THE BLACK SWAN FLIES AGAIN: CURRENT STATUS OF INTERIM STANDALONE RELIEF IN SUPPORT OF FOREIGN PROCEEDINGS IN THE BVI

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David Harby, Partner and head of Collas Crill's Dispute Resolution team in the British Virgin Islands discusses the current status of interim standalone relief in support of foreign proceedings in the Territory following the *Broad Idea* case and the introduction of the Eastern Caribbean Supreme Court (Virgin Islands) Amendment Act, 2020.

Introduction

The ability to obtain standalone relief in support of litigation which has been commenced abroad is a useful weapon in an insolvency practitioner's armory to prevent the dissipation of assets that have been transferred to, or "hidden" in, a third-party company in an attempt to defeat creditors.

For the last 10 years it was assumed that the British Virgin Islands' (the **BVI**) Commercial Court had the power to grant such orders as a matter of common law. However, last year, in *Broad Idea International Limited v Convoy Collateral Limited*[1] the Eastern Caribbean Court of Appeal (the **Court of Appeal**) decided otherwise. This left claimants in a difficult position. The potential impact of this judgment will be brought home to the reader when one considers that there are over 400,000 companies incorporated in the BVI, the majority of which are holding companies used to hold assets for parties outside the jurisdiction.

This article seeks to set out the background to the decision in *Broad Idea* and the recent introduction of legislation to place so-called Black Swan relief on a statutory footing.

Broad Idea

In *Broad Idea* the Court of Appeal was asked to consider (amongst other matters) whether the BVI Commercial Court had jurisdiction to grant a freezing order in support of foreign proceedings in circumstances where no cause of action lay against the defendant, *Broad Idea*, in the BVI and nor had any substantive proceedings been commenced against it in any other jurisdiction.

The claimant, Convoy, relied on the decision of Bannister, J., in *Black Swan Investment ISA v Harvest View Limited et al[2]* where the Commercial Court considered the dicta of Lord Diplock in the English authority, *The Siskina[3]*, which is often cited as the starting point in any discussion on the Commercial Court's power to grant such injunctions. In that case, Lord Diplock considered the English Court's authority to grant an interlocutory injunction pursuant to s.45(1) of the UK Supreme Court of Judicature (Consolidation) Act 1925, and held that:

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action (…)."

In *Broad Idea*, Bannister, J., looked at the comments of Lord Mustill in the decision of the Privy Council in *Mercedes-Benz AG v Leiduck[4]* (which was later echoed by Lord Scott in the English House of Lords in *Fourie v Le Roux and Others[5]*). In so doing Bannister held that:

"In Mercedes Benz, Lord Mustill, giving the opinion of the majority, [held] that in the absence of an equivalent to section 25 of the UK Civil Jurisdiction and Judgments Act 1982 ("Section 25") the Hong Kong court had no jurisdiction to grant a freezing order against a foreign defendant not subject to the jurisdiction of the Hong Kong Court in aid of proceedings being prosecuted against that defendant in Monaco, left open the question whether such relief could have been granted had the defendant been present in Hong Kong. But he indicated that, where the proposed defendant was already subject to the territorial jurisdiction of the court, the approach of Lord Nicholls, in his dissenting judgment, might, if the question fell to be decided in a future case, prevail. But that is not the same as ruling that it would, so that the question (…) was left open in Mercedes Benz"[6]

The learned Judge went on to hold that:

"In Fourie v Le Roux Lord Scott held that the passage from Lord Browne-Wilkinson's speech in Channel Tunnel (…) taken together with other authorities (…) showed that the English court does have jurisdiction, in the strict sense, to make an order in aid of a prospective judgment to be obtained in foreign proceedings, provided that the person restrained is subject to the in personam jurisdiction of the English court (…) He went on to say that in England the argument would now fail because of the passage of section 25. But he left open the question what would be the answer today in the absence of a provision equivalent to section 25."[7]

Bannister, J., went on to find that, consequently, the BVI Court had jurisdiction to grant a freezing order against two defendant BVI companies, against whom no cause of action was raised, nor any substantive proceedings pursued in aid of foreign proceedings.[8]

In *Broad Idea*, the Court of Appeal noted that Bannister, J., had relied on the dissenting judgment of Lord Nicholls in Mercedes Benz, which he *"curiously, preferred to the majority judgment."[9]* The Court of Appeal acknowledged, however, that the learned Judge had taken into account the policy reasons behind the Black Swan jurisdiction. In particular Bannister, J., held that: *"The business of companies registered within such jurisdictions [as the BVI] is invariably transacted abroad and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets in the jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors*

were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings (…)"[10]

In *Broad Idea*, the Claimant also relied on the Court of Appeal's decision in *Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited et al[11]* which it argued had upheld the Black Swan jurisdiction. However the Court of Appeal found that:

"Yukos did not involve a direct challenge (as is the case here) to the Black Swan jurisdiction, but simply dealt with the issue of whether the claimant may obtain a foreign judgment which may be enforceable by whatever means against the local assets owned or controlled by the defendant (…) in Yukos, the existence of the Black Swan jurisdiction was merely assumed to ventilate the central issue, Yukos therefore ought not to be read as upholding or confirming the jurisdiction. In other words, as the source of the Black Swan jurisdiction was not in issue, any pronouncements in Yukos affirming its existence can only be regarded as obiter."[12]

The Court of Appeal concluded that:

"as undesirable as it may be perceived in modern day international commerce(…) the Courts of the BVI (…) have no subject matter jurisdiction to grant a free standing interlocutory injunction against [the defendant] in aid of foreign proceeding, there being no statutory basis for the exercise of such a jurisdiction. It is for the Legislature of the BVI to step in and clothe the court with such authority."[13]

Appeal to the Privy Council and new legislation

Convoy appealed the decision of the Court of Appeal to the Privy Council, which, at the time of writing, was due to hear argument on the matter on 16 and 17 February 2021. In the interim, the BVI Legislature has acted commendably quickly to fill the lacuna and on 7 January 2021, the Eastern Caribbean Supreme Court (Virgin Islands) Amendment Act, 2020 ("the **Act**") came into force. This introduces a new s.24A into the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80.

Section 24A(1) provides that: *"The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction." "Interim relief" is defined in s.24(A)(4) as including "any relief which the High Court or a judge thereof has power to grant in proceedings relating to matters within its jurisdiction, as well as, an order against a non-cause of action against a defendant" (sic). However, the High Court retains the power to refuse to grant such relief where, pursuant to 24(1)(2) "it is inexpedient in the circumstances".* It remains to be seen how "inexpedient" will be interpreted but this appears to give the Court very broad discretion.

The placing of the Black Swan jurisdiction on a statutory basis is likely to be welcomed by claimants and, in particular, insolvency practitioners involved in litigation abroad who need to seek urgent interim relief against BVI companies, against which there may not be a cause of action, but which hold relevant assets that may otherwise be dissipated.

[1] *BVIHCMAP2019/0026*

[2] *BVIHCV2009/0399 (delivered 23 March 2010, unreported)*

[3] *Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera SA ("the Siskina") [1979] AC 210 at p.256*

[4] *[1995] 3 All ER 929*

[5] *[2007] 1 All ER 1087*

[6] *At para [8] of Black Swan*

[7] *At para [8] of Black Swan*

[8] *The Court of Appeal noted that the facts of Black Swan were on "all fours" with those in Broad Idea (para [27])*

[9] *Para [30]*

[10] *Para [31]*

[11] *HCVAP2010/028 (delivered 26 September 2011, unreported)*

[12] *Para [48]*

[13] *Para [50]*

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