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UPDATE

Black Swan has its wings clipped

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For the past 10 years the courts of the British Virgin Islands have regularly granted freezing orders under the so-called Black Swan jurisdiction in support of foreign proceedings against non-cause of action defendants located in the BVI, holding assets against which any foreign judgment might ultimately be enforced. The Eastern Caribbean Court of Appeal has however recently held that the BVI courts have no jurisdiction, absent statutory authority, to grant interlocutory injunctions in aid of proceedings in a foreign country.

The power of the BVI Courts to grant injunctions

The BVI courts' power to grant injunctive relief derives from section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap. 80) (the **Supreme Court Act**) which provides that:

... 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 the Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms as the court or Judge thinks just.

The English position

The language of section 24(1) of the Supreme Court Act is in similar terms to provisions of English statute that have been the subject of a long line of judicial pronouncements beginning with the decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, and including the subsequent decision of the House of Lords in *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera S.A.* [1979] AC 210. This line of authority recognises that the court's power to grant an interlocutory injunction is based on there being a recognised cause of action against a defendant duly served.

By section 25 of the UK Civil Jurisdiction and Judgments Act 1982, the UK courts were given the express power to grant injunctions in aid of foreign proceedings. No similar statutory provision exists in the BVI.

Whilst decisions of the House of Lords are of highly persuasive value in the BVI, they are not strictly binding. The BVI courts are bound by decisions of the BVI Court of Appeal and the Judicial Committee of the Privy Council, which is the highest court of appeal for the BVI.

Mercedes-Benz AG v Leiduck

The question of whether there was jurisdiction for a claimant to obtain an injunction in aid of foreign proceedings absent a statutory equivalent of section 25 of the UK Civil Jurisdiction and Judgments Act 1982 was considered by the Privy Council in *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 929.

In that case, the claimant filed a claim in Monaco against the defendant who owned assets in Hong Kong, namely shares in a Hong Kong company. In order to guarantee the enforceability of any judgment obtained in Monaco, the claimant applied for a worldwide freezing injunction in Hong Kong to restrain the defendant and the Hong Kong company from dealing with any of their assets which included the shares. A

deputy judge granted the claimant permission to serve the claim on the defendant outside the jurisdiction and a worldwide freezing injunction. The defendant applied to set aside the deputy judge's orders. A judge granted the defendant's application and set aside the deputy judge's orders. The claimant appealed the judge's decision to the Court of Appeal. The Court of Appeal dismissed the appeal. The claimant thereafter appealed to the Privy Council.

In giving the opinion of the majority of the Board, Lord Mustill held that in the absence of an equivalent of section 25 of UK Civil Jurisdiction and Judgments Act 1982, the Hong Kong court had no jurisdiction to grant a freezing order against a foreign defendant not subject to the jurisdiction of the Hong Kong court in aid of proceedings being prosecuted against that defendant in Monaco. That finding was sufficient to dispose of the appeal and their Lordships expressed no conclusion in relation to the question of whether such an order could be made against a party over whom the court did have personal jurisdiction. However, Lord Mustill observed that:

It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court, be it in Hong Kong or England, possessing such jurisdiction, an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service.

In his dissenting judgment, Lord Nicholls stated that *the law has moved on since the Siskina decision*, and *a claim for a Mareva injunction may stand alone in an action, on its own feet, as a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in other proceedings*. The ability to grant such relief did not therefore depend upon there being a pre-existing cause of action against the non-cause of action defendant provided that the non-cause of action defendant was otherwise subject to the court's personal or territorial jurisdiction.

The *Black Swan* jurisdiction

In *Black Swan Investment I.S.A. v Harvest View Limited & Anor* (Claim No. BVIHCV 2009/399, 23 March 2010), the indebtedness of a company called Hyundai Motor Distributors Limited was assigned to the claimant company, Black Swan Investment I.S.A. (Black Swan). Black Swan applied to the High Court of South Africa for an order that an individual called Mr Rautenbach be made personally liable for the fraudulent management of the indebted company. Thereafter, Black Swan applied to the BVI Commercial Court for a freezing order in aid of the South African proceedings against Mr Rautenbach, seeking to restrain two BVI registered companies alleged to be under his ownership or control. The BVI companies against whom a freezing order was granted were not parties to the foreign proceedings, nor were substantive proceedings filed against them in the BVI.

After reviewing the authorities, including *Siskina* and *Mercedes-Benz*, the BVI court formed the view that a lacuna in the law existed. The court proposed that the lacuna should be filled by adopting what it described as the *compelling* reasoning of Lord Nicholls in *Mercedes-Benz*.

This decision was the genesis of what became known as the *Black Swan* jurisdiction which enabled the court to grant free-standing freezing orders over non-cause of action defendants located in the BVI where the substantive cause of action was being litigated in a foreign court. The *Black Swan* jurisdiction applied to prevent entities subject to the BVI courts' personal jurisdiction from disposing of identified assets, such as shares in BVI companies, which might be available to satisfy a future judgment of a foreign court in proceedings to which the owner, or a person who is arguably the owner, of such assets was a defendant in the foreign proceedings.

In order to invoke the jurisdiction, a claimant was still required to establish that:

1. It had a good arguable case in respect of its substantive claim against the defendant; and

2. There was a real risk of the defendant dissipating its assets other than in the ordinary course of business, so as to frustrate any judgment that might be obtained against it in due course.

In addition to the usual threshold requirements, the claimant also needed to show a prospective entitlement to a judgment if successful in foreign proceedings which would be enforceable in the BVI, by registration or otherwise. The relevant enquiry was therefore whether or not the claimant may obtain a

foreign judgment which may be enforceable by whatever means against local assets owned or controlled by the defendant.

The *Black Swan* jurisdiction was subsequently applied widely in the BVI and appeared to have been approved by the Court of Appeal in its decision in *Yukos CIS Investments Limited & Anor v Yukos Hydrocarbons Investments Limited & Ors* (Appeal No. BVIHCVAP 2010/028, 26 September 2011).

Broad Idea International Limited v Convoy Collateral Limited

In *Broad Idea International Limited v Convoy Collateral Limited* (Appeal No. BVIHCMAP2019/0026, 29 May 2020), Convoy Collateral Limited (**Convoy**) had commenced proceedings against Dr Cho in the High Court of Hong Kong claiming damages and other relief for breach of fiduciary and other duties, which, it said, resulted in significant losses to Convoy. Dr Cho was the holder of 50.1% of the shares in Broad Idea International Limited (**Broad Idea**), a company incorporated in the BVI. Convoy issued an application in the BVI, seeking a freezing order against Broad Idea in support of the proceedings in Hong Kong against Dr Cho. Critically, no substantive claim was made against Broad Idea in Hong Kong, the BVI or anywhere else. The application was nevertheless granted by the BVI Commercial Court exercising its *Black Swan* jurisdiction. Broad Idea appealed the grant of the freezing order against it principally on the basis that there was no jurisdiction to make the order in circumstances where Convoy had not made any substantive claim against it in the BVI or elsewhere.

The jurisdiction issue

On appeal, the Court of Appeal held that:

It is clear that the authorities, from Mareva to the Siskina and leading up to the decisions of the Privy Council in Mercedes-Benz and the House of Lords in Fourie all support the proposition that, for the court's jurisdiction under section 24 of the Supreme Court Act to be properly invoked, there must be an enforceable cause of action against a defendant which the court has jurisdiction to enforce by final judgment, and that cause of action must be raised in substantive proceedings or an undertaking must be given to commence such proceedings.

and:

... the absence of an enforceable cause of action giving rise to actual or potential substantive proceedings against Broad Idea falls short of the requirements, outlined in the Siskina and subsequent decisions, for the grant of interlocutory injunctions such as freezing orders.

As regards the decision in *Black Swan*, the Court of Appeal said:

At first blush, it is passing strange that the learned judge in Black Swan relied principally on the dissenting judgment of Lord Nicholls in Mercedes-Benz in arriving at his conclusion. To my mind, there is no doubt that the majority judgment of Lord Mustill contains the ratio decidendi of the decision of the Privy Council, which is the highest court of the BVI. In so far as the learned judge preferred the dissenting judgment of Lord Nicholls to the majority judgment, and relied on it in arriving at his decision, I am constrained to hold that although the policy reasons are well understood, this was not a course of action open to him.

The Court of Appeal held that there was nothing in Lord Mustill's judgment in *Mercedes-Benz* which suggested that a freezing order could be granted where no substantive proceedings have been pursued against the person restrained, even where there is undoubted personal jurisdiction. It said that:

The above statement of Lord Mustill therefore ought not to be interpreted as dispensing with the requirement, recognised by the House of Lords in the Siskina and in subsequent decisions, for an underlying cause of action pursued in substantive proceedings to exist before the court can properly grant a freestanding interlocutory injunction albeit one in the nature of a freezing order.

The Court of Appeal therefore held that the BVI courts have no jurisdiction, absent statutory authority, to grant interlocutory injunctions in aid of litigation in a foreign country. That being the case, it held that *Black Swan* had been wrongly decided. The Court of Appeal held that it was not constrained in reaching this conclusion by its own decision in *Yukos* as the existence of the *Black Swan* jurisdiction was merely assumed in that case in order to ventilate the central issue, being whether the claimant may obtain a foreign judgment which may be enforceable by whatever means against BVI assets owned or controlled by the defendant.

The *Chabra* jurisdiction

The Court of Appeal otherwise affirmed the *Chabra* jurisdiction established in *TSB Private Bank SA v Chabra* [1992] 2 All ER 245, by which it has jurisdiction to join a third party as a second defendant and to grant a freezing order against it in support of the claimant's claim against the original defendant, even if there is no substantive cause of action against the third party. Such an order can be made where the claimant can establish a good arguable case that assets apparently owned by a third party are in fact beneficially owned by the defendant against whom there is a cause of action.

However, the *Chabra* jurisdiction did not apply in this case as no cause of action had been raised against Dr Cho in the BVI. Nor was the court satisfied on the evidence that Broad Idea was a mere nominee for Dr Cho. That being the case, there was no reason to suggest that any judgment obtained by Convoy against Dr Cho would be enforceable in the BVI against Broad Idea or its assets. At best, Convoy would only be able to enforce against Dr Cho's shares in Broad Idea.

Risk of dissipation

The Court of Appeal confirmed that an applicant for a freezing order must provide solid evidence of a real (as opposed to fanciful) risk of dissipation. It once again applied the test as stated by the English Court of Appeal in *Holyoake & Anor v Candy & Ors* [2017] EWCA Civ 92:

There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what this entails in any given case will necessarily vary according to the individual circumstances.

In the circumstances of this case, and even assuming that the court had jurisdiction to grant a freezing order of the nature applied for, it was not satisfied that there was sufficient evidence of risk of dissipation. It referred to the fact that the Hong Kong court had dismissed Convoy's application for a freezing order against Dr Cho having found that no risk of dissipation could be established.

A postscript: Commercial Bank of Dubai v 18 Elvaston Place Ltd

A matter of days prior to the handing down of the Court of Appeal's decision, the BVI Commercial Court had granted a *Black Swan* injunction at a without notice hearing against two BVI companies in support of a debt claim made by the Commercial Bank of Dubai (the **Bank**) against Mr Khaleefa Butti Omair Yousif Almuhairi (**KBO**) in the United Arab Emirates (the **UAE**). The matter was brought back before the Commercial Court in advance of the return date hearing to reconsider the question of jurisdiction.

On behalf of the Bank it was contended that:

(a) the injunction should be continued as the enactment of legislation giving a statutory basis for the grant of freezing orders in support of foreign proceedings was imminent;
(b) KBO should be added as a defendant to the BVI proceedings so that the injunction could be continued against the BVI companies under the Court's *Chabra* jurisdiction; and
(c) Any order discharging the Black Swan injunction should be stayed pending a "leapfrog appeal" to the Privy Council.

The imminence of remedial legislation

The Court held that there were two insuperable objections to continuing the injunction on this basis. The first being that, if the Court does not have jurisdiction to make a *Black Swan* injunction, it simply does not have jurisdiction to do so. The Court acknowledged the existence of English authorities in which the imminence of new legislation had been taken into account, but in none of those authorities was there any doubt that the English Courts had the jurisdiction to make the orders sought.

The second objection was that the Court was not satisfied that the enactment of remedial legislation was imminent. Although the Commercial Court Users' Group had drafted a proposed amendment to the Supreme Court Act, the drafting had not yet been finalised, the Attorney-General was still to indicate his support for the current draft, and the matter was still to be broached before Cabinet.

Adding KBO as a defendant

The Court considered that, whilst a satellite debt claim to that being litigated in the UAE could potentially be commenced in the BVI and stayed pending the outcome of the UAE proceedings, there were no jurisdictional gateways for permitting service of such a claim on KBO out of the jurisdiction. The Court considered whether it might be possible to make an order for alternative service on KBO within the jurisdiction, but did not need to decide the issue because the Bank sought to add KBO as a defendant to a claim for enforcement of any UAE judgment which may be obtained. A jurisdictional gateway for service out of the jurisdiction exists where *a claim is made to enforce any judgment … which was made by a foreign court … and is amenable to be enforced at common law.*

However, the Court decided that this gateway requires there to be an existing judgment which is to be enforced. The gateway does not permit service out in respect of a future judgment.

Stay pending a leapfrog appeal to the Privy Council

The Court considered that there were properly arguable grounds for an appeal to the Privy Council (there would be no point going to the Court of Appeal first given its definitive ruling in *Broad Idea*) on the basis that:

(a) the common law of the Eastern Caribbean is not necessarily the same as that of Hong Kong pre-1997 (which was the Privy Council's judgment in *Mercedes-Benz*); and
(b) the Courts of the Eastern Caribbean should no longer follow the *Siskina* which was decided in the infancy of the *Mareva* jurisdiction.

The Court nevertheless decided that it would be premature to determine the application for a stay pending appeal of the discharge of the *Black Swan* injunction. That determination would need to await the return date hearing when issues such as the substantive merits of the injunction and issues of non-disclosure would be considered afresh.

Conclusion

The Court of Appeal's decision in *Broad Idea* will come as a blow to claimants in foreign proceedings who wish to obtain a free-standing freezing order against non-cause of action defendants in the BVI, against whom they may wish to ultimately enforce any judgment obtained. However, in delivering its judgment the BVI Court of Appeal has encouraged the legislature to enact similar legislation to that found in the UK to clothe the courts in the BVI with the jurisdiction to grant injunctions in aid of foreign proceedings. Legislation was enacted relatively recently to empower the BVI courts to grant interim relief in support of foreign arbitration proceedings, so it is hoped that legislative change can be brought about swiftly.

The position in our other jurisdictions:

- The courts of the Cayman Islands are empowered to grant freestanding injunctive relief in aid of foreign proceedings under section 11A of the Grand Court Law (2015 Revision). It must be established that there are assets within the Cayman Islands against which a foreign judgment can be enforced.

- In Guernsey the courts have a statutory power to grant injunctions in support of foreign proceedings where it is satisfied that there are "exceptional circumstances". As noted by the Court of Appeal in *Garnet Investments Limited v BNP Paribas (Suisse) SA & Anor* [2009-10] GLR 1, "*Guernsey, as an offshore financial centre, will wish to be able to grant freezing injunctions in aid of proceedings elsewhere, but [the statute] requires that the court exercise appropriate caution before doing so.*" The court found that this requires some "*additional exceptional factors which make it appropriate for the injunction to lie*" but otherwise declined to lay down restricting guidelines.

- In Jersey, it is well-established that the Royal Court can grant freezing relief in aid of foreign proceedings, even where no substantive claim is made in the Jersey proceedings (see the Jersey Court of Appeal's decision in *Solvalub Ltd v Match Investments* [1996 JLR 361]); and such relief can also be obtained against *Chabra* defendants (who will be joined to the Jersey injunction proceedings as Parties Cited) on the basis that there is a good arguable case that they hold assets which are in fact beneficially owned by the substantive defendant. Although, as in the BVI, there is no statutory footing for the availability of such relief, it has been said by the Jersey courts that it is desirable in the interests of

comity with the courts of other countries and in the interests of Jersey's reputation as a financial centre. There are numerous examples of such orders having been made by the Jersey courts over several decades and the availability of such relief as a matter of the court's inherent jurisdiction has been confirmed at Court of Appeal level.

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