Black Swan flies and The Siskina lists: Privy Council upholds BVI freestanding freezing injunctions

Insights - 28/04/2022

On 4 October 2021 the Privy Council handed down its much anticipated judgment in Broad Idea.[1] By a 4:3 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.; and
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.

Brief background

Dr. Cho is a shareholder and director of Broad Idea, a company incorporated in the BVI. The sole asset of Broad Idea is its 18.85% shareholding in Town Health International Medical Group Ltd ("Town Health").

In May 2017 an activist investor, David Webb, published a report concerning the so-called "Enigma Network" of companies. The report alleged extensive cross-shareholdings in a network of 50 Hong Kong listed companies including Town Health and Convoy Global Holdings Ltd ("Convoy"). Subsequently Dr Cho was removed as a director of Convoy in August 2018 and resigned as a director of Town Health in June 2018. The Independent Commission Against Corruption in Hong Kong brought criminal charges against Dr Cho in respect of his role in Convoy but he was acquitted on all charges.

In February 2018, Convoy applied to the BVI court for freezing orders against Broad Idea and Dr. Cho to support anticipated proceedings against Dr Cho in Hong Kong. Convoy also sought permission to serve Dr. Cho out of the jurisdiction. Following a without notice hearing the BVI

court granted freezing orders against Dr Cho and Broad Idea and gave permission to serve Dr. Cho out of the jurisdiction. Convoy commenced proceedings against Dr. Cho (but not Broad Idea) in Hong Kong shortly after. The freezing orders issued against Dr. Cho and permission to serve him out of the jurisdiction were subsequently set aside in April 2019 on the basis that the court did not have jurisdiction to make them. In the meantime, Convoy had made a further application for a freezing order against Broad Idea to support the Hong Kong proceedings against Dr. Cho.

In July 2019, the freezing order against Broad Idea was continued indefinitely. Broad Idea's appeal against the judge's decision was allowed by the Court of Appeal, and Convoy appealed to the Privy Council.

An entirely obiter judgment – service out of the jurisdiction

Perhaps unsurprisingly, the Board unanimously held that the injunction gateway in EC CPR Part 7 did not permit service out of a claim for a freezing injunction alone on Dr Cho. The Board felt that there was no good reason to depart from its previous decision in *Mercedes-Benz AG v Leiduck* [1996] AC 284.

Sir Geoffrey Vos, who closely analysed the EC CPR provisions in his judgment, concluded (at [196]) that the whole purpose of Part 7 "*is that service out is in respect of claim forms and statements of claim. The application must be supported by an affidavit stating that the claimant has a "claim" with a realistic prospect of success, to which the defendant can serve a defence*." He continued by stating that the injunction gateway relied upon by the Appellant "*is referring to a substantive claim and a substantive claim form "for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction*".

Arguably, this conclusion was to be expected. Since the Board's ruling in *Mercedes* a number of other Commonwealth jurisdictions have legislated to allow for the grant of free-standing *Mareva* injunctions. Unfortunately for the Appellants the BVI had not - but now has. The rules in respect of service out are also currently being reviewed.

The result of the Board's finding in relation to service meant that the second issue in the appeal became inconsequential. The main thrust of Lord Leggatt's majority judgment, and the seemingly radical conclusion that it reached, is therefore entirely obiter. Though it still provides useful guidance, this will no doubt dampen the effectiveness of the decision in future cases by rendering it non-binding on lower courts.

The "power issue"

The remaining issue was whether the Court had the power to grant a freezing injunction against BVI respondents to foreign proceedings in aid of potential future enforcement (the Black Swan jurisdiction).

Central to the majority's reasoning upholding the Black Swan jurisdiction was the enforcement principle. This sets freezing injunctions apart from other interlocutory injunctions. The former are used to facilitate the enforcement of a future judgment while the latter are ancillary to a cause of action as they provide substantive relief on a temporary basis:

> "*the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment*". (Lord Leggett at [85])

Accordingly, the majority of the Board held that there is no reason to link the granting of a freezing injunction to the existence of a cause of action.

Moreover, the enforcement principle can be used to justify the court's increasingly broad jurisdiction to grant freezing injunctions against third parties against whom no claim for substantive relief is brought. The key test the court must consider is "*whether the third party is in possession or control of an asset against which a judgment could be executed*." (at [88]). If they are, then an injunction will be granted so that the claimant's claim will not be ultimately frustrated.

The Board also found a statutory basis for the power to grant a freezing injunction when no substantive relief is claimed in the BVI. The Board considered that the wide language of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969 s.24(1), which gave the High Court power to grant an injunction "*in all cases in which it appears … to be just or convenient*", placed no limit on the court's equitable jurisdiction. The question in future will therefore be whether the court should choose to exercise this broad jurisdiction, rather than whether it has the power to do so.

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. As such, the judgment will almost certainly be viewed by practitioners as guidance to be followed in future disputes:

"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.

Conclusion

While obiter, the Board's majority decision in this case is likely to have continued relevance. It is difficult not to appreciate the commercial logic of the ruling, particularly as this was emphasised by Lord Leggatt and the Court of Appeal had recognised its conclusions in light of The Siskina to be "*undesirable ... in modern day international commerce*" (at [3]). The world is a different place to the 1970s. The ease and speed with which assets can be moved around the world, the growth of globalised economic activity leading to litigation and arbitration in multiple jurisdictions, and the development of offshore companies, means that the Black Swan jurisdiction is a vital weapon in the Courts' armoury.

In addition, the judgment brings the BVI in the direction taken by other common law jurisdictions such as Australia by finding a principled basis for the granting of freezing injunctions, rooted in the enforcement principle (see *Cardile v Led Builders Pty Ltd* (1999) 198 CLR 380). In this sense Broad Idea is not as radical as it may first appear.

That said, this is only the beginning and the true impact of Broad Idea is yet to be felt.

This briefing first appeared in New Law Journal.

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[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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