

BVI Litigation Update - Fourth Quarter Case Notes

December 2009

Jurisdiction and Forum

In *Pacific Electric v Texan Management Limited and others*, the Privy Council has given important guidance on forum and jurisdictional challenges, and also dealt with two conflicting Court of Appeal decisions. In *Pacific* defendants filed stay applications within the time limits of CPR 9.7 with their evidence after those time limits. Other defendants filed stay applications outside the time limits. The claimant argued that the procedural defects meant the applications could not proceed which was rejected in the High Court but succeeded in the Court of Appeal.

In allowing the appeal the Privy Council gave guidance that (1) there was an inherent jurisdiction to stay proceedings outside the scope of CPR 9.7 (2) the Court has a discretion to extend time for filing evidence outside the time limits in the rule (3) a failure to serve evidence with an application can be cured by the Court and (4) an application may be made outside the normal 28 day period for filing a defence and within any extended period granted by the Court. Accordingly the English decision of *Montrose Investments Ltd v Orion Nominees Ltd* should not be followed.

This is an important decision and welcome guidance in this area.

Liquidations

The Commercial Court made the interesting observation in *Anthony Marcus v Stella Management Limited* that in relation to the BVI's Insolvency Act, because of the important differences between the Act and foreign insolvency statutes, decisions (mainly English) based upon foreign statutes are unlikely to be helpful in interpreting the BVI Act. One example is the ability of the BVI Court to liquidate a BVI company based on a claim for unliquidated damages, something which is not possible in many other jurisdictions.

Remuneration of office holders

In the earlier High Court case of *CDP Limited v CDW International (BVI) Ltd*, the High Court referred to the decision of the English Court in *Mirror Group Newspapers v Maxwell* [1988] BCC 324. In *Rich Victory v Sino Union*, the Commercial Court also reviewed *Mirror Group* and decided not to follow its guidance. The

Court indicated that in applying the criteria in section 432 of the Insolvency Act, the Court would not apply a test that a reasonably prudent man, faced with the same circumstances in his own affairs would have laid out or hazarded his own money in doing what the office holders have done. Accordingly it is now easier for office holders to recover their fees.

The Court also laid out some helpful advice on the recoverability of the fees of foreign lawyers.

Evidence

In a major trial concerning the ownership of shares in a BVI company, the Commercial Court has reviewed the general rule (see *Phipson on Evidence* 16th Ed, paragraph 12-12) that a party is required to challenge in cross examination the evidence of any witness of the opposing party if he wishes to submit to the Court that the evidence should not be accepted on that point. The Commercial Court indicated that this should not be an absolute rule, although it might be applied in some circumstances. However the rule should not be used to argue that other, contrary evidence should not be taken into account. (*Sino Union v Shangi La, Rich Victory and the Government of Dominica.*)

Application to set aside Order for the Appointment of a Liquidator

Where an application was made by the sole member and director of a BVI company to set aside the order of the Court in appointing a liquidator, alternatively to set aside the statutory demand which formed the basis of such order; the Commercial Court ruled that while it had jurisdiction to set aside such order in accordance with CPR 39.5, it had no jurisdiction to set aside the statutory demand in the circumstances. In any event, the Court found that not only was there was an inordinate delay in seeking to set aside the winding up order (approx. 1 year and 14 days) but the Company's non attendance at the hearing for the appointment of a liquidator, was deliberate. Accordingly, the Court declined to set aside the order and dismissed the application. It is also noteworthy that the Applicant also sought to rely upon section 232 of the Insolvency Act, 2003 as an alternative ground in order to seek the termination of the liquidation. The Commercial Court was of the view that this section did not apply to circumstances like this which amounted to an attempted rehearing of a liquidation application. (*Burren Energy (Egypt) Limited -v- Goura Oil Limited*)

If you have any questions about these cases please contact Litigation Head Phillip Kite (phillip.kite@harneys.com).

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