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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

In cases of fraud, asset tracing and recovery, the BVI courts and the litigants who bring their cases before them have at their disposal a wide range of remedies that will be familiar to fraud practitioners in common law jurisdictions. These remedies have their roots in both legislation and in the body of case law arising from both common law and equity. The common law of England was introduced by the Common Law (Declaration of Application) Act 1705 and the rules of equity by Eastern Caribbean States Supreme Court (Virgin Islands) Act 1969.

Injunctive relief

The most common disputes arising in this field concern the beneficial ownership of shares in BVI registered companies and proprietary injunctions are accordingly frequent. The statutory root of the court's jurisdiction to grant injunctive relief (and to appoint a receiver on an interlocutory basis) arises from Section 24 of Eastern Caribbean Supreme Court (Virgin Islands) Act 1969 (Cap 80), which provides that the court may make such an order:

> "*…in all cases in which it appears…to be just or convenient and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.*"

This section for the basis of all injunctive relief including the granting of freezing orders (see for example *Danone Asia PTE Limited v. Golden Dynasty Enterprise Limited* (BVIHCV 2007/0262)).

The High Court also has inherent jurisdiction under which orders and ancillary orders may be granted. See section 7 of ECSCC 1969.

Approach to injunctions

In determining whether injunctive relief should be granted, the court applies the guidelines set out in *American Cyanamid v. Ethicon Limited [1975] AC 396* and English (and other Commonwealth) authorities have been relied upon with regard to various elements of the guidelines (for example, the test for good arguable case contained in *Ninemia Maritime Corp v. Schiffahrtgesellschaft gmBH & Co KG (The Niedersachsen) [1984] 1 All ER 393*).

Orders which are ancillary to the granting of injunctive relief, such as interim disclosure orders in aid of proprietary or freezing injunctions, are commonly made where required.

As a general note, although the BVI has a growing body of case law of its own (to which the doctrine of precedent applies), it is relatively small in terms of volume. Whilst the common law of England has been carried into BVI law by statute, English authorities do not bind the BVI courts. They are, together with decisions from other common law jurisdictions, persuasive and are frequently cited. While the BVI is part of the Eastern Caribbean Supreme Court (and appeals are made to the Eastern Caribbean Court of Appeal), decisions from other member states are not binding on the BVI courts.

The Eastern Caribbean Supreme Court Civil Procedure Rules (ECC PR) also make specific procedural provision with regard to injunctive and other interim relief (CPR rule 17). Most notably in this regard EC CPR Part 17.4(4) provides that the court has power to grant an interim order made without notice for a maximum period of 28 days. This requires the return date to be listed within that time period. Notwithstanding the fixing of the return date, an applicant must file a formal application to continue the relief. Otherwise interim applications must be made with at least three days' notice to the Respondent.

Stop Notices

EC CPR Part 49 contains the basis for applying for Stop Notices in respect of shares. A Stop Notice may be served by any party who claims to be beneficially entitled to the shares and requires the party on whom it is served to refrain from taking any "specified steps" without first notifying the person on behalf of whom the notice was served. "Specified steps" include the transfer, sale or registration of shares and the making of any payment by way of dividend or otherwise in respect of the shares. The procedure is designed to be simple with the Notice issued by the court office on filing the appropriate form and a supporting affidavit. The Notice does not, however, prevent dealing in the shares, merely that the recipient gives notice of his intention to take any specified steps before doing so. The court also has power to issue a Stop Order (EC CPR 49.7) to prohibit the taking of specified steps. While Stop Notices are commonly issued at the early stage in order to give a modicum of protection with regard to disputed shares and sometimes to flush out the intentions of the registered owner, in disputed cases Stop Orders are rarely sought as parties prefer instead to seek injunctive relief.

Receivers

BVI courts can and do appoint receivers over assets to preserve them pending trial. The statutory basis is contained, in common with injunctions in section 24 Eastern Caribbean Supreme Court (Virgin Islands) Act 1969. These are distinct from receivers appointed post-judgment.

Norwich Pharmacal and search orders

Norwich Pharmacal orders are amongst the most common orders made in the BVI by reason (and are dealt with in a different chapter). There is no statutory basis for such orders and the jurisdiction is based on the eponymous English case *Norwich Pharmacal Co v. Customs and Excise Commissioners [1974] AC 133*, which has been followed and applied in numerous BVI authorities. Similarly,

search orders have no statutory basis (although procedural provision is made for them in EC CPR Part 17). Such orders, as elsewhere, are comparatively rare.

Asset tracing

The BVI recognises a number of causes of action in this regard, including dishonest assistance, bribery, secret commissions and knowing receipt. None of these are based on statute.

Enforcement and relief in aid of foreign proceedings

Prior to 2010, freezing injunctions were only available in relation to a substantive domestic claim. However in *Black Swan Investment ISA v. Harvest View Limited BVIHCV (COM) 2009/0399* the Commercial Court held that it had discretion to grant a standalone freezing injunction in support of foreign proceedings (including arbitrations) in cases where the defendant was within the *in personam* jurisdiction of the BVI courts. This advance was confirmed by the EC Court of Appeal in *Yukos Cis Investments Limited v. Yokos Hydrocarbons Investments Limited HCVAP 2010 0028*. While the underlying basis for freezing orders is contained in statute (see above), this now well-established refinement is purely a creature of case law. In order to obtain what is now commonly known as a "Black Swan Order" the following must apply in addition to the normal requirements in respect of freezing orders:

(1) It must be made in aid of relief the applicant is likely to obtain from the foreign court.
(2) If the relief sought goes beyond the scope of the foreign proceedings, the court will not normally make the order.
(3) The relief sought must lead or be likely to lead to a judgment capable of being enforced in the BVI.
(4) The failure to seek injunctive relief in the foreign proceedings is a discretionary factor which militates against relief being granted.
(5) In addition to having *in personam* jurisdiction over the respondent, the court must also have jurisdiction over the assets sought to be frozen.

With regard to enforcement generally, EC CPR makes provision for the enforcement of judgments both domestic and foreign together with arbitral awards. These include the normal tools of enforcement found throughout the common law world including charging orders, garnishee orders, judgment summons, orders for the seizure and sale of goods and the appointment of a receiver. Further, Part 46 provides for writs of execution including orders for the sale of land, seizure and sale of goods, sequestration of assets and writs of delivery and possession.

Insolvency regime

As a great deal of BVI litigation is company-related, the insolvency regime, as contained in the Insolvency Act 2003, is of particular importance. Liquidators are given powers to set aside transactions made while the subject company was insolvent (during a defined vulnerability period) and which have improperly diminished the assets which would otherwise have been available for creditors. There are four types of voidable transactions: unfair preferences; transactions at an undervalue; voidable floating charges; and extortionate credit transactions. Further, Part IX of the Act deals with the liquidator's powers to take action against those who have been guilty of misfeasance, insolvent trading and fraudulent trading.

Case triage: main stages of fraud, asset tracing and recovery cases

Where a fraud is suspected, the first stage for a victim will ordinarily be to learn as much as possible about what has happened. However, the victim needs to carry out an initial investigation as quickly as possible and without alerting any of the suspected wrongdoers to the fact that the fraud has been uncovered. In practice the

investigation phase will therefore often coincide with the victim seeking interim relief from the court.

In the BVI there is no procedural jurisdiction to grant pre-action disclosure. As a result, a practice has grown in obtaining this form of disclosure through the common law route developed in England through the principles established in the Norwich Pharmacal and Banker's Trust cases (Norwich Pharmacal Orders), named after the eponymous English appellate cases of *Norwich Pharmacal Co. & Others v Customs and Excise Commissioners* [1974] AC 133 and *Bankers Trust v Shapira* [1980]1 WLR 1274.

These types of orders are frequently sought to reveal key pieces of information that will enable the victim to bring a claim against the wrongdoers and/or to take protective measures (*Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55; *UVW v XYZ* (BVIHC (COM) 108 of 2016)). Such orders are commonly sought against BVI registered agents in order to obtain information relating to the management and ownership of BVI companies, which makes them a particularly useful tool where BVI companies have been used as part of a fraud Evidence in support of a Norwich Pharmacal Order can often be complemented by evidence obtained. All companies registered in the BVI must be administered by a registered agent located in the BVI and the courts have, as a general rule, found that where a BVI company has engaged in wrongdoing or otherwise become mixed up in wrongdoing, the registered agent will also have become mixed up in the wrongdoing (albeit innocently) (*JSC BTA Bank v Fidelity Corporate Services Limited* (HCVAP 2010/035)).

Given that registered agents are required by law to retain know-your-customer (KYC) documentation showing the ultimate beneficial owner of the companies they administer, a successful Norwich Pharmacal application would reveal the ultimate beneficial owner of a BVI company and, for example, confirm that payments made to that company were in fact for that individual's ultimate benefit.

They might also be used to determine the suspected wrongdoer's connections with third parties, whether he or she has interests in other companies registered in the BVI and reveal whether the wrongdoer and his companies own certain assets. By contrast to the English position, Norwich Pharmacal Orders may be obtained against entities in the BVI for the disclosure of information that will be used in support of substantive proceedings elsewhere (*The President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7; *Q v R* (unreported, 13 December 2018); *BBB (A fund acting by its investment manager) & Another v UUU Ltd (a registered agent)* BVIHC (COM) 0182 of 2019). Crucially, Norwich Pharmacal Orders are ordinarily preceded by protective seal and gag orders that prevent tipping off by the respondent party (often a registered agent of a BVI company) (*Banco Ambrosiano Andino S.A. v Banque Nationale de Paris* [1985] HKLR 72).

Once a victim knows the identity of the wrongdoer(s) and has evidence that they have assets which are at risk of dissipation, the victim will often apply for a freezing injunction in order to prevent the wrongdoer disposing of their assets. In the BVI, such orders are frequently obtained directly against the BVI companies that are owned by the ultimate wrongdoer in order to prevent those companies from disposing of any assets up to the value of the wrongdoers suspected liability (which will usually correlate with the extent of the victim's loss). Such relief will be available even if the ultimate wrongdoer is not located in the BVI and if the substantive proceedings, in support of which the injunction is sought, are taking place elsewhere (*Black Swan Investment I.S.A. v Harvest View Limited and Another* BVIHCV 2009/399; *Yukos CIS Investments v Yukos Hydrocarbons Investments Limited* HCVAP 2010/028; *Osetinskaya v Golante and Usilett* BVIHC 2013/0037). Where it is anticipated that substantive proceedings will be commenced in the BVI in relation to the fraud, injunctions might also be sought against the wrongdoers that are not located in the BVI.

With regard to substantive claims, the claims commonly used to combat fraudulent practices in the BVI include: civil bribery; knowing receipt; dishonest assistance; unjust enrichment; conspiracy; and breach of fiduciary duties. Liquidators can also commence statutory claims in relation to fraudulent transactions perpetrated by the directors or officers of a company. Such claims tend to arise out of the payment/receipt of bribes or the dishonest transfer/receipt of monies or assets. Claims will often be brought in the BVI where BVI companies are used as vehicles to receive the tainted monies or assets and where the company is therefore a natural defendant to one of the claims mentioned above. However, in circumstances where many of the actions giving rise to the fraud are known to have taken place elsewhere, and where those involved in the fraud (and who are obvious witnesses to any claims arising out of it) are located elsewhere, such claims may be liable to be stayed in the BVI pending determination of the same or similar causes of action in whatever other jurisdiction is considered to have a closer connection to the

underlying dispute and where the courts of that jurisdiction are therefore considered to be a more appropriate forum to determine the claim.

As explained in more detail below, it is possible that the criminal authorities in the BVI will commence an investigation into cases of suspected fraud and that such an investigation will lead to a public prosecution. However, this is relatively unusual. It is more common in the BVI for instances of fraud to be dealt with by way of civil claims, or for the action to be dealt with in other jurisdictions (depending on where any wrongdoing is found to have taken place).

There are various post-judgment tools that can be used by judgment creditors against judgment debtors located in the BVI or who have assets located in the BVI:

1. where judgments are obtained directly against BVI registered companies and the judgment is unsatisfied, the judgment creditor can apply to wind up the company and appoint liquidators. This is a powerful tool that allows a court-appointed officer access to the company's books and records which may reveal further crucial information regarding the wrongdoing and/or the wrongdoers' assets;
2. where there is evidence that the judgment debtor owns BVI companies, the judgment creditor can apply for charging orders against those companies, which ultimately allows the creditors to appoint a receiver to sell the companies and/or their assets to satisfy the judgment debt; and
3. a judgment debtor can be summoned to appear before the court to give evidence as to his or her assets and risks being in contempt of court if they fail to appear, which could ultimately lead to committal proceedings.

Contrary to popular belief, the BVI legal system mirrors the English legal system in many respects and has established jurisprudence that is favourable to victims and creditors. In effect, genuine victims of fraud are, if their case meets the relevant threshold requirements, able to control how they investigate and prosecute suspected frauds, which means they can make confidential applications for further information and for protective relief before the suspected wrongdoers are made aware that legal proceedings have been commenced. The insolvency framework means that obtaining judgments against BVI companies can yield further information, in addition to locating assets owned by those companies.

Parallel proceedings: a combined civil and criminal approach

Whilst it is possible to commence parallel criminal and civil proceedings in the BVI, in practice it is uncommon for the criminal authorities in the BVI to pursue wrongdoers that are located abroad.

A victim of fraud is able to initiate criminal proceedings by lodging a complaint with the Magistrate's Court. Once a complaint has been lodged, the Magistrate will make a determination on whether or not to issue a summons directing that the person against whom allegations are made in a complaint should appear before the Magistrate's Court to answer the charge or complaint made against them. Should a summons be issued, it means that matters will proceed to an initial hearing and the time and date for that first hearing will be given by the

Magistrate upon issuing the summons. The main point the court will consider when determining whether or not to issue the summons is whether the allegation is known to the law and whether the ingredients of the offence are, *prima facie*, present.

In cases where the complaint gives rise to criminal proceedings, the Magistrate's Court will ordinarily inform the DPP or the AG of the complaint. The DPP and the AG would then have a discretion as to whether to take over the prosecution. However, in the event that they choose not to bring a public prosecution, there is no restriction on a private person bringing such prosecution.

One of the advantages of commencing criminal proceedings will often be the investigative powers available to the authorities, not only within the jurisdiction where the proceedings are ongoing, but to request assistance from authorities overseas. However, it does not allow a private entity that is prosecuting criminal proceedings to make an application for assistance from authorities overseas.

In addition, or alternatively, a victim may submit a suspicious activity report (SAR) in instances where they consider that a BVI entity has dealt with or possesses property comprising the proceeds of crime. Once a SAR has been submitted, the FIA will consider it and determine whether to commence an investigation. The FIA is responsible for receiving, obtaining, investigating, analysing and disseminating information which relates or may relate to a financial offence or the proceeds of a financial offence; or a request for legal assistance from an authority in a foreign jurisdiction which appears to the FIA to have the function of making such requests.

One potential risk of commencing parallel proceedings is that a defendant subject to two sets of proceedings may seek to argue that the civil proceedings should be stayed pending determination of the criminal proceedings. The civil courts in the BVI have a general discretion to stay proceedings. Where there are parallel criminal and civil proceedings afoot, the court will stay the civil proceedings if it is satisfied that there is a real risk of serious prejudice to the defendant(s) which may lead to injustice (*R v. Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524). When determining whether there is a real risk, the court will take into account the interests of justice and the positions of the parties (*Panton and others v. Financial Institutions Services Ltd* [2003] UKPC 95).

Generally speaking, it will be difficult for a defendant to persuade a court that there is a real risk of serious prejudice simply because it has to defend civil and criminal proceedings at the same time and the court will not consider an obligation to serve a defence in civil proceedings before they are required to take any similar steps in criminal proceedings. Nor is it enough that both the civil and criminal proceedings arise from the same facts, or that the defendant has to take steps such as serving witness statements and disclosing document within the civil proceedings (*FSA v. Anderson* [2010] EWHC 308 (Ch)).

Should the defendant be able to demonstrate that there is a real risk of serious prejudice leading to injustice if the civil proceedings continue, the court may still refuse to stay the civil proceedings if it can be satisfied that sufficient safeguards are put in place to protect against the risk of injustice.

Cross-jurisdictional mechanisms: issues and solutions in recent times

Pre-action disclosure

Norwich Pharmacal relief is a common route to obtaining pre-action disclosure in the BVI, given the absence of a statutory equivalent in the BVI procedural rules. The courts typically allow *Norwich Pharmacal* relief in support of foreign proceedings provided the disclosure defendant is subject to the jurisdiction, although the court has left room for debate on the issue (*Q v R Corp,* unreported, 13 December 2018).

Disclosure is also available as ancillary relief to a freezing order, although this is not currently available in respect of a freezing order made in support of foreign proceedings where the cause of action defendant is outside of the BVI (*Bascunan v. Elsaca* BVIHC (Com) 2015/0128).

Such relief is, however, available where the freezing order is made in support of arbitral proceedings, provided the foreign arbitral award, when granted, can be enforced in the BVI (there does not need to be an intention to do so) (Section 43, Arbitration Act 2013; *Koshigi Limited & anor v. Donna Union Foundation* BVIHCMAPP2018/0043 and 0050).

Substantive jurisdiction

The BVI largely follows the test for *forum non conveniens* set out by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10. The Court should determine whether there is another available forum, whether it is more appropriate and, if so, a stay should be granted unless there is a risk of injustice in that forum.

The Court of Appeal recently held that the mere involvement in the proceedings of a company incorporated in the BVI, and by implication its shareholders' or controllers' choice to use the BVI in its corporate structure, is not a factor in support of grounding jurisdiction (*Livingtson & ors. v JSC MCC Eurochem & anr.* BVIHCMAP 2016/0042-0046). The decision may be considered by the Privy Council in 2020.

Enforcement

Foreign money judgments are enforceable in the BVI under common law. The courts will not typically conduct a review of the merits of the foreign judgment. Pursuant to statute, judgments from a number of Commonwealth countries can also be reciprocally registered and enforced. Judgments for non-money relief are not enforceable under either option.

Recognition of a foreign judgment can be defended if it would violate public policy in the BVI, if the foreign judgment was obtained by fraud or in breach of natural justice, if the foreign court lacked personal jurisdiction over the defendant or the judgment is not final and conclusive. In addition, there is a wider stipulation that it be just and convenient to enforce the foreign judgment.

It is also possible to apply to liquidate a company on the basis of an unpaid foreign judgment.

Technological advancements and their influence on fraud, asset tracing and recovery

Technology is high on the agenda of the profession in the BVI.

The BVI Financial Services Commission recognises a number of cryptocurrency-based funds including those based on Bitcoin and Ether. As a result, there is a burgeoning cryptocurrency funds sector in the BVI, with leading fintech companies such as Football Coin and Bitfinex incorporated in the BVI. The BVI government has also announced its intention to partner with LIFElabs.io, a cryptocurrency management company, to create a cryptocurrency pegged to the US Dollar for use within the jurisdiction. While the status of cryptocurrencies has not been tested in court, we would expect the court to recognise cryptocurrency as property (similar to the Singaporean decision in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03), thereby opening up pre-existing remedies in law for fraud, asset tracing and recovery remedies.

Further, crypto-assets, while enabling anonymity, typically use blockchain technology and an immutable public transaction ledger, which may assist with tracing transactions.

The BVI has seen a significant focus on data security, particularly following high-profile offshore hacks such as the "Panama Papers". In 2017, the BVI enacted the BVI Ownership Secure Search System Act, facilitating the storage and retrieval of beneficial ownership information for all BVI companies and legal entities. This uses cloud-based technology to facilitate a private search system accessible to law enforcement agencies in the combat against international crime and illicit financial activity.

The BVI legal profession has keenly adopted the use of technology in investigations, including artificial intelligence and data processing tools for large-scale documentary review exercises and forensic accounting programmes.

The BVI has also enacted the Computer Misuse and Cybercrime Act 2014, which sets out offences relating to cybercrime including

unauthorised access to computer material and unlawful publication of computer data. The legislature is also in advanced stages of introducing amendments to include online crimes such as criminal deception amid other offences.

The implementation of the electronic litigation portal has further facilitated and streamlined the process for filing and management of court cases in the jurisdiction of the Eastern Caribbean Supreme Court.

Recent developments and other impacting factors

On 1 January 2019, the BVI Economic Substance (Companies and Limited Partnerships) Act 2018 came into force (the ESA). The draft International Tax Authority Economic Substance Code issued on 22 April 2019 supplements the ESA. The ESA is in response to guidance issued by the EU Code of Conduct Group for Business Taxation on the economic substance of BVI entities and other jurisdictions with low corporate tax rates.

The BVI has passed the ESA as part of its longstanding commitment to international best practice. The ESA contains a number of requirements as to reporting and economic substance for "legal entities" (essentially companies and limited partnerships) conducting "relevant activities", i.e.: banking; insurance; shipping; fund management; financing and leasing; headquarters; distribution and service centres; holding company; and intellectual property. This will be ascertained under reporting periods lasting less than one year. The ESA allows legal entities carrying out relevant activities (except entities whose only activity is to hold equity) to conduct the relevant activity and generate income. This includes demonstrating sufficient employees and expenditure as well as physical premises for that purpose.

In a decision handed down in May 2019, the BVI court decided that it does have the jurisdiction to grant charging orders, based on English statute predating 1940 (*Commercial Bank of Dubai v Abdalla Juma Majid Al-Sari & Ors.* BVIH(COM) 114/2017). Charging orders are an important tool, particularly when enforcing foreign judgments, as they allow creditors to take a proprietary interest over assets owned by a debtor and ultimately can facilitate the sale of such assets in order to allow the creditor to realise their debt. The decision should therefore be welcomed, as it avoids the need for the legislature to step in and fill what would otherwise have been a significant lacuna in BVI law.

Key Challenges

The increasingly global nature of the corporate landscape with larger numbers of jurisdictions involved in structures and transactions presents more opportunities not just for profits but also for fraud. At the same time, the barrier between the cyber world and tangible assets is ever diminishing and the instances of fraud involving online or digital elements is on the rise. The fraudulent arrangements coming to light in proceedings in the BVI are therefore becoming more challenging to detect with current procedures, while also raising difficulties for tracing after the event, with funds moving at unprecedented speed. In addition, competing interests on the global stage are leading to an increasing number of state-sponsored events.

Prosecuting authorities, with greater powers to identify and freeze assets, are often under-resourced and slow to react. The high cost of litigation without guarantees of success can make it a difficult decision for private parties. It is common in the BVI to use nominees, complex international corporate structures, trusts and nominees as shareholders and directors which create legal barriers to the identification and tracing of assets by civil routes. The BVI also sees limited public corporate information published on the companies registry, leaving action against a company's agent in the BVI as the leading option to obtain corporate information. This can be expensive and leaves no guarantee of success since BVI company law allows corporate documents to be held by others outside of the jurisdiction.

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Prior to joining Harneys in 2012, Jonathan practised as a barrister at the Bar in London and previously worked in the investment management division of Goldman Sachs International between 2004 and 2008.

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