

BVI injunctions in aid of foreign divorce proceedings

Further to the series on interim remedies, Global Head of Litigation, Phillip Kite outlines the available options for injunctions in aid of foreign divorce proceedings. This area has expanded in recent years, in particular given the importance of “oligarch” divorce proceedings. The typical case concerns a spouse who files a divorce petition in London and then seeks injunctions to protect against dissipation. BVI companies and trusts often hold substantial assets and become the target of freezing and disclosure orders.

These types of applications can differ from other types of interim relief in subtle ways. Procedurally, being in the nature of matrimonial proceedings, they are normally filed in the BVI High Court, rather than the BVI Commercial Court. Helpfully they are also typically viewed as akin to proprietary claims, which, as explained below, can be an advantage to a Claimant.

The Statutory Framework

The statutory framework is familiar, but worth repeating. Section 24 of Cap 80 provides that an injunction may be granted by the High Court in all cases in which it appears to the Court to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.

The Eastern Caribbean Civil Procedure Rules 2000 provides that the Court may grant interim remedies including:

1. an order restraining a party from dealing with any of its assets, whether located within the jurisdiction or not, or from removing assets from the jurisdiction (Part 17.1(1)(j)); and,
2. an order for the preservation of relevant property (Part 17.1(1)(h)(ii)).

Grounds for the application

Although each case will depend on its own facts, there are normally two alternative grounds that can support an injunction.

Ground 1: Relief in Support of Matrimonial Proceedings

The Court has inherent jurisdiction to grant injunctions to preserve specific assets which are the subject matter of matrimonial proceedings pending the

determination of the issues involved. This follows *Khreino v Khreino* (No. 2) [2000] 1 FCR 80 where the English Court of Appeal held that the court “has jurisdiction under its general statutory powers of granting injunctive relief to make orders protecting financial and proprietary remedies which may be awarded in the future” (at page 4, citing with approval Lord Mustill in *Harrow London BC v Johnstone* [1997] 2 FCR 225

Importantly, in *Khreino* itself, the English Court of Appeal approved the granting of the injunction freezing a flat in London, or its proceeds, which was directed against the husband, but also against the BVI incorporated company which held the flat, and the husband’s brother who held the bearer share in the BVI company.

This approach, that preservation of the subject-matter of matrimonial proceedings is a different ground of relief from *Mareva* relief, was followed in the Jersey case of *Matthews v Matthews* [2001] JLR 671. It seems to be an approach that is here to stay in the BVI.

Accordingly, the test for the grant of injunctive relief in matrimonial cases is similar to the test in commercial/*Mareva* cases, but not identical, partly because in matrimonial claims the claimant is very likely to receive something and the only question being how much, and partly because the claimant’s rights are stronger, being mid-way between a proprietary claim and a non-proprietary claim.

In addition, the BVI court seems to adopt a **balance of justice** (rather than convenience) to grant the injunction and that the usual American *Cyanamid Co v Ethicon Ltd* [1975] AC 396 tests should also be applied, namely:

- a good arguable case for assets to be frozen;
- a risk which is real and not fanciful that the assets may not be preserved until the final determination of the rights of the parties; and,
- the order must be one which is just in all the circumstances and not be disproportionate to the object to be achieved.

Ground II: Mareva Relief

Alternatively, and in practice, in addition to the above, an application can be made under the usual principles applicable to freezing orders, plus meeting the criteria of *Black Swan* given that the order is sought in support of foreign proceedings. The use of the *Black Swan* jurisdiction was the subject of a previous article, and in this context ancillary relief may be granted in aid of substantive foreign proceedings where the person (and in practise a company) to be restrained is subject to the *in personam* jurisdiction of the BVI Court.

In *Black Swan*, the BVI court made orders based on Lord Diplock’s statement in the English case of *Fourie v Le Roux* [2007] UKHL 1, that the requirement of

an existing legal or equitable right was not limited to substantive proceedings in the jurisdiction where ancillary relief was being sought, but that relief could be sought where there were proceedings abroad in which a claimant expects to recover against the defendant a final order which is capable of enforcement in the Court granting ancillary relief. In a typical divorce case, that requirement is normally not a difficulty.

Divorce seems, unfortunately, to be on the rise. So too is the use of offshore structures, and so the use of interim orders in aid of divorce proceedings is a powerful weapon for a spouse seeking to freeze and uncover assets.

Further Information

The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

For more information on the subject please contact Phillip Kite (phillip.kite@harneys.com) or your usual Harneys contact.

April 2012