



Forum Challenges in the BVI – a forensic exercise



Author:

Richard G. Evans, Partner

The BVI Court of Appeal has recently given further guidance on the application of the established principles of *forum non conveniens* in the context of a claim brought in tort against certain BVI incorporated companies.

In *Anjie Investments Limited -v- Cheng Nga Yee* the Claimants brought proceedings in the BVI Commercial Court alleging fraudulent misrepresentation, as a result of which, they alleged, they transferred their shareholding in a BVI company to Anjie Investments Limited (“Anjie”), itself a BVI company.

Anjie applied to strike out the Claim and, in the alternative, to stay the Claim on the grounds that the BVI Courts were not the appropriate forum for the trial of the action: rather, the Court of Hong Kong was the appropriate forum. At first instance, the Commercial Court Judge (Farara J (Ag)) disagreed with Anjie. Whilst Farara J expressed satisfaction with many of Anjie’s arguments, it appeared that he was particularly swayed by the fact that the BVI corporate defendant was being sued as of right in the BVI, and the commission of the legal wrong complained of - misappropriation of shares in a BVI company, also took place in the BVI.

The Court of Appeal, whilst recognising that forum cases are generally matters left to the discretion of the first instance tribunal, disagreed and, set aside the Commercial Court’s discretionary determination.

The Commercial Court, the Court of Appeal determined, had wrongly identified the place of commission of the alleged tort. Given that the cause of action was misrepresentation, the key to determining the appropriate forum was to identify where the alleged misrepresentations had been made: that was undeniably Hong Kong. The fact that the updating of share registers might have occurred in the BVI, was none to the point: that was merely a “collateral and administrative” act, consequent upon the alleged misrepresentation.

Further, and applying the analysis of the Privy Council in *Nilon Limited -v- Westminster Investments S.A* (also an appeal from a BVI matter), the fact that the subject matter of the Claim was shares in a BVI company was at best a “paper” connection and not a connection (c.f. the view of the Commercial Court) of any real value.

The case serves as a useful reminder that forum cases must be considered in a careful and forensic manner, including down to the level of analysing precisely where the tort alleged was committed and which elements of the actions complained of, actually constitute the tort. It also highlights that the former approach, namely that BVI must be the appropriate jurisdiction if the claim concerns the affairs of a BVI company, has been firmly



consigned to the past.

Richard Evans (BVI) appeared and led the successful Conyers team of Norman Hau (Hong Kong) and Murray Laing (BVI). Matthew Hardwick QC of 3 Verulam Building, London was leading counsel for the team.

Author

Richard G. Evans

Partner

+1 284 852 1115

richard.evans@conyersdill.com

Global Contacts

Kerri L. Lefebvre

Director

Head of **Dubai** Office

kerri.lefebvre@conyersdill.com

Nigel K. Meeson QC

Partner

Head of the Asia Disputes & Restructuring Group

nigel.meeson@conyersdill.com

Linda Martin

Director

Head of **London** Office

linda.martin@conyersdill.com

Alan Dickson

Director

Head of **Singapore** Office

alan.dickson@conyersdill.com

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