

UPDATE

BVI: clarification on service out of jurisdiction

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Given the international nature of BVI companies and the multitude of jurisdictions that can be involved in any related dispute, service out of jurisdiction and the principles that underlie it have to be correctly understood in order to ensure that litigants issue in the correct jurisdiction.

A regular issue that arises concerning BVI incorporated companies relates to the subject of service out of jurisdiction. Given the international nature of BVI companies and the multitude of jurisdictions that can be involved in any related dispute, service out of jurisdiction and the principles that underlie it have to be correctly understood in order to ensure that litigants issue in the correct jurisdiction.

The recent Court of Appeal case *Amerinvest International Forestry Group Company Limited v Kwok Ka Yik*¹ examines the relevant rules concerning service out of jurisdiction and the basis on which it can be asserted that a dispute as to ownership of a BVI company has arisen.

Facts

The appellant company (**Amerinvest**) is a BVI incorporated company, whose first directors were Mr Sing Wang and the Respondent (**Ms Kwok**). It was asserted by the company that at a meeting of the board of directors, on 2 March 2007, a resolution was passed accepting Ms Kwok's resignation as a director.

Amerinvest wholly owned subsidiaries in Hong Kong and between 2011 and 2013, those subsidiaries submitted various documents to the Hong Kong Companies Registry for filing. They appeared to have been signed by Mr Wang on behalf of Amerinvest as sole shareholder of the subsidiaries. The Registrar refused to register those documents on the basis that Ms Kwok had made several representations of entitlement in relation to the subsidiaries.

Amerinvest disputed Ms Kwok's allegations on the basis that what Ms Kwok was really disputing related to the ownership of Loyal Seas Limited (**Loyal Seas**), which was a shareholder of Amerinvest, and which did not affect the beneficial ownership of Amerinvest or Mr Wang's authority to sign documents as a director.

After several skirmishes in the Hong Kong Special Administrative Region Court of First Instance (**SAR**), Amerinvest filed an application in the BVI High Court naming Ms Kwok as defendant and sought various declarations and other relief.

As Ms Kwok was resident out of the jurisdiction, permission to serve out was required.

An ex parte application, pursuant to CPR 7.3(7) was made. Bannister J, at first instance, refused the application on the basis that there was no dispute in the BVI about Amerinvest's membership of the constitution of the board. Amerinvest appealed the decision. The Court of Appeal dismissed the appeal with costs.

¹ BVIHCMAP2014/0033.

Principles

The Court of Appeal held that Bannister J had correctly exercised his discretion in refusing the application. It was trite law that it should not interfere with a decision of a lower court which has applied the correct principles and had taken into account matters which should be taken into account and disregarded matters which were irrelevant, unless it was satisfied that the decision was so plainly wrong that it must be regarded as outside the generous ambit of the discretion which had been 'entrusted to the court'. On the facts before the Court of Appeal, there was no basis upon which it could disturb Bannister J's decision. The recent Privy Council case of *Nilon Ltd Anors v Royal Westminster Investments SA*² applied.

The Court of Appeal reiterated the requirements needed to be satisfied in order for a court to grant an application to serve out of jurisdiction.

- The Claimant must satisfy the court that in relation to the foreign defendant, there is a serious issue to be tried on the merits, such as a substantial question of fact or law or both.
- The Claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. A good arguable case in this context connotes that one side has a much better argument than the other.
- The Claimant must satisfy the court that in all the circumstances the forum which is being seised is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.

*Nilon Ltd Anors v Royal Westminster Investments SA*³ and *AK Investment CJSC Anors v Krygz Mobil Tel Ltd*⁴ both applied.

The Court held that the fact that the Registrar herself elected to characterize the allegations made by Ms Kwok as a dispute as to the ownership and directorship of Amerinvest did not necessarily render it such. On the facts, there was no assertion by Ms Kwok as to the ownership of Amerinvest, rather her allegations related to the subsidiaries and ownership of the shareholder company of Amerinvest, neither of which concerned the BVI. It followed that there was no serious issue to be tried in the BVI. The Court held:

'In the circumstances, it would be a waste of time and resources to declare by way of preemptive measure on behalf of the Company (Amerinvest) that which the Company already knows and which has not been effectively challenged so as to afford some sort of pre-determination or shield in the event that a challenge was mounted.'

The real issue, it was held, related to the Hong Kong Registry's refusal to register the documents that related to the Hong Kong subsidiaries. Bannister J had clearly been alive to that fact and rightly held that a genuine dispute had not arisen in the BVI.

The court underlined the principle that matters concerning the organization and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company is incorporated, but that principle should not be taken out of context, as held by the Privy Council in *Nilon*. On the present facts, where the Hong Kong Registrar was refusing to register documents relating to the subsidiaries, the dispute did not relate to the constitution, administration or control of the company and so did not trigger CPR 7.3(7) for service out of jurisdiction. CPR 7.3(7) states:

'Claims about companies

7. A claim form may be served out of the jurisdiction if the subject matter of the claim relates to
 - (a) the constitution, administration, management or conduct of the affairs; or
 - (b) the ownership or control of a company incorporated within the jurisdiction.'

² [2015] UKPC 2 (see our update entitled '[The Privy Council clarifies the statutory jurisdiction to rectify a company's register of members](#)').

³ *ibid*.

⁴ [2011] UKPC 7.

The Court would not allow service out of the jurisdiction where it was clear that the facts did not fall within the ambit of CPR 7.3(7). To do so would only serve to encourage frivolous litigation. Ultimately, any sanction that the BVI court may hand down would not be binding on Ms Kwok. The issue at hand was clearly one best suited to the Hong Kong courts.

This case reinforces the notion that a litigant will have to demonstrate to the courts' satisfaction that there must be a strong link between the foreign defendant and the subject matter of the dispute (if any) in the BVI. It was obvious, in this case, that the BVI proceedings were an attempt to circumnavigate the decision of the Hong Kong Registrar when the appellants should have turned to the Hong Kong courts for assistance.

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