

BVI Litigation Update - Third Quarter Case Notes

September 2009

The third quarter of the year included the Court's vacation when typically only urgent matters are heard, however there were a number of developments which are listed below.

Jurisdiction Causes

In *Pioneer Freight v Worldlink Shipping* the Commercial Court confirmed that the principles laid down in the Court of Appeal decision of *Sparkasse v Associated Capital* applied to the rules on setting aside a statutory demand in the subsequent Insolvency Rules. However the Commercial Court also ruled that where BVI Court recognises there is a dispute as to the construction of an agreement which is subject to the exclusive jurisdiction of another Court, the BVI Court should not attempt to decide whether the dispute itself is a substantial one under the BVI Insolvency Rules. Instead the BVI Court should defer to the exclusive jurisdiction clause and decline to rule on the merits of the dispute. The Commercial Court therefore distinguished the English Court of Appeal case of *AWB Geneva SA v North American Steamships* [2007] EWCA Civ. 739.

Directors' duties and Preferences

Harneys has also been involved in several ongoing test cases in the areas of preferences and plans of arrangement. Whilst the BVI and UK Insolvency regimes are similar in many respects, there are important differences, for example, under the BVI Insolvency Act there is no need to show an intention to prefer and the remedy for an unfair preference operates between the company (acting through the liquidator) and the preferred creditor. It is an open question whether the BVI Court will follow the guidance in the English case *West Mercia Safetyware v Dodd* [1988] BCLC 250 on whether directors might potentially be liable to the general body of creditors for entering into a transaction which is akin to a preference but is not otherwise deleterious to the general body of creditors as a whole.

Court of Appeal rulings

As part of Commercial Court case notes, Harneys will also provide details of important commercial decisions of the Court of Appeal. For example the Court of Appeal on 28 September handed down decisions which give guidance on the grant of injunctions (*Alfa Telecom v Cukurova*) and when permission to appeal is required in injunctions cases (*Danone Asia v Trillion Sino*). In *Alfa*, the Court of Appeal discharged a High Court injunction and made important comments on the effect of a delay in making the application, and the need to carefully plead the cause of action. In *Danone*, the Court of Appeal found that the CPR and related statute codified and confirmed the powers of the full Court of Appeal to review decisions of a single judge of the Court of Appeal. This is an important power given the increase in decisions by single judges.

Commercial Court Rules

Finally it is important to note that draft Commercial Court practice directions have been circulated for comments. As these are still drafts we will prepare a further note as soon as they become effective.

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

The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation