

Free standing relief: Black Swan orders

It has been almost 3 years since the substantial change to BVI law, brought about by the *Black Swan* case. Phillip Kite and Claire Robey set out where BVI law now stands in this important area.

Prior to 2010 freezing injunctions in the British Virgin Islands were only available ancillary to a substantive domestic cause of action against the respondent. It was not possible to seek an injunction ancillary to foreign proceedings. This was a result of a restrictive interpretation of Lord Diplock's speech in *The Siskina*.¹ In that case, the House of Lords was deciding a case where the defendant was not within the court's *in personam* jurisdiction and it was therefore a case concerning whether an injunction could form the basis for the grant of service outside of the jurisdiction. The English courts have never had to decide in the years since *The Siskina* whether it had jurisdiction to grant a freezing injunction against a defendant within the territorial jurisdiction in aid of foreign proceedings. This was due to the passing of (the English) section 25 of the Civil Jurisdiction and Judgments Act 1982 which gives the court express power to make orders in aid of foreign proceedings.

The restrictive British Virgin Islands approach was overturned by the High Court, Commercial Division in *Black Swan Investment ISA v Harvest View Limited*.² There the Commercial Court held that it was within its discretion to grant a stand alone freezing injunction in support of foreign proceedings where the respondent was within the *in personam* jurisdiction of the British Virgin Islands court.³ The court followed the English decision of *Channel Tunnel Group v Balfour Beatty Ltd*⁴ and held that *The Siskina*⁵ did not prevent a court from granting an interlocutory injunction ancillary to a claim for substantive relief to be granted by a foreign court or arbitral body. In *Channel Tunnel Group v Balfour Beatty Ltd* Lord Mustill held that: '... the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a

¹ [1979] AC 210

² BVI HCV (Com) 2009/399. This is in line with the modern decisions in other parts of the common law world, see *Solvalub Limited v Match Investment* 1996 JLR 361, a decision of the Jersey Court of Appeal.

³ Although not discussed in *Black Swan Investment ISA v Harvest View Limited* it is of note that the old equitable remedies of a Bill of discovery, a Bill to perpetuate testimony, and a Bill to take testimony *de bene esse* pending a suit (Story, *Commentaries on Equity Jurisprudence* 13th ed 1886 para [1480] ff) provide examples of remedies being available in Chancery in aid of proceedings in another court before the other court has heard a suit.

⁴ [1993] AC 334

⁵ [1979] AC 210

final order whether to be granted by the English court or by some other court or arbitral body’.

Since there was no reason in principle why a claimant could not enforce a foreign money judgment in the British Virgin Islands courts, there was no logical reason why he should not be able to make a claim for relief which was ancillary to a foreign award or judgment which would lead to a money judgment.

It is particularly important to note that the injunction was in fact granted against a third party to the proceedings: the respondents were two BVI companies wholly owned by the wrongdoer who was being sued in South Africa. It was in fact the assets held by those two companies which were frozen, on the basis that a South African judgment could potentially be brought to the BVI and enforced against those assets by reason of the wrongdoer’s sole beneficial ownership of the respondent companies.

Subsequently, in *Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited*⁶ the Court of Appeal has approved the decision in *Black Swan Investment ISA v Harvest View Limited*.⁷ The Court of Appeal held that the following principles apply to the grant of *Black Swan* orders:

- a. the jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in the aid of either relief the applicant is likely to obtain from the local court or from a competent foreign court;
- b. the relief the applicant is likely to obtain from a foreign court must lead to a foreign judgment which may be enforceable by whatever means against British Virgin Islands assets owned or controlled by the defendant;⁸
- c. in appropriate cases, interim relief might be granted to an applicant in support of a foreign claim against third parties to the foreign proceedings who are resident in the British Virgin Islands. However, it is difficult to envisage circumstances in which such relief would be available;⁹
- d. a failure to seek equivalent injunctive relief in the foreign proceedings is a discretionary factor which mitigates against relief being granted. Ordinarily one would expect a freezing order to be obtained initially in the main litigation court with a duplicative application in satellite proceedings - the satellite court’s role is to assist the principal court by making an order designed to ensure that any judgment entered by that court would not be rendered nugatory.¹⁰

⁶ HCVAP 2010/028

⁷ BVI HCV (Com) 2009/399. This is in line with the modern decisions in other parts of the common law world, see *Solvalub Limited v Match Investment* 1996 JLR 361, a decision of the Jersey Court of Appeal.

⁸ HCVAP 2010/028, at [147]

⁹ HCVAP 2010/028, at [149]

¹⁰ *Ibid.*, at [160]

The BVI Commercial Court and Court of Appeal have therefore given very helpful guidance in this vital area for claimants seeking to freeze assets. However, the saying “each case depends on its own facts”, is more true than ever, especially in this area. There are cases which are presently going through the courts which might give further guidance and Harneys will keep you up to date on any new developments.

Further Information

The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

For more information on the subject please contact Phillip Kite (phillip.kite@harneys.com) or your usual Harneys contact.

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