

Fraud unravels everything – how the BVI Courts can assist

Fraudsters sometimes choose offshore vehicles in their illegal schemes under the mistaken belief that the misappropriated assets will not be found or that the victims of fraud will not be able to identify the fraudsters. This is completely wrong. The BVI Courts apply a well-known legal maxim originally developed by the English Courts in *Lazarus Estates v Beasley* [1956] 1 QB 702: “No Court in this land will allow a person to keep an advantage which has been obtained by fraud ... fraud unravels everything.”

When can fraud cases be brought in the BVI?

To secure assistance from the BVI Courts in tackling fraud, there must be a nexus to the BVI that engages the Court's jurisdiction. This will invariably involve one or more BVI companies participating in the fraud. The role of the entities located in the BVI, and the circumstances of the individual case, will dictate the extent to which the BVI Courts can assist.

Claims arising out of fraud might be pursued in the BVI in the following circumstances:

1. Where entities that participated in the fraud are located in the BVI

For example, where BVI entities paid or received bribes, where BVI entities are used as conduits through which proceeds of wrongdoing are passed, or where BVI entities enter into sham contractual agreements to conceal the diversion of assets to third parties.

2. Where property situated in the BVI has been transferred for the purpose of defrauding creditors

For example, where the shares of a valuable BVI company are transferred to a third party to put those shares out of the reach of the transferor's creditors.

3. Where the proceeds of fraud are held by an entity located in the BVI, regardless of whether that entity is directly involved in the wrongdoing

For example, where the shares of a valuable BVI company are transferred to a third party to put those shares out of the reach of the transferor's creditors.

4. Where fraudulent acts took place in the BVI

Such as the issuing of fake invoices by a BVI company or the issuing of deliberately misleading or untruthful statements by a BVI company to attract investment into a fund.

What are the claims that can be brought to tackle fraud in the BVI?

The term "fraud" can encompass a wide variety of actions that share the common theme of dishonesty, there are various causes of action that can be pursued in the BVI depending on the circumstances of the case. The most obvious ones are as follows:

1. Where fraudulent statements have persuaded people to part with their money or other assets then a tortious claim for deceit may accrue, which would allow the victim to seek compensatory damages. Where a statement

has led to the victim entering into a contract then a claim in fraudulent misrepresentation may accrue which will allow the contract to be set aside and/or a claim in damages.

2. A claim in bribery will arise in circumstances where a person or entity pays secret commissions to the agent of a person or entity with whom they are dealing and where the principal has no knowledge of the payment. Such payments will often be made to induce the agent to act other than in the best interests of their principal and to favour the bribe payer in some way, although there is no requirement to prove such inducement (it will be presumed).
3. If the director(s) of a BVI company have misapplied company assets or otherwise acted for an improper purpose, not in the best interests of the company and/or dishonestly then they will be in breach of their fiduciary duties, which gives the company a cause of action against the director(s). In addition, the breach of fiduciary duties by the director(s) may give rise to ancillary claims against third parties that had knowledge of the breach of fiduciary duties (see below).
4. Where there has been a payment of money or transfer of assets in breach of trust or breach of fiduciary duties, then a person or entity receiving the money or assets with knowledge of the breach of duties can be liable in "knowing receipt". A similar cause of action is "dishonest assistance", which can be used to pursue a person or entity that assisted in the breach of trust or breach of fiduciary duties with knowledge of the breach, but who need not have actually received the property transferred in breach of trust.
5. Should two or more entities combine to cause loss to a third party then the victim may have a claim in conspiracy. A claim in "unlawful means conspiracy" can be pursued where the combination involves unlawful activity that causes the loss and there is an intent to injure the victim. A claim in "conspiracy to injure" can (less frequently) arise where the combination involves lawful acts but where those combining act with the sole or predominant purpose of injuring the victim.
6. Any person prejudiced by a conveyance of property made with intent to defraud creditors can commence proceedings to rescind that transaction pursuant to section 81 of the BVI Conveyancing and Law of Property Act.
7. In many instances where there has been fraud there will have been unjust enrichment and this will often give rise to a restitutionary claim on the part of the victim, at whose expense the enrichment has taken place, to disgorge the profits made by the person or entity that has been unjustly enriched. Because of the requirement that the enrichment be unjust, this cause of action will often accrue alongside other causes of action – a restitutionary remedy may be preferred where the enrichment to the defendant is greater than the loss suffered by the claimant.
8. In scenarios where liquidators have been appointed over a company, whether on an insolvency or just and equitable basis, there are various claims the liquidators can bring under BVI Insolvency Act to recover assets, including in respect of the actions of delinquent former directors and officers, fraudulent trading and/or where the company was trading whilst insolvent.

What approach do the BVI Courts take to jurisdiction?

The BVI Courts have personal jurisdiction over persons, entities and/or assets located within the BVI. Therefore, persons or entities located in the BVI can be sued in the BVI "as of right". For the BVI Court to stay a claim against a defendant located within the BVI on jurisdictional grounds it must do so on the basis that there is another available forum that is clearly or distinctly more appropriate to try the claim such that the BVI Court should not exercise the personal jurisdiction it has over the defendant. This test is referred to as *forum non conveniens* and it is used to determine whether the Court has "subject matter jurisdiction" (ie rightful jurisdiction over the claim as opposed to merely having jurisdiction over the defendant).

The position is effectively reversed when seeking to claim in the BVI against defendants that are located elsewhere: for the Court to be seized of jurisdiction over the defendant the claimant must confirm that the proceedings fall within at least one of the jurisdictional gateways under the Eastern Caribbean Supreme Court. Under the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 (the **EC CPR**), it is no longer necessary to obtain permission from the court to serve a claim outside the jurisdiction. But the claimant must file a certificate confirming (i) the claimant has a good cause of action, (ii) the claim falls within a category listed in EC CPR 7.3, and (iii) the person signing the certificate believes that the BVI court is the appropriate forum and the proposed method of service does not infringe the law of the foreign state.

In the BVI matter *Nilon Limited v Royal Westminster Investments SA* [2015] UKPC 2, the Privy Council clarified the approach to *forum non conveniens* disputes in several key respects. First, where tortious wrongs are alleged but it is not known where the acts in question took place, it may not be possible to ascertain the governing law of the claims (which

would ordinarily be a factor in determining the appropriate forum to try the claim) and that there is no requirement on claimants to positively plead and prove a foreign governing law. Second, the decision confirmed that the place of incorporation of corporate entities will not, on its own, be a decisive factor in determining the appropriate forum.

However, the Privy Council went on to say (as obiter) that in the context of international fraud and bribery, the availability of remedies was a crucial part of the claims and that practical justice might well not be done if the claim had to be brought in a jurisdiction which did not have equivalent remedies. This is potentially very relevant to future claims in which defendants argue that fraud claims should be heard in jurisdictions without the same breadth of remedies that are available in the BVI (such as those giving rise to proprietary claims), because the BVI Court has a discretion to refuse to stay proceedings in the BVI, even if some other forum is clearly and distinctly more appropriate, if practice justice will not be done in that alternative jurisdiction.

What other legal tools and remedies are available in the BVI?

Besides the substantive claims that can be pursued in the BVI where the Court has the necessary jurisdiction, the BVI Courts are also able to order a variety of interim and ancillary forms of relief, often in support of proceedings to be commenced or already ongoing elsewhere. The most common examples include:

Norwich Pharmacal disclosure orders

Can be granted against entities located in the BVI, most typically the registered agents of BVI companies, which will often be used to obtain information regarding the ultimate ownership or control of BVI entities, or to glean information about assets owned by them.

Freezing injunctions

Can be granted to preserve assets that might otherwise be dissipated by a defendant pending determination of ongoing or anticipated substantive proceedings. The object here is to ensure that the defendant retains assets that any prospective judgment could be enforced against, sufficient to cover the value of the judgment being sought. Such orders can be made against the defendant to the substantive proceedings or against entities that hold assets against which a prospective judgment could be enforced (often holding companies under the ownership and control of the cause of action defendant).

Proprietary injunctions

Are akin to freezing injunctions, save that they are available only when the applicant has a proprietary claim to the assets in question (which, if so, makes a proprietary injunction slightly easier to obtain than a freezing injunction). This remedy is extremely useful when a fraud victim can directly trace assets that have been misappropriated from them.

Other forms of injunctive relief

Such as relief which prohibits certain actions (eg exercising rights as a director or a shareholder of a company) or which requires certain action to be taken (eg reinstating a director to the Register of Directors), are also available in circumstances where damages would not be an adequate remedy if the injunction is not granted and where it otherwise just and convenient to grant it.

Injunctions in support of foreign proceedings

The BVI Courts have a statutory power to grant injunctions in support of foreign proceedings which ensure that assets located in the BVI, including shares, are kept safe during the pendency of dispositive foreign litigation. This development is particularly helpful in the case of the BVI companies, as such companies typically conduct most or all of their business activities outside the BVI (such that the BVI may not be the most appropriate forum for asset recovery litigation).

Appointment of receivers

Receivers may be appointed by the Court for a variety of reasons, including to fortify a freezing order or to prevent certain actions being taken by a company.

Appointment of provisional liquidators

Where a party wishes to pursue fraudsters via the insolvency route (as discussed above), the appointment of provisional liquidators on an urgent basis to “hold the ring” can also be a very effective way of preventing the dissipation of stolen assets and facilitating their recovery.

Attachment orders and charging orders

In an enforcement scenario, where a judgment debtor is refusing to pay sums owing, the BVI Court is also able to grant attachment orders and charging orders, with a view to executing against assets of the judgment debtor that are held in the BVI or via a BVI company.

What role will the BVI regulatory authorities play in pursuing fraudsters?

There are various public authorities in the BVI that have powers to investigate and take action against activities related to fraud. These include the Financial Investigation Agency, the International Tax Authority, the Financial Services Commission, the Director of Public Prosecutions, the Attorney General and local police force.

These authorities have various administrative, quasi-judicial and judicial powers at their disposal, including the ability to levy criminal penalties and custodial sentences on individuals and corporations.

Because it is unusual for individual fraudsters to be based in the BVI – their connection to the BVI will usually be through their use of BVI companies to perpetrate or facilitate a fraud – it is rare that criminal action will be taken in the BVI. However, the BVI regulatory authorities are frequently relied upon by foreign authorities to obtain information that is required to be held by BVI companies for use in foreign criminal investigations and prosecutions.



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