

CASE NOTE:

ENTRENCHING BROAD IDEA IN ENGLISH LAW: RE G (COURT OF PROTECTION: INJUNCTION) [2022] EWCA CIV 1312; AND BACCI V GREEN [2022] EWCA CIV 1393

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Introduction

1. In two recent Court of Appeal decisions, *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312 and *Bacci v Green* [2022] EWCA Civ 1393, the Court of Appeal has considered the test to be applied when considering an application for an injunction. In both cases, the Court of Appeal approved the analysis of the majority of the Privy Council given in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24.
2. These decisions are important for commercial practitioners as they confirm that *Broad Idea* has established (as a matter of English¹ law) that the grant of an injunction under s.37(1) of the Senior Courts Act 1981 (the "1981 Act") depends on two requirements: (i) an interest of the claimant which merits protection; and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something.

The Facts of *Re G* and *Bacci v Green*

3. *Re G* concerned a 27-year-old woman, "G" who suffered from a serious degenerative neurological condition. The NHS Trust responsible for G's care applied for an injunction to regulate G's parents' and grandmother's engagement with G and their conduct towards staff at the Trust. The Court of Protection granted the injunction against all three parties. The respondents subsequently appealed the injunction.
4. *Bacci v Green* concerned an order made against a judgment debtor (Mr Green) requiring him to delegate his power to elect to draw down on his pension scheme to solicitors of the judgment creditor (Mr Bacci), in order that the debt could be enforced into his pension.



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¹ For ease of reference only, this case note adopts the convention of referring to the law of England and Wales as "English law".

- Both appeals were dismissed on their facts²; of more relevance, however, is the Court of Appeal's analysis of the effect of *Broad Idea* on English law and the underlying test for the grant of an injunction under s.37(1) of the 1981 Act.

***Broad Idea* now represents the law of England**

- In *Re G*, the Court of Appeal (Baker, Phillips and Nugee LJ) held that when the Court was granting an injunction under s.16(5) of the Mental Capacity Act 2005 it must apply the "just and convenient" test under s.37(1) of the 1981 Act, causing it to consider the nature of the test.
- In *Bacci v Green* the Court of Appeal also considered the extent of the Court's power to grant an injunction under s.37(1) of the 1981 Act, although Males LJ pointed out that the Court was not required to "explore the outer limits" of this power [45]. Arnold LJ observed that s.37(1) of the 1981 Act did not itself confer any power on the Court; it merely confirmed the existing power of the Court to grant an injunction.
- When considering the test under s.37(1) of the 1981 Act in *Re G*, the Court of Appeal held that (a) the decision in *Broad Idea* was "technically not binding" on it, "both because it is a decision of the Privy Council, and because it was not in fact necessary to the decision" [57]; however, (b) the "general principle is that although decisions of the Privy Council are not binding on the Courts of England and Wales, they should normally be regarded as being 'of great weight and persuasive value' (*Willers v Joyce (No 2)*

[2016] UKSC 44 at [12] per Lord Neuberger PSC)" [58]. Further, "unless there is a decision of a superior court to the contrary effect, a Court in England and Wales 'can normally be expected to follow' a decision of the Privy Council (*ibid* at [16])" [58]. The Court also considered that "the fact that the legal questions decided by the majority did not in fact need to be decided [...] does not [...] detract from their powerful persuasive effect" [59].

- The Court of Appeal thus held that they "should follow the majority decision in *Broad Idea* unless persuaded otherwise". There had been "no attempt" by the parties to persuade the Court not to follow it. Further, even if there had been, the Court considered Lord Leggatt's analysis to be "compelling and unanswerable" [61].
- The Court of Appeal in *Bacci v Green* (per Baker LJ at [16] and Arnold LJ at [52]) quoted and thereby endorsed this analysis of the Court of Appeal in *Re G*.
- The Court of Appeal has, therefore, concluded that it should "follow *Broad idea* and decide that it now represents the law of England and Wales as to the circumstances in which the Court may grant an injunction, or in other words what the 'just and convenient' test in s.37 of the 1981 Act requires" (*Re G* at [61]).

Restatement of the 'just and convenient' test

- The analysis of Arnold LJ in *Bacci v Green* (at [46] to [51]) situates the "just and convenient" test in its proper context:

² N.B. In *Re G*, the Court of Appeal allowed one party's appeal on the basis that she had not been given proper notice of the case against her [105]. The question of whether there should be an injunction against her was accordingly remitted for a rehearing [106].

- a. The Court has jurisdiction to grant an injunction whenever the Court has *in personam* jurisdiction over the respondent (see *Fourie v Le Roux* [2007] 1 WLR 320).
 - b. The power of the Court to grant an injunction is (subject to express statutory restrictions) unlimited (*Broad Idea* itself citing *Spry, Equitable Remedies*).
 - c. Nevertheless, the exercise of the jurisdiction must have a principled basis, but the practice of the Court can and should change to meet modern challenges (*Fourie v Le Roux, Cartier v BT* [2018] 1 WLR 3259 and *Broad Idea*).
 - d. Where the Court is exercising its jurisdiction under s.37(1) of the 1981 Act to grant an injunction, the test is justice and convenience.
13. Applying *Broad Idea*, the Court of Appeal in *Re G* (and approved in *Bacci v Green*) held that the just and convenient test (as it is now to be understood following *Broad Idea*) is comprised of two requirements:
- a. First - "that the person protected by the injunction has an interest that merits protection" [69].
 - b. Second - that "there is a legal or equitable principle which justifies exercising the power to order the defendant to do or not to do something" [71].

Conclusions

14. These decisions represent an important and long-awaited resolution of the question of whether the Privy Council's analysis of the

Court's power to grant an injunction in *Broad Idea* represents the law of England – now answered in the affirmative.

15. They will have a significant effect on the granting of injunctions, including freezing orders (particularly where third parties or "non-cause of action defendants" are involved).
16. Commercial practitioners should ensure that any application for an injunction adequately addresses the two new limbs of the "just and convenient" test as summarised in *Re G* and *Bacci v Green*.

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