

THE ASSET TRACING  
AND RECOVERY  
REVIEW

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THE LAWREVIEWS

# BRITISH VIRGIN ISLANDS

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## I OVERVIEW

The British Virgin Islands is one of the world's largest centres for the incorporation of companies – especially those created to facilitate cross-border trade and investment. There are currently around 372,000 active BVI business companies, roughly two-fifths of which originate from Asia. As at June 2017, the assets held by those companies had an estimated worldwide value of US\$1.5 trillion.<sup>2</sup>

BVI companies are utilised for a myriad of reasons, particularly as bond-issuing vehicles and holding companies for global corporate structures. The BVI is home to part of the group structure of over 140 major businesses listed on the London, New York and Hong Kong main stock exchanges. The BVI is a tax-neutral jurisdiction with a zero rate of tax on corporate profits, so cross-border transactions facilitated through BVI companies are not at risk of double taxation. Hence the reason that BVI companies are very popular for finance-raising.

The BVI has a legal system based on English common law. It also has modern, flexible and efficient company and insolvency legislation and an internationally renowned and highly respected specialist commercial court with an ultimate right of appeal to the Judicial Committee of the Privy Council seated in London. It is generally regarded as a creditor-friendly jurisdiction and the courts have a wide variety of tools to assist a victim of fraud.

## II LEGAL RIGHTS AND REMEDIES

### i Civil and criminal remedies

While an order for the payment of compensation is available under Section 27 of the Criminal Code where a person is convicted of a criminal offence, the reality is that a criminal prosecution of a fraud related offence is unlikely to take place in the BVI given that the fraudster is unlikely to be found in the jurisdiction. Accordingly, the remedies available in the BVI for a victim of fraud are largely civil.

Claims against persons who have committed fraud are often made for breach of fiduciary duty or breach of trust. Relevantly for this purpose, directors of BVI companies are subject of a number of statutory fiduciary duties under the BVI Business Companies Act 2004 including:

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<sup>2</sup> *Creating Value: The BVI's Global Contribution*, June 2017, a report by Capital Economics for BVI Finance Limited.

- a a duty under Section 120(1) to act honestly and in good faith and in what the director believes to be in the best interests of the company; and
- b a duty under Section 121 to act for a proper purpose.

Accordingly, directors of BVI companies who dispose of the company's property in breach of their fiduciary duties are treated as having committed a breach of trust.

In cases where a company is unwilling or unable to bring a claim for breach of fiduciary duty or breach of trust against its directors because the defaulting directors remain in control of the company, it may be possible for a member to obtain permission from the court to bring a derivative claim in the name of and on behalf of the company under Section 184C of the BVI Business Companies Act 2004. In considering whether to grant permission, the court will consider:

- a whether the member is acting in good faith;
- b whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;
- c whether the proceedings are likely to succeed;
- d the costs of the proceedings in relation to the relief likely to be obtained; and
- e whether an alternative remedy to the derivative claim is available.

As regards the last point, an alternative remedy that is often available is found under Section 184I of the BVI Business Companies Act 2004. That section provides that:

*A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.*

The court has the ability to grant a broad array of relief under the section including an order requiring the company or any other person to acquire the member's shares, or requiring the company or any other person to pay compensation to the member.

Claims may also be brought in dishonest assistance against those who assist a person who has committed a fraud. In order to establish liability, it is necessary to show:

- a a breach of fiduciary duty;
- b the defendant must have procured or assisted that breach; and
- c the defendant acted dishonestly in procuring or assisting the breach of fiduciary duty.

Liability for dishonest assistance gives rise to a personal liability on the assister to pay compensation for loss flowing from the breach of fiduciary duty that it assisted.

Claims against third-party recipients of the proceeds of fraud may be made in knowing receipt. In order to establish such a claim, it is necessary to show:

- a there is property subject of a trust (such as assets of a company);
- b the property is transferred in breach of trust or fiduciary duty;
- c the property (or its traceable proceeds) are beneficially received by the defendant; and
- d the defendant received the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a bona fide purchaser for value without notice, retains the property, or deals with it inconsistently with the trust, after acquiring such knowledge.

In addition to the payment of compensation in respect of any losses flowing from the breach of fiduciary duty, it may also be possible to:

- a* obtain an account of profits; or
- b* claim a proprietary interest in the misappropriated property or its traceable proceeds through the processes of following and tracing.

Restitutionary claims may also be available in unjust enrichment. The general requirements for a claim in unjust enrichment under BVI law are as follows:

- a* the defendant was enriched or benefited;
- b* the defendant was enriched or benefited at the claimant's expense;
- c* the defendant's enrichment was unjust; and
- d* there are no defences available to the defendant. The main defence to a claim for restitution is change of position where the defendant has changed its position to its detriment as a result of the benefit or enrichment.

Claims may also be made for breach of contract. Alternatively, it may be possible to set aside an agreement entered into in reliance upon the tort of deceit. In order to succeed in a claim for deceit, the claimant will need to show:

- a* that the defendant made a false representation to the claimant;
- b* the defendant knew that the representation was false, or alternatively, the defendant was reckless as to whether it was true or false;
- c* the defendant intended that the claimant should act in reliance on the representation; and
- d* the claimant did act in reliance on the representation and in consequence suffered loss.

Claims may also be brought in negligence. Under Section 122 of the BVI Business Companies Act 2004, directors of BVI companies have a duty to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation:

- a* the nature of the company;
- b* the nature of the decision; and
- c* the position of the director and the nature of the responsibilities undertaken by him.

Increasing popular are claims in conspiracy of which there are two types – unlawful means conspiracy and lawful means conspiracy. The constituent elements of an unlawful means conspiracy are:

- a* an agreement, combination or understanding involving two or more persons;
- b* to take action that is unlawful;
- c* with the intention (but not necessarily the predominant purpose) of injuring the claimant; and
- d* damage is caused to the claimant by unlawful means.

The other type of conspiracy is a lawful means conspiracy, which involves persons combining to use lawful means with the predominant intention of injuring the claimant. In this type of conspiracy, the claimant must allege and prove that the combiners' predominant intention is to injure the claimant. If the conspirators have more than one intention and the predominant intention is to further their own business interests, it does not matter that their secondary intention is to injure the claimant.

Claims in conspiracy are notoriously difficult to prove, but have the perceived advantage of being able to extend liability to a greater number of defendants.

Section 81 of the Conveyancing and Law of Property Ordinance (Cap 220) provides that every conveyance of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced. However, no relief is available in respect of any property conveyed for valuable consideration and in good faith, or upon good consideration and in good faith to any person not having at the time of the conveyance, notice of the intent to defraud creditors.

## ii Defences to fraud claims

Under the Limitation Ordinance 1961 (Cap 43), the prescribed limitation period for claims in contract or in tort (eg, negligence, dishonest assistance or conspiracy) is six years from the date on which the cause of action arose. The limitation period in an action upon a speciality (which includes deeds) is 12 years. A 12-year limitation period also applies in relation to actions to enforce any judgments, although interest will not be recoverable after the expiration of six years.

There is also a limitation period of six years in respect of claims by a beneficiary to recover trust property or in respect of any breach of trust. However, no period of limitation will apply in respect of any claim in respect of any fraud or fraudulent breach of trust to which a trustee was party. As set out above, directors of BVI companies are generally considered to be trustees of assets held by their companies.

In addition, the prescribed limitation periods may be extended or postponed in certain cases. For instance, where the claim is based upon the fraud of the defendant or its agent, or the right of action has been concealed by the fraud of such persons, the period of limitation does not begin to run until the claimant has discovered the fraud or concealment, or could with reasonable diligence have discovered it.

Although there is no limitation period in respect of a claim for unfair prejudice under Section 184I of the BVI Business Companies Act 2004, unjustified delay resulting in prejudice or an irretrievable change of position are likely to be significant factors in the exercise of the court's discretion to grant or refuse a particular remedy: *Sumitomo Mitsui Trust (UK) Ltd v Spectrum Galaxy Ltd*.<sup>3</sup>

As regards claims in contract:

- a Waiver by election arises when a state of affairs comes into existence in which one party to a contract becomes entitled, either under the terms of the contract or by general law, to exercise a right and that party has to decide whether to do so; the party making the election has to choose between two alternative and inconsistent courses of action or remedies. Once it has made its election to pursue one course it is bound by it and cannot thereafter pursue the alternative course. For the doctrine to apply, the party electing must have knowledge of the facts giving rise to the choice and must have made a clear and unequivocal representation to the other party that it has made its election between the two alternative courses of action; an election is binding once a clear representation is made, and it does not depend on reliance on it by the other party: *Delta Petroleum (Caribbean) Limited v British Virgin Islands Electricity Corporation*.<sup>4</sup>

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3 Claim No. BVIHC (COM) 2018/0172, 14 April 2021.

4 Appeal No. BVIHC VAP2016/0003, 8 May 2017.

- b* The BVI court gives effect to ‘no oral modification or variation’ clauses that provide that no variation to the contractual terms will be effective unless in writing: *Sumner Group Mining Limited v Zica SA*.<sup>5</sup>

### III SEIZURE AND EVIDENCE

#### i Securing assets and proceeds

A claimant may obtain a freezing order in the BVI in support of domestic or foreign proceedings. A freezing order is a form of injunction that restrains a defendant from disposing of or dealing with its assets other than in the ordinary and proper course of business. Its primary purpose is to prevent the dissipation or concealment of assets that would otherwise be available to satisfy a judgment or prospective judgment.

Generally speaking, an applicant for a freezing order must establish that:

- a* it has a good arguable case in respect of its substantive claim against the respondent; and
- b* there is a real risk of the respondent dissipating its assets other than in the ordinary course of business, so as to frustrate any judgment that might be obtained against it in due course.

Strictly speaking, an applicant must also show that the order sought is just and convenient, although in practice this requirement will usually be satisfied if an applicant can show a good arguable case and a real risk of dissipation.

A good arguable case is one that is more than barely capable of serious argument and yet not necessarily one which the judge believes to have better than 50 per cent chance of success. This is a relatively low threshold.

A real risk of dissipation of assets is established by showing that:

- a* there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the respondent will dissipate or dispose of his assets other than in the ordinary course of business; or
- b* that unless the respondent is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes.

An applicant must show that there is a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. Solid evidence is required to support a conclusion that relief is justified, although precisely what that entails will vary from case to case.

In general, allegations of dishonesty are, of themselves, insufficient to constitute a real risk of dissipation of assets. However, where the dishonesty alleged goes to the heart of the claim against the respondent, the Court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the respondent also establishes sufficiently the risk of dissipation of assets.

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5 Claim No. BVIHC (COM) 2020/0171, 14 December 2020.

Delay in making an application for a freezing order is not itself a bar to relief, but is one factor that the Court will take into account in evaluating whether there is a risk of dissipation. If, notwithstanding delay in making the application, the Court is satisfied on the evidence that there remains a real risk of dissipation, it should still grant an order.

An applicant for a freezing order will usually be required to provide an undertaking to the Court to pay any damages that the Court considers the applicant should pay should it turn out that the order should not have been made.

A freezing order will usually contain ancillary orders relating to disclosure of the respondent's assets. The purpose of the ancillary asset disclosure order is to ensure the effectiveness of the freezing order or, in a case where a judgment has already been obtained, to aid in the enforcement of that judgment.

If, as is often the case, the application is made without notice to the respondent, the applicant will be under a duty to make full and frank disclosure to the Court of all material facts. The duty may be summarised as follows:

- a* A person applying for an order upon an application made without notice must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.
- b* The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application.
- c* Materiality is to be decided by the Court and not by the assessment of the applicant or its legal advisers.
- d* The duty of candour is a heavy one. The duty of disclosure extends not only to material facts known to the applicant, but to additional facts that it would have known had it made proper inquiries. The applicant is under a duty to present the facts disclosed fairly. The rationale for the duty is that the Court is being asked to grant relief in the absence of the respondent and wholly on the information provided by the applicant. Other parties do not have the opportunity to collect or supplement the evidence that has been put before the Court. Observance of the duty is essential to secure the integrity of the court process and to protect the interest of these potentially affected by whatever order the Court is invited to make.

In order to enable the respondent to decide whether there has been compliance with the duty of full and frank disclosure, the applicant will be required to take a note of any without notice hearing and such note must be served on the respondent.

Failure to comply with the duty will not automatically lead to the discharge of a freezing order obtained on a without notice application. On the proof of material non-disclosure, the court has a discretion whether to discharge the without-notice order, or to continue the order, or to make a new order on terms.

The most obvious matters that will need to be disclosed on any without notice hearing are any potential defences upon which the respondent is likely to rely.

A freezing order made on an application without notice to the respondent may only remain in force for a period of 28 days. In making a without-notice order, the Court will therefore fix a date within that period for further consideration of the application on notice to the respondent. This is known as the return date hearing.

A BVI court may grant interim relief under Section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act where proceedings have been or are about to be commenced in a foreign jurisdiction.

The Court also has the power under Section 43 of the Arbitration Act 2013 to grant interim relief in relation to any arbitral proceedings that have been or are to be commenced in the BVI or in a foreign jurisdiction.

The Court may decline to grant interim relief in support of domestic arbitral proceedings on the ground that:

- a* the interim measure being sought is currently the subject of arbitral proceedings; and
- b* the Court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.

In relation to arbitral proceedings that have been or are to be commenced in a foreign jurisdiction, the Court may grant an interim measure under only if:

- a* the arbitral proceedings are capable of giving rise to an arbitral award, whether interim or final, that may be enforced in the BVI; and
- b* the interim measure sought belongs to a type or description of interim measure that may be granted in the BVI by the Court in relation to arbitral proceedings.

## ii Obtaining evidence

The *Norwich Pharmacal* jurisdiction, which takes its name from the English House of Lords decision in *Norwich Pharmacal Co and Others v Customs and Excise Commissioners*<sup>6</sup> is available in the BVI. In that case Lord Reid said:

*... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.*

The two threshold requirements to be satisfied for the court to exercise its power to grant *Norwich Pharmacal* relief were set out by the Court of Appeal in *JSC BTA Bank v Fidelity Corporate Services & Ors.*<sup>7</sup> They are:

- a* a wrong must have been carried out; and
- b* the respondent must have become mixed up in the wrongdoing.

Originally, the type of wrong was a tort as in the *Norwich Pharmacal* case itself. However, it is now clear that the wrong may be a crime, tort, breach of contract, equitable wrong or contempt of court.

In *JSC BTA Bank v Fidelity Corporate Services Limited & Ors.*<sup>8</sup> the Eastern Caribbean Court of Appeal confirmed that registered agents of BVI companies are ‘mixed up’ in the wrongdoing of the companies they incorporate and maintain by virtue of their role in providing registered agent services to those companies.

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6 [1974] AC 133.

7 Appeal No. HCVAP 2010/035, 21 February 2011.

8 *ibid.*

Even if the threshold requirements are satisfied, the Court retains a discretion over whether to grant a *Norwich Pharmacal* order, and it will only exercise that discretion where it is a necessary and proportionate response in all the circumstances.

The test of necessity does not require the remedy to be one of last resort. It also stated that the principle to be derived from the modern authorities is that there is a need for flexibility when applying discretion to increase the ambit of the jurisdiction. The Court cited with approval the House of Lords decision in *Ashworth Hospital Authority v MGN Ltd*,<sup>9</sup> where Lord Woolf CJ stated:

*New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously.*

As regards the scope of information that could be ordered to be disclosed, the Court cited with approval *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*,<sup>10</sup> where Thomas LJ said:

*In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] 3 All ER 511, para 19 as 'a missing piece of the jigsaw'. It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in Norwich Pharmacal and the cases to which we have referred.*

## IV FRAUD IN SPECIFIC CONTEXTS

### i Banking and money laundering

The BVI has a modern and rigorous anti-money laundering and terrorist financing regime that applies to regulated business in the BVI including banking business. It does not, however, contain any notable features that would assist in pursuing fraud claims or asset recovery.

### ii Insolvency

Liquidators of BVI companies have a number of specific office holder remedies available to them under Parts VIII and IX of the Insolvency Act 2003. These remedies are additional to those available to the company over which they are appointed.

Part VIII deals with voidable transactions including unfair preferences, undervalue transactions and voidable floating charges.

Under Section 245, a transaction entered into by a company is an unfair preference given by the company to a creditor if the transaction:

- a* is entered into at a time when the company is insolvent, or causes the company to become insolvent (an insolvency transaction);
- b* is entered into in a period of two years prior to the appointment of the liquidator in the case of 'connected persons', or six months in the case of any other person (the vulnerability period); and

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<sup>9</sup> [2002] 1 WLR 2033.

<sup>10</sup> [2009] 1 WLR 2579.

- c* has the effect of putting the creditor into a position that, in the event of the company going into insolvent liquidation, will be better than the position it would have been in if the transaction had not been entered into.

A transaction is not an unfair preference if the transaction took place in the ordinary course of business.

- Under Section 246, a company enters into an undervalue transaction with a person if:
- a* the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
  - b* the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and
  - c* in either case, the transaction concerned:
    - is an insolvency transaction; and
    - is entered into within the vulnerability period.

A company does not enter into an undervalue transaction with a person if:

- a* the company enters into the transaction in good faith and for the purposes of its business; and
- b* at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Section 247 also provides that a floating charge created by a company is voidable if:

- a* it is created within the vulnerability period; and
- b* it is an insolvency transaction.

Under Section 249, where the Court is satisfied that a transaction entered into by a company was a voidable transaction, it may:

- a* may make an order setting aside the transaction in whole or in part; or
- b* in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction.

Part IX of the Insolvency Act deals with malpractice.

Under Section 254, where the court is satisfied that an officer of a company:

- a* has misapplied or retained, or become accountable for any money or other assets of the company; or
- b* has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company:

it may make an order that the officer pay compensation or account for any profits received.

The court may also make an order for contribution against any person under Section 255 where it is satisfied that, at any time before the commencement of the liquidation of the company, any of its business has been carried on:

- a* with intent to defraud creditors of the company or creditors of any other person; or
- b* for any fraudulent purpose.

An order for contribution may also be made against a director of a company under Section 256 where the court is satisfied that:

- a* at any time before the commencement of the liquidation of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
- b* the person was a director of the company at that time.

### **iii Arbitration**

Enforcement of a foreign arbitral award may be refused under Section 83 of the Arbitration Act 2013 (in the case of awards not made in a state or territory which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958) or Section 86 (in the case of a Convention award) if it would be contrary to public policy to enforce the award. This is likely to include cases in which the award was obtained by fraud.

### **iv Fraud's effect on evidentiary rules and legal privilege**

Section 22(3) of the Evidence Act 2006 provides that no claim of privilege shall be allowed if the communication between a client and its legal practitioner was made for the purpose of committing a fraud, crime or other wrongful act. This is essentially a statutory restatement of the common law fraud or iniquity exception. In *Hu Lan v Sundale International Limited*,<sup>11</sup> the Court held that a prima facie case of fraud need be established for the exception to apply, even if that might be one that could eventually be disproved or fail at trial.

The Court also has a discretion under Section 125 of the Evidence Act to exclude improperly obtained evidence where the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained. In exercising its discretion, the Court is required to take into account the following matters:

- a* the probative value of the evidence;
- b* the importance of the evidence in the proceeding;
- c* the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
- d* the gravity of the impropriety or contravention;
- e* whether the impropriety or contravention was deliberate or reckless;
- f* whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention; and
- g* the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.

## **V INTERNATIONAL ASPECTS**

### **i Conflict of law and choice of law in fraud claims**

A claimant who wishes to serve a claim on a defendant out of the BVI will require the court's permission under Part 7 of the Eastern Caribbean Civil Procedure Rules.

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<sup>11</sup> Claim No. BVIHC (COM) 2019/0167, 22 February 2021.

The applicable requirements for obtaining the court's permission for service of a claim form out of the jurisdiction under Part 7 were summarised by the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Limited*<sup>12</sup> and in *Nilon v Royal Westminster Investments SA*.<sup>13</sup> In obtaining permission to serve out, a claimant is required to satisfy the court that:

- a There is a serious issue to be tried on the merits, that is, a substantial question of fact or law or both.
- b 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. In this context 'good arguable case' connotes that one side has a much better argument than the other.
- c In all the circumstances, the BVI 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 of the proceedings out of the jurisdiction.

The classes of case in which permission to serve out may be given are set out in rule 7.3 and include:

- a Where a claim is made against someone on whom the claim form has been or will be served (usually a BVI company that is able to be served as of right), and:
  - there is between the claimant and that person a real issue which it is reasonable for the court to try; and
  - the claimant wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to that claim.
- b Claims made in relation to a contract where:
  - the claim is made in respect of a breach of contract committed in the BVI; or
  - the claim is made in respect of a contract where the contract:
    - contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract; or
    - is by its terms or by implication governed by the law of the BVI.
- c Claims in tort where the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction.
- d Claims to enforce any judgment or arbitral award that was made by a foreign court or tribunal and is amenable to be enforced at common law.
- e Claims where the whole subject matter of the claim relates to property within the jurisdiction (such as shares in a BVI company).
- f Claims where the subject matter of the claim relates to:
  - the constitution, administration, management or conduct of the affairs; or
  - the ownership or control of a company incorporated within the jurisdiction.
- g A claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction.
- h A claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled within the jurisdiction.
- i A claim is made under an enactment that confers jurisdiction on the Court and the proceedings are not covered by any of the other grounds referred to in the rule.

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12 [2012] 1 WLR 1804.

13 [2015] UKPC 2.

The leading authority in the BVI in relation to the test for determining the most appropriate forum for the trial of a claim is *IPOC International Growth Fund Ltd v LV Finance Group Ltd*,<sup>14</sup> in which Gordon JA applied and summarised the English House of Lords decision in *Spiliada v Cansulex*.<sup>15</sup> There are therefore three stages to the test:

- a* is there another available forum?
- b* if so, is that forum more appropriate for the trial of the claim; and
- c* if there is another more appropriate forum a stay should be granted unless there is a risk that the claimant will not receive justice in the more appropriate forum.

Appropriateness is generally determined by which forum has the most real and substantial connection to the dispute. Important factors include: the place of the commission of the wrongful acts; the governing or proper law of the torts and breaches of duty allegedly committed by the defendants; and the location of witnesses.

## **ii Collection of evidence in support of proceedings abroad**

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (more commonly referred to as the Hague Evidence Convention) has been given effect in the BVI through the Evidence (Proceedings in Foreign Jurisdictions) Ordinance.

An application may be made to the Court under Section 3 of the Ordinance for an order for evidence to be obtained in the BVI if:

- a* the application is made in pursuance of a request issued by an authorised court in a foreign jurisdiction (the requesting court); and
- b* the evidence to which the application relates is to be obtained for the purposes of civil proceedings:
  - that have been instituted before the requesting court; or
  - the institution of which before that court is contemplated.

The letter of request from the requesting court is required to be written in the English language or in the language normally used in the foreign jurisdiction in which the request originates together with a certified English language translation.

The Court has the discretion under Section 4 to make such order as it considers appropriate for the purpose of giving effect to a request including making provision for:

- a* the examination of witnesses, either orally or in writing; or
- b* the production of documents.

Importantly, Section 7 confirms that the Court cannot make an order that would have the effect of overriding any valid claim of privilege that could be made in civil proceedings in the BVI, such as legal professional privilege or privilege in respect of self-incrimination.

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<sup>14</sup> Appeal Nos. BVIHCVP2003/0020 & BVIHCVP2004/0001, 22 November 2004.

<sup>15</sup> [1987] AC 460.

**iii Seizure of assets or proceeds of fraud in support of the victim of fraud**

The Proceeds of Criminal Conduct Act and Asset Seizure and Forfeiture Act 2020 both make provision for the seizure by authorities of the proceeds of criminal conduct. However, once again, these provisions are unlikely to be of much assistance as the criminal conduct in question is unlikely to take place in the BVI.

**iv Enforcement of judgments granted abroad in relation to fraud claims**

There are two procedures for obtaining recognition and enforcement of a foreign money judgment in the BVI, depending upon where the foreign judgment was obtained:

- a* A simplified statutory process of registration is provided for under the Reciprocal Enforcement of Judgments Act 1922 in respect of judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland, and the courts of the Bahamas, Barbados, Belize, Guyana, Grenada, Jamaica, St Lucia, Trinidad and Tobago and New South Wales (Australia).
- b* For judgments from all other jurisdictions, it is necessary for the judgment creditor to bring a common law claim for enforcement of the judgment. In *Taruta v JSC VTB Bank*,<sup>16</sup> Webster JA stated:

*It is trite that the BVI court has jurisdiction at common law to recognise and enforce a money judgment obtained in foreign proceedings. The power to do so is set out in Halsbury's Laws of England – 'A judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England [BVI]. Apart from statute such a judgment will not be enforced directly by execution or any other process, but will be regarded, for procedural purposes, as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. The debt so created is a simple contract debt and not a specialty debt, and is subject to the appropriate limitation period'.*

Foreign arbitral awards may be recognised and enforced by leave of the Court under Section 81 of the Arbitration Act 2013. Upon leave being granted, the award is enforceable in the same manner as a judgment or order of the Court that has the same effect.

**v Fraud as a defence to enforcement of judgments granted abroad**

Section 3(2)(d) of the Reciprocal Enforcement of Judgments Act 1922 provides that no judgment shall be ordered to be registered under the Act if the judgment was obtained by fraud. Similarly, as regards common law claims for the enforcement of judgments, the Court may in the exercise of its discretion refuse to enforce a foreign judgment if it is satisfied that the foreign judgment was obtained by fraud of the party in whose favour it is given, or of the court pronouncing it.

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16 Appeal Nos. BVIHCMAP 2021/0002, 2021/0008 & 2021/0012, 2 June 2021.

## VI CURRENT DEVELOPMENTS

The BVI Court has recently followed the decision of the United Kingdom Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd*,<sup>17</sup> in holding that it was permissible to sue unnamed defendants in the context of the theft of digital assets from wallets held with a BVI-incorporated cryptocurrency exchange. In *ChainSwap Limited*,<sup>18</sup> the Court made a worldwide freezing order against the unknown owners of various wallets that were alleged to have been used to receive and dissipate stolen tokens.

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17 [2019] 1 WLR 1471.

18 Claim No. BVIHC (COM) 2022/0031, 4 May 2022.

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Shane Donovan is a partner in the Mourant Ozannes BVI litigation practice. He is a commercial litigation lawyer with specialist experience in complex international litigation, including fraud and asset recovery, insolvency, and corporate and shareholder disputes. Shane is also experienced in obtaining urgent injunctions such as worldwide freezing orders and anti-suit injunctions, and *Norwich Pharmacal* (disclosure) orders.

Shane has over 10 years' experience of practice in the BVI. He is also admitted in England and Wales (where he practised for five years prior to moving to the BVI) and Queensland, Australia (currently non-practising).

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