

UPDATE

Free-standing Freezing Orders in the British Virgin Islands: service out on non-submitting foreign defendants

Update prepared by Justine Lau (Partner, Hong Kong) and Kimberley Leng (Senior Associate, Hong Kong)

Does the BVI Court have jurisdiction to grant free-standing freezing orders in support of foreign proceedings if it is not seized of jurisdiction over a foreign defendant? This question has been answered in the Court of Appeal's recent decision in *Convoy Collateral Ltd v Broad Idea International et al* (BVIHCMAP2016/0030).

Background

The claimant, Convoy Collateral Ltd (**Convoy**), sought injunctive relief in support of ongoing proceedings in Hong Kong against (i) Broad Idea International Limited (**Broad Idea**) and (ii) Dr Cho Kwai Chee Roy (**Dr Cho**). Dr Cho, a Hong Kong national domiciled and resident in Hong Kong, held 50.1% of the shares in Broad Idea, a BVI-incorporated company.

The Hong Kong proceedings were against Dr Cho and sought to recover losses in amounts exceeding US\$92million. Dr Cho's shareholding in Broad Idea was estimated to be worth approximately US\$62.5 million.

Convoy initially succeeded on its *ex parte* application for freezing orders against Dr Cho and Broad Idea in support of the proceedings in Hong Kong and for permission to serve Dr Cho outside the jurisdiction. On an application made by Dr Cho to set aside the orders previously made by Chivers J *ex parte*, Adderley J held that the BVI Court does not have power to grant a free-standing injunction in aid of foreign proceedings for service outside the jurisdiction on a person who is not resident in the jurisdiction or otherwise subject to the *in personam* jurisdiction of the BVI Court. The learned judge held as such, notwithstanding the fact that there were considerable assets in the BVI.

The Court of Appeal Decision

On appeal by Convoy, and a cross-appeal by Dr Cho that Adderley J's decision be upheld, the Court of Appeal affirmed Adderley J's decision. In so doing, the Court of Appeal made the following two key points.

First, the doctrine of *stare decisis* remains very much a part of BVI law, and as a consequence, the BVI Court remains bound to follow the decision delivered by the Privy Council (on appeal from Hong Kong) in *Mercedes-Benz AG v Leiduck*¹.

In *Mercedes-Benz*, the Privy Council was asked to construe the Hong Kong equivalent of rule 7.3(2)(b) of the Civil Procedure Rules 2000 (CPR), which is also materially similar to Order 11, rule (1)(b)(m) of the English Rules of Court. The Privy Council, applying the principles laid down in the English House of Lords decision *Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA*², concluded that the presence of assets within the jurisdiction, without more, was insufficient to invoke the court's jurisdiction

¹ [1996] 1 AC 284

² [1979] AC 201

for service out under Order 11 because Order 11 'is to authorise service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document... Absent a claim based on a legal right which the defendant can be called upon to answer of the kind falling within Ord. 11, r.1 (1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.'³

A freezing order, being the relief sought and initially obtained by Convoy, is a claim that is *sui juris*: it does not determine any rights or issues between the parties and is meant to maintain the status quo to preserve assets so that a defendant does not make itself judgment proof. A freezing order, '[w]hen ruled upon it decides no rights, and calls into existence no process by which rights will be decided.'

That being the case, the Court of Appeal was bound to follow the decision of the Privy Council in **Mercedes-Benz**, which settled the issue that assets within the jurisdiction was not a sufficient basis to give the BVI Court power under CPR rule 7.3(2) to serve a foreigner, who had not submitted to the BVI Court's jurisdiction, outside the jurisdiction⁴.

Second, the Court of Appeal noted it is a question for the legislature, and not the judiciary, to bring the judiciary's powers in the BVI in line with that in the Cayman Islands⁵ to allow the grant of free-standing injunctions against persons who are not otherwise subject to the BVI Court's jurisdiction. It is not, in the words of Webster JA, open to the BVI Court to adopt a 'strained interpretation' of the CPR (as presently drafted) to accommodate such an interpretation.

Discussion

It remains to be seen whether this Court of Appeal decision will now trigger legislative change, particularly in circumstances where the Court has echoed the concerns raised in the BVI Court below regarding the ability of the judiciary to assist claimants in securing the assets of defendants in foreign proceedings who chose to place their assets in the BVI jurisdiction. Absent legislative change, the position in the BVI remains focused on obtaining freezing orders in aid of foreign proceedings (i) through satellite proceedings commenced in the BVI, (ii) the BVI Court's **Black Swan** jurisdiction, or (iii) in support of foreign arbitral proceedings under the Arbitration Act, 2013.

Contacts



Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 284 852 1712
eleanor.morgan@mourant.com



Justine Lau
Partner, Mourant Ozannes
Hong Kong
+852 3995 5749
justine.lau@mourant.com



Kimberley Leng
Senior Associate
Hong Kong
+852 3995 5716
kimberley.l@mourant.com

³ See Convoy at [18]

⁴ C.f. The case of **Black Swan Investment ISA v Harvest View Ltd** (BVIHCV2009/399), where the applicant sought a free-standing injunction in support of proceedings commenced in South Africa against defendant companies incorporated in the BVI. The BVI Court had jurisdiction over the BVI corporate defendants, and as a consequence, there was no issue of obtaining leave for service out under CPR 7.3(2). Read our client guide [Freezing Orders in the British Virgin Islands](#).

⁵ Section 11A of the *Grand Court Law (2015 Revision)* as amended

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2020 MOURANT OZANNES ALL RIGHTS RESERVED