

Update from the BVI Court: free-standing freezing orders and foreign defendants

Convoy Collateral Limited v (1) Broad Idea International Limited (2) Cho Kwai Chee

In a decision handed down on 17 April 2019, the BVI Commercial Court has given guidance on the scope of its jurisdiction to grant freezing orders in support of foreign proceedings (the so-called *Black Swan* jurisdiction named after the leading case of *Black Swan Investment ISA v Harvest View Limited* decided in 2009). In an important decision, Adderley J has held that the BVI Court does not have power to grant a free-standing injunction in aid of foreign proceedings for service outside the jurisdiction on a person who is not resident in the jurisdiction or otherwise subject to the *in personam* jurisdiction of the BVI Court, notwithstanding the fact that they had considerable assets in the BVI.

The Facts

The claimant, Convoy Collateral Limited, sought injunctive relief in support of ongoing proceedings in Hong Kong against Mr Cho. Relief was sought against Broad Idea International Limited (**Broad Idea**, a BVI company in which Mr Cho held 50.1% of the shares) and Mr Cho personally. Whilst Broad Idea was situated in the BVI, Mr Cho is a Hong Kong national who was customarily resident in Hong Kong.

The Hong Kong proceedings were against Mr Cho and sought to recover losses in amounts exceeding US\$92million. Mr Cho's shareholding in Broad Idea was thought to be worth approximately US\$62.5million.

The Decision

The question before the Court was whether it had power and jurisdiction to order service of a free-standing injunction in aid of foreign proceedings out of the jurisdiction on a foreign person who is not resident in the jurisdiction or otherwise subject to its *in personam* jurisdiction but had considerable assets in the jurisdiction. The Court noted that this was believed to be the first time that this discrete question had been addressed in the BVI.

After a careful analysis of the statutory framework and the common law (including considering the provisions applicable in the BVI, the United Kingdom and Hong Kong), the Court found that it had no such jurisdiction and that none of the putative gateways for service out were applicable. The Court founded its analysis in particular upon the view of the Privy Council in *Mercedes Benz A.G. v Leiduck* [1995] 3 All ER PC; [1996] AC 284.

Discussion

It remains to be seen whether the decision will be appealed or whether legislative change will be triggered by the findings. It is notable that the Court explicitly recommended in its judgment that the legislature reviewed the position.

As things stand, it appears that the potential extension of the *Black Swan* relief has been curtailed: *Black Swan* relief will be focussed on assets and persons located within the jurisdiction. In more complex cases, such relief will have to dovetail with relief from other jurisdictions to ensure that a complete framework is put in place to protect the relevant assets from dissipation worldwide.