broad Idea International Ltd (Broad Idea). A freezing injunction against Dr Cho was set aside because no gateway permitted service out of the jurisdiction, but a further injunction was granted against Broad Idea. The Eastern Caribbean Supreme Court (ECSC) Court of Appeal discharged the injunction, holding that a BVI court has no power to grant such relief against a BVI company except in support of substantive proceedings in the BVI. Convoy appealed to the Privy Council.

In finding that the Court of Appeal had erred, the majority of the board held that, where the court has personal jurisdiction over a party, it can grant an injunction against that party to help enforce an existing or prospective foreign judgment regardless of whether substantive relief is being sought in the BVI. Because the appeal failed on other grounds, and the minority declined to decide the point, the majority's views are strictly obiter, although they are highly persuasive.

The majority of the board expressly affirmed Lord Nicholls' dissenting judgment in *Mercedes-Benz AG v Leiduck*, where he set out a principled basis for the grant of a freezing injunction; namely, that its essential purpose is to help enforce a money judgment, so the claimant's underlying cause of action is relevant "only in so far as it bears on the prospect that such a judgment will be obtained" (*[1996] AC 284*). The board also relied on other forms of injunction to support the proposition that no substantive cause of action is required, including *Norwich Pharmacal* orders against innocent third parties and website-blocking injunctions against internet service providers (*Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133*). Lord Leggatt concluded that there is "no reason in principle" to link the grant of a freezing injunction to the existence of a cause of action.

Broad Idea decoupled the court's equitable jurisdiction from a strict cause-of-action-based approach and reframed it around the underlying purpose of the injunction. *Broad Idea* was expressly adopted by the English Court of Appeal in *Re G (Court of Protection: Injunction)* (*[2022] EWCA Civ 1312*).

The *Broad Idea* principle continues to raise novel issues. In a recent Court of Appeal judgment, an attempt to bring a free-standing application for worldwide freezing relief against non-cause of action defendants out of the jurisdiction was rejected in the absence of a specifically available gateway (*Gilbert and another v Broadoak Private Finance Limited and others [2026] EWCA Civ 1172*). The court rejected the argument that section 37 of the Senior Courts Act 1981 provides a relevant gateway.

Insolvency and arbitration

Sian Participation Corp (in liquidation) v Halimeda International Ltd concerned the interaction between insolvency proceedings and arbitration, and in particular the rule in *Salford Estates (No 2) Ltd v Altomart Ltd* (*[2024] UKPC 16, www.practicallaw.com/w-043-9419; [2014] EWCA Civ 1575*). Under the *Salford Estates* rule, if a debt is disputed and the dispute falls within an arbitration agreement, the court will usually dismiss or stay a winding-up petition using its discretion under section 122(1)(f) of the Insolvency Act 1986. It will do this even if the dispute is not genuine and substantial. In effect, a debtor can defeat or delay a winding-up petition simply by asserting a dispute, no matter how flimsy, provided that it falls within an arbitration clause.

In the BVI, however, the applicable test is governed by *Sparkasse Bregenz Bank AG v In the matter of Associated Capital Corporation*; namely, whether the debt is disputed on genuine and substantial grounds (*BVIHCVAP 2002/0010*).

In *Sian*, the Privy Council agreed with the ECSC Court of Appeal and rejected the *Salford Estates* approach. It held that, as a matter of BVI law, the correct test remains whether the debt is disputed on genuine and substantial grounds, even where it falls within an arbitration agreement. An application to appoint liquidators is not an "action" within section 18 of the BVI Arbitration Act 2013, so it does not trigger a mandatory stay. Nor is the pro-arbitration policy undermined, since a liquidation application does not determine the parties' rights as between themselves. By contrast, a rule allowing debtors to shelter behind unsubstantiated disputes would undermine the insolvency regime and the public interest in winding up insolvent companies without undue delay. The Privy Council also made a *Willers v Joyce* direction that Salford Estates should no longer be followed in English law.

Abolition of the shareholder rule

Jardine Strategic Limited v Oasis Investments II Master Fund and others (No 2) is an important decision from Bermuda on whether a company's shareholders are

entitled to see the company's legal advice for the purposes of litigation against the company (*[2025] UKPC 34; see News brief "Access to privileged company documents: shareholder rule abolished", www.practicallaw.com/w-047-9731*).

Following an amalgamation, dissenting shareholders triggered the statutory fair value appraisal regime for cancelled shares under section 106 of the Companies Act 1981 (Bermuda). They sought disclosure of the company's legal advice, relying on the shareholder rule; that is, that a company cannot, in the course of litigation between it and former or current shareholders, withhold documents on the ground of legal advice privilege. The Privy Council held that the shareholder rule should no longer be applied. The two principal justifications traditionally offered for the rule were that:

- Advice obtained by a company is paid for out of company funds, in which shareholders are said to have an interest by analogy with the rule that beneficiaries may see advice paid for out of trust funds.

- Shareholders have a joint interest with the company in the advice, by analogy with relationships such as a trustee and beneficiary, principal and agent, partners, joint venturers and certain insurance relationships.

The Privy Council rejected both justifications. A company is a separate legal person which owns its own property, and shareholders have no proprietary interest in its assets. As for the company-shareholder relationship, the Privy Council concluded that this relationship is insufficiently analogous to the other joint interest relationships to be included among them. There was therefore no sound basis for an exception to legal advice privilege that strips a company of privilege in adversarial litigation with its own members. The Privy Council made a *Willers v Joyce* direction that the shareholder rule should no longer be followed in England and Wales.

Jardine has obvious practical importance. Shareholder activism, unfair prejudice petitions, derivative claims and appraisal actions are a staple of offshore and English commercial litigation, and the shareholder rule had long given claimant shareholders a significant forensic advantage. Companies can now take legal advice about disputes with their members with greater confidence that the advice will remain privileged.

The *Siskina* restriction

In *Siskina (Owners of Cargo Lately Laden on Board) v Distos Compania Naviera SA*, the House of Lords held that the courts had no power to grant an interim injunction unless it was ancillary to a claim for final, substantive relief that the courts had jurisdiction to grant (*[1979] AC 210*). This restriction proved difficult to reconcile with the later expansion of the scope of freezing injunctions in response to the globalisation of commerce and advances in technology.

In England and Wales, Parliament addressed part of the problem through section 25(1) of the Civil Jurisdiction and Judgments Act 1982, which allows the court to grant interim relief in support of foreign proceedings. However, many other common law jurisdictions have no equivalent provision, so *Siskina* continues to limit their courts' powers.

Implications for offshore digital assets

The three decisions discussed above share common features. Each decision arose from a structure typical of offshore practice, required the Privy Council to re-examine the rationale for an established rule and has resulted in a change to, or clarification of, English law. There is every reason to expect this pattern to continue, and the digital asset sector is a prime candidate to generate the next wave of issues.

The use of offshore jurisdictions for the domicile of crypto exchanges, token issuers, digital asset funds and foundation companies as the legal wrappers for DAOs gives rise to difficult issues of English law.

The first issue is jurisdiction. A digital asset has no physical location, yet many of the gateways for service out of the jurisdiction depend on a territorial connection, such as property within the jurisdiction or an act carried out there. Following *Gilbert*, any extension of *Broad Idea* to allow free-standing applications for injunctions against respondents out of the jurisdiction appears unlikely without a change to the jurisdictional gateways.

Secondly, the interaction between smart contracts, arbitration clauses embedded in platform terms and insolvency processes will test the principles restated in *Sian*. Many exchange terms of service contain arbitration agreements, and the question of whether customer claims, or claims by liquidators, must be arbitrated will recur.

Thirdly, an application for special leave to appeal to the Privy Council is pending from the decision of the Bermuda Court of Appeal in *Re Bittrex Global (Bermuda) Ltd (in liquidation)* concerning how joint liquidators should treat unclaimed digital assets (*[2026] CA (Bda) 1 Civ*). In *Re Bittrex*, the joint liquidators sought the court's sanction to distribute around $63 million in unclaimed assets to the company's sole shareholder as surplus. The Bermuda Court of Appeal held that the digital assets held by Bittrex in customers' hosted wallets were not company property and could not be distributed to the shareholder. If special leave is granted, the appeal may provide welcome guidance on the treatment of digital assets in an insolvency process.

Finally, the governance of DAOs that are structured as offshore foundation companies raises novel questions about the rights of token holders, their standing to bring claims and their access to information. The reasoning in *Jardine*, which emphasises the separate legal personality of the company and the absence of any proprietary interest of members in its assets, may prove relevant in determining what token holders are, and are not, entitled to see.

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