

Significant Decision of the Eastern Caribbean Supreme Court - Court of Appeal: Jurisdiction and Service Out

On 18 September 2018 the Eastern Caribbean Supreme Court – Court of Appeal (BVI) handed down judgment in the matter of Livingston Properties Equities Inc and Ors v JSC MCC EuroChem and Ors. The case is important because it affirms the criteria to be applied when considering whether a proceeding involving issues of foreign law and foreign defendants should properly be brought in BVI or in some other jurisdiction. Campbells' BVI litigation team acted throughout for one of the defendants and on the appeal.

The judgment was resoundingly in the appellants' favour as the Court of Appeal granted the appeals and ordered that the BVI proceedings be stayed, set aside the service out orders granted in the proceedings in relation to the foreign defendants, discharged the worldwide freezing orders that had been made in the proceedings and ordered that the claimants (the Eurochem companies) pay the appellants' costs of the appeal and in the court below.

The claimants are a Russian and a Swiss company. JSC MCC Eurochem is one of Russia's largest mineral fertiliser traders and Eurochem Trading GmbH is a Swiss company and an affiliate of JSC Eurochem.

Two of the defendants (Russian nationals) were employed by the claimants in senior positions. It was the claimants' case that these individuals set up companies including some registered in BVI, and also in Panama, Cyprus and Scotland for the sole purpose of receiving, concealing and laundering the proceeds of over \$45 million in secret commission payments made by the claimants' trading partners and their affiliates.

The alleged payers of the bribes were two individuals living in Turkey and Switzerland as well as companies registered in Singapore, Switzerland and BVI.

The claimants made various allegations to include breaches of fiduciary duties, dishonest assistance and knowing receipt of secret commissions and unlawful means conspiracy.

Campbells, acting for one of the defendants Drey Moor Fertilizers Overseas PTE Ltd (along with counsel for other aggrieved defendants by their own applications) brought an appeal on behalf of Drey Moor to overturn orders made by the BVI Commercial Court granting permission to serve the claim on Drey Moor in Singapore. It also sought a stay on the basis that BVI was not the appropriate forum for the claim. Because Eurochem had abandoned their efforts to seek a worldwide freezing order against Drey Moor, Drey Moor was unaffected by the other freezing orders which had been granted but which were discharged by the Court of Appeal.

At first instance, it was held that BVI was the most appropriate forum to determine the claim. In coming to his

decision the judge at first instance placed significant weight on the fact that a number of the defendant companies were registered in BVI and that the claimants had chosen to issue a claim within BVI. The judge also found that, in the absence of satisfactory evidence of foreign law, the court will apply BVI law to the claim.

The Court of Appeal resoundingly overturned the decision at first instance and found that Russia was the more convenient jurisdiction for the claims to be heard. The proceedings were stayed and the orders for service out of the jurisdiction and worldwide freezing injunctions set aside. Specifically, the Court of Appeal found that:

- There was sufficient evidence to allow the judge at first instance to determine what the applicable governing law was. The Court of Appeal also found that the judge at first instance should have examined the evidence to determine the law with which the action has its closest connection. Had he done so, he would have found that the claims have their closest connection with Russian law and therefore the governing law of the claims is Russian law.
- The judge at first instance attached too much weight to the use by the Russian defendants of companies incorporated in the BVI and to the fact that the claimants chose to sue in the BVI. Webster JA found that these are neutral considerations in a forum application.

The judgment is a reminder that mere incorporation of a company in BVI and commencement of proceedings in BVI as a result of the claimant having selected BVI as its preferred jurisdiction are insufficient for the BVI court to be determined as the appropriate forum for trial of a claim. Instead, a thorough examination of all factors to include (but not limited to) the presence of any governing law clause in a contract or legal document, the language spoken by and location of any witnesses, the language of any document that may be submitted into evidence, the likely applicable law and the remedies available to the parties should be taken into account to determine which forum is most appropriate for a claim to be tried.

The judgment also reiterated the longstanding legal principle that a claimant must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the BVI forum. In this instance, the remedies available to the claimants in the BVI were broader in scope than those available to the Russian courts. Nevertheless, the court found that Russia was the appropriate forum and that in light of all the other appropriate considerations the limitation of remedies was not sufficient to refuse a stay on the ground that the claimants would not receive justice.

The case highlights how important it is for claimants and defendants alike to take complete legal advice before commencing or defending proceedings in BVI. It also reaffirms the considerations to be taken into account in determining whether BVI or some other jurisdiction is the more appropriate forum in which a claim should be heard.

The litigation team in Campbells' BVI office advocating in relation to Campbells' representation of Drey Moor included Brian Child (senior counsel), Jeremy Lightfoot, Paul Griffiths and Charlotte Walker. Leading counsel on the applications was Stephen Moverley Smith QC of XXIV Old Buildings in London.