

## Service out of the jurisdiction--the Caribbean way

02/09/2015

**Dispute Resolution analysis: How does the decision of the Eastern Caribbean Court of Appeal further our understanding of how the BVI courts will approach requests to serve out of jurisdiction? Adam Hinks, an associate of Conyers Dill & Pearman in the BVI, comments on the consequences of the decision in *Amerinvest International Forestry Group v Kwok Ka Yik*.**

### Original news

*Amerinvest International Forestry Group Company Limited v Kwok Ka Yik* BVIHC MAP 2014/0033

*Amerinvest is incorporated in the BVI. Its two directors resided in Hong Kong. Amerinvest owned Hong Kong subsidiaries. In a dispute concerning these subsidiaries, the company registry in Hong Kong made a decision about the membership and directorship of Amerinvest itself. The Court of Appeal has ruled that in relation to Amerinvest, a BVI registered company, the rulings by the Hong Kong company registry about its subsidiaries do not engage any of the pathways in the rules of the BVI courts to permit service out of the jurisdiction.*

### What is background to this case?

The company was incorporated in the BVI and comprised of two directors, Mr W and Ms K, who resided in Hong Kong. The company owns subsidiaries in Hong Kong which over time submitted various documents to the Hong Kong company registry for filing. Based on representations made by Ms K as to ownership of the company's shareholders and her unlawful removal as a director of the company, the Hong Kong company registry refused to register the documents.

This decision was appealed and subsequently adjourned to allow proceedings to be commenced in the BVI. A claim was filed in the BVI seeking directions as to the identity of the directors and shareholders of the company. Ms K was the only named defendant and permission to serve out of the jurisdiction was duly sought on the basis that the subject matter of the claim related to the constitution, administration, management or conduct of the affairs and ownership and control of a BVI company. The judge at first instance concluded that there was no issue in the BVI jurisdiction about the company's membership or constitution of its board.

### What issues did the court have to consider and what did it decide?

The applicable principles to be applied in relation to service out of the jurisdiction are captured in *Nilon Ltd and another v Royal Westminster Investments S.A. and others* [2015] UKPC 2, [2015] 3 All ER 372. On an application for service out of the jurisdiction, a claimant has to satisfy the court of these three requirements:

- o in relation to the foreign defendant there is a serious issue to be tried on the merit--that is a substantial question of fact or law or both
- o there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, and
- o the BVI is the appropriate forum for the trial of the dispute

The Court of Appeal found that Ms K's allegations related to the Hong Kong subsidiaries and ownership and directorship in the shareholders of the company. It held that the judge at first instance was right to hold that there was no serious issue to be tried as the issue raised related to the constitution of the membership and directorship of the company. The company is taken to know who its own members and directors are.

The real issue was the Hong Kong company registry's refusal to register the documents related to the Hong Kong subsidiaries. Accordingly, the judge was right to conclude that any question about changes to the boards of the Hong Kong subsidiaries was something exclusively within the jurisdiction of the courts of Hong Kong. Merely because the basis provided by the Hong Kong registry for its decision suggests some perceived dispute about the membership and

directorship of the parent company of the Hong Kong subsidiaries in the BVI, this does not bring about a dispute in the BVI concerning the membership and directorship of the company.

Accordingly, it found that the appellant failed to show any issue relating to the constitution, administration or control of the company which engages the gateway provided by the BVI Civil Procedure Rules 2000, r 7.3(7) (BVI CPR) for service out of the jurisdiction.

### **To what extent does the decision help clarify the issue of service out of jurisdiction?**

The pragmatic and sensible decision in *Westburg Anstalt v Profitstar Anstalt* BVIHC MAP 2013/0020 amended the BVI CPR to provide for service out of the jurisdiction so as to enable a judgment creditor to enforce a foreign judgment against BVI assets. Notwithstanding that the decision in *Amerinvest* is distinguished on the basis that it relates to a different gateway, it is an example of how the courts require applicants to closely follow the key principles and requirements when seeking permission to serve out.

The BVI follows English procedure quite closely but there are some differences of detail between the CPR which applies in England and Wales to the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (ECSC CPR) which apply in the BVI. In England and Wales, service out of the jurisdiction is governed by CPR 6.36 and CPR PD 6B, para 3.1. An applicant must show that each claim made has the attributes set out in the Practice Direction. At present this sets out ten gateways--an application must fall clearly within one or more of them. The ECSC CPR has nine gateways of which six are similar to those in the English CPR. The ECSC CPR has a distinct company law gateway in part 7.3(7) of the ECSC CPR. This provides that a claim form may be served out of the jurisdiction if the subject matter of the claim relates to either 'the constitution, administration, management or conduct of the affairs' or 'the ownership or control of a company incorporated within the jurisdiction'.

In the BVI the burden is upon an applicant to show that in respect of each claim it comes within one of these jurisdictional gateways. The standard of proof is a good arguable case. An application for permission must set out which of the gateways are relied on. The court retains a general discretion to decide whether or not the cause is a proper one for service out of the jurisdiction.

### **What are the implications of this decision for practitioners? What should they be advising clients?**

Service out of the jurisdiction is one of the fundamental issues affecting BVI companies involved in multijurisdictional disputes. Accordingly, in order to avoid issuing in the wrong jurisdiction and erroneously incurring costs by doing so, the key principles must be understood and applied. In *Amerinvest* the court rightly refused to countenance the appellant's attempt to sidestep the gateway provided for by BVI CPR 7.3(7) and in doing so ensured that the court's time and resources were not wasted. The court should be commended for correctly applying the applicable principles and ensuring that the dispute was remitted to the appropriate jurisdiction and forum.

As the judge at first instance forcefully stated:

'I am not prepared to allow litigation in this forum in order to resolve by the back door an issue which is appropriately to be resolved in the Courts of a friendly foreign jurisdiction.'

The salutary lesson from this decision to any would-be litigants is obvious, but often missed--namely to ensure that the legal analysis as to such fundamental matters as jurisdiction is carried out before issuing a claim. Remembering to have clarity as to what relief is being sought and, accordingly, whether the BVI is the appropriate jurisdiction to obtain it is essential. As can be seen, the court will not tolerate attempts to circumvent its established principles by commencing inappropriate litigation in the wrong jurisdiction. The consequences of this are sometimes missed by claimants being advised in jurisdictions where the costs consequences are not identical.

While this case was a refusal to grant permission and the consequences were expensive enough, had this been an appeal against a decision to grant permission then both sides' costs would have fallen on the claimant. While we have seen a welcome expansion of gateways permitting service out of the jurisdiction in recent years, the BVI remains robust

on the management of these gateways and strategic advice from the outset remains key to ensuring that costs are sensibly incurred

### **Are there any trends emerging in this area of law?**

Whereas the *Westburg* decision rectified an unwanted lacuna in the ECSC CPR, the decision in *Amerinvest* shows that courts are not prepared to permit service out of the jurisdiction through the back door.

*Interviewed by David Bowden.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor*



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