

Death of a Black Swan (but is there a ghost?)

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Ten years ago, in a move that was heralded across the common law world, the BVI Commercial Court broke new ground by ruling that claimants could seek freestanding freezing injunctions in the BVI in support of foreign proceedings, without the need to bring a substantive claim in the BVI. That became known as the Black Swan jurisdiction, named after the case in which Justice Edward Bannister made his landmark ruling.

The Black Swan injunction has been a key feature of the BVI's international asset tracing armoury ever since, but a recent decision of the Eastern Caribbean Court of Appeal has found that Justice Bannister's decision in Black Swan was wrongly decided. As a result, absent intervention by the Privy Council or legislative change, the Black Swan injunction is no longer available in the BVI.

This briefing summarises the Eastern Caribbean Court of Appeal's recent decision and explains that this development does not completely close the door to obtaining injunctions in support of foreign proceedings in the BVI.

Analysis

In its judgment in *Broad Idea International Limited v Convoy Collateral Limited* BVIHCMAP2019/0026 ("*Broad Idea*") handed down on 29 May 2020, the Eastern Caribbean Court of Appeal held that:

I. the BVI Court's inherent jurisdiction to grant a freestanding interlocutory injunction against a BVI company cannot be

invoked where the BVI company is not a party to substantive proceedings (or where an undertaking has not been given to the court to commence substantive proceedings against the BVI company) applying the principles set down in *Siskina (owners of cargo lately laden on board) and other v Distos Companies Naviera SA* [1979] AC 210; and

II. the statutory provision which provides the BVI Court jurisdiction to grant interlocutory injunctions (section 24 of the Supreme Court Act) does not, in the absence of enabling legislation, give the BVI Court jurisdiction to grant a freestanding interlocutory injunction in support of foreign proceedings.

As to (i), the Court of Appeal found that where the Claimant sought to rely on a procedural rule which concerns seeking a remedy in relation to proceedings that are, or will be taking place in another jurisdiction, it was unable to do so where there was no enforceable cause of action against the BVI company. Section 24 of the Supreme Court Act establishes the BVI Court's jurisdiction to grant freezing orders based on there being a recognised cause of action which would entitle the applicant to relief against the respondent. Where there was no cause of action, there could be no substantive proceedings, or even the possibility of proceedings, against Broad Idea and therefore there existed no jurisdiction for the BVI court to grant an interlocutory injunction.

As to (ii), it was argued by Convoy Collateral that the BVI court in any event had jurisdiction to grant a freezing order on the

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basis of the decision in *Black Swan*, a case in which a freezing order was obtained against two BVI companies, in aid of fraud proceedings in South Africa. In *Black Swan*, the BVI companies were not parties to the South African proceedings and no substantive proceedings were filed in the BVI. The Court of Appeal in *Broad Idea* considered that *Black Swan* was on all fours with the present appeal and fell to be reconsidered in light of the appeal. The Court of Appeal found that *Black Swan* had been wrongly decided and should be disapproved. Justice Bannister, the judge in *Black Swan* had improperly followed the dissenting judgment of Lord Nicholls in the case of *Mercedes Benz A.G. v Leiduck* [1995] 3 All ER 929, finding that there were sound policy decisions for the BVI Court to fill a lacuna in the law. Justice Bannister found that in the absence of a BVI statutory provision equivalent to section 25 of the UK's Civil Jurisdiction and Judgments Act 1982. He (rightly) believed that it would be undesirable and detrimental to the reputation of the BVI as an international financial centre if potential foreign judgment creditors were denied resort to assets in the BVI without commencing substantive proceedings which in all probability could not be served abroad.

Whilst recognising the policy decisions as espoused in *Black Swan*, the Court of Appeal found that it was not open to Justice Bannister to adopt and follow the minority dissenting judgment in *Mercedes Benz* when the majority judgment clearly contained the *ratio decidendi*, requiring there to exist an underlying cause of action pursued in substantive proceedings before the court can grant interim injunctive relief.

The Court of Appeal considered the territorial effect of section 24 of the BVI's Supreme Court Act and found that it did not extend to granting injunctions in support of foreign proceedings. The Court of Appeal noted that the BVI legislature should consider enacting legislation to give the BVI court the necessary jurisdiction, but that in the absence of such enabling legislation, the BVI Court does not have jurisdiction to grant an interlocutory injunction in support of foreign proceedings (*Black Swan* disapproved).

Consequences of the decision

The current position in the BVI is therefore that the *Black Swan* approach to injunctions in aid of foreign proceedings, which has been used to great effect in the BVI for 10 years, is no longer available.

It seems likely that the Court of Appeal's decision will be appealed to the Privy Council for final determination, and it may be that the BVI legislature introduces legislative reform in due course to fill the lacuna identified by Justice Bannister, but the decision in *Convoy Collateral* will undoubtedly present difficulties for claimants seeking to invoke the assistance of the BVI courts in support of foreign proceedings. Carey Olsen is already engaged in matters where clients are looking to challenge the continuation of existing *Black Swan* injunctions,

and so it appears that the *Convoy Collateral* decision is already making waves in the BVI and beyond.

In the meantime, the ghost of *Black Swan* may live on, albeit in a different form. Injunctive relief (and other ancillary relief) in support of foreign arbitration proceedings is available under the BVI's arbitration legislation. Moreover, injunctive relief in support of foreign court proceedings may still be possible in the BVI in appropriate limited circumstances where the target BVI company is a respondent to substantive proceedings and appropriate steps are taken to engage the BVI's jurisdiction.

For further information or to discuss a specific situation, please contact your usual Carey Olsen contact.

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