

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2021/0037

BETWEEN:

CLAIMANT X

Applicant

and

A TVI COMPANY

Respondent

Appearances:

Mr. David Welford, with him Ms. Sarah Latham, for the Applicant

2021: March 8, 30

JUDGMENT

- [1] **WALLBANK, J:** This judgment concerns an application for a proprietary injunction and ancillary disclosure orders against a company registered in the Territory of the Virgin Islands ('BVI') in support of ongoing foreign proceedings brought in England and Wales (the 'English Proceedings'). This appears to be one of the first applications to be brought under the new statutory jurisdiction of this Court to grant free standing interim relief in support of foreign proceedings, which is set out in section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the 'BVI SCA').
- [2] The application was brought on an urgent *ex parte* basis and heard on 8th March 2021. I granted the application and gave oral reasons. At the return date hearing on 30th March 2021, I continued the injunction. It is appropriate for an anonymised written judgment to be given to provide guidance

on how the Court has interpreted this provision. To preserve anonymity, this written decision only addresses the legal aspects which are likely to be of general interest.

INTRODUCTION

- [3] This application was made on an urgent basis without notice for a proprietary injunction and ancillary disclosure orders in support of the English Proceedings. The Respondent is a BVI company and a defendant in the English Proceedings.
- [4] In the English Proceedings, the Applicant claims that the primary defendant to those proceedings ('D1') dishonestly and systematically abused the trust the Applicant placed in D1 and breached fiduciary duties owed by D1 to the Applicant. The Applicant further advances claims in deceit in respect of a number of agreements and transactions that it is alleged D1 dishonestly induced the Applicant to enter into.
- [5] As against the Respondent BVI company, in the English Proceedings, the Applicant alleges that the Respondent was the recipient of transfers D1 procured to be made out of the Applicant's funds. The Applicant there brings various claims against the Respondent to recover what the Applicant claims to be his or her money.
- [6] The Applicant has sought and obtained interim relief against D1 and the other five defendants to the English Proceedings in England and Wales and in the Cayman Islands. That relief includes a worldwide freezing order against D1, proprietary injunctions against D1 and the other defendants (excluding the Respondent), and disclosure orders against D1 and four of the defendants including the Respondent.

THE BVI COURT'S JURISDICTION TO GRANT FREE STANDING INTERIM RELIEF

- [7] The Applicant seeks against the Respondent in support of the English Proceedings, specifically: (i) a proprietary injunction; and (ii) disclosure orders. As the Applicant is not bring substantive proceedings in this jurisdiction, the injunction and disclosure orders would be free standing interim relief. The Applicant relies on section 24A of the BVI SCA for the grant of the relief sought.
- [8] Section 24A of the BVI SCA provides:

"24A. (1) The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.

(2) On an application for any interim relief under subsection (1) the High Court or a judge thereof may refuse to grant such relief if, in the opinion of the High Court or a judge thereof,

- (a) it has no jurisdiction, apart from this section, in relation to the subject-matter of the proceedings in a foreign jurisdiction; and
- (b) it is inexpedient in the circumstances for the High Court or a judge thereof to grant such relief.

(3) Subsection (1) applies notwithstanding that

- (a) the subject matter of the proceedings in a foreign jurisdiction would not, apart from this section, give rise to a cause of action over which the High Court or a judge thereof would have jurisdiction; or
- (b) the appointment of a receiver or the grant of interim relief sought is not ancillary or incidental to any proceedings in the Territory.

(4) In this section "interim relief", includes any relief which the High Court or a judge thereof has power to grant in proceedings relating to matters within its jurisdiction, as well as, an order against a non-cause of action defendant.

(5) Where the High Court or a judge thereof has the power at common law to make an order for the provision of documents and information, the High Court or a judge thereof may notwithstanding that

- (a) proceedings may be, will be or have been commenced outside of the Territory; or
- (b) a power to make such an order is available under the provisions of the Evidence (Proceedings in Foreign Jurisdictions) Act,

grant such an order."

[9] The Applicant contended that this Court, when interpreting section 24A of the BVI SCA, should adopt the approach taken by the courts of England and Wales to the application of section 25 of the Civil Jurisdiction and Judgments Act 1982 (the "English CJA"), given the similarity of the two statutory provisions. Section 25 states:

"25 Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings

- (1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where –
 - (a) proceedings have been or are to be commenced in a 2005 Hague Convention State other than the United Kingdom...; and
 - (b) they are or will be proceedings whose subject-matter is within scope of the 2005 Hague Convention as determined by Articles 1 and 2 of the 2005 Hague Convention (whether or not the 2005 Hague Convention has effect in relation to the proceedings).
- (2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.
- ...
- (7) In this section "interim relief", in relation to the High Court in England and Wales or Northern Ireland, means interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than –
 - (a) a warrant for the arrest of property; or
 - (b) provision for obtaining evidence."

[10] The Applicant submitted that the wording of the two sections is substantially similar. Both provisions give their respective courts a discretion to refuse an application if that court has 'no jurisdiction apart from this section' and the relief sought is 'inexpedient'. However, the definition of 'interim relief' in the BVI SCA is arguably wider than the definition in the English CJA, given the exclusions at subsections 25(7)(a) and (b) of the English CJA, which are not material to this application.

The Approach in England and Wales

[11] The English courts, when dealing with applications under section 25 of the English CJA, adopt a two-stage approach. The Applicant cited **Refco Inc and another v Eastern Trading Co and others**¹ as authority for this approach, which comprises the following stages:

- (1) to consider if the facts would warrant the relief sought, if the substantive proceedings had been brought in England; and

¹ [1999] 1 Lloyd's Rep. 159; see also Gee: Commercial Injunctions (7th Ed., Sweet & Maxwell, 2021) 6-070.

- (2) if the answer to that question is in the affirmative, then to consider whether, in the language of section 25(2) of the English CJA, the fact that the court has no jurisdiction apart from that section (because the substantive proceedings are abroad) makes it 'inexpedient' to grant the relief.

[12] With regard to the exercise of the English court's discretion, the Applicant contends that the presence of connecting factors to England, for example the presence of the person or assets in England, is relevant. Where there are no such factors, the court will not normally grant relief. In the English Court of Appeal case of **Motorola Credit Corporation v Uzan and others (No 2)**,² Potter LJ summarised the principles to be applied as follows:

"114 ... It is plain that, in relation to the grant of worldwide relief, the jurisdiction is based on assumed personal jurisdiction: as such it has the potential for extra-territorial effect in the case of non-residents with assets abroad. Thus it is likely that the jurisdiction will prove extremely popular with claimants anxious to obtain security against defendants in disputes yet to be decided where they cannot obtain it in the court of primary jurisdiction or the court of the defendants' residence or domicile, which courts are the natural fora in which to make such applications. There is thus an inherent likelihood of resort to the English jurisdiction as an "international policeman", to use the phrase employed by Moore-Bick J, in cases of international fraud. We would do nothing to gainsay, and indeed would endorse, the observations of Millett LJ in Cuoghi's case [1998] QB 818 to the effect that international fraud requires courts, within the limits of comity, to render whatever assistance they properly can without the need for express provision by an international convention requiring it. However, even in the case of article 24 of the Brussels Convention it has been made clear that

"the granting of provisional or protective measures on the basis of article 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought"...

115 As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of the order will interfere with the management of the case in the primary court eg where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign

² [2003] EWCA Civ 752.

defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."

[13] In **Credit Suisse Fides Trust v Cuoghi**³, which was referred to in the **Motorola** case, the defendant lived in England and this in itself provided an acceptable foundation for the English court to grant relief against him in support of proceedings brought in Switzerland. The English Court of Appeal confirmed that relief was not necessarily confined to assets within England. Worldwide relief could be granted and this was appropriate in circumstances where the defendant is resident in England and thereby susceptible to enforcement orders and where documents and information relevant to the interim relief are in England. Since the Swiss court could not grant the relief that was sought itself, it was not inexpedient for the English court to make orders designed to preserve assets. There was no reason why an English court should not restrain a person properly before it from disposing of assets abroad.

[14] Lord Bingham of Cornhill CJ mentioned three particular matters as potentially making it 'inexpedient' to grant interim relief:

"... it would obviously weigh heavily, probably conclusively, against the grant of interim relief if such grant would obstruct or hamper the management of the case by the court seized of the substantive proceedings ("the primary court"), or give rise to a risk of conflicting, inconsistent or overlapping orders in other courts. It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined."

[15] Gee on Commercial Injunctions helpfully summarises the principles that apply in the situation where interim relief has not been granted by the primary court as follows⁴:

"It is thought that in a case in which interim relief has not been granted by the court having jurisdiction over the substance of the case, the first question is why no such relief is available. Once that question has been answered, the second question is whether this should affect the exercise of discretion by the English court. Thus if the primary court will not grant relief because the assets are situated outside of its territorial jurisdiction, this may provide a good reason for the English court acting in support of the primary court. On the other hand, if the reason is because the primary court applies a higher threshold test for the strength of the case that has to be shown to justify such relief, then the English court should

³ [1998] QB 818; see also Gee, *Commercial Injunctions* (7th Ed., Sweet & Maxwell, 2021) 6-075 to 6-076.

⁴ Gee, *Commercial Injunctions* (7th Ed., Sweet & Maxwell, 2021) 6-077.

take into account that it is undesirable for the claimant to be encouraged to shop for another forum."

The BVI Arbitration Act

- [16] The Applicant also referred to section 43 of the Arbitration Act, 2013 (the 'BVI Arbitration Act'), which provides at subsection (2) that '[o]n the application of a party, the Court may, in relation to any arbitral proceedings which been or are to be commenced in or outside the Virgin Islands, grant an interim measure'. Subsection 43(4) provides that the Court may decline to grant such relief if 'considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal'.
- [17] The Applicant cited **Koshigi Limited & Anor v Donna Union Foundation**⁵, as authority for the Court's ability to grant relief even if the existence of assets in the BVI cannot be established.
- [18] The English equivalent of section 43 of the BVI Arbitration Act is contained in sections 2(3) and 44 of the English Arbitration Act 1993 (the 'English Arbitration Act'). Section 2(3) provides that the English court 'may refuse' to grant relief under section 44 where the foreign seat of the arbitration 'makes it inappropriate to do so'. In considering whether it is 'inappropriate' to grant relief and in the absence of exceptional features such as a fraud, the English courts will look for connections with England: **Mobil Cerro Negro Ltd v Petroleos de Venezuela SA**.⁶

EXERCISE OF THE COURT'S JURISDICTION

- [19] I was urged by the Applicant to adopt the two-stage approach taken in England when interpreting section 24A of the BVI SCA:

Stage 1: consider whether the facts warrant the relief sought, if the substantive proceedings had been brought in the BVI; and

Stage 2: if the answer to that question is in the affirmative, then, to consider whether the fact that the court has no jurisdiction apart from section 24A of the BVI SCA makes it 'inexpedient' to grant the relief.

⁵ BVIHCMAPP 2018/0043.

⁶ [2008] All ER (D) 310.

[20] I am grateful for the Applicant's submissions as to the way in which the jurisdiction is applied in England and I see no reason for this Court to depart from that approach, given the substantial similarities in the wording of section 24A of the BVI SCA and section 25 of the English CJA. For this reason, I proceeded with approaching the exercise under section 24A using the two-stage test the Applicant has set out.

[21] On the question of when granting relief in support of foreign proceedings is 'inexpedient' under the second stage of the test, I proceeded on the basis of the authorities set out above.

CONCLUSION

[22] Having followed the two-stage approach, I concluded that it was appropriate to grant the Applicant the relief that was sought.

[23] I take this opportunity to thank the Applicant's learned Counsel for their assistance during this matter, in particular for having willingly agreed to have carriage of the first draft of this judgment in accordance with a direction to do so pursuant to rule 42.5(1)(c) of the Civil Procedure Rules 2000. Such cooperation by Counsel greatly assists the Court in alleviating its judgment preparation workload.

Gerhard Wallbank

High Court Judge

By the Court

Registrar