The BVI Year

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The BVI had another busy year of cases and legislation. We did not experience the worst ravages of COVID but, like other Courts, the BVI Commercial Court moved to online hearings and trials. After adjusting to this new World, the Court continued its business relatively smoothly, although it was notable that the Court, and counsel, still like their physical bundles.

Black Swan Resurrected

Perhaps the biggest and most welcome news was published in the BVI Gazette on 7 January 2021, when the Eastern Caribbean Supreme Court (Virgin Islands) Amendment Act came into force. For those of you that come across the BVI, you will know that practitioners love their interim relief and asset chasing, and the BVI Commercial Court was regularly asked to grant freestanding injunctions in aid of foreign proceedings.

The *Black Swan* jurisdiction was used for about 10 years following a Justice Bannister case of the same name and substantial assets were frozen and recovered until the Court of Appeal found in *Broad Idea International Limited v Convoy Collateral Limited* in May 2020, that the *Black Swan* decision was wrongly decided. Whilst *Broad Idea* was appealed and we await the Privy Council's decision, the ability to obtain a freestanding injunction in support of foreign proceedings is now on a proper statutory footing and can now be obtained against BVI and non-BVI parties.

The legislation was (deliberately) closely modelled on section 25 of the Civil Jurisdiction and Judgments Act 1982 (the "**CJJA**") in England and as a result also provides a statutory route for interim relief to be granted against non-cause of action defendants such as *Chabra* defendants.

This particular power to enjoin foreign NCADs has been a feature of English law as a result of s.25 of the CJJA for some time. The ability to do so in BVI common law has been stymied by strict judicial adherence to *stare decisis* and the majority decision of the Privy Council in *Mercedes Benz v Leiduck*, which recommended that a standalone Mareva injunction is not an injunction within the meaning of the injunction service out gateway.

This is perhaps the most eagerly awaited aspect of the Privy Council's determination. If *Mercedes Benz* is found to be no longer good law no further enactment will be required under the CPR to construe a standalone Mareva injunction under the service out gateway as an injunction.

In the orders made so far the BVI Court has taken a suitable flexible view of the jurisdiction, which is suitably encouraging news for asset tracing.

Not Just Injunctions

Although NP applications take their name from a 1974 English case, in reality the BVI common law has gone much further than that rather limited English authority, probably as the BVI does not have a separate specific disclosure rule in its CPR. The basic concepts of an NP order are still that:

(a) *a wrong has been committed;*

(b) *a party (always the local registered who set up the BVI company) has innocently become mixed up with wrongdoing; and*

(c) *the information is necessary to identify a wrongdoer or establish a wrong.*

The "*wrong*" can have a wide definition and can be a tort or a contract, as well as, in some cases, breaching a court order abroad or filing a suspect claim in a foreign bankruptcy. The target tends to be the company incorporation agent which tend to have an increased number of "*know your client*" information showing who has even a small beneficial ownership.

Many times this sort of discovery has led to successful claims abroad and significant asset recovery. Importantly a proper proprietary case will bolster an application and the separate High Court judges also can assist with discovery in oligarch divorce cases where a BVI company asset is located, through the Court's matrimonial powers.

The most recent procedure adopted by the Commercial Court is for a first *ex parte* application which imposes a seal and gag order on the registered agent, and a second *inter-partes* hearing then hears the application in full.

Directors Alert

As we move to an era of more public disclosures, the Privy Council gave a timely reminder to directors on their duties when a company slips into insolvency. In *Byers and Others v Chen*, Ms Chen was a sole director of a BVI company, PFF, and sought to appoint a replacement director and simultaneously resign by way of letter. There was some confusion as to whether a replacement director was appointed, but later a large payment was made to one of the creditors. PFF's liquidators pursued Ms Chen personally including

on the basis that she continued as the *de jure* director. The Privy Council exercised a rare jurisdiction to review findings of the trial judge and held that Ms Chen continued as *de jure* director even after her resignation letter, especially given Ms Chen retained important responsibilities including over decision making and over bank accounts.

In addition, the Privy Council stated *"a director may not knowingly stand idly by and allow a company's assets to be depleted improperly".*

It was a busy BVI year for the Privy Council which adopted remote hearings enthusiastically and there seemed no let-up in appeals and judgments including on unfair prejudice remedies *(Ming Siu Hung v J F Ming)*, Duomatic rule applies to beneficial owner who cannot be allowed to "*lurk in the shadows*" *(Ciban Management Corp v Citco (BVI) Ltd)*, waiver by election and restitution *(Delta Petroleum v BVI Electricity Board)*. In the context of a forum challenge, the Privy Council found that where governing law could not be ascertained, that became only a neutral factor which led to the BVI Court taking jurisdiction and the availability of particular common law remedies like tracing could be a strong factor in favour of the BVI being the more appropriate jurisdiction (*JSC Eurochem et al v Livingston Properties et al)*. In an important decision for insolvency proceedings *(Chu v Lau)* the Board upheld Justice Kaye's judgment to wind up a deadlocked company on just and equitable grounds agreeing with the first instance judge that it was a quasi-partnership and the judge had been entitled to take account of disputes at a subsidiary level for the superimposition of equitable considerations.

Quick Justice

The Commercial Court also reminded directors to use their powers for a proper purpose. In *IsZo Capital v Nam Tai Property & Ors*, after a group of shareholders served notice to hold a shareholders' meeting to appoint new directors, the then board carried out a private placement of shares that diluted the minority shareholders. The BVI Court first granted an injunction to hold the position and then an expedited, virtual trial with the court sitting early to accommodate witnesses in Macau and Hong Kong.

The Court found that the directors who had voted for the placement had indeed breached their fiduciary duties and had acted for the improper purpose of diluting investors and making it more difficult for minority investors to challenge the then board. Whilst there is an appeal and the trial was very fact sensitive, it is useful to review the Court's approach to this type of case as they tend to recur on a regular basis.

The Court considered the following 4 stage test arising out of the renowned director's liability case of *Hogg v Cramphorn* [1967] Ch 254 in order to determine whether there had been a breach of the proper purpose rule. The Court agreed that it had to:

(a) *identify the power whose exercise is in question;*

(b) *identify the proper purpose for which that power was conferred upon the directors;*

(c) *identify the purpose for which the power was, in fact, exercised; and*

(d) *decide whether that purpose was a proper purpose.*

In relation to these questions the Court had particular regard to two BVI Court of Appeal decisions in this area. First of all, in *Independent Asset Management v Swiss Forfaiting*, Webster JA held that "*once a court determines that the dominant purpose for the directors' decision is an improper purpose it does not matter what were the motives of the directors, however altruistic.*" Secondly in *Antow Holdings v Best Nation Investments*, Pereira CJ held that "*a section 120(1) enquiry is largely, though by no means entirely, a subjective one. Directors must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interest of the company, and not for any collateral purpose. Nonetheless a section 120(1) enquiry has an objective overlay as bona fides cannot be the sole test, 'otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational'*".

The Court will therefore look for independent, objective evidence to test the director's claim to be acting bona fide. As Pereira CJ continued as part of her analysis of section 120(1), "*I reiterate that a court will look for objective independent evidence to determine whether there was an honest belief on the part of a director. A court will not accept in any unquestioning way a director's assertion that he acted bona fide when the facts might appear to suggest otherwise*".

Both this case, and *Byers vs Chen* are reminders of how to act as a director and there are many lessons to be learned, in particular that an unlawful plan before a resignation or allotment of shares risks a quick unwinding from the BVI Court.

Common Law recognition still alive

This has been the subject of some debate over the years but in *Net International Property Ltd v Adv. Eitan Erez*, the BVI Court of Appeal held that common law recognition of foreign insolvency proceedings continues to exist post the enactment of the BVI Insolvency Act. However, assistance will depend on whether the country involved is a designated country pursuant to the legislative provisions.

This appeal arose out of proceedings in Israel where the Supreme Court found that a bankrupt was the owner of the

shares of Net International. The Court ordered the Trustee in bankruptcy to take steps in the BVI to register himself as shareholder of Net International in accordance with the company's articles.

The Trustee applied to the BVI Commercial Court for an order, under the inherent or common law jurisdiction, for recognition as the trustee of the assets of the bankrupt in the BVI, namely, the beneficial and legal interests in all the shares of Net International. The Trustee also sought orders for assistance in registering himself as the shareholder of Net International and powers to deal with the shares of the company as if he was the registered shareholder of the Company. The claim was successful.

Net International appealed against the orders of the learned judge. The following material issue arose on appeal whether the BVI Court had jurisdiction to grant both recognition and assistance to the Trustee. Recognition is usually accompanied by assistance which gives the foreign office holder powers to deal with the local estate. However, recognition does not necessarily include assistance.

As for recognition: although Part XVIII of the Insolvency Act, 2003 provided a comprehensive scheme for the recognition of foreign office holders that may be sufficient to abolish the common law of recognition, it was not yet in force as a matter of BVI law. It was held therefore that the common law right of recognition survives in the BVI.

As for assistance: Part XIX of the Act provides a complete code for foreign representatives from designated foreign countries to apply to the BVI courts for assistance. However, Israel has not been designated as a relevant foreign country. Assistance is no longer available at common law to foreign office holders from non-designated countries. The Trustee therefore has to commence a new action in the BVI to seek rectification of the share register, rather than be granted the same in the form of statutory assistance. Whilst this guidance is helpful, it does potentially increase the time and costs of this sort of common enforcement action.

Nilon revisited?

The Privy Council's decision in *Nilon v Royal Westminster Investments* restricted the previous use of the rectification of the share register in the BVI Business Companies Act, effectively moving such disputes largely to be dealt with in courts where the parties reside. However, in *Pavel Sazonov v Elena Silkina* the BVI Commercial Court ordered that a company's register of members should be rectified on an interim basis, subject to determination of the ultimate ownership of the company at the trial of the underlying proceedings.

It is apparent from the judgment, which was given orally on 22 February 2021 but handed down in written form on 26 April, that the applicant, Mr Sazonov, commenced proceedings in the BVI to resolve the question of whether he or Ms Elena Silkina is the beneficial owner a BVI company, Emery Capital Limited. There are also ongoing proceedings in Russia where, it seems, Mr Sazanov needed to show that he was the shareholder of the company by 2 March if he was to avoid an outcome that would be "*extremely adverse*" to him. In order to avoid this situation Mr Sazonov made an application seeking urgent rectification of the Company's register of members to show him as shareholder.

It should be noted that the respondents to the urgent application appear to have been the registered agent of the company and Ms Silkina. The company was not named as a respondent. In addition, whilst it appears that Ms Silkina may have been notified of the application, the Court took into account that she was not formally served with the application (she was not represented at the hearing).

The registered agent took the position that rectification of the register is a final remedy and could not be granted on an interim basis so a more appropriate remedy in the circumstances would have been to appoint a receiver over the Company who could hold the ring. However, the Court took the view that there was insufficient time for the appointment of a receiver and was also mindful that such an approach could be expensive.

Ultimately the Court considered that the wording of the statutory provision that

provides for the rectification of registers of members, s43 of the Business Companies Act, empowered it to rectify the register of members on an interim basis because it expressly says that "*the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of member*".

Whilst the Court was keen to point out that it was making an interim order that was subject to determination at the trial of the underlying proceedings (to determine the true beneficial owner), it does open up the possibility of a party in such circumstances dealing with the shares at least to protect them. Whilst the ruling appears to make available a novel form of interim relief, it remains to be seen how this decision will be reconciled with *Nilon v Royal Westminster Investments*, where it was held that "*the summary nature of the [rectification] jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute*". The Privy Council ultimately decided in *Nilon* that a claim for rectification can only be brought where legal title has been established and not where a claimant asserting a right to legal title is yet to succeed in their claim.

Unlawfully obtained evidence

In *Tall Trade Ltd v Capital WW Investment Ltd*, Justice Jack had to grapple with hacked communications in the context of a liquidation application being allegedly brought for an improper purpose and section 125 of the BVI Evidence Act which prohibits admissibility of improperly obtained evidence unless the "*desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained*".

And finally in *Showa Holdings Ltd* the EC Court of Appeal recently outlined the relevant principles for court supervision of an office holder such as a receiver and that the court will usually defer to the assessment of an officeholder unless it is shown that the assessment of the officeholder is perverse relying on Snowden J's decision in *Re Nortel*.

A BVI Moratorium

In a major development in BVI insolvency law and practice, the BVI Commercial Court held in *Constellation Overseas Limited and 5 Others* that provisional liquidation is available to facilitate a restructuring. The decision brings the BVI broadly into line with other jurisdictions, where provisional liquidations have been used to support a number of cross-border restructurings in recent years.

In the proceedings, six BVI companies (part of a group headquartered in Brazil) sought the appointment of provisional liquidators to support the group's restructuring, which is driven by a Brazilian Judicial Reorganisation procedure. That was in turn supported by Chapter 15 proceedings in the USA. The companies required the protection against "*predatory creditor claims*" afforded by the moratorium imposed by a BVI provisional liquidation; there was no current intention to wind up the BVI companies or the group.

The judge found that the BVI Court has a "*very wide common law jurisdiction*" to appoint provisional liquidators for restructuring purposes, based on authority from the courts of England, Cayman and Bermuda (amongst others). He distinguished certain Hong Kong cases that suggested that provisional liquidation was only available in that jurisdiction where the objective was a liquidation.

In 2020 the BVI Court again appointed joint provisional liquidators over four BVI companies on a "*light touch*" basis following the precedent set down in Constellation, and gave further, useful guidance for practitioners. The terms of the appointment mean that they will supervise the ongoing management of the companies by the existing boards of directors and ensure that the companies work towards a "*holistic*" restructuring of the wider Group's debts. However, the appointment of the provisional liquidators would not have automatically imposed a moratorium on creditor claims or actions because the companies are not considered to be in (full) liquidation. This meant that, without some added layer of protection, the companies would still be prone to creditor actions and claims, which could potentially undermine the wider Group restructuring.

The companies were able to circumvent this concern by having the Court impose a "*contingent moratorium*" within the appointment order.

Section 174 of the BVI Insolvency Act provides that where an application for the appointment of a liquidator has been filed but not yet determined, a person who would have the power to apply for the appointment of a provisional liquidator (which includes the company itself) may apply to stay any action or proceeding that is pending against the company in the BVI courts. In this case the companies sought a term in the order that would automatically impose a stay, pursuant to s.174, in the event that any suit action or other proceeding is commenced against the companies. This term means that the companies will not be required to apply to the court for a stay each and every time a suit or action is commenced against the company and should ensure that any associated costs with such applications are avoided.

The use of s.174 in this way is believed to be novel and has the effect of putting in place a moratorium in circumstances where provisional, but not full, liquidators have been appointed and where no automatic protection would automatically arise.

Whilst each case will likely turn on its own facts the key areas the Court is likely to review are whether:

(a) *the companies were cash flow (but not balance sheet) insolvent;*

(b) *there was a real prospect of a restructuring being achieved, resulting in a better outcome for creditors than would be the case on a winding up;*

(c) *the application was supported by a number of the group's major creditors.*

These rulings are a very welcome addition to the range of effective procedures available in the BVI to facilitate cross border restructurings. ■