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International Fraud & Asset Tracing 2022

British Virgin Islands: Law & Practice
and
British Virgin Islands: Trends & Developments

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BRITISH VIRGIN ISLANDS

Law and Practice

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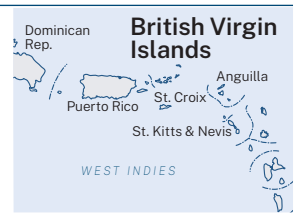

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

As in English common law, while fraud is not itself a tort, it may be a necessary ingredient in other torts – eg, fraudulent misrepresentation or unlawful means conspiracy. The term "fraud" encompasses a variety of actions which must each have the key element of dishonesty.

Proof of intent and dishonesty are key ingredients to any fraud claim. The dishonesty test applicable in the British Virgin Islands (BVI) is an objective one. The defendant's knowledge of the transaction must have been such as to render his participation contrary to normally acceptable standards of honest conduct.

In the Privy Council decision of Barlow Clowes International Limited v Eurotrust International Ltd [2006] 1 WLR 1476, the court confirmed that the test for dishonesty was objective. This case was followed in the BVI decision of Akai Holdings v Brimlow Investments (BVIHCV 2006/0134).

More recently, in the UK decision in Ivy v Genting Casinos (UK) Ltd [2017] UKSC 67, the court clarified that the test is objective and confirmed the end of any subjective test.

The common causes of action available for pursuance in instances of fraud are:

- deceit;
- *receipt-based liability – personal claims:*
  - (a) unjust enrichment;
  - (b) conversion;
  - (c) knowing receipt;
- *receipt-based liability – proprietary claims:*
  - (a) breach of fiduciary duty;
  - (b) constructive trust claims (for misappropriation of assets);
  - (c) conspiracy;
  - (d) bribery;
- dishonest assistance;
- fraudulent misrepresentation.

Fraudulent Misrepresentation

An action for fraudulent misrepresentation in the BVI has its roots in the English common law tort of deceit. Therefore, for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of the relevant representation, which in summary means that the maker of the statement made it knowingly, recklessly or without belief in its truth (Derry v Peek (1889) 14 App Cas 337).

The relevant elements for pleading fraudulent misrepresentation are:

- the defendant made a false representation of fact to the claimant;
- the defendant knew that the representation was false, or alternatively, he was reckless as to whether it was true or false;
- the defendant intended that the claimant should act in reliance on the statement; and
- the claimant acted in reliance on the representation and, as a consequence, suffered loss.

Where a claim for fraudulent misrepresentation has been made, the person against whom an allegation of fraudulent misstatement is made would be able to defeat such a claim if he is able to prove that there was at all times from the making of the statement an honest belief by him that what he was saying was true.

Deceit

If the fraudulent misrepresentation was such that a victim was induced to pay money or hand over assets, then in addition to a claim for fraudulent misrepresentation, a tortious claim for deceit may also accrue. The victim will in these cir-

cumstances be entitled to seek compensatory damages.

Bribery

The tort of bribery is a long-recognised form of malfeasance in BVI common law. A victim of bribery will be able to bring a cause of action against a fraudster where the fraudster pays secret commissions to the victim's (as principal) agent and where the principal has no knowledge of the payment. The victim of a bribe will not be required to show that the payment actually induced its agent to act in any particular way which is not in the interests of the principal – this inducement will be presumed.

Misappropriation of Assets

The cause of action of misappropriation of assets is most commonly seen in the context of directors of BVI companies. If, therefore, such a director is shown to have misapplied company assets, or has otherwise acted for an improper purpose or not in the best interests of the company and/or dishonestly, that director will then be in breach of his fiduciary duties, and this will enable the company to pursue a claim against the offending director.

Dishonest Assistance and Knowing Receipt

The key element of the tort of "knowing receipt" is the presence of a fiduciary relationship. Once such a relationship exists, if any person accepts payment of money or receipt of assets in the knowledge that the provision of those items was done in breach of trust or in breach of a fiduciary duty, then the recipient with knowledge of the breach will be liable in "knowing receipt".

Similarly, a person who knowingly assists in a breach of trust or fiduciary duty could be liable for "dishonest assistance".

Conspiracy

This cause of action may be pursued where at least two persons combine to cause loss to a third party (the victim), and a claim in unlawful means conspiracy may be pursued where the combination involves unlawful activity which was intended to injure and which causes loss to the victim.

The statutory provisions which enable fraudulent actions to be pursued are as follows.

- In relation to the conveyance of property made with intent to defraud creditors, any person who has been impacted by such a conveyance will be able to commence proceedings to rescind that transaction pursuant to Section 81 of the BVI Conveyancing and Law of Property Act.
- Additionally, under Section 155 of the BVI Insolvency Act, a liquidator could bring an action against the former directors of a BVI company if he can show that the directors continued to transact business when the company was insolvent. This is referred to in the BVI Insolvency Act as "fraudulent trading".

Although not a cause of action, a proprietary claim for breach of constructive trust often arises in circumstances where there has been a breach of fiduciary duty or some other form of receipt-based liability. It is a flexible remedy, which arises by operation of law and aims at retrieving money which was wrongly taken from a victim.

1.2 Causes of Action after Receipt of a Bribe

In summary, the BVI common law position is that an agent who receives a bribe will hold the proceeds of the bribe as constructive trustee for its principal, and the principal will be treated as the true owner of the property in question.

Depending on the circumstances of the case, there are a number of causes of action that will be available to a principal who has been the victim of fraud perpetrated by its agent, who accepted a bribe and/or a secret commission. These include:

- unlawful means conspiracy; and
- dishonest assistance.

The key elements of bribery are that the agent receives a promise of payment or a payment of commission or receives some other form of inducement by a third party, and that "transaction" is not disclosed to the agent's principal.

A principal who intends to rely on a bribe in bringing an action against an agent will therefore only need to show that his agent received a payment in his capacity as agent of the principal and that that payment or other inducement was not disclosed to him, the principal. The victim of the bribe will also need to demonstrate that he has suffered some loss for which damages are payable, as a result of the bribe.

There is no requirement as a matter of BVI law to show that the persons involved in the bribery scheme believed what they were doing was wrong, nor is it a requirement to show that the agent was influenced by the bribe. There is also no requirement to show that the third party was making the payments in order to induce the agent to act in a particular manner.

Where an agent receives a bribe, the receipt of that bribe will more likely than not engage the agent's fiduciary duties which it owes to its principal, and the mere fact of receipt of the bribe will inevitably mean that there has been a breach of those duties.

Such a breach would entitle the principal to damages, equitable compensation, an account of profits, and a constructive trust over the bribe, as well as over any yields from the bribe.

If damages are to be claimed, the principal would need to show that it has suffered loss.

As regards a claim for unlawful means conspiracy, in order for the principal to be able to file such a claim, the following key ingredients would need to be present:

- there must have been a combination of or agreement between the agent and the bribing third party;
- there must have been an intention of the agent to injure the principal;
- the unlawful acts carried out pursuant to the combination or agreement was a means of injuring the principal;
- the unlawful acts caused the principal to suffer loss.

If a claim for dishonest assistance is to be pursued, the principal would need to establish:

- that there has been a breach of trust or fiduciary duty;
- procurement of or assistance in that breach by the agent; and
- dishonesty on the part of the agent.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Parties who assist or facilitate fraudulent acts may face claims for dishonest assistance, knowing receipt and a claim for conspiracy by unlawful means.

In order to make out a case of dishonest assistance, one has to demonstrate that:

- there has been a removal of the claimant's assets in breach of trust or fiduciary duty;

- the defendant assisted in that breach of trust or breach of fiduciary duty;
- the defendant was dishonest; and
- there has been resulting loss to the claimant.

The test for "dishonesty" in this context is also objective: "Was the conduct of the defendant dishonest by the standards of an ordinary honest person in his or her position?"

Ordinarily, to make out a claim for knowing receipt, the claimant must demonstrate that:

- the assets were disposed of in breach of trust or fiduciary duty;
- the recipient beneficially received the assets which are traceable as representing the claimant's own assets; and
- the recipient's state of knowledge at the time of receipt was such that it is unconscionable for him to retain the benefit, ie, that the defendant knows that the assets are traceable to a breach of trust or breach of fiduciary duty.

Although the cause of action is based on the defendant having received the funds, the claim is not defeated if the defendant has not retained the funds. If he has not retained the funds, not only are the proceeds of the funds traceable, but the claimant has a personal remedy against that knowing recipient.

To make out a conspiracy claim, one must demonstrate the following.

- There was an agreement between two or more parties to injure another. It is important to note that a company can conspire with its directors.
- The parties acted in concert pursuant to the agreement. The courts have held that concerted action can be passive or active but must be more than just facilitation.
- The claimant suffered loss as a result of the actions of the defendants.

In unlawful means conspiracy, the claimant does not need to demonstrate that the conspirators' sole or predominant purpose was to injure another person. It is sufficient to show merely that they had an intention to do so, that is, it was one of the defendant's purposes. The intention to cause injury will be satisfied where conspiracy is aimed or directed at another person, or it can be reasonably foreseen that the conspiracy may injure that person.

Dishonest assistance, knowing receipt and unlawful means conspiracy claims may arise in circumstances where:

- BVI companies are used as conduits to receive money as part of an international fraud;
- public bodies receive bribes to award commercial contracts; and
- third parties receive misappropriated company funds with knowledge that these funds were transferred in breach of fiduciary duty.

1.4 Limitation Periods

The limitation period in fraud claims begins to run from the date of the knowledge of the victim. The key provisions are contained in the Limitation Act of the BVI, and this Act prescribes the limitation period on different classes of actions.

Where fraud is alleged, the limitation of the particular class of action as prescribed in the Act applies, save that the period of limitation runs from the date on which the fraud was discovered.

There are a few exceptions to this general principle.

- Section 19(1)(a) – which provides that no period of limitation shall apply to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party, or privy to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
- Section 19(2) – which provides that an action by a beneficiary to recover trust property, or in respect of any breach of trust, shall not be brought after six years from the date on which the right of action accrued.
- Section 25 – which provides that no action shall be brought to recover or enforce any charge against or set aside any transaction affecting any property which in the case of fraud was purchased for valuable consideration by a person who was not a party to the fraud, and did not at the time of the purchase know or have reason to believe that any fraud had been committed, where the action is based upon the fraud of the defendant or his agent. The period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable due diligence have discovered it.

1.5 Proprietary Claims against Property

The equitable principle of constructive trusteeship would enable the victim of fraud to assert rights against property that represents converted proceeds of fraud. These proceeds would also be "ring-fenced" from the wrongdoer's personal assets available to satisfy its unsecured creditors in an insolvent liquidation procedure.

As a matter of BVI law, it is possible to recover funds that represent proceeds of fraud that have been mixed with other funds. The BVI position is the same as the position in England and Wales where, if the victim's money is money which has been mixed with money of other innocents, the innocents will be ranked pari passu,and they will each receive a distribution equivalent to the proportion of their contribution.

However, where the victim's funds are mixed with the funds of the fraudster, it will be for the fraudster to distinguish his funds from the victim's funds. If he fails to do so, then the victim of the fraud will be able to rely on whichever of the following presumptions is more advantageous, depending on the circumstances of the case. This approach was established in the case of Re Tilley's Will Trust [1967] Ch 1179.

The alternative presumptions available to the victim are as follows.

- Where withdrawals from the mixed fund have been dissipated, it is presumed that the wrongdoer spent their own money first and that the withdrawals were from the wrongdoer's share of the mixed fund (Re Hallett's Estate (1880) 13 Ch D 696). Although this is the usual presumption, there is some flexibility here since this presumption could be disadvantageous to the victim.
- Where some withdrawals from the mixed fund were not dissipated but, were, for instance, used to purchase an asset, and the remainder of the fund which would have been sufficient to meet the victim's claim was subsequently dissipated, it will be presumed that the fraudster spent the claimant's money first, so that the claimant can trace into the purchased asset (Re Oatway [1903] 2 Ch 356).

The case of Foskett v Mckeown [2001] 1 AC 102 is instructive regarding how the BVI courts will treat misappropriated assets which are later successfully invested before the recovery by the victim. In summary, in that case, the beneficiaries of misappropriated trust funds were able to trace their trust property through a mixed fund of money and into assets acquired from it, being

an insurance policy. From there, they were able to trace into the proceeds of the policy such that the payout on the policy to its beneficiaries (the children of the deceased fraudster) entitled the victims to a portion of the payout.

1.6 Rules of Pre-action Conduct

There are no pre-action protocols applicable in the BVI as obtain in other jurisdictions, such as the United Kingdom.

1.7 Prevention of Defendants Dissipating or Secreting Assets

The most common relief for an applicant who seeks to prevent a response from dissipating assets, with a view to avoiding the consequences of a judgment, is to secure a freezing injunction.

In order to succeed in an application for a freezing injunction, the applicant will need to show:

- that there is a good arguable case against the respondent;
- that the refusal of an injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied; and
- that it is just and convenient for the injunction to be granted.

If it is determined that the freezing injunction would not provide the level of protection intended, then a receiver may be appointed to "hold the ring" and preserve the assets which are at stake pending trial.

It is important to note however that if there is no danger to property or assets and no fact is in evidence which shows the necessity or expediency of appointing a receiver, then a receiver will not be appointed.

In order to satisfy the court that a receiver should be appointed, the applicant must at least meet the threshold which is required for obtaining a freezing injunction.

The grant of a freezing injunction would operate in rem such that all persons with notice of the injunction would be prohibited from facilitating its breach.

The court-filing fees payable on an application for a freezing injunction would not exceed USD1,500. If a transcript of the proceedings is required, depending on the complexity of the application and therefore the length of the hearing, the cost of the transcript could range between USD250 and USD1,750.

All freezing injunctions are granted under cover of a penal notice, and a respondent or any other person with knowledge of the injunction who does anything which assists or permits the respondents to the application to breach the terms of the injunction may be held in contempt of court, imprisoned, fined or have their assets seized.

An applicant for a freezing injunction will be required to provide a standard undertaking to compensate the respondent for any loss which is later determined to have been wrongfully suffered as a result of the order.

If a respondent to an injunction wishes for the undertaking given by the applicant to be fortified, then that respondent must place evidence before the court as to the worthlessness of the undertaking if it is not fortified.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

CPR Rule 17 gives the court jurisdiction to order the disclosure, by a party who is the subject of a

freezing order, details about the location of relevant property and assets which are or may be the subject of the freezing order.

In practice, the freezing order would be granted ex parte, and would contain an order for ancillary disclosure. The respondent will be required to provide this disclosure within a specified period of being served with the order.

Since this disclosure is ordered within the freezing order and since all freezing injunctions are granted under cover of a penal notice, each respondent, or any other person over whom the court has jurisdiction, who is made aware of the injunction is bound by its terms. If any such person therefore facilitates the breach of the injunction, then that person may be held in contempt of court, imprisoned, fined or have their assets seized.

An applicant will be required to give an undertaking to compensate the respondent in damages if that respondent later suffers loss as a result of the grant of the injunction and the provision of the ancillary disclosure.

2.2 Preserving Evidence

CPR Rule 17(1)(c) and (h) outlines the court's powers and procedures in relation to the preservation of evidence.

The court has jurisdiction to grant an interim order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of detention, custody or preservation of relevant property.

Separately, CPR Rule 28 details the duties of disclosure and inspection of documents, and requires that any document which is relevant to the issues in a claim must be disclosed to the adverse party in the claim, whether or not that document is helpful or harmful to the disclosing party's case.

Where a document to be disclosed is withheld without cause, the disclosing party will not be able to rely on that document at trial, and the adversely affected party could use that non-disclosure to seek the strike-out of a particular aspect of the disclosing party's case.

A party to whom documents have been disclosed pursuant to CPR Rule 28 may also request physical inspection of any such document. Such a request must be in writing, and the party to whom the request is made must arrange for the requested documents to be available for inspection not more than seven days after the request for inspection has been received.

There is no requirement in this context for a cross-undertaking in damages to be given.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Norwich Pharmacal disclosure orders are available in the BVI to an applicant who considers that there might be a claim against an intended respondent, but the claim cannot be sufficiently particularised without first obtaining some information.

The BVI courts' jurisdiction to order Norwich Pharmacal disclosure is grounded in common law and is a process by which an innocent third party who has become innocently mixed up in some wrongdoing, through no fault of its own, is ordered to give disclosure.

In the BVI, these orders are most commonly sought against third-party registered agents. Under BVI law, all BVI companies are required to have licensed registered agents who are responsible for maintaining certain records and for facilitating the statutory filings of such com-

panies. They are also the local means through which BVI companies are served at a physical location.

An applicant for a Norwich Pharmacal disclosure order must establish that a wrong has been committed against it; that the respondent (ie, the registered agent) has become mixed up in the wrongdoing; and that the registered agent is likely to have information and/or documents which would be of assistance to the applicant.

Once these threshold requirements are met, it is still at the discretion of the court whether to grant the relief sought. The court will be reluctant to grant the relief sought if there is another means by which the information could be obtained without prejudicing any impending claim to be brought by the applicant.

The rationale for seeking this form of relief is to enable the applicant to gather sufficient information to enable it to formulate a claim against the ultimate wrongdoers.

These types of applications are typically brought on an ex parte basis and under seal and gag. This means that the respondent registered agent is, at the time of the application, prohibited from notifying any person (save for their lawyers) of the existence of the application. The parties to the claim are also typically anonymised to prevent any tipping off. In addition, the documents disclosed are to be used for the limited purpose of assisting an applicant with identifying the wrongdoers and the formulation of a claim. If the documents are to be used for ancillary purposes, then the court would need to give permission for this.

2.4 Procedural Orders

A litigant can seek ex parte protective relief from the BVI court, based on the common law principles that govern the grant of the relief and/or the relevant civil procedure rules of the BVI. Typically, relief such as a Norwich Pharmacal order, or a freezing order or other injunction, are granted ex parte. Further, Part 17 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR) lists the types of protective relief that are available, and gives the court discretion to grant them ex parte. The court will, however, need to be satisfied that there are good reasons for not giving notice.

Generally, where a party obtains relief ex parte, he will be required to provide the court will full and frank disclosure and provide an undertaking in damages.

2.5 Criminal Redress

Unless a perpetrator is present in the jurisdiction, victims of a fraud will seldom seek redress via the criminal process. This is largely due to the offshore nature of the jurisdiction and the potential jurisdictional challenges that would arise from a criminal claim. The BVI Criminal Code, Part XIV lists a number of offences relating to property that may be helpful to a victim of fraud. They include false accounting and false statements by company directors. There is also provision for officers of a company to be liable for certain offences committed by the company.

The commencement of criminal proceedings does not impact the ability to commence civil proceedings. However, any remedies obtained in criminal proceedings will impact any remedies that can be pursued in civil proceedings.

2.6 Judgment without Trial

In the BVI, there are two avenues by which a judgment can be obtained without the need for a full trial. The first is to obtain judgment in default and the second is to obtain summary judgment.

Default Judgment

CPR Rule 12 governs the procedure for obtaining judgments in default and the category of cases in which this redress is available. The prerequisites to obtaining judgment in default are:

- the defendant must have failed to file an acknowledgment of services within the prescribed period in which they fail to give notice of an intention to defend the claim brought against them; or
- the defendant must have failed to file a defence within the period prescribed in the CPR.

There are a few categories of claims in respect of which default judgment cannot be obtained. These are:

- claims in probate proceedings;
- claims brought by way of a fixed-date claim form; or
- admiralty claims in rem.

Permission to seek to obtain judgment in default is required in the following instances:

- where the claim is contemplated against a minor or patient, being a person who by reason of mental disorder within the meaning of the relevant mental health legislation in the BVI is incapable of managing his or her own affairs;
- where the claim is contemplated against the State, insofar as issues of state immunity arise; and
- where the claim is contemplated against a diplomat who failed to acknowledge service, and where that diplomat enjoys immunity from civil jurisdiction.

The procedure for obtaining such default judgment is that a request for entry of judgment in default must be filed in the form prescribed by the CPR. Once the request is made, it must be served on the defendant. The request, once made, must also include interest for the period claimed and fixed costs unless the court assesses the costs. Any application for the assessment of costs must be on notice to the defendant.

Once a claimant obtains judgment in default, unless the defendant then applies for and is successful in setting aside the default judgment, the only matters on which a defendant may be heard are:

- the assessment of damages, once specific requirements are met;
- an application concerning a default judgment where the remedy ordered is not money or the delivery of goods;
- costs;
- enforcement of the judgment; and
- the time of payment of the judgment debt.

Summary Judgment

CPR 15 sets out the requirements and governs the procedure for obtaining summary judgment.

A defendant can seek summary judgment against a claimant where the claimant has no real prospect of succeeding with the claim or the issue, and a claimant can seek summary judgement against a defendant where the defendant has no real prospect of successfully defending the claim or issue.

As in the case of requests for entry of default judgment, summary judgment is not available in specific categories of claims. These are as follows.

- Admiralty proceedings in rem.
- Probate proceedings.
- Proceedings by way of a fixed-date claim form.
- Proceedings for:

(a) claims against the Crown;
(b) defamation;
(c) false imprisonment;
(d) malicious imprisonment; and
(e) redress under the Constitution.

Notice of an application for summary judgment must be served on the respondent to that application not less than 14 days before the hearing of the application, and the notice must identify the issues which the court would be asked to address at the hearing.

Affidavit evidence must be filed in support of a summary judgment application, and this evidence and the application must be served on all respondents to the application, not less than 14 days before the hearing of the application.

If a respondent to the application intends to challenge the application and rely on evidence in support of their challenge, then that evidence must be filed and copies served on the applicant and any other respondent to the application, at least seven days before the hearing.

If the result of the summary judgment application is that the proceedings are not brought to an end, that hearing must be treated as a case management conference.

2.7 Rules for Pleading Fraud

There are no special rules in the Eastern Caribbean Supreme Court Civil Procedure Rules for pleading fraud. Nonetheless, the BVI courts follow the principle in Derry v Peak (1889) 14 App Cas 337 that any party seeking to avail itself of the provision will need to plead and prove fraud. The courts will need cogent evidence to be satisfied that the fraud has been made out. In AO Alfa Bank v Kipford Venture Ltd BVIHCOM2020/0219, 14 December 2021, the BVI court adopted the guiding principles when pleading fraud as set out in Bullen & Leake & Jacobs' Precedents of Pleading as applicable to the BVI, as follows.

- It is the duty of counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.
- A claimant is required specifically to set out in his particulars of claim any allegation of fraud, details of any misrepresentation, details of all breaches of trust and notice or knowledge of facts.
- The facts must be so stated as to show distinctly that fraud is charged. Where any inference of fraud or dishonesty is alleged, the party must list the facts based on which the inference is alleged, and the question is whether, based on the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.

2.8 Claims against "Unknown" Fraudsters

It is possible to bring claims against persons unknown in the BVI. However, the claimant will be required to describe the alleged wrongdoer with sufficient specificity to allow the defendant to be identified and served. Claimants are expected to provide information such as email addresses, wallet address in the cryptocurrency context, profile or user names on particular platforms, or other means of similar identification.

2.9 Compelling Witnesses to Give Evidence

CPR Rule 33 outlines the circumstances and procedure by which a witness may be compelled to give evidence. This rule requires the issuance of a witness summons, which is a document issued by the court which requires the witness to attend court to give evidence or to produce documents to the court.

The witness summons must be in a prescribed form, and where there are multiple witnesses

being summoned, each witness must be independently summoned. Once the witness summons is prepared, it may require that the witness being summoned produces documents to the court on either the date of the trial of the proceedings or on any date on which an application in the proceedings is being heard. The court may also direct the production of the documents on a separate date.

The witness summons is issued on the date entered on the summons by the court, and the person in whose favour the witness summons is issued must obtain the permission of the court if the witness summons is requested to be issued less than 21 days before the date of the hearing at which the documents or evidence by the witness is to be produced.

Permission must also be sought where the witness is required to attend court to give evidence or produce documents on a date other than the date fixed for the trial or the date of any application in the proceedings.

A witness summons is binding only if it is served at least 14 days before the date on which the witness is required to attend to give his/her evidence before the court. Notwithstanding this minimum service requirement, the court may direct that the witness summons is binding even if it is served on a date that is less than 14 days before the date on which the witness is to attend to give his/her evidence.

Importantly, at the time that a witness is served with a witness summons, he/she must be offered or paid a sum reasonably sufficient to cover his/her subsistence and expenses for travelling to and from the court, and a sum which compensates for loss of time.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Whereas it is accepted as a matter of BVI law that the decisions and actions of directors would, as a matter of course, bind any company in respect of which they act as directors, by virtue of their ostensible authority, a director is not likely to be able to escape personal liability if his actions against the company are fraudulent in nature.

BVI courts have adopted the well-known legal maxim which has its origins in the UK decision in Lazarus Estates v Beasley [1956] 1 QB 702, where at 712 it is stated that “no court in this land will allow a person to keep an advantage which has been obtained by fraud... fraud unravels everything”.

This position is supported by the words of Lord Hoffman in Standard Chartered Bank v Pakistan National Shipping Corp (No 2) [2002] UKHL 43,where at paragraph 22 he stated “no one can escape liability for his fraud by saying ‘I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.’”

The English court’s attitude in relation to the fraudulent conduct of directors was further highlighted in the decision in Jetivia SA v Bilta (UK) Ltd [2015] UKSC 23 (“Jetivia”), where the position on the attribution of a fraudulent director’s conduct to a company was settled. In that case, the court highlighted the inappropriateness in attributing the acts of a director to the company where the company is itself the victim of the director’s acts. In summary, in Jetivia, the company itself was a victim of a fraud which had been perpetrated by a number of its directors.

Lord Neuberger at paragraph 7 of the judgment stated that "[w]here a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing, even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings."

This case is the latest judicial precedent on this subject matter in the BVI, and will therefore be followed by the courts in the BVI.

3.2 Claims against Ultimate Beneficial Owners

In the UK case of Prest v Petrodel Resources Ltd [2013] UKSC 34, the Supreme Court clarified that where a person controls a company, that person may be liable separately or together with the company for its acts as agent of the company. In that case, the court confirmed that there may be justification in a court piercing the corporate veil where the company's separate legal personality is being exploited so as to protect an ultimate wrongdoer.

The wrongdoing complained of must meet a certain threshold which the court has distilled down into two categories. The first, wrongdoing for the purpose of concealment; and the second, wrongdoing for the purpose of evasion – the "concealment principle" and the "evasion principle".

The court expressed that there is no piercing of the corporate veil when dealing with the concealment principle. In instances where this principle is engaged, the job of the court is to ascertain what is being concealed. In doing this, the court will look behind the corporate structure.

According to Prest v Petrodel, in the case of the evasion principle, "the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement" – (see paragraph 28 of the judgment).

The principles confirmed in Prest v Petrodel apply in the BVI.

3.3 Shareholders' Claims against Fraudulent Directors

There are a number of statutory duties which directors are required to adhere to in the conduct of their services to BVI companies. Where a director is in breach of any of these duties, a shareholder may institute a claim against the director based on breaches of those statutory duties.

As a shareholder, that individual will first need the permission of the court before it can bring a claim on behalf of the relevant BVI company. Section 184C of the BVI Business Companies Act, 2004 (as amended), which governs the bringing of derivative claims by members on behalf of BVI companies, also provides that the court, before granting permission to a member to bring a claim on behalf of a BVI company, will consider:

- whether the member is acting in good faith;
- whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;

- whether the proceedings are likely to succeed;
- the costs of the proceedings in relation to the relief likely to be obtained; and
- whether an alternative remedy to the derivative claim is available.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The only mechanism for the addition and substitution of parties to a claim is as provided in CPR 19.

Under this rule, a claimant has the power to add additional defendants to a claim without the permission of the court at any time before the first case management conference of the claim. If the addition is contemplated for a date after the first case management conference, then the permission of the court will be required.

As in all claims, any claim against a foreign defendant must be served out of the jurisdiction on that defendant. Permission to serve such a defendant must first be obtained by the court. The court's jurisdiction over that particular defendant will only be engaged when service on that defendant has occurred in accordance with the rules for service prescribed in the jurisdiction where the service is being effected. Proof of service will be required by the BVI court, and this must be by way of affidavit evidence.

If, after being served, a foreign defendant does not engage in the judicial process, then a request for default judgment can be made. If the default judgment is entered, the claimant will be able to pursue enforcement of the judgment in the BVI.

5. ENFORCEMENT

5.1 Methods of Enforcement

The principal legislation on the enforcement of judgments in the BVI is the Judgments Act 1907, and various other enforcement processes are governed by the provisions of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

Where a judgment or order is granted for the payment of money, and that money is not money which is required to be paid into court, payment may be enforced in the following ways:

- by way of a charging order (CPR Rule 48);
- by way of a garnishee order (CPR Rule 50);
- by way of a judgment summons (CPR Rule 52);
- by way of an order for the sale or seizure of goods (CPR Rule 46);
- by way of the appointment of a receiver (CPR Rule 51).

Enforcement of judgments pursuant to CPR Rule 46 relates to writs of execution and, in addition to the aforementioned examples, includes:

- orders for the sequestration of assets;
- writs of delivery; and
- writs of possession.

There are certain instances where permission to enforce pursuant to CPR Rule 46 may be required. These instances include where the judgment sought to be enforced has been entered for a period greater than six years, or where the judgment debtor has died and the enforcement sought is against his/her estate.

Where charging orders are granted, these are commonly sought to be enforced against the BVI shares of the judgment debtor. Once those

shares stand charged, an order for sale is the next step.

Securing a final charging order is a two-stage process whereby the judgment creditor must first obtain a provisional charging order and then the final order. A provisional charging order is made on a "without-notice" basis and is considered "on the papers" without a hearing. The hearing of the final charging order application is made once notice of the provisional charging order is given to the judgment debtor and the order is granted, if the application is successful, within 14 days of the hearing.

The CPR Rule 50 attachment of debts procedure enables a judgment creditor to obtain the payment of the judgment debt from a person who owes the judgment creditor money. This garnishee remedy can however only be sought against someone resident in the BVI.

There is also scope for the enforcement of foreign judgments in the BVI pursuant to the Reciprocal Enforcement of Judgments Act. In order to enforce pursuant to this statute, however, the judgment must be a money judgment, and the country from which the judgment is sought to be enforced must be in the list of prescribed countries in the statute. If the country is not in the list of prescribed countries, then enforcement will only result if a new claim is filed in the BVI for the money judgment (the effect of which is to localise the judgment) and, once the claim is filed, a summary judgment application is made on the basis that there is no realistic prospect of the defendant successfully defending the claim.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

The rules of privilege are governed by Part XIX of the Evidence Act, 2006in three broad categories:

- legal professional privilege;
- loss of legal professional privilege; and
- privilege in respect of self-incrimination in other proceedings.

The underlying requirement for the protection of legal professional privilege pursuant to Section 114 of the Act is that the confidential communication must be made or prepared for the dominant purpose of providing or receiving legal services, whether it is for the purpose of legal advice generally or for the purpose of anticipated or pending legal proceedings. However, there are a number of specific factors which can result in the loss of legal professional privilege including the client's consent to disclosure of the confidential communication, instances were non-disclosure would prevent the court from enforcing an order of the court, special circumstances surrounding criminal proceedings, and a number of other instances.

Privilege in respect of self-incrimination in Section 116 of the Evidence Act codifies a witness' right to object to providing evidence on the ground that he or she could be incriminated for either committing a criminal offence, or be made subject to civil liability. Pursuant to Section 116, if the witness raises this objection, and if the court upholds the objection and determines that the witness has a reasonable basis for making the objection, the court will inform the witness that: (a) he need not give the evidence but that, if he does give evidence the court will give a certificate under this Section; and (b) the court will explain the effect of the certificate. If the objection is upheld by the court and the wit-

ness refuses to give evidence, the court shall not require the witness to give evidence.

However, pursuant to Section 116(5), if the court rejects and overrules the objection and the witness is compelled to give evidence, but the court finds that there were reasonable grounds for the objection, the court shall give the witness a certificate in respect of the evidence. Evidence which has been subject to a certificate under this section is not admissible against the person to whom the certificate was given in any legal or administrative proceedings, not being criminal proceedings in respect of the falsity of the evidence. Subsection 5 expressly excludes evidence in criminal proceedings in relation to whether an accused performed an act the doing of which is a fact in issue; or evidence in relation to a state of mind the existence of which is a fact in issue.

This is consistent with the BVI Police Evidence Act, 2019 which codifies the accused's right to remain silent in Section 186 – since all accused persons must be cautioned by an interviewing police officer that they have the right to remain silent and that if he or she exercises his or her right to remain silent, inferences may be drawn from their silence.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

As stated, professional privilege between a lawyer and client is governed by Section 114 of the Evidence Act 2006. However, under Section 114(6), where a client or party has voluntarily disclosed the substance of evidence, not being a disclosure made (a) in the course of making of the confidential communication or the preparation of the confidential document, or (b) as a result of duress or deception, Section 114 does not prevent the adducing of the evidence.

Additionally, subject to specific provisos Section 114 does not prevent the adducing of evidence of a communication made or a document prepared in furtherance of the commission of (i) an offence or (ii) an act that renders a person liable to a civil penalty; or a communication or a document that the client ought reasonably to have known was made or prepared in the furtherance of a deliberate abuse of a statutory power.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

In common law jurisdictions like the BVI, damages are compensatory in nature and designed to put the claimant in the position he would have been, had the alleged breach not occurred.

The relevant approach to punitive or exemplary damages in this jurisdiction is as follows.

- Punitive damages are generally not available, unless expressly provided for by statute as seen in Section 86 of the Labour Code 2010.
- At common law a claimant can pursue a claim for aggravated or exemplary damages, but to do so, it must be explicitly pleaded: Dominica Agricultural and Industrial Development Bank v Mavis Williams (supra); and Clayton James v The Public Service Board of Appeal, The Commissioner of Police, The Attorney General of St. Vincent & the Grenadies SVGHCV2004/0333 (unreported).

If aggravated or exemplary damages are pleaded, in order to succeed, the guiding principles that the court will apply are set out in Rookes v Bernard [1964] AC 1129.

7.2 Laws to Protect "Banking Secrecy"

Although there are no special laws which exist in the BVI relating to banking secrecy, a bank's duty of confidentiality may arise under the common law in specific circumstances or by contractual agreement. There is no criminal sanction for breach of a duty of confidence, although a bank may find itself liable to pay damages if an affected customer is able to prove that it suffered loss as a result of the bank's breach of confidentiality.

Where there is no statutory regime governing a bank's confidentiality to its customers, it will owe a customer a common law duty of confidentiality relating to any information that is held in respect of that customer's affairs. It is not uncommon for such common law duties to be strengthened by contractual duties of confidentiality.

All banks in the BVI are regulated by the BVI Financial Services Commission, which has wide powers to visit the premises of any bank to seek information and examine and take copies of documents. The relevant legislation also empowers the Commission to co-operate and share information with foreign regulatory authorities in order to detect and prevent financial crime, the financing of terrorism, misconduct or abuse of financial markets and offences involving fraud and dishonesty.

Even if a bank sought to argue that any duty to disclose confidential information was limited to providing such information to local regulatory bodies, the decision in Pharaon v BCCI SA [1998] 4 All ER 455 makes it clear that the duty of confidentiality could be overridden by the greater public interest in preventing and uncovering fraud, and that this could justify the provision of confidential documents to foreign regulatory authorities directly.

There is no statutory duty of confidence under BVI law, but a duty of confidentiality may arise under the common law in specific circumstances or by contractual agreement. There is no criminal sanction for breach of a duty of confidence, although it may sound in damages subject to proof of loss, and may be restrained by injunction if threatened.

However, banks could be compelled to disclose client information by order of the court in specific forms of civil proceedings including proceedings for Norwich Pharmacal or Bankers Trust orders. Additionally, there are various statutes in the jurisdiction which may permit or compel a bank to disclose information relating to a customer including but not limited to the Proceeds of Criminal Conduct Act, 1997; Drug Trafficking Offences Act 1992; Terrorism (United Nations Measures) (Overseas Territories) Order 2001; Criminal Justice (International Co-operation) Act 1993; Mutual Legal Assistance (United States of America) Act 1990; Banks and Trust Companies Act 1990; Financial Services Commission Act 2001; Financial Investigation Agency Act 2003; and the Proliferation Financing (Prohibition) Act 2009.

7.3 Crypto-assets

In the BVI, crypto-assets are recognised as property and it is possible to obtain freezing injunctive relief in relation to such assets. There is an ongoing action in the BVI in relation to injunctive relief that was granted by an applicant against unknown hackers. In this case, the question arose regarding the necessary ingredients to applications against persons unknown. The court provided useful guidance on this point and made clear that in making an application against unknown respondents, the applicant needs to be able to define the fraudsters by reference to specific characteristics, ie, email addresses, and that this definition must be such that the fraudsters are capable of being served.

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HARNEYS

Trends and Developments

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Cryptocurrency, Blockchain and Digital Assets

Overview

The global economy has been transformed by the emergence of the digital assets sector.

The British Virgin Islands (BVI) has long been a popular jurisdiction for individuals and entities looking to operate in the digital asset market.

The boom in digital asset ownership, and the popularity of this jurisdiction with entities and projects operating in this area, has led to an inevitable surge in cases where digital assets have been misappropriated from and/or dissipated through channels connected to the BVI. In turn, the BVI has adapted its traditional tools and embraced new ones to combat fraud and enhance asset tracing in this rapidly growing area.

The jurisdiction has attracted a large number of cryptocurrency exchanges, token issuers, crypto-funds and other entities providing blockchain services by virtue of its offering a friendly regulatory framework, coupled with a support network of experienced lawyers and accountants with extensive knowledge of blockchain technology and digital assets.

The frenzied activity in the industry is generating a rapidly increasing number of cases concerning fraud, the misappropriation of digital assets, and digital asset tracing.

Recent trends in digital fraud and asset tracing in the BVI

The BVI fraud and asset tracing market has seen an increase in activity related to digital assets. Examples include:

- individuals seeking to recover digital assets being withheld by exchanges registered in the jurisdiction;
- victims of wrongdoing seeking to freeze digital assets traced to BVI-registered centralised exchanges; and
- companies incorporated in the BVI pursuing claims for economic torts and seeking injunctions and disclosure orders from the BVI courts.

Where these cases have made their way to litigation, the BVI courts have demonstrated their ability to adapt traditional fraud and asset-tracing remedies to the new challenges posed by these technological advances. In doing so, the BVI courts have, on numerous occasions, been persuaded to follow the rapidly growing body of jurisprudence in England and Wales concerning digital asset fraud. For example, BVI courts have:

- held that digital assets can be considered property for the purposes of an interlocutory application for injunctive relief; and
- been willing to grant relief against “persons unknown” – an issue that is often prevalent in fraud cases concerning digital assets.

In addition to the proactive approach of the civil courts, law enforcement agencies in the BVI are also rapidly familiarising themselves with the

nature of digital asset fraud in this jurisdiction, and the tools available to them (including cross-border avenues), to tackle such wrongdoing.

A recent case study

A recent decision of the BVI courts demonstrates the jurisdiction's ability to deal with the challenges posed by digital asset fraud and asset tracing.

In this case, a BVI company provided cross-chain bridges to enable digital tokens to be transferred between blockchains. Hackers were able to exploit the software to (i) steal tokens from private user wallets that were authorised to interact with the bridge and (ii) mint new tokens from projects that operated on the bridge.

The BVI company consequently made various compensation payments to the affected users, thereby incurring loss.

The hackers exchanged large quantities of the stolen tokens for stablecoins (cryptocurrencies pegged at a fixed rate to a fiat currency) some of which were then transferred through a mixer fund, which intends to obfuscate the origin of any tokens that pass through it.

The applicant obtained expert digital asset tracing advice from a firm in the BVI, which concluded, on the balance of probabilities, that it had been able to trace the stolen tokens through the mixer fund. Subsequent tracing and enquiries with exchanges suggested that a portion of the stablecoins was then traced to a centralised exchange located in Croatia. That exchange was understood to hold know-your-customer information which would disclose the identity of the owner of a digital wallet believed to be under the control of the hackers.

The applicant filed a claim against the hackers for (i) damages arising from certain economic torts and/or (ii) a restitutionary remedy in unjust enrichment. The applicant also sought the following urgent ex parte relief:

- an interim worldwide freezing order against the hacker;
- permission to serve the hacker out of the jurisdiction by alternative methods, including via an email address identified during the asset tracing exercise and via the Croatian exchange believed to have contact details for the hacker (or his associate); and
- that the BVI court issue a letter of request to the Croatian authorities seeking assistance in obtaining evidence from the Croatian exchange that should confirm the identity of the hacker along with other information, such as any bank accounts to which fiat currency was paid pursuant to a sale of digital tokens.

All ex parte relief sought was granted and the freezing order was continued at a notice hearing on 15 March 2022, which the respondents did not attend.

Steps were also taken by the BVI Financial Investigation Agency (FIA) to obtain the identity of the hacker from the Croatian exchange, via the Croatian authorities.

Acknowledging that their identity was about to be revealed, the hacker approached the BVI company and settled the claim against it.

Developments into the future

The BVI courts have demonstrated their ability to move quickly to secure assets in cases of digital asset fraud and their willingness to assert jurisdiction over claims where there is a sufficient nexus to the jurisdiction. As such cases become more commonplace, the courts and law enforcement agencies in the BVI will continue to provide pragmatic and, where necessary, novel solutions. In particular, one of the challenges will

be in addressing how unknown persons can be served with documents if all that is known about them is their ownership of certain digital wallets.

When considering the fraud and asset recovery toolkit available in the BVI, one of the most commonly used forms of relief is the Norwich Pharmacal Order (NPO).

The prevalence of cryptocurrency exchanges registered in the BVI suggests that they may now also be a prime target for NPOs in circumstances where hackers have used exchanges to transfer their ill-gotten gains. In addition, or alternatively, the BVI may see an increase in the use of "double-barrelled" freezing and disclosure orders sought against unknown persons (eg, hackers) as well as against any centralised exchanges that they have used to hold or dissipate stolen tokens.

We expect to see a shift towards this type of application becoming more common, in light of the relatively comprehensive Customer Due Diligence (CDD) that reputable centralised exchanges will keep on their users (at least those that trade between fiat and cryptocurrencies).

Government agencies are becoming increasingly collaborative across borders, and access to vital information that they hold will be paramount in combatting fraud and tracking digital assets.

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