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UPDATE

The Siskina listing after striking a Black Swan

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The Judicial Committee of the Privy Council has held by a majority that, where the High Court of the British Virgin Islands has personal jurisdiction over a party, the Court has the power to grant a freezing order against that party to assist enforcement of a prospective or existing foreign judgment.

The Legal Landscape Prior to the Privy Council Decision

In *The Siskina* [1979] AC 210, the House of Lords considered whether a freezing injunction granted by the English High Court could be served out of the jurisdiction on a foreign defendant under Ord. 11, r. 1 (1) of the then Supreme Court rules which provided that:

'*(1)... service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the court in the following cases... (i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of the failure to do or the doing of that thing); ...*'

The House of Lords held that to come within Ord. 11, r. 1 (1) (i) the injunction sought in the action had to be part of the substantive relief to which the plaintiff's cause of action entitled him; and the thing that it was sought to restrain the foreign defendant from doing in England had to amount to an invasion of some legal or equitable right belonging to the plaintiff in England and enforceable by a final judgment for an injunction.

Subsequently, in *Mercedes Benz AG v Leiduck* [1996] AC 284, the majority of the Board (with Lord Nicholls dissenting) followed the decision of the House of Lords in *The Siskina* in holding that the equivalent provision of the Hong Kong rules permitting service out of the jurisdiction of claims in which an injunction was sought applied only to a final and not an interim injunction. Having reached that conclusion, Lord Mustill (who gave the majority judgment) preferred to express no conclusion on the question whether, if the defendant had been properly served with a writ, the Hong Kong court would have had power to grant a freezing injunction in support of a claim being pursued against him in a foreign court.

However, in his dissenting judgment, Lord Nicholls stated that the law had moved on since *The Siskina*, 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.*' In Lord Nicholls' view, the ability to grant such relief did not depend upon there being a pre-existing cause of action against the non-cause of action defendant (NCAD) provided that the NCAD was otherwise subject to the court's personal or territorial jurisdiction.

Lord Nicholls' dissenting judgment was adopted by the BVI High Court in *Black Swan Investment I.S.A. v Harvest View Limited* (Claim No. BVIHCV 2009/399, 23 March 2010), in which the Court held that the BVI Court had jurisdiction to grant free-standing freezing orders over NCADs located in the BVI where the substantive cause of action was being litigated in a foreign court.

The so-called *Black Swan* jurisdiction was thereafter widely used in the BVI for a number of years until the Eastern Caribbean Court of Appeal held in *Broad Idea International Limited v Convoy Collateral Limited* (Appeal No. BVIHCMAP2019/0026, 29 May 2020), that the BVI Courts had no jurisdiction, absent statutory authority, to grant interlocutory injunctions in aid of litigation in a foreign country, and that *Black Swan* had been wrongly decided.

Whilst an appeal to the Privy Council against the Court of Appeal's decision was pending, the BVI legislature introduced a new section 24A into the Eastern Caribbean Supreme Court (Virgin Islands) Act (which came into force on 7 January 2021), to provide that the High Court may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction, and to allow interim relief to be granted against a NCAD.

The Factual Background

Broad Idea International Ltd (**Broad Idea**) is a BVI company. 50.1% of its shares are owned by Dr Cho, who is resident in Hong Kong. The other 49.9% of its shares are owned by Mr Choi. Collateral Ltd (**CCL**) had brought proceedings in Hong Kong claiming damages and other substantive relief against Dr Cho and other defendants (not including Mr Choi or Broad Idea). In the BVI, CCL applied for freezing orders against Dr Cho and Broad Idea.

An *ex parte* order of the BVI Court granting a freezing injunction against Dr Cho and permission to serve a claim form on him outside the BVI was set aside by the BVI High Court. However, no such permission was required to serve Broad Idea with a claim form as it was located within the jurisdiction. The BVI Court therefore granted a freezing order against it under the *Black Swan* jurisdiction.

The Court of Appeal dismissed CCL's appeal from the decision to set aside the relief against Dr Cho. As mentioned above, the Court of Appeal upheld Broad Idea's appeal against the grant of the freezing order against it.

The Issues Considered by the Privy Council

The two principal issues considered by the Privy Council were:

(1) Whether the BVI Court has the power under the Eastern Caribbean Civil Procedure Rules 2000 (the **CPR**) to authorise service on a defendant outside the jurisdiction of a claim form in which a freezing injunction was the only relief sought (the **Service Out Issue**); and

(2) Where the BVI High Court has personal jurisdiction over a party, whether the Court has power to grant a freezing injunction against a party to assist enforcement through the Court's process of a prospective or existing foreign judgment (the **Jurisdiction Issue**).

The Service Out Issue

The Board was unanimous in its decision on this issue.

The relevant rule in the CPR is in largely similar terms to that considered by the High Court in *The Siskina* and the Board itself in *Mercedes Benz*. The Board was of the view that those decisions should not be disturbed in relation to this issue. To introduce a specific gateway for stand-alone freezing injunctions to be served out of the jurisdiction would require amendment to the CPR (as was done to the English Civil Procedure Rules immediately following *Mercedes*).

It followed that CCL's appeal from the decision of the Court of Appeal that the BVI Court had no power to permit service of a claim form on Dr Cho outside the BVI failed.

The Jurisdiction Issue

The majority of the Board (Lord Leggatt, with whom Lord Briggs, Lord Sales and Lord Hamblen agreed) upheld CCL's appeal in relation to this issue finding that *Black Swan* was correctly decided and that the Court of Appeal had been wrong to conclude that it should be overruled.

The majority provided the following useful summary of the current practice:

'101. In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

(ii) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;

(iii) the respondent holds assets (or … is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

(iv) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

102. Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:

(i) There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.

(ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

(iii) There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that
proceedings will be brought (whether in the domestic court or before another court or tribunal).'

The minority (Sir Geoffrey Vos, with whom Lord Reed and Lord Hodge agreed) disagreed with the approach of the majority for a number of reasons including that:

(1) the great value to the international commercial community of certainty and consistency in the common law;

(2) the reasoning in *The Siskina* had not in fact impeded the development of the common law as it affects the grant of interim injunctions;

(3) different jurisdictions have legislated in different ways to cater for their own perceived commercial requirements. It was clear after *The Siskina* that legislation would be necessary if it were thought desirable to be able to grant freezing injunctions in aid of foreign proceedings or arbitration, and to allow service out of claims for such relief;

(4) more would be required for the court to overturn one of its prior decisions than simply that the court would have decided it differently.

A Pyrrhic victory

Although CCL succeeded on the Jurisdiction Issue, the Board was nevertheless unanimous in its view that it otherwise failed on the facts. In particular, it accepted that: (a) there was no basis for the conclusion that Broad Idea was merely holding assets to which Dr Cho was beneficially entitled; (b) Broad Idea's assets were not amenable to any process of execution to satisfy any judgment that might be obtained against Dr Cho in Hong Kong; and (c) there was no basis for finding any risk of dissipation.

The Board's unanimous conclusion on the facts was another reason why the minority considered that it was inappropriate for the majority to have proceeded to decide the Jurisdiction Issue.

Conclusion

The BVI Courts now have both statutory and equitable jurisdiction to grant free-standing injunctions in support of foreign proceedings against parties against who it has personal jurisdiction. However, it remains the case that foreign defendants will not be able to be brought within the jurisdiction of the BVI Courts for such purposes until the CPR is amended to make provision for service out of claim forms seeking only interlocutory injunctions. Also, as the Privy Council's decision in *Broad Idea* illustrates, it remains vital that

an applicant for such relief be able to show how they will be able to enforce the foreign judgment against the NCAD or its assets, and be able to establish a risk of dissipation by solid evidence.

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