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Interim receiverships in the BVI: a cautionary tale

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Alexandra Vinogradova v (1) Elena Vinogradova, (2) Sergey Vinogradov (BVIHCMAP 2018/052)

In recent years, the Courts of the British Virgin Islands have seen an increase in the number of applications for interim receiverships. In this recent decision, the Eastern Caribbean Court of Appeal has expressed concern with this trend, making it clear that judges should be careful to ensure that interim receiverships are only granted where there is strong evidence of the possibility of asset dissipation, and only where less intrusive relief would not provide the applicant with sufficient protection.

Facts of the case

The case in question concerns the estate of a deceased Russian businessman ("**VAV**"). The heirs to the estate are the respondents: a) VAV's widow ("**EV**") and his son by his widow ("**SV**"); and the appellant, VAV's daughter by his first wife ("**AV**"). Grantway International Ltd ("**Grantway**") is a BVI company which in turn owns shares in three Cypriot companies, one of which is Bescant Enterprises Ltd ("**Bescant**"). Bescant was used by VAV to make numerous loans to himself in the total amount of approximately $7.75 million (the "**Loan Amount**").

Following VAV's death, the heirs entered into a number of agreements ("**Agreements**") regarding the distribution of assets and liabilities of VAV's estate, which resulted, among other things, in AV acquiring control of Grantway, and therefore indirectly of Bescant, and the right to call for repayment of the Loan Amount from EV and SV. In July 2016, AV caused Bescant to issue proceedings in Moscow against EV and SV for the recovery of the Loan Amount, plus interest. In February 2017, Bescant obtained a pre-judgment freezing order against EV and SV from the Russian court. In June 2017, the Russian court entered judgment in favour of Bescant for a sum in excess of the Loan Amount (the "**Russian Judgment**").

EV and SV appealed the Russian Judgment and concurrently filed a claim in Switzerland against AV, seeking declarations from the Swiss Court that certain clauses of the Agreements were null and void as a result of alleged fraudulent conduct on the part of AV. If they succeeded in the Swiss proceedings, EV and SV would take control of Grantway, and thus would be in a position to discontinue the Russian proceedings. Shortly after issuing the Swiss proceedings, EV and SV applied *ex parte* to the BVI Court for the appointment of a receiver over the assets of Grantway. Their primary argument was that if EV and SV's appeal in Moscow did not succeed, AV would enforce the judgment against the heirs for the benefit of Bescant and would distribute the funds for her own benefit as opposed to allowing them to be paid up the corporate chain to Grantway. A receiver of Grantway would be able to take steps to ensure that Bescant did not dissipate the proceeds of the Russian judgment pending the determination of the Swiss proceedings.

The *ex parte* application was successful and the receiver was appointed. At the subsequent *inter partes* hearing, AV applied to discharge the appointment, denying the allegations of dishonest and fraudulent conduct and arguing that the appointment of a receiver over Grantway was an improper use of the Court's process. Notwithstanding this, the Judge ordered a continuation of the receivership, subject to the limitation that the receiver could not, without the prior sanction of the Moscow Court, take any step that would have the effect of staying or attempting to stay the execution of the Russian judgment. AV appealed that decision.

In its judgment, the Eastern Caribbean Court of Appeal helpfully summarised the applicable principles for the appointment of interim receivers:

1. There must be a good arguable case in the underlying claim in support of which the appointment is sought. This does not mean that the applicant must have a better than 50% chance of success in its claim, but rather that the applicant has a case that is "*more than barely capable of serious argument*". However, the Court of Appeal emphasised that whilst this is substantially similar to the test for granting a freezing order, the threshold test for the grant of an interim receivership is higher, in recognition of the "*irreparable damage*" that could result from the appointment of a receiver;
2. There must be a real risk of dissipation of assets. The Court of Appeal confirmed that this required the applicant to show "*solid evidence*" of a "*real risk*" of dissipation of assets that would otherwise be available to meet a future judgment, or of assets which belong to the applicant;
3. The appointment of a receiver must be "*just and convenient*". Crucially, the Court of Appeal emphasised that "*the basic principle is and continues to be that an order for the appointment of a receiver is a draconian measure that should not be granted when a freezing injunction would provide the claimant with adequate protection.*"

On the first question, the Court of Appeal deferred to the decision of the lower court and upheld the Judge's view that on evidence EV and SV had a good arguable case in the Swiss proceedings. On the second question, however, the Court of Appeal was not persuaded that the totality of evidence of dissipation reached the required threshold of 'solid evidence' or 'a real risk' that the Bescant recoveries would be dissipated. On the third question, the Court of Appeal was not satisfied that the appointment of a receiver was justified in the circumstances of the case. It found that a freezing injunction would have provided adequate relief to the applicants, and it further found that the appropriate jurisdiction to obtain that relief was Russia, and not the BVI. Consequently, the appeal was allowed and the receivership was discharged.

The Court of Appeal concluded its judgment by noting its concern with the increasing number of receivership applications "*when the grant of less intrusive relief... would provide the [claimant] with sufficient protection", cautioning that "[t]rial judges should be vigilant to ensure that the Court's jurisdiction to appoint interim receivers is exercised only when it is truly just and convenient to do so.*"

Comment

This decision should not be taken as an indication that receivership orders are no longer available from the BVI courts in appropriate cases. To the contrary, the Court of Appeal has helpfully summarised the principles upon which such orders may be granted, providing essential guidance for those seeking to invoke this invaluable remedy in the context of complex international litigation. However, this decision is a salutary reminder for claimants seeking protective relief from the BVI courts that the availability of a receivership order cannot be taken for granted, particularly where some other form of relief might also be available to afford the protection sought, and that it is essential to show strong evidence that assets are likely to be dissipated if a receiver is not appointed.

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