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British Virgin Islands dispute resolution and insolvency client update

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In the January 2018 edition of our dispute resolution and insolvency bulletin, we review eight cases from the BVI Commercial Court and BVI Court of Appeal from the past year. As most readers will be aware, the main non-legal news last year was that in September 2017, the British Virgin Islands were hit by category five hurricanes Irma and Maria which caused considerable devastation. The BVI Commercial Court temporarily relocated to St Lucia and impressively got back on its feet quickly in order to support the international financial services business of the BVI. This month the Commercial Court moved back to the BVI, marking significant progress in the recovery of the islands. The following decisions demonstrate the strength and breadth of the jurisdiction during difficult times.

Overview

The cases in this edition are:

- **Green Elite Limited v Delco Participation BV**: Court of Appeal decision regarding the entitlement of shareholders to financial information
- **KMG International NV v DP Holdings SA**: Commercial Court decision regarding a foreign company's liquidator voting the shares of a BVI company
- **In the Matter of Fairfield Sentry Limited (in liquidation) & Ors**: Court of Appeal decision about the meaning of "persons aggrieved" under section 273 of the Insolvency Act
- **Independent Asset Management Company Limited v Swiss Forfaiting Ltd**: Commercial Court decision regarding injunctions and material non disclosure
- **TIPP Investments PCC v Chagala Group Limited & Ors**: Commercial Court decision about standing to bring an application and the meaning of "member"
- **Independent Asset Management Company Limited v Swiss Forfaiting Ltd**: Court of Appeal decision regarding the rule that directors shall exercise their powers for a "proper purpose"
- **(1) Anjie Investments Limited and (2) Tian Li Holdings Limited v (1) Cheng NGA Yee and (2) Cheng NGA Ming Vincent**: Court of Appeal decision regarding forum conveniens
- **Sheikh Mohamed Ali M Alhamrani & Ors v Sheikh Abdullah Ali M Alhamrani**: Court of Appeal decision regarding the burden of proof on costs assessments and recoverability of travel time costs.

Green Elite Limited v Delco Participation Bv

The first BVI judgment of the Court of Appeal in 2018 considered a standard clause in the articles of association of a BVI company incorporated under the BVI Business Companies Act (the "**BCA**"), which states as follows: "*The Company may by Resolution of Shareholders call for the directors to prepare periodically and make available a profit and loss account and a balance sheet...*" ("**Regulation 19.2**") As a part of the appeal, the legality of Regulation 19.2 was challenged by the appellant.

The Court came to a commercially sensible decision that companies are free to agree with their shareholders what financial information they are entitled to.

The shareholders of BVI companies only have a right to inspect a limited number of documents under section 100(2) of the BCA – only the memorandum and articles, the registers of members and directors, and the minutes of meetings and resolutions of members. Further, access to these limited documents may be refused by the directors under section 100(3) of the BCA if they consider it to be contrary to the company's best interests. In any case, the list does not refer to the financial statements of the company. As the Court of Appeal noted, an officious bystander would probably exclaim in surprise at hearing that the owners of a company would not be entitled to information on its financial position. But this may be in keeping with the policy of the BCA, as distinct from other Companies Acts in other jurisdictions, of confidentiality of the company's operations, even from its shareholders.

The respondent shareholder had relied on Regulation 19.2 to requisition a meeting for the members to call upon the directors to make financial statements available to the members of the company. At first instance, the Commercial Court found that this was valid and not illegal in light of the restrictions in section 100(2) of the BCA.

The Court of Appeal agreed, noting that Section 100(2) of the BCA cannot be read as a compendium of all shareholder rights of access to corporate documents but only as a minimum standard of such rights. There is nothing in the BCA that prohibits a company from granting access to its information. A BVI company may choose to be listed on a stock exchange, for instance, and publish financial statements as a part of listing requirements. A company is entitled to waive the confidentiality of its records. In this case, the member's rights of access and the corresponding obligation of the company were created by the regulation in the articles. Regulation 19.2 came into existence at the time of the company's incorporation and the company should be bound by it. As such, the Court found that Regulation 19.2 is not unlawful per se and that it is a matter on which the requisition for a shareholders meeting may be based.

The Court also noted (obiter) that such a regulation in the articles cannot purport to take away the directors' obligations to exercise their powers for proper purposes and in the best interests of the company. As such, it may be that directors could refuse on proper grounds to make the financial statements available (in a similar manner to section 100(3) of the BCA) notwithstanding the resolution passed in general meeting for this purpose.

KMG International Nv V DP Holding SA

In this case, the Commercial Court found that where a foreign company's properly appointed liquidator is that company's agent under the law of its home jurisdiction, the liquidator does not need formal recognition by and assistance of the Commercial Court in order to vote and otherwise deal with shares that it owns in a BVI company. This common-sense judgment by Mr Justice Wallbank (Ag.) will be welcomed by foreign insolvency practitioners.

The question which arose was what would happen if DP Holding SA ("**DPH**") (a Swiss company) were acting by a Swiss court appointed liquidator, and wished to vote its shares in a BVI company, KMG International ("**KMG**") to appoint new directors to KMG with a view to realising KMG's assets for DPH's benefit.

It was common ground that the Swiss liquidator would become the new representative of DPH under Swiss law, displacing DPH's directors, and that Swiss law would govern the question of who could control DPH's affairs. DPH's liquidator would therefore be entitled to be recognised as DPH's representative in the narrow sense that the Court would accept his authority to act on KMG's behalf (per Bannister J in Re C, a *Bankrupt*).

KMG nonetheless argued that DPH would not be able to take the requisite steps to vote KMG's shares without DPH's liquidator obtaining formal recognition and assistance from the BVI Court. KMG's principal arguments were as follows:

- A foreign liquidator cannot deal with property in the BVI as if it were property in the jurisdiction of his appointment, without such course of action being "validated" by the BVI Court. KMG based this argument on the purpose and intent of the statutory and common law mechanisms for assistance and co-operation found in the BVI Insolvency Act and established by familiar authority.
- KMG submitted that as part of this "validation" exercise, it would fall to the Court to explore the reasons for DPH's desire to replace KMG's directors and to assess and approve DPH's plans for KMG's assets.
- On the other side of this coin, KMG argued that if such formal recognition and assistance were not necessary, it would essentially drive a coach and horses through the statutory and common law recognition and assistance provisions, and enable a foreign liquidator to simply appoint an agent to deal with the BVI company's assets and bypass the Court process entirely.

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- This was particularly so when, KMG argued, the real effect of what DPH was proposing would be an effective liquidation of KMG given the proposal to realise its assets for DPH's benefit. Such a liquidation by (effectively) DPH's liquidator could not take place other than with the BVI Court's assistance, nor should it take place other than in accordance with the BVI's statutory regime for liquidating a BVI company (whether solvent or insolvent).

The Judge rejected these arguments, rightly in our view. He found that the two principal flaws in KMG's reasoning were:

- It would not be DPH's Swiss liquidator who would be dealing with the BVI assets (the voting rights in KMG's shares), but DPH itself. The Swiss liquidator was simply DPH's agent. In that sense (although the Judge did not put it this way) it makes no difference whether DPH is acting by its directors or its liquidators. In either event, DPH is the principal. DPH does not need the BVI Court's approval to exercise the voting rights relating to its shares in KMG.
- A foreign appointed liquidator in this situation might wish to avail himself of the BVI's recognition and assistance provisions, if for example someone took a misconceived position in relation to the liquidator's authority. However, this does not mean that it is necessary and inevitable that such assistance must be sought in every case.

The Judge accordingly held that DPH would be entitled to exercise the voting rights in its shares in KMG as of right, and without the need for formal recognition and assistance of the BVI Court. The fact that this might result in the realisation of KMG's assets was neither here nor there – that would be a matter for KMG's directors, and the newly appointed directors could, if they so chose, cause KMG to realise and distribute its assets.

The case is a useful reminder that the BVI's provisions for the assistance of foreign insolvency representatives are just that; assistance provisions. It may not be necessary to use those provisions where a foreign appointee is simply causing a foreign company to exercise that company's pre-existing rights, but the provisions are available where the attempt to exercise those rights is thwarted or not given proper effect.

In the matter of Fairfield Sentry Limited (in liquidation) & ORS

The Court of Appeal recently dismissed attempts by certain redeemed former shareholders of Fairfield Sentry Limited (the "**Fairfield Fund**") and considered an important point of standing in relation to bringing a claim under section 273 of the Insolvency Act 2003.

Actions by the liquidators of the Fairfield Fund (the "**Liquidators**") to recover redemption monies paid out based on a mistaken calculation of the relevant net asset value caused by the notorious Bernie Madoff Ponzi scheme were dismissed in the BVI following the decision of the Privy Council in Fairfield Sentry Ltd (in liquidation) v Migani and others. However, the Liquidators then commenced further claims against the appellants and other redeemed former shareholders of the Fairfield Fund in bankruptcy proceedings in the US (the "**US Proceedings**").

The appellants' application under section 273 of the Insolvency Act to restrain the Liquidators from pursuing the US Proceedings was dismissed by the Commercial Court at first instance, along with their application for an anti-suit injunction on the basis that pursuit of the US Proceedings constituted vexatious and/or oppressive conduct.

They appealed to the Court of Appeal on the following basis: (i) that the Judge had erred in his analysis of the question of standing by not considering the appellants to be "persons aggrieved" within the meaning of section 273 of the Insolvency Act; and (ii) that the claims in the US Proceedings were an abuse of process in light of *Migani.*

The Court of Appeal dismissed the appeal and provided some helpful commentary that assists in clarifying the question of standing.

Section 273 of the Insolvency Act states as follows: "*a person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.*"

By drawing a comparison to section 168 of the English Insolvency Act and using it as the context for the interpretation of section 273, the Court determined that a person cannot be considered as a "person aggrieved" unless they have a sufficient interest in the outcome of an act, omission or decision of a liquidator. Having "technical capacity" as a creditor, for example, is not alone determinative of standing – it must be demonstrated that there is a legitimate interest in the relief sought in that capacity. The Court noted that the appellants, as alleged debtors, did not have any interest in the assets of the Fund or the manner in which they are distributed or spent. Instead, they were applying in their capacity as mere defendants in the US Proceedings. As such, they were strangers to the liquidation and had no legitimate interest in the relief sought.

The Court of Appeal also rejected the appellants' argument that an anti-suit injunction should be granted to restrain the Liquidators. The Court noted that the first instance Judge had exercised his discretion and that the case did not fall into the limited circumstances in which an appellant court would interfere.

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Independent Asset Management Company Limited V Swiss Forfaiting Limited (Commercial Court decision regarding injunctions and material non disclosure)

Here, the Commercial Court considered whether an interim injunction should be discharged following material non disclosures by the claimant and, if so, whether it was in the interests of justice to impose a fresh injunction in its place.

In summary, the claimant, Independent Asset Management Company Limited ("**IAMC**"), obtained an interim injunction on an ex parte basis restraining the defendant, Swiss Forfaiting Limited ("**SFL**"), formerly a BVI regulated private fund, from diluting, disposing or dealing with the IAMC's shareholding in SFL or issuing new shares in the same class held by IAMC or creating new share classes with voting rights. IAMC had been the investment manager of SFL.

IAMC had argued that the effect of the injunction would be to maintain the status quo, pending the determination of the substantive dispute (which concerned actions taken by SFL which IAMC alleged was prejudicial to its interests). SFL applied to set aside the injunction.

The Court found that, in obtaining the interim injunction, IAMC had made a series of non disclosures that "*exhibited a clear and wanton disregard*" for SFL and its interests. Those non-disclosures included failing to inform the Court that IAMC had been dissolved at the time the allegedly prejudicial activities had taken place and that the investment management agreement governing the relationship between IAMC and SFL had been (validly) terminated following the dissolution of SFL.

Mr Justice Farara (Ag.) found that these non-disclosure were "*so grave as to warrant the immediate discharge of the injunction*". The Court then considered whether it was appropriate to impose a fresh injunction. Notwithstanding the egregious nature of the material non-disclosures, the Court found it was in the interests of justice to impose a new, more limited injunction, to protect against the dilution of IAMC's shareholding pending trial.

This case demonstrates that for the purposes of injunctions of this kind, even where one party has acted in a way to incur reproach, the Court will be willing to "hold the ring" and grant injunctions, if it considers that overriding interests of justice demand it.

Tipp Investments Pcc v Chagala Group Limited & ORS

In this case, the Commercial Court considered the question of standing to bring an application under section 184B of the BVI Business Companies Act (the "**BCA**"). This provision is a gateway for relief in a variety of circumstances where a company or its director engaged, engages, or proposes to engage in conduct that contravenes the Act or the company's memorandum or articles. The application can be brought by a member or a director of the company, with "member" being defined in section 78 of the BCA as "*a person whose name is entered in the register of members as the holder of one or more shares [...] in the company*". In these first instance proceedings, TIPP Investments PCC ("**TIPP**") attempted, unsuccessfully, to stretch the definition of "member" to include beneficial ownership in shares, resulting in the Court clarifying the position.

The background to the dispute is quite fact specific and concerns the ownership of shares by TIPP in the first defendant, Chagala Group Limited ("**Chagala**"). Chagala's shares were traded through a system called CREST that operated as a paperless securities depositary and settlement system for securities traded through the London Stock exchange. By virtue of this system, shares in Chagala were legally owned by a custodian company that traded in them on CREST as a nominee for and on behalf of their beneficial owner, TIPP. Indeed, TIPP's acquisition of shares in Chagala was made in the form of "*depository interests traded on the LSE*" and the Court decided that what TIPP acquired was a beneficial interest in Chagala's depository interests and, indirectly, an interest in the underlying shares in Chagala.

A dispute arose when a number of steps were taking in respect of Chagala and its shares. TIPP brought proceedings challenging those steps under section 184B of the BCA on the footing that it is nonetheless a shareholder of Chagala within the meaning of section 78 of the BCA, despite not appearing on the register of members of Chagala. TIPP relied on an earlier decision of the BVI Court, *Headstart Class F Holdings Limited et al v Y2K Finance Inc*, which related to a claim for unfair prejudice brought pursuant to section 184I of the BCA.

The Court did not agree and found that *Headstart* was wrongly decided. TIPP is a beneficial owner of and not a registered owner of Chagala's shares. Seeing as TIPP failed to satisfy this requirement, the claim failed.

Interestingly, the defendants' application to strike out the claim failed, because TIPP amended its claim to join the registered holder of the depository interests and the registered holder of Chagala's shares (i.e. the custodian) as fifth and sixth defendants to the claim. This potentially allowed the claim to proceed as a (double) derivative trust claim.
This is an important decision on standing to bring a claim, which is equally applicable to beneficial owners when considering bringing claims for unfair prejudice under section 184I of the BCA.

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Independent Asset Management Company Limited V Swiss Forfaiting Ltd (Court of Appeal decision regarding the proper purpose rule)

The Court of Appeal recently considered the "proper purpose" rule under section 121 of the BVI Business Companies Act (the "**BCA**") which states as follows: "*A director shall exercise his or her powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum of the company.*"

The case related to a BVI fund which had two classes of share: A shares with voting rights, but no participation in profits/assets; and B (equity) shares with no voting rights but with participation in profits/assets. The appellant was a Hong Kong company which had been the sole A shareholder and investment manager. A breakdown between the individuals who set up the fund led to a reorganisation in which the directors of the fund passed a resolution issuing 500 class A shares to another entity, reducing the appellant's voting control from 100% to 16.67%.

The appellant filed a claim in the Commercial Court under sections 184I and/or 184B of the BCA on the basis that the issuance of shares was unfairly prejudicial and/or in breach of provisions of the BCA. The BVI Commercial Court at first instance dismissed the claim, finding that the directors were not acting for an improper purpose; instead the Judge found that they were seeking to ensure that the new shareholder had effective control in order to prevent the appellant from using its voting power to thwart the fund's legal proceedings in Switzerland against a related entity.

The appellant appealed on the basis that the issuance of shares was made by the directors for an improper purpose pursuant to section 121 of the BCA. The Court of Appeal allowed the appeal, applying the proposition in the Privy Council's decision in *Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821:* a director's purpose, however noble, should not be used to affect the balance of power of the company – i.e. the shareholdings of the company.

In this case the first instance judge had found that the substantial purpose of the directors' actions was to create a new majority. The Court of Appeal held that such an issuance of shares cannot be saved by the directors' honest intentions motivated by concerns about the well-being of the fund and its equity shareholder. The effect was to take control of the voting power from the appellant to another. Altruistic motives and reasons are not enough to justify this.

This is an important decision and a reminder to the directors of funds and other corporate entities that when issuing shares, one must carefully consider the proper purpose rule, which requires more than an analysis of what is for the benefit of the company.

(1) Anjie Investments Limited And (2) Tian Li Holdings Limited V (1) Cheng Nga Yee And (2) Cheng Nga Ming Vincent

In this case the Court of Appeal gave an important judgment in relation to forum conveniens, focusing on the need to identify properly the essential or underlying wrong in the pleaded case, and noting that the residence or convenience of witnesses is a core factor when considering the question of appropriate forum for trial.

A claim was brought by two individuals resident in Hong Kong against two defendants, both BVI incorporated companies: (i) Anjie Investments Limited ("**AIL**"); and (ii) Tian Li Holdings Limited (the "**Company**"). The claimants held the entire issued share in the Company. The Company held a shareholding in Smartpay, an investment company engaged in payment cards in partnership with banks, which was exploring business opportunities in the PRC.

The claimants claimed that they relied on misrepresentations by individuals regarding further investment in Smartpay and business operations in the PRC, by signing various documents(the "**Documents**") pursuant to which their shares in the Company were (wrongly) transferred to AIL.

The claimants sought: (i) a declaration that they are the owners of the entire issued share capital of the Company; (ii) rectification of the register of members of the Company to record them as registered owners of the shares; and (iii) damages. AIL applied for strike-out or a stay of proceedings on the basis that Hong Kong is clearly and distinctly the appropriate forum for that dispute.

At first instance, Mr Justice Farara (Ag.) concluded that the BVI was clearly and distinctly the most appropriate forum for the trial of the claim. The Judge held that the weightiest factor was that the claimants had founded jurisdiction in the BVI as of right and that the BVI court ought not lightly disturb jurisdiction so established. He noted: (i) that this is a claim against a BVI defendant company concerning the disputed ownership of shares in a BVI company; (ii) that it concerns an alleged wrongdoing in the BVI, being the wrongful submission and registration of the Documents which are said to be null and void and ineffective in law; (iii) that the changes to the register of directors and register of members, based on those Documents, took place in the BVI; and (iv) that it was by these steps that the claimants complain they were deprived of their shares in the Company.

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The Court of Appeal disagreed, finding that the Judge had erred and that Hong Kong is the most appropriate forum:

- When considering the appropriate forum for a tort claim, the place of commission of the alleged tort is the relevant starting point and will normally establish a prima facie basis for treating that jurisdiction as appropriate. (*VTB Capital plc v Nuritek International Corp and Others [2013] UKSC 5* applied)
- The Judge mischaracterised or failed to properly identify the essential or underlying wrong. The primary wrong on the pleadings related to the fraudulent misrepresentations, which had been made in Hong Kong rather than the BVI. The use of the Documents in the BVI leading to the entry of AIL's name on the register of members was not the primary wrong.
- The residence or convenience of witnesses is a core factor when considering the question of appropriate forum for trial. The issues in this case concerned the alleged negotiations and representations which took place in Hong Kong and documents which were signed in Hong Kong. The location of witnesses in this case is a core factor and its importance is not to be diluted by a consideration that the incorporators of BVI companies should expect to travel to the BVI for Court proceedings. (*Nilon Limited & Another v Westminster Investments S.A. and Others [2015] UKPC 2* applied)
- The fact that the claimants had founded jurisdiction in the BVI as of right was not a factor of special weight or which outweighed the host of other factors in favour of Hong Kong.

Sheikh Mohamed Ali M Alhamrani & ORS v Sheikh Ali M Alhamrani

The Court of Appeal considered an appeal concerning what the Court described as "*undoubtedly one of, if not the largest and most complicated [cost] assessments ever undertaken in the BVI*". In so doing, it clarified an important point of principle regarding the burden of proof in costs assessments, and considered the recoverability of travel time costs.

The substantive dispute concerned a disagreement between the children of the late Sheikh Ali M. Alhamrani. The family ran various businesses that were involved in the production and sale of oil in the United Arab Emirates. Two proceedings were brought before the Court, which were ultimately tried together. Following a 32 day trial, Mr Justice Bannister dismissed the claim brought by Sheikh Abdullah Ali M Alhamrani ("**Sheikh Abdullah**"), but did not grant the relief sought by Sheikh Abdullah's brothers (the "**Brothers**").

Sheikh Abdullah successfully appealed part of the judgment, the outcome of which was that (in addition to be granted the relief he sought) he was awarded legal costs of approximately US$9.3 million plus interest of approximately US$1.75 million. The Brothers appealed that award. In examining the decision of Mr Justice Eder (Ag.), the Judge at first instance, the Court of Appeal predominately found that, in respect of the majority of the issues before the Judge, there was no basis for interfering with his decision as to costs. However, an important principle was considered by the Court of Appeal.

One ground of appeal was the Brothers' complaint that the Judge had effectively reversed the burden of proof and required them, as paying party, to prove that the disputed items of the claim were unreasonable and should not be allowed. Part 65.2 of the Eastern Caribbean Civil Procedure Rules sets out where the burden of proof lies in an assessment of costs and sets out the basic principles that the Judge making the assessment should apply. The Brothers argued that this provision should be read in conjunction with rule 44.3 of the English Civil Procedure Rules ("**CPR**"), with the result that any doubt as to whether any costs were reasonable or proportionate should be resolved in favour of the paying party.

The Court of Appeal dismissed this argument, noting that it is settled law in the BVI that the law and practice in the High Court of England can be imported but only when there is no local law or practice covering the point. Therefore, because the relevant BVI costs rule and English costs rule cover the same ground, there is no room for the application or operation of rule 44.3 of the English CPR in the BVI. The Court of Appeal stated that the position in the BVI was as applied by the Judge at first instance - that in the BVI there is no bias one way or the other and the burden of proof rests throughout on the receiving party to prove that the costs claimed are reasonable and fair on both the paying party and the receiving party. If the receiving party proves on a balance of probabilities that the claim is reasonable and fair, then he or she is generally entitled to that item in full or so much as the Court finds reasonable. If he or she does not discharge that burden, then the claim for costs will fail.

The Court of Appeal also considered the recoverability of travel time in relation to overseas lawyers working on the case. The Judge at first instance had allowed the full amount of travel time, including "down time" (i.e. time spent not working on flights), finding that it was entirely reasonable. However, the Court of Appeal noted that lawyers travelling to the Commercial Court in the BVI often have to travel across the Atlantic and even from as far as Asia. As such, there is potential for significant amounts of downtime during journeys that can take two days. In the circumstances, the Judge's order was varied to a more reasonable rate of one half of the fee earner's hourly rate.

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