



ADVISORY
Industry Information

BVI Commercial Court provides helpful guidance on the function of ancillary claims in a complex dispute concerning Lunan Pharmaceutical Group Limited

May 2022

Walkers has secured a further victory for its client, Ms. Zhao Long, in a complex dispute regarding the ownership of shares in a significant PRC pharmaceutical company in a further judgment of the British Virgin Islands (“BVI”) Commercial Court demonstrating the BVI Court’s ability to adjudicate complex cross-border commercial disputes tracing PRC assets.

The latest judgment in the proceedings provides helpful guidance on the circumstances in which an ancillary claim can be brought and the jurisdictional hurdles and evidential issues that may arise in pursuing an ancillary claim:

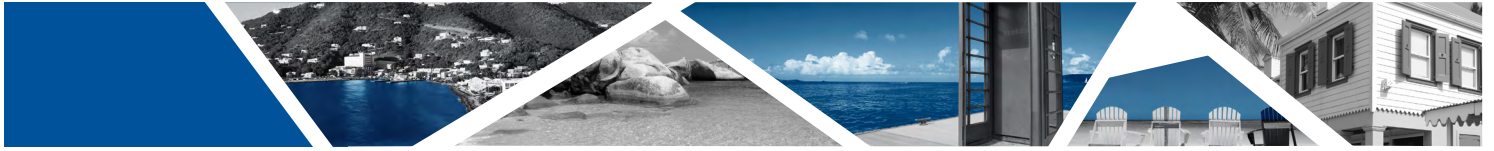
- » Ancillary claims must fall within the parameters for such claims set out in Part 18 of the Eastern Caribbean Supreme Court Civil Procedure Rules (the “EC CPR”) and are most commonly a counterclaim initiated by a defendant against another party to the proceedings. Where an ancillary claim does fall within the parameters of EC CPR Part 18, the Court can exercise its discretion to dismiss ancillary claims pursuant to EC CPR 18.10 in particular having regard to whether there is a close connection between the ancillary claim and the original claim.
- » Where a claimant applies to amend its pleadings to add a fresh cause of action against a foreign defendant who only appears because of service out of the jurisdiction, the Court should consider whether the fresh cause of action passes through one of the gateways for service out of jurisdiction. In contrast, where a defendant (in this case an ancillary defendant) voluntarily submitted to the jurisdiction, by doing so they were submitting to the risk that another party might raise a counterclaim (including in the form of an ancillary claim).
- » A prior judgment can be admitted as evidence and relied upon as regards its findings of fact in a subsequent claim (including an ancillary claim) in circumstances where the subsequent claim is between parties involved in the earlier proceedings and before the same judge that determined the prior judgment.

Background

Following a three week trial in March 2021, the BVI Commercial Court handed down a judgment in July 2021 (the “July 2021 Judgment”) which held that Walkers’ client, Ms. Zhao Long had a proprietary interest in a BVI company (“Endushantum”) which in turn was the beneficial owner of a quarter of the issued share capital of a significant PRC pharmaceutical company called Lunan Pharmaceutical Group Limited (“Lunan” and the “Lunan Shares”) as well as shares in other group companies (together with the Lunan Shares, the “PRC Shares”).

Lunan’s counterclaim that it had a proprietary claim to the PRC shares and in Endushantum was rejected. Please see Walkers’ client advisory on the July 2021 Judgment [here](#).

However, on the eve of trial in February 2021, the PRC Shares were transferred to two companies controlled by Lunan which were incorporated in Hong Kong (the “Hong Kong Companies”) specifically to hold the PRC Shares. This asset transfer was said to have been conducted in reliance upon a judgment from a court in the PRC (the “Linyi Judgment”) following proceedings between Lunan and Endushantum (controlled by its then purported trustees) which were conducted in secret and only disclosed after the dissipation.



In the July 2021 Judgment, Justice Jack found that the Linyi Judgment was collusive and refused to recognise it. Following the July 2021 Judgment, the BVI Court ordered that Endushantum's register be rectified to record Ms. Zhao Long as its sole shareholder. As the litigation was not a contest about Endushantum as an empty shell, the question was then how might Walkers' client recover the PRC Shares.

The Ancillary Claim

Ms Zhao Long caused Endushantum to pursue an ancillary claim that Lunan (through its privies, the Hong Kong Companies) was a knowing recipient, in that it knowingly received the PRC Shares in breach of a trust. The knowing receipt claim relied upon the fact that the PRC Shares should have been held pending the resolution of the BVI proceedings dealing with competing claims to beneficial ownership of the PRC Shares (the "Ancillary Claim").¹ Lunan challenged both Endushantum's ability to bring its ancillary claim against Lunan and an order for service on Lunan's solicitors in the BVI (the "Jurisdictional Objections") whilst Ms Zhao Long applied for summary judgment on the Ancillary Claim (the "Summary Judgment Application").

In a judgment handed down by Justice Jack in March 2022 the Jurisdictional Objections were rejected and the Summary Judgment Application was granted in favour of the ancillary claimant, Endushantum (the "AC Judgment"). The AC Judgment provides guidance on jurisdictional hurdles and evidential issues arising in relation to ancillary claims.

Jurisdictional hurdles when pursuing an ancillary claim

What types of causes of action can be brought as ancillary claims?

Ancillary defendants may argue about the suitability of a cause of action for an ancillary claim. An ancillary claim must fall within the parameters of EC CPR 18.2 and must be closely connected to the original claim. Justice Jack noted that the Ancillary Claim was a counterclaim, which is the most common species of ancillary claim (expressly referred to in EC CPR 18.2), and, applying the criteria in EC CPR 18.10(2) which guide the judicial discretion to refuse ancillary claims, the Judge found that there was a close connection between the counterclaim made by Lunan against Endushantum and the Ancillary Claim: both sought to establish a beneficial interest in the PRC Shares.

Is leave required to serve a foreign domiciled ancillary defendant out of jurisdiction or are they deemed to have submitted to the BVI Court's jurisdiction for the purposes of an ancillary claim?

The Judge considered whether the Ancillary Claim could be validly served on Lunan at its BVI solicitors' offices in the BVI or whether leave to serve out of jurisdiction was required.

Where a foreign defendant only appears because of leave being granted for service out of the jurisdiction (a step necessary where a party is outside the jurisdiction and is deemed not to have submitted to the jurisdiction), the Court should consider whether the fresh cause of action passes through one of the gateways for service out before leave is granted to serve the party.²

In contrast, where a party (in this case the ancillary defendant, Lunan) voluntarily submits to the BVI Court's jurisdiction for the purposes of the original claim, by doing so that party was submitting to the risk that another party might raise a counterclaim and that party can be validly served at its BVI solicitors office in the BVI with the counterclaim.

Evidential issues when seeking Summary Judgment on the Ancillary Claim

To succeed on the Summary Judgment Application, Endushantum had to establish that Lunan had no "real" (i.e. realistic as opposed to a fanciful) prospect of success in defending the Ancillary Claim.³ An application for summary judgment will be determined without the benefit of a full examination of evidence at a trial. In this case, Endushantum's counsel argued that the evidence required to establish the Ancillary Claim was established during the trial of the main claim and recorded in the July 2021 Judgment.

When can the BVI Court admit the factual findings of an earlier judgment as evidence in subsequent proceedings?

The Judge cited a recent judgment from the English High Court in the case of *Bailey v Bailey*⁴ clarifying the scope of the rule in *Hollington v Hewthorn* (which prohibits reliance on findings of fact from earlier proceedings) is limited to situations where there are separate proceedings between different parties or between one party to the current proceedings and a stranger.



A prior judgment could be relied upon in a subsequent claim in circumstances where the subsequent claim was between parties involved in the earlier proceedings and before the same judge that determined the prior judgment as was the case here.

Justice Jack admitted the July 2021 Judgment as evidence in the Ancillary Claim. Relying upon the findings of fact in the July 2021 Judgment, he was satisfied to the summary judgment standard that Lunan was a knowing recipient and ordered Lunan to cause the Hong Kong Companies to return the PRC Shares to Endushantum.

Conclusion

The case demonstrates the BVI Court’s ability to efficiently adjudicate complex commercial disputes tracing PRC assets and provides helpful guidance on how to adapt proceedings following asset dissipation by initiating an ancillary claim.

The Walkers team representing Ms Zhao Long includes BVI based Oliver Clifton, Meenaa Azmayesh and Yegâne Güley, and Hong Kong based John Crook and Vivian Kwan. Walkers instructed Tom Lowe QC of Wilberforce Chambers.

1. Knowing receipt is a common law trust doctrine imposing liability on people who receive property held on trust where the recipient knew that the trust property had been given to them in breach of trust.
2. This was the situation addressed by Justice Jack in the earlier case of ABC Grandeservus Ltd v Emmerson International Corp [2019] ECSCJ No 206.
3. Applying the test for summary judgment set out EC CPR 15.2 and elaborated in the case of St Lucia Motor & General Insurance Co Ltd v Peterson Modeste [2010] ECSCJ No 8 at [21]f.
4. [2022] EWHC 5.

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