

Black Swan flies and The Siskina lists

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The Privy Council today (4 October 2021) handed down its much anticipated judgment in *Broad Idea*. [1] By a majority, the Board:

1. Upheld (albeit obiter) the *Black Swan* jurisdiction, which, since the original judgment by Bannister J in 2010, [2] had been a vital tool [3] in aid of judgment and award enforcement in the BVI, permitting freezing injunctions against BVI respondents to foreign proceedings in aid of potential future enforcement.
2. Agreed that, on the rules and law as it then was, the Court did not have jurisdiction to grant service out of a claim seeking only a freezing injunction.

In confirming the *Black Swan* jurisdiction, the Board curtailed the power of the decision in *The Siskina*, although in refusing to permit service out of a claim only for a freezing injunction the Board expressly refused to sink *The Siskina*, leaving it merely listing:

"It is necessary to dispel the residual uncertainty emanating from *The Siskina* and to make it clear that the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound. The shades of *The Siskina* have haunted this area of the law for far too long and they should now finally be laid to rest." Per Lord Leggatt at paragraph 120.

The decision in *Broad Idea* contains a useful summary of the jurisdiction to grant freezing orders against non-cause of action respondents to foreign proceedings:

"There is no difference in principle between a case where a freezing injunction is sought in anticipation of (i) a future judgment of a BVI court in substantive proceedings brought in the BVI, (ii) a future judgment of a foreign court enforceable by the BVI court on registration in the BVI, and (iii) a future judgment of a BVI court obtained in an action brought to enforce a foreign judgment. In each case the injunction, if granted, is directed towards the enforcement of obligations to satisfy judgments which do not yet exist. In each

case the question is whether there is a sufficient likelihood that a judgment enforceable through the process of the BVI court will be obtained, and a sufficient risk that without a freezing injunction execution of the judgment will be thwarted, to justify the grant of relief." Per Lord Leggatt at paragraph 95.

Dispelling some commonly asserted propositions, Lord Leggatt went on to say (at paragraph 102):

"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)."

On the principle of "money box" injunctions, freezing the assets held by the BVI company when it is a non-cause of action defendant, Lord Leggatt confirmed that such injunctions can be permissible:

"There seems no reason in principle why the expanded form of the enforcement principle should not be applied in an appropriate case to assets held by a "non-cause of action defendant", as it was in *Gilfanov v Polyakov*" at paragraph 111.

Although the substantive law of the BVI has already been amended to provide a statutory basis for free standing injunctive relief (similar to section 25 of the Civil Jurisdiction and Judgments Act 1982 in England), and on the facts of this case the decision in respect of *Black Swan* was obiter, it is nevertheless a positive endorsement of the practice that had long been established in the BVI.

[1] *Broad Idea International Ltd (Respondent) v Convoy Collateral Ltd (Appellant) (British Virgin Islands) Convoy Collateral Ltd (Appellant) v Cho Kwai Chee (also known as Cho Kwai Chee Roy) (Respondent) (British Virgin Islands)* [2021] UKPC 24

[2] *Black Swan Investment ISA v Harvest View Ltd* (BVIHCV 2009/399) (unreported) 23 March 2010

[3] Since the Court of Appeal's decision in Broad Idea BVI legislation has been amended to confer a statutory basis for granting freezing injunctions in aid of foreign proceedings.

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