CAREY OLSEN

Receiverships in the BVI

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Shining a light on the courts of British Virgin Islands' approach to granting the appointment of receivers, and the state of the law in respect of this powerful interim remedy.

There have been an increasing number of court applications in the British Virgin Islands (BVI) for the appointment of receivers an as interim remedy to 'hold the ring' in respect of assets which are the subject of ongoing litigation and in aid of equitable execution of judgments.

Receivers

The appointment of receivers is more commonly used as a remedy by which a secured creditor can enforce its security against assets of a company that is in financial difficulty or in breach of a debt obligation.

The BVI Court has demonstrated a flexible approach to the appointment of receivers and a willingness to appoint receivers in circumstances where there is a need to preserve or recover assets or in aid of the equitable execution of judgments. As can be seen by the following review of the most recent BVI Court judgments, the appointment of receivers is a remedy not to be taken lightly; whilst the BVI Court maintains a flexible approach to assisting parties against recalcitrant defendants, the BVI Court will only make a receivership order in suitably serious cases.

The principles applicable to the appointment of receivers were outlined in the case of *Norgulf Holdings Limited v Michael Wilson and Partners*[1]:

1. The applicant must have a good arguable case in respect of the underlying claim. This has since been clarified by the Eastern Caribbean Court of Appeal ("Court of Appeal") to mean a case that is "*...more than barely capable of serious argument...*"[2] and not necessarily a case in which the applicant has a more than a 50% chance of success in the underlying claim. The Court of Appeal noted that the threshold test for the appointment of an receiver is higher than that for a freezing injunction, echoing its findings in *Norgulf* at paragraph [27]:

"the appointment of a receiver is more intrusive, more expensive, and less reversible than the grant of an injunction... The appointment of a receiver is more draconian than issuing a freezing order because of the expenses and inconvenience which often arise with the appointment."

2. There must be a real risk of dissipation of assets. The Court of Appeal in *Vinogradova* clarifies that the applicant must demonstrate a "*real risk*" of dissipation by virtue of "*solid evidence*" in support of any application to appoint a receiver.

1 BVIHCVAP2007/2008 (29 October 2007, unreported)
2 Alexandra Vinogradova v (1) Elena Vinogradova, (2) Sergey Vinogradov (BVIHCMAP 2018/052)

3. The Court of Appeal in *Vinogradova* (applied in the case of *Industrial Bank Financial Limited Leasing Co Ltd v Xing Libin*[3] and *VTB Bank (Public Joint Stock Company) v (1) Miccros Group Ltd (2) Taurus Ltd*[4]) also underscored that an applicant must show it is "*just and convenient*" to appoint a receiver. A receiver should not be appointed where a freezing order would provide adequate protection.

In the matter of *(1) Mitsuji Konoshita, (2) A.P.F. Group Co Ltd v J Trust Asia PTE Ltd*,[5] the Court of Appeal considered a number of issues arising from the first instance decision granting a world-wide freezing order over the funds of the appellants, and a subsequent order appointing two receivers of APF. The Court of Appeal was asked to find that the first instance court had wrongly exercised its discretion to make a receivership order after the grant of the freezing order.

The Thai authorities filed a criminal complaint against Mr. Konoshita for, inter alia, fraud and misappropriation of assets of Group Lease, of which Mr. Konoshita was CEO. J Trust applied for and obtained a world-wide freezing order against the appellants, in support of a claim for knowing receipt and dishonest assistance. A receivership order appointing two receivers of APF (controlled by Mr. Konoshita and holding a controlling interest in Group Lease) was subsequently made for the purpose of asset protection, pending resolution of the underlying proceedings.

The Court of Appeal found that a failure to comply with a disclosure obligation (in this case pursuant to the freezing order) is "*a significant factor in determining whether it is just and convenient to appoint a receiver. Invariably, where there is a continuous failure to comply with a disclosure obligation, a court would appoint a receiver.*"

In spite of the freezing order, the Court found there was a real risk of dissipation and the failure to comply with the disclosure obligation was only part of the evidence on which the judge relied. The Court of Appeal upheld the receivership order.

In the matter of *(1) Koshigi Limited, (2) Svoboda Corporation v Donna Union Foundation*,[6] the Court of Appeal was again asked to consider the exercise of discretion by the first instance court in appointing receivers over Koshigi and Svoboda. A freezing order was granted over the assets of Koshigi and Svoboda in support of an LCIA Arbitration Award.

The Court of Appeal held that a failure to comply with the terms of a freezing order (being a prohibition against dissipation of assets and a disclosure order) provided cogent evidence to justify the appointment of receivers. The receivership order was conditional such that the receiver had no power to vote the shares of Koshigi and Svoboda without leave of the Court, so any interference to Koshigi and Svoboda would be limited.

It was thought that the BVI Court had sought to curtail the use of receivers noting its concern with the increasing number of receivership applications.[7] However, it can be seen from both *Vinogradava* and *VTB Bank* that the Court was simply applying the existing test for the appointment of receivers and on the facts of each case, it was not just and convenient to make a receivership order.

Vinogradava involved the distribution of assets of a deceased Russian individual's estate and a dispute arising between the beneficiaries in relation to loans made by a Cypriot company to the deceased, with a BVI company controlling the Cypriot company. Judgment was issued in Moscow against two of the beneficiaries in favour of the Cypriot company. Pending appeal, the two beneficiaries applied for receivers to be appointed over the BVI company as if the appeal failed, there was a risk that the proceeds of the Russian judgment would be dissipated, whilst related Swiss proceedings remained extant. The Court of Appeal found that a freezing injunction would provide adequate relief and that the relief should be properly sought in Russia.

In the case of *VTB Bank (Public Joint Stock Company) v (1) Miccros Group Ltd (2) Taurus Ltd*, VTB Bank obtained judgment in the BVI in separate proceedings against Mr. Skurikhin in the sum of approximately US$22 million. VTB Bank, in support of the execution of the judgment, had an interim receiver appointed in respect of the single issued share in Miccros, which was said to have lent €19m to a company called Pikeville, to purchase multiple Italian properties. Taurus, being beneficially owned by Mr. Skurikhin, held the single issued share in Miccros and sought to have the receivership set aside with VTB Bank applying to extend the interim receivership. The BVI Court said the purpose of an interim receivership order was to obtain interim relief and nothing indicated that VTB Bank would take substantive steps to enforce the judgment if the receivership was extended. Any concerns as to Miccros interfering in the process of the realisation of the Italian properties by the administrators of Pikeville could be addressed by a limited form of freezing injunction.

3 BVIHC (COM) 0032 of 2018
4 BVIHC (COM) 2018/0067
5 BVIHCMAP2018/0047, BVIHCMAP2018/0020
6 BVIHCMAPP2018/0043 and 0050
7 Alexandra Vinogradova v (1) Elena Vinogradova, (2) Sergey Vinogradov (BVIHCMAP 2018/052)

Continued

Most recently in *Industrial Bank Financial Limited Leasing Co Ltd v Xing Libin*,[8] the BVI Court reaffirmed its position that equitable receivers would be appointed where it would be "*just and convenient*" to do so. Industrial Bank obtained judgments against Mr Xing in the PRC, who owned 100% of Firstwealth Holdings Limited, a BVI company owning assets in Hong Kong. The judgments were recognised in Hong Kong and in the BVI, with a charging order ultimately made over the shares of Firstwealth.

Whilst Firstwealth was considered to be controlled by Mr Xing, the assets of Firstwealth were not; the BVI Court stating that "*it is trite law that the assets of a company are not the assets of even a 100% shareholder*". The BVI Court could however order the appointment of an equitable receiver over the shares of Firstwealth, who could replace the existing director of Firstwealth and take steps to realise the assets of the company. It was the view of the BVI Court that it was unlikely that Hong Kong would refuse to recognise the appointment of an equitable receiver over the shares of a BVI company.

Whilst it may be considered by some commentators that the law in the BVI as to the appointment of equitable receivers is in flux, it is the view of the authors that the BVI Courts' recent decisions have had the effect of underscoring the relevant principles and that the appointment of receivers continues to be available in appropriate cases.

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8 BVIHC (COM) 0032 of 2018

FIND US

Carey Olsen (BVI) L.P.
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong

T +852 3628 9000
E hongkong@careyolsen.com

Carey Olsen Singapore LLP
10 Collyer Quay #24-08
Ocean Financial Centre
Singapore 049315

T +65 6911 8310
E singapore@careyolsen.com

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