

Recent cases from the BVI Commercial Court

June 2010

Events of Default and Appropriation

The Commercial Court concluded its trial in the long running *Alfa Telecom v Cukurova* litigation. This case concerns the important subject of appropriation under English law. A guide to some of the legal issues at trial is set out in the [banking section](#) of this newsletter but it is interesting to note that such a detailed judgment was delivered in such a major trial in just 3 weeks. We believe this shows that the new rules and concept of a Commercial Court is producing dividends.

Costs of an office holder in the BVI

The Court recently provided clarity on the ability of an office holder to recover fees prior to the order placing the company into provisional or full liquidation. The BVI Insolvency Act provides that remuneration of an insolvency practitioner will be fixed by reference to time properly incurred whilst carrying out his duties in the insolvency proceeding. As the proceeding may only commence after an appointment, fees incurred prior to that date should not be considered for recovery.

Practitioners should be aware of this provision when undertaking pre liquidation investigations and preparation.

This case is the latest in a line of cases on costs of insolvency proceedings. For example in *Rich Victory v Sino Union*, the Court reviewed the English case of *Mirror Group Newspapers v Maxwell* [1988] BCC 324 and decided not to follow its guidance. The BVI 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.

Norwich Pharmacal review

As the BVI does not have pre-action disclosure in its Court rules, Norwich Pharmacal orders have been an important tool for Claimants. In *Al Rushaid and others*

vs *TSJ Engineering Consulting Company Limited* the BVI Court took the opportunity to restate the relevant principles. *Al Rushaid* concerned allegations that former directors had set up a BVI company to receive secret commissions and a BVI disclosure order was sought in support of English proceedings to trace assets.

The BVI Court reviewed the authorities and emphasised that the key to the jurisdiction was to enable a claimant to obtain legitimate redress for a wrong which otherwise would not be available to him. In granting a “tracing” disclosure order the Court set out the following general conditions to be satisfied:

- There must be an apparent wrong carried out, or arguably carried out, by the ultimate wrongdoer;
- There must be the need for an order to enable an action to be brought against the ultimate wrongdoer;
- The person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued;
- As an alternative to the above the Court would order disclosure under *Bankers Trust v Shapira* [1980] W.L.R 1274 where a claimant was legitimately seeking evidence against known defendants.
- If the above conditions are satisfied the court has a residual discretion whether it is right that an order should be made. One of the most important factors seemed to be whether there are any other means available of finding out the information.

For more information about these or any other British Virgin Islands litigation matters please contact Phillip Kite (phillip.kite@harneys.com) or Andrew Thorp (andrew.thorp@harneys.com).

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