

HARNEYS

BRITISH VIRGIN ISLANDS LITIGATION BRIEF

I GENERAL INFORMATION

1 Constitutional Position

- 1.1 The Territory of the British Virgin Islands (the “BVI”) is a self-governing British Dependent Territory. The group of about 50 islands and cays lies some 60 miles east of Puerto Rico in the Eastern Caribbean and has a population of approximately 20,000 people. Tortola is the main inhabited island of the group. On Tortola, Road Town is the major port, financial centre and seat of government.

2 Government

- 2.1 The BVI is responsible for its own self-government and has a ministerial form of government with a Chief Minister and ministers responsible for most aspects of local government. The Governor (appointed by the UK Foreign and Commonwealth Office) is responsible for foreign affairs, security and the civil service.

3 Economy

- 3.1 The economy of the BVI is service based, founded on tourism and financial services. The financial services industry rests largely on the success of the International Business Companies Act 1994. There are over 600,000 offshore companies (IBCs) registered in the BVI. There are no exchange controls in force in the BVI and the US Dollar is the official currency.

II LEGAL SYSTEM

4 Sources of law

- 4.1 The BVI has its own statutes in the form of locally enacted acts (formerly known as ordinances) and subsidiary legislation promulgated by the Legislative Council. In addition, some United Kingdom legislation (particularly with respect to the implementation of international treaties) has been extended to the BVI and forms part of the laws of the BVI.
- 4.2 In addition, English common law has been extended to the BVI by the Common Law (Declaration of Application) Act (Cap 13). Under section 13 of the Eastern Caribbean Supreme Court Act, the principles of English equity also apply. As a result, the common

law of the British Virgin Islands is largely identical with that of England (except as modified by statute).

- 4.3 Any decisions by the Judicial Committee of the Privy Council are binding on the BVI courts. In addition, in the absence of any BVI authority on point decisions of the English courts are of strong persuasive authority. In the absence of some local consideration to justify a deviation, the BVI courts are unlikely to differ from the decisions of the English Courts (whilst not strictly binding) and would recognize the desirability of having the same common law throughout the Commonwealth.

5 Court structure

- 5.1 The BVI court system comprises a Magistrate's Court and a High Court. The Magistrate's Court deals mainly with minor criminal and smaller civil matters. Most civil and commercial matters are heard in the High Court, which forms part of the Eastern Caribbean Supreme Court (along with former associated states of the Federation of the West Indies).
- 5.2 Appeals from the High Court are to the Court of Appeal, which sits on circuit around the Eastern Caribbean states and visits the BVI in January and June each year. Under the new court rules, procedural appeals are dealt with on paper. Any substantive appeal is likely to be heard at the next sitting of the Court of Appeal (i.e. within six months after the filing of a notice of appeal). Appeals from the Court of Appeal are made to the Judicial Committee of the Privy Council in London.

6 Court rules

- 6.1 The rules of court are embodied in the Civil Procedure Rules 2000 (replacing the former Rules of Supreme Court). The new rules have been modelled largely on the English Civil Procedure Rules as well as procedural reforms in Canada. While the rules are wide in ambit, they do not apply to insolvency proceedings.
- 6.2 The rules begin with a single guiding principle for their interpretation. The "overriding objective" is to enable the court to deal with cases justly. This novel requirement is to ensure the parties are on an equal footing, save expense, deal with the case proportionately, ensure that each case is dealt with expeditiously, and allot to the case an appropriate share of the court's resources.
- 6.3 At the heart of the new rules is the concept of active case management, by which the procedural Judge or Case Management Master takes a "hands-on" proactive approach from the outset of the litigation. Active case management includes encouraging the parties to co-operate with each other throughout the proceedings; "front-loading" cases; disposing of some issues summarily; encouraging the parties to use ADR and promoting early settlement; and fixing timetables and giving tight deadlines with strict penalties for non-compliance. As a result, the court now controls the progress of litigation.

6.4 Other key changes include:

- A change in terminology: “pleadings” are called “statements of case”; a “plaintiff” becomes a “claimant”; “writs” and “originating summonses” will be commenced by “claim form”; there is a single interim applications procedure replacing summonses and notices of motion, etc.; a party can request “further information” rather than “further and better particulars” or interrogatories.
- All claims are commenced by filing a claim form, together with a Statement of Claim.
- There are new rules governing counterclaims, claims for contribution or indemnity and third party claims. Together these secondary claims are known as “ancillary claims”.
- The extent to which the parties can agree to delay the progress of litigation is severely limited. Defendants cannot file a “holding defence” by pleading general denials but must give reasons for the denial.
- All statements of case must be verified by the party signing personally a “certificate of truth”.
- The jurisdiction to give summary judgment is enlarged. The “no triable issue” test has been replaced by the *Saudi Eagle* test. Either party may apply for summary judgment. The court can, upon application or of its own initiative, make a summary determination on the grounds that the case or part of the case has no realistic prospect of success. In addition, the court may give summary judgment on any issue of fact or law, whether or not the judgment will bring the proceedings to an end.
- Normally the judge will summarily assess costs at the end of a hearing, avoiding the need for taxation.
- The rules governing disclosure (formerly “discovery”) have changed fundamentally. In particular, the test of relevance has changed and the *Peruvian Guano* test has been abolished for standard disclosure.
- Expert evidence has been limited, and there are complex rules governing the role and duties of the expert witness.

6.5 The new rules reflect a streamlined and modern approach to litigation to avoid the twin evils of cost and delay.

7 Our experience

7.1 The BVI courts are empowered to grant a wide range of interim and final remedies including remedies designed to trace and preserve assets, obtain information, preserve documents and evidence and maintain the status quo until trial.

- 7.2 A claimant can only start proceedings in the BVI against a defendant if that defendant is resident, domiciled or present within the BVI; or the cause of action is one for which the court permits service outside the jurisdiction and the claimant otherwise satisfies the requirements of Part 7 of the Civil Procedure Rules. A claimant can bring claims in the same action against different parties who are within and outside the jurisdiction, although the doctrine of *forum non conveniens* might apply.
- 7.3 Harneys is frequently instructed to obtain urgent, emergency relief such as freezing orders, *Norwich Pharmacal* disclosure and production orders, as well as the appointment of provisional liquidators and receivers. We have extensive experience on a wide variety of company and commercial disputes, including asset tracing and recovery, shareholders disputes, insolvency matters, creditors' remedies, conflict of laws (particularly enforcement of foreign judgments), and employment disputes. In addition, as the jurisdiction has matured Harneys has developed particular expertise in handling disputes involving challenges to and variations of trust deeds, and advising on duties of trustees and protectors and beneficiaries' rights.
- 7.4 We receive instructions from many of the leading international law firms and work closely with international accounting firms. We frequently participate in or co-ordinate multi-jurisdictional disputes.

8 Legal Profession

- 8.1 In the BVI the legal profession is "semi-fused". That is, solicitors are admitted to practise only as solicitors, but barristers are admitted to practise as both barristers and solicitors. In the higher courts only a barrister has a right of audience.
- 8.2 Only qualified lawyers who have a certificate of legal education from one of the regional law schools or who have been admitted to practise as a barrister or solicitor of England, Wales, Scotland or Northern Ireland are eligible for admission as a legal practitioner of the Eastern Caribbean Supreme Court in the Territory of the BVI.

9 Use of External Counsel

- 9.1 In some cases it is useful to involve London Counsel from the inception of the claim so that they may assist in formulating the case and to allow Counsel to have periodic involvement thereafter. Involving Counsel at an early stage of any proceedings is often a cost-efficient exercise in the long run.
- 9.2 Harneys has a "best friend" relationship with a leading Commercial Chancery set, Twenty Four Old Buildings, Lincoln's Inn. Several members of Chambers are admitted as barristers in the BVI and have substantial experience in trust, fraud and asset tracing litigation. They have appeared regularly before courts in offshore jurisdictions including the BVI and have assisted Harneys in numerous high-profile disputes in the BVI courts.

10 Fees and Costs

- 10.1 In determining our fees we are required to have regard to a number of factors. The principal factor in calculating our charges is the time spent by the particular solicitor dealing with this matter. In certain cases, however, it might be appropriate to mark-up our fees for any urgent or complex matters involving difficult or novel questions. We are not permitted to accept instructions on a contingency fee arrangement.
- 10.2 The general rule is that the unsuccessful party must pay the costs of the successful party. In addition to certain fixed costs, there are three ways by which a court may quantify costs: prescribed costs (where a claim concludes before trial, costs are calculated as a function of the stage of the proceedings reached and the value of the claim), budgeted costs, or assessed costs (formerly known as “taxation”, either summarily or by detailed assessment).
- 10.3 If the successful party were to prevail at trial and obtain an order for costs against the other side, the successful party will not recover its costs in full because they will be reduced by the process known as “assessment”.
- 10.4 Consequently, a claimant should understand that even if it were successful (and assuming that the proposed defendant is able to satisfy any costs order against it) the claimant would probably have to bear a proportion of its actual costs. This could be a significant amount. In addition, there is a risk that the intended defendant may not be ordered to pay or be capable of paying the full amount of the claimant’s costs.
- 10.5 There is also the risk that the claimant could lose the litigation, in which case it would be responsible for bearing not only its own legal costs but those of the defendant’s as well.

If you have any queries please do not hesitate to contact our Litigation partner Phillip Kite at phillip.kite@harneys.com

This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

February 2003