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British Virgin Islands Commercial Court delivers key decision on third party disclosure orders

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The BVI Commercial Court has confirmed that it has jurisdiction to order third parties to provide disclosure on Norwich Pharmacal principles in order to assist with the enforcement of judgments, including foreign judgments.

UVW V XYZ (a registered agent) BVIHC (com) 108 of 2016 (27 october 2016)

In addition, the decision also confirms that the BVI Court can order third parties to provide disclosure in order to police interim freezing orders granted by the BVI or foreign courts.

This will provide additional confidence to parties seeking to enforce and execute judgments in respect of assets held in the BVI, and will reassure businesses that the BVI's confidentiality regime does not enable counter-parties to evade the enforcement of legitimate decisions from international courts.

This briefing note analyses the two aspects of the decision separately and contrasts the approach taken by the BVI Court with that taken by the courts in the Channel Islands.

Background

The Claimant judgment creditor was seeking to enforce overseas judgments and had identified a company registered in the BVI belonging to the judgment debtor. It was able to demonstrate a pattern of behaviour by the debtor of concealment of assets to frustrate that enforcement. The judgment creditor applied to the BVI Commercial Court seeking third party disclosure orders against the local registered agent of the BVI company to obtain information which could lead to the identification of assets available for enforcement. The corporate confidentiality regime for which the BVI is well-known would ordinarily prevent a third party from accessing detailed information about a BVI company's affairs.

Wallbank J. held that Norwich Pharmacal relief was available against the registered agent:

- Post-judgment, in aid of enforcement, where there is reasonable suspicion for believing that the registered agent is "mixed up" (innocently or otherwise) in the wilful evasion of another's judgment debt; and
- To assist in securing compliance with freezing orders, including such orders made by foreign courts.

The decision on the post-judgment disclosure order

In his judgment, Wallbank J held that:

- The legal basis for a post judgment disclosure order against a third party was found in the English Court of Appeal case of *Mercantile Group (Europe) AG v Aiyela [1994] QB 366 [25].*
- The judgment of the BVI Court of Appeal in *JSC BTA Bank v Fidelity Corporate Services Limited et al BVIHCVAP 2010/0035* had confirmed that a registered agent, by taking that role, facilitates the functioning of the company for the purposes of the third party being "mixed up" in "wrongdoing" by the debtor [12].
- "If the judgment debtor uses the registered agent's services to use a corporate vehicle for evading enforcement efforts I have no doubt the registered agent becomes liable to give disclosure, if all other Norwich Pharmacal criteria are also satisfied." [13]
- A deliberate effort by the debtor to obstruct or frustrate the legitimate enforcement of a judgment undoubtedly constitutes such sufficient predicate wrongdoing but mere non-payment of the judgment debt was not sufficient wrongdoing [14].
- Even though the applicant in this case had "... no direct evidence that the judgment debtor [was] using the BVI vehicle to conceal assets" [7] "...a reasonable suspicion of wilful evasion" by the debtor combined with "...a reasonable suspicion that the third party had been mixed up in the wrong doing" (which is "... something less than prima facie evidence") sufficed [14] and [32].
- There was no need for the corporate vehicle to have been created by the registered agent for the wrongful purpose; it was sufficient that the company had been used for that purpose [31].

Commentary: post judgment disclosure

The court was correct to apply *Mercantile Group (Europe) AG v Aiyela [1994] QB 366* as the test for a disclosure order in aid of enforcement against a third party. This test, which requires the third party to have been mixed up in the evasion of the payment of the debt, was not applied in Jersey in the similar post judgment third party order case *Jomair Leasing Ltd v Hourigan [2011] JRC042*. In that case, (which was unopposed, which may therefore explain the lack of focus on a threshold test), reliance was only placed by the court upon earlier Jersey cases. These endorsed the principle set out in English case law when considering the power to make such orders against judgment debtors themselves (rather than third parties)[1].

In our view, the Courts in Jersey and other offshore jurisdictions should now follow this BVI decision by applying the "mixed up" test or some refinement of it.

The decision on the pre-judgment disclosure order

In his judgment, on this aspect, Wallbank J determined the legal basis in BVI law upon which a third party could be required to make disclosure of the assets of a person who was the subject of a freezing order; and a foreign freezing order at that.

He held that:

- The fact that it was a foreign freezing order made no difference and the court's approach rested on principles of comity [27, 28]
- The Court's jurisdiction to make such an order rested on the Court's inherent power to make all such ancillary orders as appears to the court to be just and convenient to ensure that the exercise of the freezing order jurisdiction is effective [26].
- The court could therefore make what it also described as a Norwich Pharmacal order to give effect to that ancillary power [28].

1 As captured by the dicta of Coleman, J in Gridrxsime Shipping Co Ltd v Tantomar-Transportes Maritimos LDA [1994] 1 WLR 299, at 310,—"Where, [...], one has the position that a judgment has been already obtained or an award made and where a Mareva injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and independently of the injunction as a power in support of the execution of the judgment or award . . ." (emphasis added).

Continued

Commentary: pre-judgment disclosure

To test this decision it is interesting to speculate whether the court would have granted this interim disclosure order if it had not also, at the same time, decided to make a post-judgment order in substantially the same terms. The judgment, it appears, relies upon the same analysis of the factual ingredients to justify the Norwich Pharmacal order pre judgment. Neither the Channel Islands nor England and Wales it seems have endorsed this approach. In this situation the closest the Channel Islands and the English Courts have come is a far more general and vague "prevention of abuse" test[2].

There would seem to be some difficulties in most cases in applying the Norwich Pharmacal test in aid of an interim freezing order. Whilst clearly confirming that Norwich Pharmacal relief can be granted in order to "assist the administration of justice in other jurisdictions" [27] – [28] the judge did not elaborate on the predicate wrong by the substantive defendant in which the innocent third party may have been mixed up. Whilst the breach of the disclosure provisions in a freezing order would on any analysis constitute wrongdoing, it is less clear when a BVI registered agent, who may not have notice of the freezing order, may be deemed to have been "mixed up" in that non-disclosure.

In our view, both interim and post-judgment scenarios may well call for a moderated "sufficient connection" threshold test (rather than the "facilitation" or "mixed up" test) between the defendant and the third party as has been suggested in the article "Third party Disclosure of a Debtor's assets: what are the limits?"[3]

Given the continuing propensity for individuals to hold assets internationally through intermediaries in offshore financial centres, it is likely that the jurisdiction to grant third party disclosure orders in aid of the enforcement and execution of judgments will continue to develop as more cases come before the courts in those jurisdictions.

Conclusion

This recent decision is to be welcomed by those doing business with entities in the BVI or with individuals who hold assets in that jurisdiction. It reiterates the willingness of the BVI courts to assist the courts of friendly foreign jurisdictions in the enforcement of judgments and the policing of interim measures such as freezing orders. It also serves as a timely reminder that judgment debtors cannot hide behind the confidentiality regime in order to evade justice.

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2 See Seed International v Tracey (Guernsey Court of Appeal) 18 December 2003 applying A v C [1981] 1 QB 956

3 Published in the February 2012 edition of the Jersey and Guernsey law Review by Nicolas Journeaux