

UPDATE

Can the British Virgin Islands Court order the examination of foreign persons in BVI liquidations?

Update prepared by Shane Donovan (British Virgin Islands)

The question of whether a British Virgin Islands Court can order the examination of foreign persons in the liquidation of BVI companies has been the subject of two recent conflicting decisions of the Commercial Division of the High Court. As such, the answer to the question is likely to remain uncertain until it has been resolved by the Eastern Caribbean Court of Appeal.

The Statutory Framework

Section 284 of the Insolvency Act, 2003 provides that:

'Where a company is in liquidation, an application may be made to the Court, ex parte, by the liquidator ... for an order that a person specified in subsection (2) appear before the Court for examination concerning the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company'.

The range of persons specified in subsection (2) are broad and include current and former directors, shareholders and employees of the company and *'any other person who the [liquidator] considers is capable of giving information concerning the company or a connected company'*, or *'any other person who the [liquidator] knows or suspects has in his possession or control any asset of the company or is indebted to the company'*.

Section 285 provides that, on hearing an application made under section 284, the Court may order the examinee to appear before the Court to be examined.

The Conflicting Decisions

Ocean Sino Limited

On 15 February 2022, the Court granted an *ex parte* application made by the liquidators of Ocean Sino Limited for the examination of one of its 50 per cent shareholders, Mr Chu Kong. Mr Chu is resident in Hong Kong.

After the examination order was purportedly served on Mr Chu by delivery to his BVI legal practitioners, he applied to set it aside.

On 18 May 2022, the Court heard and determined Mr Chu's application to set aside the examination order. The Court delivered an oral *ex tempore* judgment in which it granted his application and set aside the examination order on the grounds that, *inter alia*, sections 284 and 285 do not have extraterritorial effect. A written memorandum of that oral judgment has only recently been published at the request of one of the parties made on 13 March 2023.

Three Arrows Capital Ltd

In the meantime, on 19 December 2022, a differently constituted Court granted an *ex parte* application made by the liquidators of Three Arrows Capital Ltd for the examination of its directors, Mr Su Zhu and Mr Kyle Davies. Mr Zhu and Mr Davies were then resident in Singapore.

As the Court has not yet delivered a written judgment in relation to the *ex parte* application, it is unclear whether it was aware of the earlier judgment delivered in *Ocean Sino*, or if it was, why it decided that the earlier case was wrongly decided in relation to the extraterritorial effect of sections 284 and 285.

The Reasoning in *Ocean Sino*

Mr Chu's principal contention in *Ocean Sino* was that sections 284 and 285 were in all material respects the same as provisions in England and Wales, where those provisions are understood not to have extraterritorial effect. Ultimately, the Court accepted that English authority was highly persuasive in the interpretation of the BVI provisions.

In Re Tucker

In particular, the Court followed and applied the English Court of Appeal decision *In Re Tucker* [1990] 1 Ch 148, in which Lord Justice Dillon referred to the rule of statutory construction which provides that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. That rule of construction applies equally in the BVI.

The Court relied upon four points or principles that emerged from *Tucker*:

1. The statutory provision which was being considered was fundamentally about summoning people to appear before an English Court to be examined on oath and to produce documents. The Court was of the view that that is precisely what sections 284 and 285 do, nothing more and nothing less.
2. Dillon LJ had stated that, '*the general practice in International law is that the courts in a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process*'. In this case, Mr Chu had neither accepted service of the examination order or been present in the BVI when he was purportedly served with it. The Court was also of the view that, although Mr Chu had participated in other aspects of the liquidation, that was not sufficient submission to compel him to accept service within the jurisdiction.
3. Dillon LJ had further stated that, '*Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court*'. The Court considered that the same position applied to the BVI Court and BVI subjects. The fact that Mr Chu was a Hong Kong resident and not a BVI subject meant that his position was one step further removed from this situation. In the Court's view, the BVI legislature's failure to expressly state that the Court's powers to order an examination should apply to anyone, whether within or without the jurisdiction was a '*glaringly obvious*' omission. Applying the rules of statutory construction, this suggested that the legislator's intention was that the BVI provisions were only to apply to BVI subjects or foreigners bringing themselves within the jurisdiction.
4. Finally, against this legal background, Dillon LJ had said that he would not expect the English provisions to have empowered the Court '*to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English Court*'. In this respect, the Court held that Mr Chu was not present in the jurisdiction through his BVI legal practitioners.

The Court also considered it notable that section 285(3)(e) requires that an order made under the section '*shall state the action that may be taken against a person if he does not appear before the Court as required by the order*'. The Court considered that only persons over whom the Court has jurisdiction could be so compelled.

Akkurate

The Court also considered the English High Court decision in *Akkurate* [2020] EWHC 1433 (Ch) to be particularly important. That was so because it represented an up-to-date statement of English law in relation to the question of extraterritoriality, expressed by one of the top jurists in the English Court system who is also known for his work in relation to some offshore jurisdictions, namely the United Kingdom's (then) Chancellor of the High Court (currently Master of the Rolls), Sir Geoffrey Vos.

In *Akkurate*, Sir Geoffrey Vos candidly explained that his own personal views as to extraterritoriality of the English Insolvency Act provisions in question are quite possibly different from those which were expressed

by the English Court of Appeal in *Tucker*. However, he nevertheless considered that he was bound by the doctrine of *stare decisis* to follow *Tucker*.

A Surprising Outcome?

The Court expressed the view that, although it had been persuaded to accept Mr Chu's submissions, the outcome was a surprising one. It said:

'It would seem to me eminently sensible, particularly for an offshore jurisdiction such as the BVI, to allow for extraterritorial examinations, especially since BVI business companies are usually merely links in a chain, and it is necessary in the interests of cross-border cooperation in insolvency matters, as well as for comity, to be able to work together with other courts and other regimes, to enable a full picture to be established and to prevent the dishonest and greedy from getting away with occult practices of hiding information, on the basis of technicalities. There is a great public interest in allowing an officeholder of this Court to get straight to the point, but that is not, as I understand it, how sections 282 to 285 of the Act are to be construed. So, I am constrained, I think, with no great enthusiasm, I would add, to say that the Court simply did not have power to make the Examination Order.'

Although the liquidators of Ocean Sino were granted leave to appeal the decision 'without hesitation' on the basis that this was the first time that the Court had addressed sections 284 and 285 of the Insolvency Act, 2003 and the issue of extraterritoriality is an issue of great public importance to the jurisdiction, an appeal does not appear to have been ultimately pursued.

Conclusion

For the time being, we only have the benefit of the Court's reasoning in *Ocean Sino*, so it is not readily apparent why the differently constituted Court in *Three Arrows* determined the extraterritoriality issue the other way. However, until such time as the issue has been determined by the Eastern Caribbean Court of Appeal, or the statutory provisions are amended to clarify the position, the question of whether the BVI Court has the power to order the examination of a foreigner remains unsettled.

The current uncertainty is not necessarily an impediment to the conduct of BVI liquidations. In many cases, BVI liquidators may be able to seek recognition and assistance in the jurisdiction in which the foreign person is resident with a view to obtaining an order for examination from the Courts of the foreign jurisdiction in question.

Contacts



Eleanor Morgan
Partner | Mourant Ozannes
British Virgin Islands
+1 284 852 1712
eleanor.morgan@mourant.com



Jennifer Jenkins
Partner | Mourant Ozannes
British Virgin Islands
+1 284 852 1709
jennifer.jenkins@mourant.com



Shane Donovan
Partner | Mourant Ozannes
British Virgin Islands
+1 284 852 1731
shane.donovan@mourant.com

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