

Offshore Cases

British Virgin Islands

Court of Appeal

Net International Property Limited (*Appellant*) v. Adv. Eitan Erez (As Trustee in Bankruptcy for Rachael Sofer Sayag) (*Respondent*)
 Judgment given on 22 February 2021

Common law right of recognition and assistance to “foreign representative” not from “relevant foreign country” – Jurisdiction to rectify register of members

Background

This appeal arises out of bankruptcy proceedings commenced in Israel concerning the ownership of shares in BVI incorporated company Net International Property Limited, the Appellant (the “Company”) by Rachael Sofer, who was declared bankrupt in Israel. Adv. Eitan Erez is the appointed trustee in bankruptcy for Rachael Sofer and the Respondent to the Appeal.

By way of background, the District Court in Israel previously found that Mrs Sofer (as debtor in the bankruptcy proceedings) was the “controlling owner and moving force” of Net International. The District Court had also made a declaration that all the assets of the Company belong to Mrs Sofer as part of the bankruptcy estate. The Supreme Court in Israel confirmed the findings of the District Court save the finding attributing the ownership of the assets of Net International to Mrs Sofer.

First Instance Decision

Adv. Eitan Erez (the “Trustee”) sought to have his status as trustee recognized in the British Virgin Islands and issued a Fixed Date Claim seeking his recognition and assistance of the Court under the common law jurisdiction of the Court. The Trustee also sought further ancillary orders inter alia, appointing him as shareholder of Net International and empowering him to deal with the shares of the Company.

On 9 June 2020, the Commercial Court judge the Honourable Mr Justice Adrian Jack [Ag] summarily determined the Claim and ordered inter alia, (i) that the Trustee be recognised as trustee of the assets of Mrs Sofer, (ii) that the Trustee be registered as shareholder of Net International and (iii) that the current registered agent of the Company rectify the register of members accordingly.

Net International appealed the decision on all counts.

Recognition and assistance

The Court of Appeal affirmed the lower court’s decision granting recognition and held that recognition remains part of the common law of the BVI so long as Part XVIII of the Insolvency Act 2003 (the “Act”) remains not yet in force. Part XVIII of the Act is the relevant statutory regime for recognition of foreign proceedings and cooperation with foreign representatives.

The Court of Appeal set aside the remaining orders made by the learned judge on the basis that the learned judge had no power under the common law or otherwise to grant assistance to the Trustee in the form of the orders made registering the Trustee as shareholder of Net International and rectifying the share register. The reasoning provided by the Court of Appeal was that Part XIX of the Act provides to the court the jurisdiction to grant assistance in aid of foreign proceedings once the foreign representative was from a “relevant foreign country”. It is common knowledge that Israel is not a “relevant foreign country” for the purpose of the Act. The Court held in substance that the common law power to grant assistance could not survive with the enactment of Part XIX of the Act because the purpose of that part was expressly to limit those foreign representatives entitled to apply to the BVI courts for assistance. As Israel was not a designated jurisdiction under the Act, the Trustee could also not be granted assistance by the Court pursuant to the common law or otherwise because that power had been abrogated by the Act.

Interestingly, the Court of Appeal also held that assistance was a separate and distinct concept from recognition and that the former remains governed by Part XIX of the Act. In explaining the difference between the two, it was held that recognition would only confer *status* on the Trustee to reflect his appointment in Israel whereas assistance would confer onto the Trustee the power to deal with the shares in the Company.

Takeaways

This is the first appellate decision in the BVI on the common law powers of recognition and assistance to foreign insolvency practitioners under Parts XVIII and XIX of the Act. While the Court of Appeal appeared to approve the position taken by former Commercial Court judge Justice Bannister in *Re C (a Bankrupt)* (delivered 21 July 2013, unreported), which rejected the idea that common law assistance could be granted to foreign representatives from non-designated countries, by its judgment the Court of Appeal has dismissed the notion that the general common law power to grant recognition did not remain to confer status of any foreign representative wherever situated. It does.

The decision was not confined to the common law power of recognition but also offered useful guidance on rectification claims in the BVI and when a matter can be determined summarily under the rules.

In so far as it concerned the setting aside of the rectification order, the Court of Appeal held that the Court had no jurisdiction to make a rectification order against the registered agent where there was no evidence that the registered agent maintained the register of members of the Company. At the time of the appeal, there was no evidence before the Court as to who maintained the original register of members of Net International.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.