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BVI Court of Appeal Overturns Black Swan

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Summary

In a judgment handed down on Friday 29 May 2020 in *Broad Idea International Limited v Convoy Collateral Limited* (BVICMAP 2019/0026), the Eastern Caribbean Court of Appeal (Pereira CJ, Blenman, Michel JAA) has ruled that the BVI Court cannot grant a free standing freezing injunction against a BVI company where that company is not a party to substantive proceedings either in the BVI or elsewhere. In so deciding, the Court of Appeal has determined that the case of *Black Swan Investments ISA v Harvest View Limited* (Claim No BVIHCV 2009/399) ("Black Swan") was wrongly decided. The Court of Appeal also ruled that the assets of a BVI company are not, without more, to be considered the assets of one of its shareholders such that the company's assets may be directly available for execution of a foreign judgment against that shareholder so as to justify their being made subject to a freezing injunction.

Although the judgment of the Court of Appeal overturns 10 years of development of the Black Swan jurisdiction in the BVI, it confirms the integrity and robustness of the judicial process, the rule of law and the doctrine of precedent. It disposes unambiguously of any argument that there is some jurisdiction of uncertain ambit to obtain "Black Swan relief" and it places the onus clearly on the Legislature of the BVI to decide whether the BVI Courts are to have the power to assist foreign courts directly, and if so which foreign courts, in what specific circumstances and using what procedural mechanisms, something that was lacking from the Black Swan line of authority.

The Facts

The appellant, Broad Idea International Limited ("Broad Idea") is a company incorporated in the BVI. Its shareholders are Dr Cho Kwai Chee ("Dr Cho") and Mr Francis Choi Chee Ming who hold 50.1% and 49.9% of its shares respectively. Broad Idea's sole known asset of value is its 18.85% shareholding in Town Health International Medical Group Ltd.

The respondent, Convoy Collateral Limited ("Convoy"), is a company incorporated in Hong Kong. In February 2018, Convoy commenced proceedings against Dr Cho in Hong Kong claiming damages and other relief for breach of fiduciary and other duties.

By its application to the Commercial Court in the BVI, Convoy sought to freeze Dr Cho and Broad Idea's assets and to restrain Broad Idea from registering certain dealings with its shares. Chivers J [Ag.] granted Convoy's application.

On 25 February 2018, Convoy applied for a continuation of the freezing order against Broad Idea and Dr Cho. Subsequently, Dr Cho made an application seeking to set aside the order of Chivers J [Ag.], which was heard by Adderley J. In the interim, and without any further pursuit of the February application in respect of Broad Idea, Convoy made a further application seeking a freezing order against Broad Idea in support of the Hong Kong proceedings against Dr Cho. In the meantime, the learned judge granted Dr Cho's application and discharged the freezing order against him.

The freezing order against Dr. Cho having been discharged, the learned judge heard Convoy's further application for a freezing order against Broad Idea.

Grounds of the Appeal

Broad Idea argued that as Convoy had made no substantive claim against it in the BVI, the court had no jurisdiction to grant a freezing order against it. The judge nonetheless impliedly concluded that he had jurisdiction to make an order and continued the freezing order against Broad Idea indefinitely, having found that the Chabra jurisdiction applied in the circumstances, that Broad Idea was Dr Cho's "moneybox" and that Broad Idea's assets were therefore at risk of dissipation.

Broad Idea appealed. The key issues for determination by the Court of Appeal were as follows:

(i) Whether the judge had the power under section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap 80) ("the Act") to grant a freezing order in circumstances where Convoy had not raised any substantive cause of action and had not pursued any substantive proceedings against Broad Idea in the BVI or Hong Kong or anywhere else in the world, and whether in any event any such power extended to granting a freezing order in support of foreign proceedings to which Broad Idea was not a party (the "Jurisdiction Issue"); and

(ii) if the judge had jurisdiction, whether he properly exercised his discretion to grant the freezing order on the basis of his findings of a risk of dissipation and that the Chabra jurisdiction applied (the "Discretion Issue").

The Jurisdiction Issue

As the Court of Appeal noted, there was no dispute that the BVI court had personal or territorial jurisdiction over Broad Idea, since Broad Idea is a company incorporated in the BVI. The appeal, however, was concerned with whether the Court had subject matter jurisdiction to grant, in aid of foreign proceedings, a freezing order against a person resident in the BVI against whom no substantive proceedings had been pursued anywhere in the world.

Broad Idea argued that the power given to the Court under section 24 of the Act does not extend to protecting the process of foreign courts. It is notable that the BVI Legislature expressly enacted such powers in relation to arbitrations by section 43 of the Arbitration Act 2013 but did not do so relation to foreign proceedings, as (for example) England and Wales did by section 25 of the (English) Civil Jurisdiction and Judgments Act 1982, and the Cayman Islands enacted by section 11A of the Grand Court Law (2015 Revision).

The judgment of Bannister J in Black Swan relied upon the power to grant injunctions under section 24 of the Act. Black Swan found that this power could extend to injunctions against a party within the territorial jurisdiction of the BVI in support of claims overseas, based on the reasoning in a dissenting judgment of Lord Nicholls in *Mercedes Benz*, notwithstanding that that dissenting judgment has not subsequently been followed at Privy Council or Supreme Court level. Broad Idea argued that, as a matter of precedent, it was not open to Bannister J to choose to prefer a dissenting judgment and should have been guided in that approach

by the overwhelming weight of authority for the reasoning of the majority in that case.

The Court of Appeal noted the "*long line of judicial pronouncements*" in relation to the High Court's jurisdiction to grant interlocutory injunctive relief and summarised the position as follows:

> *"… the authorities… all support the proposition that, for the court's jurisdiction under section 24 of the Supreme Court Act to be properly invoked, there must be an enforceable cause of action against a defendant which the court has jurisdiction to enforce by final judgment, and that cause of action must be raised in substantive proceedings or an undertaking must be given to commence such proceedings."*

No allegations had been made against Broad Idea in any claim made by Convoy, as Convoy had not filed any claim against Broad Idea anywhere in the world. Convoy sought to freeze Broad Idea's assets allegedly as a means of safeguarding the enforcement of any money judgment that it might obtain in the future against Dr Cho in the Hong Kong proceedings. As Convoy had no cause of action (nor had it sought to assert one) against Broad Idea itself, the Court of Appeal found that the judge at first instance had no jurisdiction to grant a freezing order against Broad Idea. After referring to *Willers v Joyce & Anor* to confirm that the doctrine of precedent is a fundamental principle of a common law legal system, the Court of Appeal held that the decision in Black Swan does not provide support for free standing interlocutory injunctions in aid of foreign proceedings. In so far as the judge relied on a dissenting judgment in *Mercedes Benz*, this was not a course of action available to him. As the Court in the BVI has no jurisdiction to grant free standing interlocutory injunctions in aid of foreign proceedings, Black Swan was wrongly decided.

The Chief Justice noted that it may be considered "*undesirable*" that the BVI Courts (despite having *in personam* jurisdiction over Broad Idea) nonetheless had no "*subject matter jurisdiction*" to grant a freestanding interlocutory injunction against it in aid of foreign proceedings, however, it was for the "*Legislature of the BVI to step in and clothe the Court with such authority.*"

The Exercise Issue

The Court at first instance, in arriving at the conclusion that it was appropriate to grant a freezing order against Broad Idea, had concluded that Broad Idea qualified as a defendant pursuant to the principles emanating from *TSB Private Bank International SA v Chabra*, which is authority for the proposition that a claimant could obtain an injunction against a third party if that claimant could establish a good arguable case that assets apparently owned by a third party were in fact beneficially owned by the defendant against whom there was a cause of action.

It was undisputed that Convoy had raised no cause of action against Dr Cho in the BVI. The Court of Appeal therefore held that it was not open to the judge at first instance to consider Broad Idea as a valid NCAD in circumstances where there is no cause of action raised against Dr Cho in the BVI and that it followed that the BVI court was not seized of any substantive proceedings involving a primary defendant to which Broad Idea could have been "added" as a Chabra defendant.

In respect of the alleged risk of dissipation, although necessarily fact specific, the Court of Appeal noted that a recent application to the Hong Kong Court for a freezing order against Dr Cho had been dismissed, the Hong Kong Court having found that no risk of dissipation had been established. The Court of Appeal recognised that it could hardly be arguable that a freezing order should be maintained against Broad Idea based, as it must be, on an underlying risk of dissipation on the part of the *real defendant Dr Cho*, which had been found in the primary jurisdiction not to have been made out on the evidence. The Court of Appeal noted that this provided yet another reason for the refusal of such relief (were there jurisdiction to grant it).

Finally, the Court considered whether any judgment obtained by Convoy against Dr Cho would be enforceable against Broad

Idea or its assets. The Court referred to the decision of the Supreme Court of the United Kingdom in *Prest v Petrodel Resources Ltd* and noted that the only circumstances in which the assets of a company can be looked to in satisfaction of a claim against a defendant are if those assets are held by the company merely as a nominee or beneficially for the defendant. The Court noted that (hypothetically) if Convoy were awarded a money judgment against Dr Cho in Hong Kong, the enforcement of such judgment could "*at the highest…. only be in respect of Dr Cho's shares in Broad Idea*."

Endorsing the observations of Kawaley JA in *Yukos*, the Chief Justice acknowledged that the notion of separate corporate legal personality is a "*fundamental feature of English company law and is the cornerstone of the corporate commercial landscape in the BVI*" and that the grant of freezing orders in cases where there is no possibility of a judgment being enforced against the local defendant would potentially render the company's separate corporate legal personality meaningless.

Conclusion

The Chief Justice of the Court of Appeal noted that it may be considered "*undesirable*" that the BVI Courts (despite having in personam jurisdiction over Broad Idea) nonetheless had no "*subject matter jurisdiction*" to grant a freestanding interlocutory injunction against it in aid of foreign proceedings. The Chief Justice considered, however, that it was for the "*Legislature of the BVI to step in and clothe the Court with such authority.*"

The BVI is a robust and flexible jurisdiction with a solid track record of implementing legislation to meet the needs of international business world. It is anticipated that BVI legislature will indeed take note of the judgment of the Court of Appeal and take steps to implement specific legislation to provide a statutory basis to grant injunctions in aid of foreign proceedings.

Walkers Partners Murray Laing and Rosalind Nicholson, along with Associate Catherine O'Connell, acted for the successful Appellant, Broad Idea International Limited. Walkers instructed Richard Morgan QC of Maitland Chambers.

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