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UPDATE

BVI High Court confirms the test in an application for interim relief in aid of foreign proceedings

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The BVI High Court recently heard one of the first applications brought under section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act which now provides the statutory authority for applications for free standing interim relief in aid of foreign proceedings, following the end of the *Black Swan* jurisdiction.

Claimant X v A TVI Company[1] considers the first application for freestanding interim relief in aid of foreign proceedings brought under the recently passed section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the **BVI SCA**).

The new provision brought a solution to the abrupt end of the reign of the *Black Swan* jurisdiction.

Background

In *Black Swan Investments ISA v Harvest View Limited and Anor*,[2] the BVI High Court granted, without statutory authority, freestanding 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. It was a significant and welcomed decision as it allowed applicants a way to restrict entities from disposing of certain assets which could be used to satisfy a future foreign judgment. This came to be known as the 'Black Swan jurisdiction' and was widely applied in the BVI for 10 years following the decision.

In *Broad Idea International Limited v Convoy Collateral Limited*,[3] the BVI Court of Appeal held that the BVI courts had no jurisdiction to grant interlocutory injunctions in aid of litigation in a foreign country, absent statutory authority to do so, and ultimately that *Black Swan* was wrongly decided.

For more background on the Black Swan jurisdiction and the decision in *Broad Idea*, read our update *Black Swan has its wings clipped* linked here.

The decision in *Broad Idea* prompted the BVI legislature to enact section 24A of the BVI SCA, which now provides statutory jurisdiction for the grant of interim relief in aid of foreign proceedings.

Claimant X v A TVI Company

In *Claimant X*, the Applicant sought a proprietary injunction and disclosure orders against the Respondent in support of proceedings brought in England and Wales. No substantive proceedings were being pursued in the BVI. The Respondent, a non-cause of action defendant, was alleged to have received transfers made out of the Applicant's funds which were procured by the primary defendant in the English proceedings through dishonest and systematic abuse of the Applicant's trust.

[1] BVIHC (COM) 2021/0037.

[2] BVIHCV 2009/399, 23 March 2010.

[3] BVIHCMAP2019/0026, 29 May 2020.

The Applicant relied on section 24A of the BVI SCA for grant of the relief sought. The Applicant submitted that the BVI courts should adopt the same approach as the English courts in the application of section 25 of the Civil Jurisdiction and Judgments Act 1982 (the **English CJJA**) due to the similarity between the two provisions.

The BVI High Court accepted that there were substantial similarities in the wording of the two provisions. It specifically accepted that both provisions give the court discretion to refuse an application if that court has '*no jurisdiction apart from this section*' and the relief sought is '*inexpedient*'.

It was acknowledged that there was a distinction in the provisions with respect to the definition of *interim relief*, finding that the definition in the BVI SCA was broader than that of the English CJJA. However, this was found to be of no consequence to the present application.

The England and Wales Approach

The English court exercises its discretion by applying a two-stage approach:

1. Whether the facts would justify the relief sought, if the substantive proceedings had been brought before it; and

2. If stage one is answered in the affirmative, the court then considers whether it would be *inexpedient* to grant the relief sought since it has no jurisdiction apart from section 25(2) of the English CJJA.

Under the second leg of the test, in determining whether it is 'inexpedient', the court will consider whether there are connecting factors to the jurisdiction in which the relief is sought, including, the presence of the person or the assets, and will take into consideration whether:[4]

(i) the making of the order will interfere with the management of the case in the primary court, eg where the order is inconsistent with an order in the primary court or overlaps with it;

(ii) it is the policy in the primary jurisdiction not to make worldwide freezing/disclosure orders;

(iii) there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions;

(iv) there is likely to be a potential conflict as to jurisdiction at the time the order is sought, rendering it inappropriate and inexpedient to make a worldwide order;

(v) the court will be making an order which it cannot enforce.

The court may also consider whether the primary court in the substantive proceedings declined to grant the relief sought, and whether the reasons for declining the relief should affect the exercise of its discretion.[5]

Application of the two stage-approach

Adopting the two-stage approach applied in England, the BVI court considered (i) whether the facts warranted the relief sought, if the substantive proceedings had been brought in the BVI; and (ii) if the answer to stage one was affirmative, whether the fact that the court had no jurisdiction apart from section 24A of the BVI SCA made it 'inexpedient' to grant the relief.

The BVI court concluded that it was appropriate to grant the relief sought.

Conclusion

The decision in *Claimant X* provides guidance on how the BVI courts will apply the statutory jurisdiction under section 24A of the BVI SCA in considering an application for interim relief in support of foreign proceedings. This provides welcome clarity in the wake of the demise of the Black Swan jurisdiction.

[4] *Motorola Credit Corporation v Uzan and others (No 2)* [2003] EWCA Civ 752.

[5] *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818.

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