When the tide goes out

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Richard Evans and Alecia Johns of Conyers provide a BVI litigation toolkit for asset tracing and recovery.

In the wake of the economic downturn resulting from the global pandemic, a significant increase in fraud cases can unfortunately be expected. There are two principal reasons. Firstly, the seismic changes brought about by the pandemic, including increased reliance on remote working and systems, generally create ripe opportunities for fraudsters. Second, pre-existing or historic frauds are easier to detect when the proverbial tide goes out. History has firmly established this pattern – the discovery of Bernard Madoff's Ponzi scheme occurred during the 2008 global financial crisis. This article therefore offers a timely synopsis of some of the interim remedies available in the British Virgin Islands (BVI) in order to trace, preserve and recover assets which have been misappropriated as a result of fraud or otherwise.

DISCLOSURE AND INFORMATION GATHERING TOOLS

While there is no dedicated provision for pre-action disclosure in the BVI Civil Procedure Rules (CPR), useful information may be obtained for the asset recovery process by way of *Norwich Pharmacal* and *Bankers Trust* orders.

The *Norwich Pharmacal* jurisdiction (*Norwich Pharmacal Co and Others v Customs* [1974]) may be used to obtain information from a third party who may be mixed up in the wrongdoing of another (whether innocently or otherwise) and who possesses information which the litigant needs to pursue a claim against the wrongdoers. The registered agents of BVI companies have been held to be the potential subjects of Norwich Pharmacal orders on account of their role in providing corporate management services to BVI companies, which renders them to be involved in the activities of those companies, albeit innocently, and therefore not 'mere onlookers' (*JSC BTA Bank v Fidelity Corporate Services Limited*). This is particularly the case where, for example, it can be asserted that the subject BVI company was established solely for the purpose either of carrying out the fraud, or for channeling or secreting its proceeds.

The threshold criteria to be fulfilled for obtaining *Norwich Pharmacal* relief are that a good arguable case that a wrong has been committed against the applicant and that the respondent became mixed up in the wrongdoing. After these thresholds are met, the court will consider as a discretionary factor whether the information is necessary to establish that a wrong has been committed or to identify the wrongdoers.

Bankers Trust orders (*Bankers Trust v Shapira* [1980]) may be obtained against third parties, such as financial institutions, in instances where there is a *prima facie* case of fraud or breach of trust, and information is required to preserve assets which are the subject of a proprietary claim. This remedy is not available where the applicant has no proprietary interest in the assets in question.

The BVI Court of Appeal has emphasized that, while often conflated, the *Bankers Trust* and *Norwich Pharmacal* jurisdictions are separate forms of relief and so too are the criteria for obtaining each. In order to obtain a *Bankers Trust* order, the applicant must satisfy the court of the following: there is compelling evidence that the applicant was defrauded or otherwise wrongfully deprived of his assets, there is good reason to believe that the assets held by the third-party institution belong to the applicant, delay may lead to dissipation of the assets, there is a real prospect that the disclosure sought may lead to the location or preservation of the assets, and the information disclosed will be used only for tracing the applicant's assets *(ABCD v E*).

Search orders (also referred to as *Anton Pillar* orders) may also be obtained requiring the respondent to admit another party to premises for the purpose of preserving evidence. The applicant must establish a strong *prima facie* case against the respondent and that there is a real risk that the respondent may destroy relevant evidence in his possession if the order is not made. In practice, *Anton Pillar* orders are rarely, if ever, sought or granted in the BVI.

ASSET PRESERVATION AND RECOVERY

A freezing order (also referred to as a *Mareva* injunction), prevents the respondent against whom it is made from disposing of or otherwise dealing with specified assets (but not assets to which the applicant makes any proprietary claim) pending the outcome of the substantive proceedings.

In order to obtain a freezing order, the applicant must establish that: there is a good arguable case against the respondent on the merits of the substantive claim; there is a real risk of dissipation of assets if the freezing order is not granted; and it is just and convenient in all of the circumstances for the injunction to be granted. A good arguable case has been described as one which is "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success" (*Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft* [1983]).

The applicant for a freezing order is generally required to give a cross-undertaking in damages, which is intended to compensate the respondent if the court later finds that the order should not have been granted and

the respondent has suffered loss as a result. The court may also order that the applicant provide fortification of that cross-undertaking by payment of a sum of money into court (or equivalent) in support of the undertaking.

It is customary for freezing orders to also require the respondent to disclose information about its assets in order to police the injunction. These disclosure provisions are important ingredients which constitute part and parcel of the 'injunction' itself *(Emmerson International v Renova* [2019]).

In circumstances where the claimant has a proprietary claim to the assets in question, there is no requirement to establish a risk of dissipation of the assets. A proprietary injunction in order to preserve such assets may be obtained if the following criteria are met: there is a serious issue to be tried, damages would not be an adequate remedy, the balance of convenience lies in favour of the applicant, and in all the circumstances it is just and convenient to grant the injunction.

Chabra injunctions are freezing orders made against non-cause of action defendants, against whom the applicant has no cause of action but who have been joined as defendants for the sole purpose of preserving their assets pending the determination of the claim against the main defendant (*TSB Private Bank International v Chabra* [1992]). Chabra injunctions are granted in circumstances where the applicant establishes that there is a good arguable case that the third party or non-cause of action defendant possesses assets to which the claimant may ultimately have recourse in order to satisfy a judgment against the main defendant.

Chabra injunctions are generally available against BVI defendants against whom the court has personal jurisdiction, once it can be established that there is sufficient nexus between enforcement of the judgment against the main defendant and the assets held by the non-cause of action defendant (*Gilfanov et al v Polyakov et al* and *Renova Industries Limited et al v Emmerson International*) on the difficulties in obtaining Chabra orders against foreign defendants).

The BVI court also possesses the jurisdiction, under section 24 of WI Supreme Court Act, to appoint receivers in order to preserve assets on an interim basis pending the outcome of the substantive claim. The applicant for such an order must establish: a good arguable case against the respondent, a real risk of a dissipation of assets, and that it is "just and convenient" to appoint a receiver (*Norgulf Holdings Limited v Michael Wilson*).

Given that an interim receivership order is considered a very intrusive remedy, the BVI Court of Appeal has held that the evidential threshold for establishing whether there is a "good arguable case" is higher on a receivership application than it would be for a freezing order (*Vinogradova v Vinogradova*). Further, in determining whether it is just or convenient to grant the order, the court will assess whether any less draconian remedy is sufficient (such as a freezing order) and if it is, a receiver will not be appointed.

AVAILABILITY OF EX PARTE AND/OR URGENT RELIEF

All of the interim remedies outlined above may be sought on an *ex parte* basis, that is, without notice to the respondent. In order to obtain these remedies *ex parte*, the applicant must satisfy the court of at least one of the following: urgency dictated that no notice was possible or to give notice would defeat the purpose of the application (*National Commercial Bank Jamaica Ltd v Olint* [2009]).

Any such order made *ex parte* should not last for more than 28 days. On granting the order the court must fix a date for further consideration of the application. The respondent to such an order is entitled to apply to have the order set aside at the further hearing (or subject to the terms of the order, sooner if urgency can be demonstrated). Applicants for *ex parte* relief are under a strict duty of full and frank disclosure. Failure to adhere to this requirement can result in the discharge of any order obtained.

These interim remedies may also be sought on an urgent basis, including before the filing of a substantive claim in the BVI. In order to grant an interim remedy before the filing of a claim, the court will need to be satisfied that the matter is urgent or it is otherwise necessary to do so in the interests of justice. The BVI court also has the jurisdiction to permit the service of such interim orders on respondents outside of the jurisdiction before the claim form is issued (*Thelma Paraskevaides et al v Citco Trust Corporation Limited*).

INTERIM RELIEF IN AID OF FOREIGN PROCEEDINGS

The availability of interim relief in support of proceedings that are taking (or will take place) outside the jurisdiction is a fluid one at this precise time. For many years, the BVI had adopted that approach that by reason of the decision in *Black Swan Investment ISA v Harvest View Limited et al* there was a common law jurisdiction to grant so-called 'freestanding' injunctions in the BVI in support of foreign proceedings.

However in *Broad Idea International Limited v Convoy Collateral Limited*, the Court of Appeal determined that *Black Swan* had been wrongly decided. The decision created shockwaves amongst BVI commercial practitioners, and efforts are afoot to enact legislation in order to put the jurisdiction to grant injunctions in aid of foreign proceedings on a statutory footing. At this time, there remain various options available to achieve a like result, depending on the particular fact pattern in question.

The court's power to award interim remedies in aid of foreign arbitral proceedings is firmly established by statute in section 43 of the Arbitration Act, 2013. In *Koshigi Limited et al v Donna Union Foundation*, the BVI Court of Appeal upheld a worldwide freezing order and an interim receivership order made in aid of arbitral proceedings before the **London Court of International Arbitration** (LCIA). The court held that there was no need for assets to be in the BVI in order for the court to be able to grant interim measures pursuant to section 43.

While not a comprehensive list, we hope this is a useful summary of the most commonly used legal options available to those seeking to trace and recover assets in the BVI.

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