A CAUTIONARY TALE OF TWO COURTS:

THE RISKS OF SEEKING NOVEL INTERIM RELIEF IN THE CONTEXT OF CONTENTIOUS TRUSTS

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Both the Commercial Court in the British Virgin Islands (BVI), and the Grand Court of the Cayman Islands, have confirmed they have jurisdiction to grant a novel form of interim relief sought by the beneficial owner under a nominee arrangement. However, the BVI Court was confronted with the issue of the duty of full and frank disclosure and fair presentation, the court's view of which was negatively reinforced by the presentation of the novelty of the ex parte relief sought.

This article considers the judgment of the BVI Court in this case of Chia Hsing Wang v XY and XYZ, in which a beneficiary sought to appoint joint provisional liquidators (JPLs) over a professional fund in the BVI (the Fund), via interim receivers. The judgment provides a cautionary tale to contentious trusts practitioners looking to deploy intricate relief at the ex parte stage.

Background

A nominee Swiss bank held shares on behalf of Mr Wang in the Fund, which was in turn managed by a wealth management company (Floreat). Mr Wang was said to be the ultimate beneficial owner of over 97% of the shares in the Fund, valued at over US$200 million. The relationship between the Swiss bank and Mr Wang was governed by a custody agreement, which expressly provided that the bank would not engage in any legal action in connection with disputes concerning the shares.

A similar arrangement was in place in relation to the shares in three Cayman funds.

Mr Wang alleged that Floreat and its principals were engaging in serious wrongdoing and mismanagement of the funds. In particular, he claimed that there were misrepresentations in the offering memoranda, that the funds had been used to buy property well over the market value to curry favour with a Sheikh who was the vendor, and the use of the funds' real estate and art collection as the personal property of Floreat's principals. He further alleged that the funds had also been used to cover the personal expenses of fund managers. The alleged wrongdoing was said to be in the range of several million USD.

Relief sought

Given that the terms of the custody agreement prevented the Swiss bank from instituting proceedings, Mr Wang filed proceedings to compel the Swiss bank to transfer the shares to him. He simultaneously filed an ex parte application for receivers to be appointed over the shares. He asserted that the receivership was necessary to prevent a forced redemption of his shares and the dissipation of the funds' assets. The receivership application was granted in the BVI and in Cayman.

Shortly after the receivers were appointed, winding-up proceedings

were instituted by Mr Wang and the Swiss bank (acting via the receivers), together with an ex parte application for the appointment of JPLs to investigate the allegations of wrongdoing in the funds. This application was also granted in both the BVI and Cayman.

Floreat sought to intervene and applied for the ex parte relief to be discharged; which was met with different outcomes.

Discharge of the orders

This two-stage approach was described by Mr Wang's counsel as "a novel route for beneficial owners of shares […] to access statutory shareholder remedies where those shares are held through nominee structures where those nominees are unwilling/unable to act."

In the BVI, Wallbank J discharged both the receivership and JPL orders. He found that Mr Wang had failed to give full and frank disclosure and a fair presentation of the alternative remedies, the circumstances surrounding the right of forced redemption of his shares and the original purpose for his investment in the Fund, which was to provide his family with liquidity where there were overseas court orders preventing access to his assets. On the JPL application, Wallbank J found that Mr Wang's counsel had misrepresented the urgency of the application and the risks of redemption of his shares so as to insist upon and persuade the other judge to proceed and grant the ex parte relief. Wallbank J considered that the claimant had done this in order to present a "fait accompli", by having the ultimate relief of a just and equitable winding-up brought off the back of the interim receiver appointment.

Wallbank J was particularly concerned that the entire "novel" strategy was a "device". He concluded that while the BVI Court had the power to grant the relief sought, where a two-pronged strategy of relief was to be deployed in such a novel manner, the litigant "comes under a duty to give full and frank disclosure and fair presentation of the whole plan."

Wallbank J considered that these breaches of full and frank disclosure were not innocent and that it would be against the interests of justice to regrant the relief.

The contrasting position in the Cayman Islands

The approach taken by the BVI Court is to be contrasted with the approach taken in the Cayman Islands.[1]

The Honourable Justice David Doyle concluded that the Cayman Court had jurisdiction to appoint receivers and that it was just and convenient to do so, providing Mr Wang with a springboard from which to launch an application for the appointment of JPLs. At the ex parte hearing of the JPL applications, Doyle J considered that the receivers had standing to bring those applications and that it was necessary to make the appointments, given there were no other more proportionate and reasonable alternatives available.

The Cayman Court accepted that it had jurisdiction to grant the form of interim relief that was sought. However, unlike the BVI Court, the Cayman Court did not expressly opine upon the novelty of the form of relief; nor did it consider that the receivership application was "artificial". This is despite both courts being informed that the purpose of the receivership application was to enable the bringing of the JPL applications. Further, the Cayman Court continued the receivership and JPL orders at the subsequent inter partes hearing, notwithstanding the applications to discharge the orders on similar grounds of a failure to provide full and frank disclosure and lack of fair presentation.

The major differences between the conclusions of the two courts were:

- The BVI Court considered that the allegations of wrongdoing concerned only a small proportion of the total assets under management and that the overall performance of the Fund's assets appeared to be satisfactory. Further, the BVI Court had not been told that there was a major dispute between Mr Wang and Floreat concerning Floreat's unpaid fees. In comparison, the Cayman Court concluded that there was ample evidence of a risk of dissipation and of wrongdoing before it in relation to the Cayman funds. It considered that even if the orders had to be discharged because something material had been missed, they would have been re-granted because any omissions were innocent non-culpable omissions and the interests of justice required the re-granting of the orders
- The BVI Court noted that the representations by Mr Wang that Floreat had an absolute right to redeem the Fund's shares, and thus that he had no protection, were wrong, and had been the only points on which the court had proceeded to consider the provisional liquidation application on an ex parte basis. The BVI Court concluded that this breach of full and frank disclosure was not innocent. In contrast, the Cayman Court considered that Mr Wang's concerns over a compelled redemption of his shares in the Cayman companies had been put properly
- The BVI Court noted that there were at least three alternative remedies to a JPL/JL order that were arguably available: a staged redemption of the Fund's shares, an unfair prejudice action, if necessary supported by an injunction and/or a stop order, or legal proceedings for breach of duty and/or conspiracy. The Cayman Court was presented with the same options, but took the view that it was unrealistic for Floreat to suggest that Mr Wang's interests could have been properly protected by a stop order, an injunction, undertakings or some other remedy

Conclusion

Novel and complex forms of relief beleaguer applications in contentious trust situations where HNW individuals have implemented elaborate wealth structuring. This is particularly so where obtaining interim relief requires ingenious steps to be taken in short order, either to avoid putting adverse parties on notice or to avoid constraints that exist within aspects of the corporate structure.

The approach taken here was successful in Cayman and was in principle successful in the BVI. However, the conclusions drawn by the BVI Court are a cautionary tale: while the BVI Court is willing to be flexible and to grant a novel remedy in appropriate circumstances, those who seek to persuade the court to do so on an ex parte basis must be very careful to consider the novelty within the context of the duty of full and frank disclosure. The perception by the court of a failure to do so may lead to one being hoist by one's own petard.

1 For reasons of confidentiality, it is not possible to cite the judgment of the Grand Court.