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Asset Tracing in the British Virgin Islands

In this article, we will discuss some of the tools available to a party in the British Virgin Islands (BVI) to seek to recover property, or proceeds of property, which have been misappropriated. It is not surprising that in some cases, the identity of the wrongdoer or the whereabouts of the misappropriated property is unknown.

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Tracing consists of a series of rules developed by equity to deal with situations where assets have been misappropriated and the wrongdoer is not in a position to compensate, or money compensation is not adequate.

Against that background, it is worth noting that while a company incorporated in the BVI is required to maintain certain records at the office of its registered agent (such as its memorandum and articles of association, register of directors, register of members, minutes of members’ and directors’ meetings and copies of resolutions), there is no right for the public to inspect such records. Indeed, confidentiality of corporate documents and information is one of the key attractions of incorporating a company in the BVI. BVI companies are not generally required to maintain or file statutory accounts, or meet any particular set of international accounting standards. Under section 98 of the BVI Business Companies Act 2004, all that a company is required to maintain are records “sufficient to show and explain the company’s transactions” and which “will, at any time, enable the financial position of the company to be determined with reasonable accuracy”. There is no requirement for any accounts or financial records to be subject to independent audit.

There are other publicly available sources which may help a party to identify and track assets of a company. It is possible to conduct a company search at the BVI Registrar of Corporate Affairs (the **Registrar**), although such a search is likely to reveal only limited information. A BVI company is only required to file its memorandum and articles of association, together with any amendments to these documents. It is not required to file its register of directors, register of members, register of charges or an annual return with the Registrar. A company may elect to file one or more of these registers, and if it does it will be obliged to continue to file such documents until it gives formal notice to the

Registrar. In practice, however, it is very rare for a company to undertake such voluntary filing.

Information regarding entities regulated by the BVI Financial Services Commission is available on the Commission website. Such information would include banks and fiduciary services companies, insurers and insurance brokers, accountants, lawyers, insolvency practitioners, mutual funds and registered agents.

It is also possible to undertake a court search to determine whether a company is a party to any pending litigation in the BVI, and whether there has been any past judgment which may shed light on assets held by the company. In addition, upon application the BVI Land Registry can provide certain details regarding the owner of BVI land or real estate. However, this requires the applicant to first be able to identify the location or owner of the land. A party may also obtain certain information regarding vessels registered under a BVI flag from the BVI Ship Registry.

What is “tracing”?

Tracing consists of a series of rules developed by equity to deal with situations where assets have been misappropriated and the wrongdoer is not in a position to compensate, or money compensation is not adequate.

In the English case of *Foskett v McKeown* [2001] 1 AC 102, the House of Lords distinguished the concepts of “following” and “tracing”, and explained that “following” is the process of following the same asset as it moves from hand to hand, whereas “tracing” is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. Tracing identifies the traceable proceeds of the claimant’s property. It enables the claimant to substitute the traceable proceeds of the original asset as the subject matter of his claim.

The value of tracing is that the identification of property as the misappropriated property opens the way for a proprietary claim. The benefit of asserting a proprietary claim (as opposed to a personal claim) is that it gives the claimant a right to recover a particular asset, which has priority and will defeat the claims of other creditors on the defendant’s bankruptcy. The proprietary nature of the remedy also allows the claimant to claim any increase in the value of the property which is being traced. On the other hand, a personal remedy only gives the claimant the right to recover money equivalent to the value of the property, so any judgment awarded will simply be ranked as an unsecured debt and will probably not be satisfied on the defendant’s bankruptcy.

Asset tracing tools

Generally, the remedies available in the BVI to victims whose assets have been misappropriated are broadly similar to those available in England. Some tools available for tracing assets include: Norwich Pharmacal orders, Bankers Trust orders, Anton-Pillar orders, injunctions and the appointment of receivers, which we will discuss in more detail below. These interim relief orders are mostly done by way of *ex parte* applications.

Obtaining information

Norwich Pharmacal orders

Disclosure orders constitute a very powerful weapon for the tracking down and recovery of assets. There is no provision for pre-action disclosure in the CPR and as such, resort is often made to Norwich Pharmacal relief which was first granted in the BVI in *The Canada Trust Company & Others v Century Holdings Ltd & Others* (1998/99) 1 ITELR 56. Since then Norwich Pharmacal orders have been frequently granted. They are available before action against third parties who have become involved in or facilitated wrongdoing by the intended defendant, however innocent their involvement may be. The information sought must be relevant to and

necessary for the claimant to pursue the wrongdoers. These orders are relevant in the BVI and are frequently used to obtain information from registered agents relating to companies which they administer. The BVI Court of Appeal¹ has held that the mere provision of basic registered agent services is sufficient involvement to impose upon the registered agent a duty to disclose information which could assist the victim in discovering the true wrongdoers. Evidence of involvement in the actual wrongdoing is not necessary.

Bankers Trust orders

Bankers Trust order is a remedy available against third parties in circumstances where a *prima facie* case of fraud or breach of trust has been made out and the information is required to recover, trace, or preserve assets that are the subject of a proprietary claim. This remedy requires a third party (usually a bank) to provide information which might ordinarily be protected by the duty of confidentiality. Bankers Trust orders are similar to Norwich Pharmacal orders except that:

- (a) there is no requirement to prove any involvement in the alleged wrongdoing by the respondent; and
- (b) the remedy is only available where the claimant is tracing assets that he claims belong to him but have been taken by the defendant. It is not available where the claimant has no proprietary interest in the relevant assets.

In *Bankers Trust v Shapira* [1980] 1 WLR 1274, the order was granted in relation to bank records and was ancillary to the applicant's right to trace the missing monies. The applicant had no right against the bank itself.

To succeed in an application for Bankers Trust relief, there must be strong evidence of fraud. The applicant will need to demonstrate there is a good ground for thinking that the money is his money, and a need for urgent action (for example, through risk of dissipation of assets). The court will balance the interests of the intrusion into the privacy of the respondent against the potential detriment to the applicant if the information is not provided. Once a suitable case is demonstrated, the court is willing to grant wide orders.

Gagging orders

The BVI courts have an inherent jurisdiction to grant gagging orders to restrain a respondent against whom an *ex parte* disclosure order is made from communicating with the intended defendant regarding the disclosure order. This relief is generally granted in conjunction with Norwich Pharmacal and Bankers Trust orders. Any breach of a gagging order can result in contempt proceedings.

BVI Evidence Act 2006

Section 135(7) of the Evidence Act 2006 provides that on the application of any party to legal or administrative proceedings, the court may order that that party be at liberty to inspect and take copies of any entries in the records of any financial institution for the purposes of the legal or administrative proceedings. Such an application is usually ancillary to a Norwich Pharmacal or Bankers Trust order.

Anton Pillar orders

Anton Pillar orders are effectively search orders, and may be granted by the court before substantive proceedings are issued. Such relief would allow persons to enter the respondent's premises to search for and remove property and preserve it as evidence pending trial.

¹ *JSC BTA Bank v Fidelity Corporate Services Limited* HCVAP 2010/035

Application for an Anton Pillar order is made *ex parte*. Due to the extreme nature of the remedy, such an order is only granted where absolutely necessary and the court will ensure that the order contains sufficient safeguards to protect the person on whom the order is to be served, such as the appointment of independent lawyers to supervise the search and to specify the limits on the parameters of the search.

Letters of request

The BVI court has the power to grant relief pursuant to a letter of request from a foreign court in furtherance of civil proceedings, with a view to taking or obtaining evidence in the BVI in aid of those proceedings.

Securing assets and proceeds

Freezing injunctions

The BVI court has the power to grant an interim injunction to preserve assets. This enables the claimant to secure the assets to prevent them from being dissipated in any way pending the outcome of substantive proceedings. The application for such an order may be made *ex parte* at the same time as the filing of a claim form, or before the claim is filed if an undertaking is given to file the claim as soon as possible.

To succeed in an application for a freezing injunction (or often referred to as a Mareva injunction), the applicant must be able to demonstrate that (i) he has a good arguable case against the defendant or intended defendant, (ii) the refusal of an injunction would involve a real risk that a judgment or award in favour of the applicant would go unsatisfied, and (iii) it is just and convenient for the injunction to be granted. The English Court of Appeal² has held that as a general principle, a Mareva injunction ought not to interfere with the ordinary course of business of the defendant. It is not intended to give the claimant security in advance of judgment but merely to prevent the defendant from defeating the claimant's chances of recovery by dissipating or secreting away assets. In determining whether it is just and convenient to grant the injunction, the court will consider factors such as the conduct of the claimant, the rights of any third party who may be affected and the potential hardship to the defendant.

When a freezing injunction is granted, the court will almost always require the applicant to give a cross undertaking in damages. This is intended to compensate the respondent if it is later found that the interim relief should not have been granted and the injunction has caused the respondent loss. Such an undertaking is enforced by an inquiry into what loss the respondent has suffered as a result of the injunction.

Black Swan orders

The BVI court has jurisdiction to grant stand-alone injunctions in support of foreign proceedings. This approach was taken in *Black Swan Investment ISA v Harvest View Limited* BVIHC (Com) 2009/399, and subsequently approved by the Court of Appeal in *Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited* HCVAP 2010/028. It is therefore a very helpful tool in support of proceedings which a claimant has instigated, or intends to instigate, in a foreign jurisdiction. For relief to be granted, the BVI court must have *in personam* jurisdiction over the respondent or defendant, although before granting this type of relief, the court must be satisfied that it is necessary in the circumstances, and that the relief sought in the main proceedings before the foreign court will lead to a judgment which will be enforceable in the BVI.

² *Polly Peck International v Nadir* [1992] 4 All ER 769

Appointment of receivers

Under section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Act, the BVI court has the power to appoint receivers on an interim basis to secure and protect relevant property on behalf of the party applying to appoint them. A receiver essentially “holds the ring” and preserves the assets pending trial. In order to obtain such relief, the court will have to be satisfied that the circumstances to justify a freezing order exist and that the additional protections afforded by a receivership order and any potential prejudice to the respondent can be justified in the circumstances of the case. A receivership can also be granted to supplement the powers of a freezing injunction if it can be shown that the injunction is not providing adequate protection on its own.

For more information please contact:

Ian Mann

+852 3195 7236

ian.mann@harneys.com

Hong Kong

Andrew Thorp

+1 284 852 2571

Andrew.thorp@harneys.com

British Virgin Islands

www.harneys.com

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