

Claimants All at Sea After Lost Anchor

This week, the British Virgin Islands ("BVI") Commercial Court has published its long-awaited judgment in *Joint Stock Company "BTA Bank" v Timur Sabyrbaev and Ors*¹, providing helpful clarity on issues concerning extra-territorial service, and the use of 'Anchor Defendants' to establish the BVI as the appropriate forum within which to bring a claim.

The judgment is the latest in the global Ablyazov litigation, whereby BTA Bank ("BTA") of Kazakhstan, issued a claim against 54 Defendants. Eight of those Defendants responded to the claim by challenging service and forum.

Among the Defendants are two entities which sit within the ADM Group (referred to as the "ADM Defendants"), for whom Matthew Freeman and Scott Tolliss, of the Maples Group's BVI office, act.

Background

In its claim, BTA Bank alleged that it had been the victim of a fraudulent scheme concerning the issue of approximately 100 high-value letters of credit that resulted in losses of approximately US\$230 million.

The Defendants included:

- (i) various Kazakh former officers and employees of BTA;
- (ii) certain BVI and foreign-incorporated SPV companies (counterparties to the letters of credit);
- (iii) former directors of those SPV companies;
- (iv) various foreign commodities companies, which included Maples Group's clients, and certain of their current or former employees; and
- (v) certain former senior officers of BTA, including Mr Mukhtar Ablyazov.

In 2009, BTA obtained judgments in default against four of the nine BVI-incorporated Defendants (referred to collectively as the "BVI SPVs") in the courts of England & Wales. It later appointed receivers over those BVI SPVs. The receiverships continued for some seven or eight years before being discharged. None of those BVI SPVs participated in or defended, at any stage, those proceedings. It is thought that those receiverships terminated without assets having been identified and / or realised.

Between 2010 and 2020, eight of the nine BVI SPVs were struck from the Register of Companies in the BVI, and thereafter dissolved. It was only in 2021 that BTA successfully applied to restore them to the Register, for the purpose of naming them as defendants in the current proceedings (which they did three days after the restorations had been granted).

The BVI SPVs did not substantively engage with the proceedings, including by failing to file

¹[maples.com/JointStockCompanyBTABankvTimurSabyrbaevandOrs](https://www.maples.com/JointStockCompanyBTABankvTimurSabyrbaevandOrs)

acknowledgments of service. Nevertheless, BTA elected not to apply for judgments in default (as they had done in 2009 before the English courts). Instead, all the BVI SPVs went on to be struck off again and / or dissolved, or liable to be struck off or dissolved, without corrective action being taken by BTA or its lawyers.

On 12 May 2022, BTA issued three *ex parte* applications seeking, among other things, permission to serve non-resident Defendants, including the ADM Defendants, out of the jurisdiction. That permission was granted by the BVI court on the basis those Defendants were *"located outside of the jurisdiction but are necessary and proper parties to the proceedings"* (the "Service Out Order").

Applications then ensued, including by the ADM Defendants, to set aside the Service Out Order on grounds which included that the BVI was not *"clearly or distinctly the appropriate forum for the trial of the dispute"*.

Forum

The Applicants submitted, among other things, that the sole connection with the BVI was the fact that the BVI SPVs happen to have been incorporated in the Territory. Furthermore, that the Claimant had not alleged that any wrongdoing had actually been perpetrated in the BVI, and that, in reality, *"the connection between these proceedings and the BVI is bordering on non-existent"*.

BTA maintained its position that the BVI was in fact the most appropriate forum on the basis, in summary, that the BVI was *"a strong common thread across each of the streams of the [letters of credit] transactions and the majority of the embezzled funds were channelled through the BVI SPVs"*.

Decision

Setting aside the Service Out Order, and allowing the collective Defendants' applications, the Court held:

- (i) BTA had inappropriately sought, by way of an application to amend its original pleadings, to elevate the importance and involvement of the BVI SPVs in order to represent the BVI as central to the alleged scheme, when that was not in fact the case;
- (ii) the BVI SPVs were, for all intents and purposes, defunct;
- (iii) there was no evidence that the BVI SPVs had any operational offices, or operational or executive staff, or documents located in the BVI – they were simply incorporated here;
- (iv) BTA's approach was to use the defunct BVI SPVs as 'Anchor Defendants' to bring in the real target commodity trader Defendants, including Maples Group's clients, whereupon the BVI SPVs could then be dropped;
- (v) forum will not be established if only a *"tangential or peripheral"* link to the BVI can be demonstrated;
- (vi) the alleged scheme was perpetrated mainly in Kazakhstan, by officers and employees (themselves located in Kazakhstan) of a Kazakhstani bank, dealing with commodity traders operating out of various jurisdictions, such as Germany and Switzerland, with funds being channelled to a bank in Latvia; and
- (vii) BVI certainly was not *"clearly or distinctly the appropriate forum for the trial of the dispute"*.

The judge was exceptionally critical of BTA's conduct and approach to the proceedings, finding that it had breached its duty of full and frank disclosure in procuring the Service Out Order. The learned judge, accepting the Applicants' submissions in respect of BTA's use of the BVI SPVs as 'Anchor Defendants', remarked that:

"...BTA's invocation of the BVI SPVs is no more than an artifice. BTA's words to the contrary sound as hollow as the corporate husks they briefly resurrected wherewith to accomplish their sole purpose of opening the gates of litigation against BTA's real targets."

Comment

The judgment serves as a stark warning to litigants seeking to use BVI-incorporated 'Anchor Defendants' as vehicles for bringing their real target(s) into a court process, and as a means by which to "unlock the door (or 'gateway')" to the territory's courts.

The Maples Group welcomes the judgment, and the clarity it brings to the territory's jurisprudence on forum challenges.

Further Assistance

If you need assistance with a recent claim, our Dispute Resolution & Insolvency team have unparalleled experience providing in-depth, pragmatic and commercial advice with cross-office cooperation and support on all litigation matters.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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