

A Black Swan Event: The Privy Council Clarifies the Law on Freezing Injunctions

On 4 October 2021, a seven-member panel of the Privy Council (the "Board") issued its judgment in *Broad Idea v Convoy Collateral* [2021] UKPC 24, which considered the overruling by the Court of Appeal of the jurisdiction established in the case of *Black Swan Investment ISA v Harvest View Ltd*¹ that allowed litigants to bring applications in the British Virgin Islands ("BVI") for freestanding injunctive relief in support of foreign proceedings.

By a 4:3 majority, the Board affirmed the *Black Swan*² jurisdiction of the BVI Court (the "Court"). This judgment clarifies the law of freezing injunctions, which had previously taken a wrong turn 44 years prior in the leading judgment of *The Siskina*³.

The Privy Council considered the jurisdiction of the Court to grant freezing injunctions in support of foreign proceedings in circumstances where the Court of Appeal ruled that the Court had no power to grant a freezing injunction in the absence of domestic proceedings seeking substantive relief, thus displacing the *Black Swan* type relief and a decade of common law that followed thereafter. In light of the Court of Appeal's decision, the BVI House of Assembly enacted the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020 (the

"Amendment Act"), which confers statutory jurisdiction on the Court to grant such relief⁴.

The Appeal concerned mainly two issues: (a) whether the Court has jurisdiction to permit service out of an application seeking standalone freezing relief pursuant to the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the "EC CPR"); and (b) whether the Court can assist foreign proceedings by issuing a freezing injunction, i.e. *Black Swan* relief.

On the former issue, the Board upheld the rationale in *Mercedes Benz AG v Leiduck*⁵ and *The Siskina* (in part) confirming that the Court does not have jurisdiction to authorise service outside the jurisdiction of a claim form only seeking freezing relief. It was held that to do so would have repercussions beyond the BVI and lead to confusion and uncertainty, accordingly "any lacuna in the EC CPR could only be filled by amending the rules not by reinterpreting them".

On the latter issue addressed by the Board, the majority held that *Black Swan* was correctly decided and the Court of Appeal was wrong to overrule that decision. The Board in turn overruled *The Siskina* as they held it was both necessary to dispel the residual uncertainty emanating from it and to make clear that the

¹ BVIHCV 2009/399

² Coined after the decision in BVIHCV 2009/399 *Black Swan Investment ISA v Harvest View Ltd* (dated 23 March 2010)

³ *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA ("The Siskina")* [1979] AC 210

⁴ Previous article: <https://maples.com/en/knowledge-centre/2021/2/black-swan-flies-again-new-bvi-legislation-confirms-availability-of-free-standing-interim-relief>
⁵ [1996 AC 284]

constraints on the Court's 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.

This judgment is of great importance as it not only clarifies and upholds the *Black Swan* jurisdiction but details a new test applicable to the granting of freezing injunctions. Lord Leggatt helpfully provided the following summary of the test:

A court with equitable and / or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power - and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that⁶:

- (a) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
- (b) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and
- (c) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or

value of the assets is impaired and the judgment is left unsatisfied.

Lord Leggatt further clarified that although there are other factors potentially relevant to the exercise of the Court's discretion in granting a freezing injunction, there are no other relevant restrictions to the availability of this remedy, such that there is no requirement that:

- (a) 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;
- (b) the judgment should be a judgment against the respondent; and
- (c) 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)⁷.

This ground breaking decision further highlights the BVI as a leading jurisdiction for commercial disputes and is timely confirmation that the *Black Swan* jurisdiction exists, as such, all surviving injunctions previously made under the *Black Swan* jurisdiction, prior to the Amendment Act, are not at risk of being discharged.

⁶ Paragraph 101 of Judgment.

⁷ Paragraph 102 of Judgment.

Further Information

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