

UPDATE

British Virgin Islands court confirms its jurisdiction to grant Chabra freezing injunctions in aid of foreign insolvency proceedings

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In the recent British Virgin Islands (BVI) case of *Parles AS & Daniel Perner v Winsley Finance Limited* (BVIHCM2022/0123, 29 March 2023), the Honourable Madam Justice Mangatal granted an application brought by two unsecured creditors for a Chabra freezing injunction against a BVI company in aid of foreign insolvency proceedings in Czechia. In this article, we look at the reasoning employed by the BVI Court in reaching its decision and consider the wider significance of the judgment to insolvency practitioners and creditors dealing with assets in the BVI.

Background

The case concerned an application by Parles AS (**Parles**), a Czech company, and Mr Daniel Perner, its ultimate beneficial owner (**UBO**), for a Chabra injunction against Winsley Finance Limited (**Winsley**), a BVI company.

Chabra relief can be granted against a third party against whom no substantive cause of action is asserted in circumstances where there is good reason to believe that the assets of the third party are in truth the assets of the party against whom a claim is made and/or the assets will ultimately be available to meet any judgment against that person (such as where the assets are held on bare trust or as nominee by the third party).

Parles and Mr Perner sought the injunction on the basis that its alleged UBO, Mr Petr Pernicka, owed debts to them of CZK13,504,446 and CZK137,546,301 respectively (approximately US\$5.7 million in total).

Winsley's sole asset was a claim against the Government of Croatia in relation to non-payment for a delivery of anti-air defence weapon systems during the mid-90s. The claim had been dismissed at first instance but was subject to an appeal which, if successful, would result in a judgment of approximately US\$200 million.

Mr Pernicka disputed Parles and Mr Perner's asserted debts, arguing that either he did not sign the relevant debt instrument or that his signature had been fraudulently inserted onto the document. Mr Pernicka further contended that the claim against the Government of Croatia had been assigned to his brother and was no longer an asset of Winsley.

Parles – but not Mr Perner – issued Court proceedings in Czechia in respect of its portion of the debt. Mr Perner, meanwhile, successfully applied to the Czech Court for the appointment of an interim administrator over Mr Pernicka's assets, which is a Czech court procedure akin to receivership. The interim administrator, Mr Broz, attended the hearing of the application on a watching brief but did not otherwise participate in the proceedings.

The decision

The BVI Commercial Court Judge, Mangatal J, identified two unusual features about the application:

- (a) **Jurisdiction:** Mr Perner had not issued (and did not intend to issue) court proceedings in respect of his portion of the debt, which accounted for more than 90 per cent of the quantum of the freezing order sought against Winsley.
- (b) **Standing:** the applicants, Mr Perner and Parles, were two unsecured creditors of Mr Pernicka and his court appointed interim administrator was not party to the proceedings.

Mangatal J held that:

- The BVI Court had jurisdiction to grant the Chabra injunction under section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap 80) (the Act). This was because the wording of the section permitted the granting of interim relief in support of existing 'civil proceedings', defined as 'proceedings in any civil or commercial matter'. Mr Broz's appointment as interim administrator by the Czech Court was 'plainly [a] commercial matter' and accordingly the BVI Court's jurisdiction under section 24A was engaged.
- Following the judgment of Justice Briggs in the English case of *HM Revenue and Customs v Egleton* [2006] EWHC 2313 (Ch), an application under section 24A should be brought by the insolvency practitioner unless there are exceptional circumstances that justify the pursuit of the application by the petitioning creditor.
- Applying the standard test for freezing relief, Mangatal J decided that the injunction should be continued (albeit the amount frozen was reduced so that it only covered Mr Perner and Parles' claims, not other creditors who were not party to the proceedings).

Takeaway points

There are a number of takeaways from the Court's judgment for insolvency practitioners and creditors dealing with assets in the BVI:

- The BVI Court may grant injunctive relief in support of foreign insolvency proceedings, even if those proceedings concern the appointment of an insolvency practitioner rather than the pursuit of a monetary judgment. Mangatal J disagreed with Winsley's argument that there must be an existing or contemplated substantive claim seeking a monetary sum. The term 'civil proceedings' in section 24A of the Act is broadly drafted, such that the existence of foreign court proceedings appointing an insolvency practitioner over the debtor may be sufficient to engage the Court's jurisdiction.
- Chabra relief in aid of foreign insolvencies may, in appropriate cases, be available to petitioning creditors as well as insolvency practitioners. This could be particularly relevant to creditors with claims in foreign insolvencies that do not meet the requirements for recognition and/or assistance in the BVI.
- However, the safest course of action is for the foreign insolvency practitioner to obtain recognition from the BVI Court and then make the application for interim relief. Mangatal J stressed that it would only be in exceptional cases that freezing orders would be made at the behest of creditors, and that in the ordinary course, creditors should not expect freezing orders against potential judgment debtors of the company sought to be wound up.
- What amounts to an 'exceptional case' remains open to argument. Although the Court found that Mr Pernicka had 'exhibited dishonesty' and 'consistently demonstrated low standards of commercial morality', it did not provide guidance or expressly identify the facts on which it relied upon in reaching the conclusion that the case was sufficiently 'exceptional' to justify the granting of relief to Mr Pernicka's unsecured creditors, Parles and Mr Perner, as opposed to his Court appointed interim administrator, Mr Broz.

Conclusion

The decision in *Parles* illustrates the BVI Commercial Court's flexible and pragmatic approach to applications for Chabra freezing injunctions and provides helpful guidance to foreign insolvency practitioners and unsecured creditors on the circumstances in which interim relief may be available in aid of foreign insolvency proceedings.

The judgment is welcome judicial precedent that an application for relief under section 24A is potentially available to both creditors and insolvency practitioners – although the pursuit of an application by a

creditor is likely to be a last resort option as the creditor will need to demonstrate exceptional circumstances which will largely be dependent on the facts of any given case.

This article was first published in [INSOL World Q3 2023](#).

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