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An offshore system

An overview of the British Virgin Islands' court system, with some interesting case studies, by Andrew Willins of Appleby

The British Virgin Islands have their own legislative and judicial framework, but a High Court staffed with only two resident judges and no formal system of law reporting.

These statistics belie the territory's status as a leading financial centre. It has one of the most progressive legislative regimes for companies, with no taxes on its business companies and low rates for domestic companies. No taxes are payable on wealth inheritance, capital gains, or capital transfers, nor are there any estate or death duties. In the past few years, many of the leading international offshore firms have opened in the territory; it now has a wealth of talent in both the legal and the financial sector.

The BVI are now regarded by many as the offshore incorporation centre of choice. Over 800,000 companies have been incorporated within their shores, including a significant number of mutual funds and hedge funds, captive insurance and trust companies. It is now the world's second largest jurisdiction for the incorporation of hedge funds. It is also a jurisdiction particularly favoured by those operating in Russia, Cyprus, the Middle East and Asia.

The legal system

The British Virgin Islands remain a British overseas territory, with the British government retaining responsibility for their foreign policy and defence. Executive authority invested in the Queen is exercised on her behalf by the governor, currently His Excellency, Mr. David Pearey. Otherwise, it is a largely self-governing jurisdiction, with its own constitution (adopted in 2007 by the Virgin Islands Constitution Order) and parliament.

The court system in the BVI consists of a Magistrates' Court, a High Court and a Court of Appeal, with the final court with appellate jurisdiction being the Privy Council in London. The Superior Court of Record for the BVI is the Eastern Caribbean Supreme Court (ECSC), which also serves as the Superior Court of Record for two other British overseas territories (Anguilla and Montserrat) and six independent member states of the Organisation of Eastern Caribbean States (OECS), namely Antigua, Barbuda, the Commonwealth of Dominica, Grenada, St Christopher and Nevis, Saint

Lucia, St Vincent and the Grenadines.

The ECSC consists of two divisions, the Court of Appeal and the High Court of Justice. The Court of Appeal is an itinerant court whose sittings rotate between the nine members of the OECS. Its rules are largely modelled upon the English civil procedure rules. The BVI also has a magistrates' court, from which appeals lie direct to the Court of Appeal. The magistrates' court has both a criminal and a petty civil jurisdiction.

In what is widely seen as an important development, not just for the BVI but also for the wider Eastern Caribbean region, the BVI will acquire its own commercial court in 2009. The Commercial Court, which implements one of the recommendations of a report prepared by a team from Essex University, UK, will become a specialist division of the ECSC, with a jurisdiction over commercial cases issued in the various member states of the OECS. The building for the new Commercial Court is still under construction, but its judge (Edward Bannister QC) has been appointed and is expected to sit from May 2009.

Litigation trends

2008 has been an interesting barometer to the global economic meltdown.

The year started typically enough with the Court being called upon to consider the usual mix of shareholders disputes, fraud and asset tracing claims and forum challenges. One of the first cases in the docket of the year, on January 29 2008, was *IManagement Services Limited v. Cukurova*. That was a claim based in conspiracy, abuse of civil process and malicious falsehood arising out of the alleged

forgery of an arbitration agreement, on the back of which IManagement obtained an award in Russia. Then in July 2008 came the BVI sequel to the long running battle between Tajik Aluminium and Oleg Deripaska's Rusal Group, where Tajik sought to resist a stay on forum non conveniens grounds on the basis that the Russian Arbitrazh Courts were prone to political interference and that Tajik would not receive substantial justice in Russia.

June 20 2008, saw judge Hariprashad-Charles provide guidance in relation to the treatment of costs incurred by non-BVI admitted lawyers in *Michael Wilson & Partners v. Temujin & Others* (MWP). Michael Wilson & Partners, a Kazakhstan based law firm, was ordered to pay \$395,085.84 after capitulating at the door of the Court on its application to continue a receivership.

That litigation had come before the BVI Court on a number of occasions over several years, and had produced a number of significant judgments. Most notable is that of the Court of Appeal discharging the receivership orders made ex-parte and continued at the return date against the fifth and sixth defendants, Norgulf Limited and Incomborts Limited.

MWP is a case in which there were parallel proceedings in multiple jurisdictions, arbitration proceedings in London and allegations concerning the misuse of BVI corporate structures, with diffuse (and generally) poorly evidenced allegations against what appears to have been a growing list of defendants. It is apparent from the reports that the central allegation in *Norgulf* changed over time (there were five reformulations of the Statement of Claim). At its heart was the allegation that various former partners of MWP had breached their fiduciary duties to MWP, that the various respondents had assisted those parties by knowingly receiving and attempting to retain the proceeds of those breaches. The key allegation against Norgulf and Incomborts was particularly striking – that the beneficial owner of those two companies was not in fact the beneficial owner at all, but that the ultimate beneficial owners were the former partners.

The fact that the registers of shareholders and directors are not publicly available

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Author biography



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Andrew Willins is an associate within the litigation and insolvency group of Appleby's BVI office. His practice focuses on fraud and asset tracing, shareholders disputes and insolvency.

Prior to joining the group in 2008, he practised for a number of years at the Chancery Bar in London. He has appeared in every division of the English High Court, in county courts throughout the country, three times in the Court of Appeal and in various specialist tribunals. Since joining Appleby, he has appeared before the Court of Appeal of the Eastern Caribbean Supreme

Court in the BVI and on a regular basis before its High Court.

Andrew graduated from the University of Wales, Aberystwyth in 1999 with an LLB (Hons) and completed his Bar Vocational Course at the Inns of Court School of Law in London in 2000. He was called to the Bar of England and Wales in 2000.

perhaps fostered this suspicion, but it was persisted in even after powerful evidence to the contrary was produced. The Court applied its earlier decisions in *Audubon Holdings Limited v. Treasure Island Hotel Company* and *Spectrum International Holdings v. Modern Perfect Developments* and held that the test to be applied on an application to appoint receivers was whether or not there was a serious issue to be tried.

In a robust judgment, the Court of Appeal discharged the receivership orders. It ruled that its earlier decisions, upon which the first instance judge was bound, were wrong. They had been based on an understanding of the law that had been overtaken by the English decision in *Ninemia Maritime Corporation v. Trave*. The Court then went on to conduct a careful analysis of the evidence adduced by the Applicants and concluded that it fell far short of the test for appointing a receiver. MWP's case, it concluded, was based on "speculative inferences" largely unsupported by evidence and that such evidence as there was "is at best a litany of speculative assertions.... [moreover] sparse on any detail relating to the dissipation of assets." It is perhaps an unhappy feature of this case that the judge was not told at the ex-parte stage that the draft order which she was being asked to approve did not contain an undertaking in damages (although an unfortified undertaking was later given).

Freezing injunctions

On December 30 2008, judge Joseph-Olivetti discharged ex-parte receivership and freezing

injunctions in the well-publicised Dannone litigation (*Dannone v. Golden Dynasty Enterprises & Others*), principally on the grounds that the case had not been presented fairly by leading counsel for the claimants at the ex-parte stage.

It seems likely, given the BVI's standing as one of the leading centres for the incorporation of hedge funds, that the litigation landscape will change in the wake of current economic conditions. A number of funds exposed to the Madoff fraud were incorporated in the BVI. The fallout from that fraud has yet to come before the BVI courts.

One of the most enduring legacies of the financial crisis from 2008 may prove to be judge Joseph-Olivetti's judgment on November 14 2008 in *SV Special Situations Fund Limited v. Headstart Class F Holdings Limited*. The judgment begins with a timely reminder, not least given the discovery of the Madoff frauds only weeks later:

"Hedge funds are sophisticated investment vehicles reminiscent of hedgehogs or sea urchins which tend to prick badly if not carefully handled. Perhaps John C Bogle in the foreword to his book Bogle on Mutual Funds refers to the risks of dealing with such bodies more elegantly when he adverts to the Surgeon General's caveat on cigarette packages – 'warning, this product may be dangerous to your health'."

In *SV Special Situations*, the fund had applied to set aside a statutory demand that had been served by a redeeming member. It took what was described as the preliminary

point that Headstart did not have standing to make the demand because it was not a creditor for the purposes of the BVI Insolvency Act 2003. Section 197 of the BVI Insolvency Act provides, so the argument went, that "a member, or past member of a company may not claim in the liquidation of the company for a sum due to him in his character as a member..."

Argument rejected

The Court rejected this argument. It concluded that Section 197 had no application before a liquidation was underway and that Section 197 "only needs to be adverted to after the liquidation is underway and the liquidator is considering what claims to honour". The Court's alternative, and perhaps stronger, analysis was that the redeeming members claim did not accrue in its capacity as a member, but pursuant to a liability arising in contract.

A similar approach was taken by the court in Bermuda in *Stewardship Credit Arbitrage Fund*. Applying the decision of a Court in New South Wales in *Basis Capital Funds Management Limited v BT Portfolio Services* the Court held that "once redemption has taken place, the position of the former unit holder is transmuted from unit holder to creditor if the redemption price is unpaid."

But this was not the approach of the Cayman Islands Court of Appeal in *re Strategic Turnaround Mastership Partnership* where a general suspension of redemptions was held to bind investors whose redemption date had passed.

The effect of the suspension of redemptions upon a redeeming member was not argued in the BVI *SV Special Situations fund* case, nor was it in issue. The creditor was on particularly strong ground in *SV Special Situations Fund* because the fund had signed an agreement letter that acknowledged the redemption and promised to make payments on certain dates. The Court was unimpressed with the fund's attempt to renege on that letter by arguing that it did not refer to a payment of cash, but could (properly construed) instead meet its obligations through securities. The Court noted that the agreement letter had been signed by both parties, that subsequent correspondence made it "abundantly clear" that the fund would meet its redemption obligations in cash and that there was evidence that Headstart had relied on that agreement, and various subsequent representations to that effect, to its detriment.

Quite apart from the fact that *SV Special Situations Fund* has yet to come before the Court of Appeal, it seems inevitable that it will not be the last word of the BVI court on the rights of redeeming investors. When times were good, the Court was not troubled by failure to meet redemption requests. Now that economic conditions have deteriorated, and funds are suspending redemptions en masse, further litigation is surely inevitable.

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