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September 2015 Legal Update

The Federal Republic of Brazil and another (Respondents) -v- Durant International Corporation [2015] UKPC 35

This is a case that was dealt with by the Privy Council and was an appeal from Jersey but involved BVI companies that were used to secrete the proceeds of bribes.

The Privy Council is the final court of appeal for BVI cases and therefore it has persuasive authority in the BVI.

The case revolved around the depletion and replenishment of a bank account that was used to hold bribe money. The main hurdle in this case was that tracing is a proprietary relief and queries were raised regarding whether the depletion of funds in a bank account will have the effect of removing from the scope of a tracing exercise any further funds subsequently paid into that account.

The appeal therefore considered two principles that have developed tentatively in the courts. Those being the principles of "backwards tracing" and "the lowest intermediate balance rule".

In giving judgment Lord Toulson noted that this issue had been approached differently. He considered the case of Scott V-C in Foskett -v- McKeown [1998] Ch 265 and in that case it was held that one should have regard to the substance of the transaction or transactions and not "the strict order in which associated events happened". Lord Toulson favoured this approach as it refused to rule that backward tracing was not an available concept. He commented in his judgment that "a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect". He acknowledged that individuals were finding ever more sophisticated and elaborate methods to money launder and that the courts had to be alive to this when assisting victims of fraud.

The Privy Council confirmed that a general and flexible approach will be necessary when evaluating such cases. A judge must consider the whole of the transaction for a victim to establish coordination between the depletion of the trust fund which can readily be traced into, and the acquisition of, the new asset that is sought to be the subject of the tracing exercise.

Practitioners assisting parties in asset recovery in fraud cases will no doubt rejoice at such a finding and welcome the court's flexible approach to these claims.

In short the court will look to grant relief based on the substance of the arrangements, not merely their strict date of occurrence.

Amerinvest International Forestry Group Company Limited –v- Kwok Ka Yik

This case acts as a reminder that just because a company is registered in the BVI it does not follow that a claim should be brought in the jurisdiction.

The claim related to a dispute between Amerinvest and a former director of that company (Ms Kwok). Amerinvest is a BVI incorporated company and Ms Kwok was resident in China.

Amerinvest filed an application in the BVI High Court seeking various declarations and other relief against Ms Kwok.

An ex parte application, pursuant to CPR 7.3(7) was made for permission to serve out. Permission was refused at first instance as Bannister J. found that there was no claim in the BVI regarding Amerinvest's membership or constitution of its board.

Amerinvest appealed the decision and the Court of Appeal held that Bannister J. had correctly exercised his discretion in refusing the application.

In coming to its decision the Court of Appeal reviewed the case of Nilon Ltd Anors –v- Royal Westminster Investments. Lennox Paton acted for Nilon Limited at all stages in that case including its successful appeal to the Privy Council in London (see Spring 2015 update for more information). Essentially the court should not interfere with decisions of the lower court which has applied the correct principles and had taken into account matters which should be taken into account, unless it was plainly wrong that it must be regarded as outside the ambit of the discretion of the lower court

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The Court of appeal reiterated the requirements that were considered in the Nilon case:

- The Claimant must satisfy the court that in relation to the foreign defendant, there is a serious issue to be tried on the merits

- 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 (one party must have a much better argument than the other).

- The Claimant must satisfy the court that in all the circumstances the forum which is being seized 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.

The Court of Appeal found that the substantive dispute related to the ownership of the parent company of Amerinvest, which was a Chinese corporation. Therefore the BVI was not an appropriate form for the claim to be heard.

The case is a useful reminder that the BVI Courts are live to the practice of Claimants issuing a claim in this jurisdiction in order to circumnavigate decisions of foreign courts.

Claimants and practitioners alike should first consider the guidance in this case and the Nilon case before embarking on litigation. Those that ignore the guidance will likely get short shrift from the Court.

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