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Litigation in the Cayman Islands

Introduction

Dillon Eustace opened its Cayman Islands office in 2012 providing legal services in the areas of commercial litigation, financial services in general and investment funds in particular.

Building on our well established and highly regarded Litigation and Dispute Resolution department in Ireland representing both domestic and international corporations, organizations and individuals, Dillon Eustace Cayman Islands extends the range of litigation services we offer to include international litigation in the Caribbean region. Our clients include some of the leading global banks, financial institutions, product manufacturers, insurers, airlines and public companies.

Cayman Islands : Relationship with the United Kingdom

The Cayman Islands have had a relationship with the United Kingdom since the signing of the Treaty of Madrid in 1670. From that time until 1962, Cayman was linked to Jamaica as a dependency. In 1962, Jamaica chose to become independent, but the Cayman Islands decided to remain a British colony. The Foreign and Commonwealth Office in London discontinued the use of the term "Dependent Territory" and the Islands are now called an "Overseas Territory." The Foreign and Commonwealth Office appoints a Governor, whose responsibilities cover a number of areas including National Security, Foreign Affairs, Police, Immigration, the Passport Office, the Postal Services and other portfolios such as Broadcasting, District Administration and Civil Service. The Cayman Islands has a democratic system with an elected Assembly from which the executive arm of Government is formed. Cayman Islands is a young country in comparison to western democracies. It has a successful democratic system which is fundamental to a vibrant and effective legal system. This, along with a tax neutral status, makes the country attractive for international investment.

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The Legal System

Background

The Cayman Islands legal system is based on English common law, with the addition of local statutes and adaptations to the common law. The country has a modern legal and judicial system which enhances its reputation as a leading financial services centre.

In several respects the legal system is similar to that of the United Kingdom and Ireland. Attorneys in court wear wigs and gowns. Solicitors and barristers admitted to practice must be called to the Cayman Bar. In the Cayman jurisdiction they are known as attorneys-at-law regardless of whether they qualified as solicitors or barristers. A minority of attorneys actually practice in the courts full-time. Many Irish and United Kingdom solicitors are admitted to practice in the Cayman Islands, Irish solicitors and barristers being required to be admitted in the United Kingdom prior to being called to the Cayman Bar. The legal system, in tandem with the Department of Immigration also facilitates the entry of barristers, usually Queens Counsel from London, to practice before the Grand Court in specific cases such as murder trials or complex commercial cases in the Financial Services Division.

The Cayman Islands is at the forefront of modern legal systems which keeps pace with changes in the Common Law jurisdictions.

Administration of Justice

Justice in the Cayman Islands is administered at three levels - Summary Court, Grand Court and the Court of Appeal. Minor criminal and civil cases are tried by a magistrate sitting in the Summary Court. All serious crimes and larger civil cases are tried by the Grand Court, presided over by the Chief Justice and Grand Court Judges permanently located in the Islands. Appeals lie from the Grand Court to the Cayman Islands Court of Appeal, which sits in Grand Cayman, and from there to the Judicial Committee of the Privy Council in England.

The Summary Court has a civil and criminal jurisdiction with magistrates presiding. Coroner's inquests are held in Summary Court where a magistrate sits with a jury as coroner for the Islands. Appeals from the Summary Court lie to the Grand Court.

The Grand Court is a superior court of record and administers the common law and the law of equity of England, as well as locally enacted laws and applied laws. A dedicated Financial Services Division of the Grand Court opened in November 2009 which was a very progressive step in a country with a thriving financial services industry. The Financial Services Division has enhanced the Cayman Islands as a forum for international litigation and dispute resolution and has expedited commercial disputes for speedy resolution in an age when legal systems are often criticised as cumbersome and slow to respond to the needs of the global economy. This is a clear

demonstration how the Cayman Islands Legal System has responded efficiently to the needs of the financial services industry.

Appeals from the Grand Court lie to the Cayman Islands Court of Appeal. Further appeal lies, as appropriate, to the Judicial Committee of the Privy Council in London. There is also a right of petition to the European Court of Human Rights once domestic legal remedies have been exhausted. Some decisions of the Grand Court, and all decisions of the Court of Appeal and the Privy Council on appeals from Cayman, are reported in the Cayman Islands Law Reports, (CILR) Decisions handed down from the Higher Courts in the United Kingdom, other Commonwealth countries and Privy Council are cited and reported in the local courts and in the Cayman Islands Law Reports.

The Grand Court judiciary consists of the Chief Justice and five other full-time judges with visiting judges from overseas. Decisions of the Court of Appeal and the Privy Council on appeals from Cayman are binding on the Grand Court. Decisions of the Courts of England and Wales and in appropriate cases other Commonwealth or common law jurisdictions are highly persuasive.

Most commercial disputes are allocated to the Financial Services Division which has seen an increase in the volume of cases. The Court ensures that complex commercial matters are dealt with in a timely and efficient manner.

Court Practice and Procedure

The following is a broad outline of the procedures.

Proceedings in the Grand Court are governed by the Grand Court Rules (1995 Revision). Proceedings relating to the winding up of companies are governed by the Companies Winding Up Rules (2010).

To commence proceedings, a writ or other form of originating process is filed and served on the defendant (or its authorised representative or appointed attorneys). Personal service is required or to a registered office for corporate entities. If the defendant is not present in Cayman, the Court's permission will be required to effect service out of the jurisdiction.

For local defendants an acknowledgment of service and notice of intention to defend must be filed within 14 days and for overseas defendants in compliance with permission in the order to serve out.

A Statement of Claim has to be served by the plaintiff within 14 days after service of the defendant's notice of intention to defend.

A Defence and Counterclaim should be served within 14 days of the date of acknowledgment of service of the writ or the date of the Statement of Claim, whichever is later (but no less than 28 days after service of the writ).

A Reply (and any Defence to Counterclaim) must be served within 14 days after the Defence.

Lists of documents must be exchanged within 28 days after the Reply.

A Summons for Directions is required to be issued within 14 days after exchanges of the lists of documents to deal with future conduct of the case to trial and any other matters. In large commercial disputes, these periods may be extended by agreement between the parties or by order of the court. They may also be shortened in urgent cases.

If Judgment is obtained it is enforced by way of warrant of execution by which assets are seized and sold to pay the judgment debt; attachment of assets or garnishee order; appointment of receiver; writ of sequestration to seize real and personal property; attachment of earnings order.

Appeals

Appeals to the Court of Appeal for an error of law or mistaken conclusion of facts must be filed within 14 days. Permission or leave may be required. Once the notice and grounds of appeal have been filed, the Registrar of the Court of Appeal sets a timetable for the exchange of written submissions and other materials to be lodged with the Court, and fixes a hearing date. Attorneys for both parties are consulted about a hearing date.

The Court of Appeal (Amendment) Rules 2009 introduced summary determination of the question whether an appeal is one for which leave is required.

Discovery

Discovery to be made 14 days after the close of pleadings. Parties normally consent to extension of time in large commercial cases and the court is accommodating. Discovery is completed by each party, allowing the other party an opportunity to inspect the documents.

The Grand Court follows the common law principle that a party may withhold certain documents from inspection by the other party on the grounds of privilege, although their existence must still be disclosed.

Litigation funding

Third parties may fund litigation, subject to compliance with the rules against maintenance and champerty which are fundamental principles in common law jurisdictions. Litigation funding is not widespread in the Cayman jurisdiction. The Court may accommodate individual funding arrangements, where it is in the interests of public policy. For example where a stateable case could otherwise not be brought by an impecunious plaintiff. The Court would monitor any such arrangements. The Court has considered similar public policy issues in the context of conditional fee arrangements for attorneys. Conditional fee arrangements are permissible in certain instances with the sanction of the Court. A contingent arrangement for payment of an attorney's fee based on

the proceeds of the case is not allowed. The recoverability from the losing party of any conditional fee is a matter for the court to decide in each case, on the basis of what is fair and reasonable. A conditional fee arrangement with uplift in fees for the successful plaintiff's attorneys was approved in *Quayum v. Hexagon Trust Company (Cayman Islands) Limited Grand Court (Smellie, C.J.) 2002 CILR 161*.

Enforcement of foreign judgments

The Common Law system in the Cayman Islands affords a means of enforcing judgments which is consistent with other countries in the Commonwealth and further afield. The procedure to enforce foreign judgments is well established in the legal jurisprudence of Cayman.

Historically a foreign judgment could only be enforced in Cayman if it was for a debt. This area of law changed significantly following the case of *Bandone v Sol Properties 2008 CILR 301*. The case involved a claim for enforcement of an order for specific performance of a contract. The Grand Court granted the order sought. The court confirmed that the direct enforcement of foreign judgments should no longer be confined to those for a debt or specific sum of money. Other judgments may be enforced by way of equitable remedies. When deciding on an application to Grand Court to enforce a non-money judgment, the court will also have regard to general considerations of fairness and will ensure that enforcement would not favour foreign litigants over domestic litigants.

The Foreign Judgment Reciprocal Enforcement Law (1996 Revision) has very limited application as a statutory mechanism to enforce judgments in the Cayman Islands. The legislation extends to those jurisdictions where the Governor in Council is satisfied that Cayman Islands judgments will be reciprocally recognised. Australia is the only country that qualifies under the terms of the legislation.

Procedure for Enforcing Foreign Judgments

The judgment creditor must bring a new action by writ of summons in Cayman, based on the foreign judgment. The claim proceeds as any other action commenced by writ of summons including service out of the jurisdiction if necessary. The Court will determine whether there is a valid judgment to be enforced and consider any relevant factors governing the granting of the order sought. The court does not retry the original claim but ensures that the foreign court had jurisdiction in accordance with Cayman law notwithstanding that the foreign court already determined that it had jurisdiction in the original judgment.

A foreign court will be recognised as having had jurisdiction over the defendant:

- if the defendant was ordinarily resident in the foreign country at the time of commencing the foreign proceedings; residence for a corporation is ordinarily where it carries on business;

- if the defendant voluntarily participated in the proceedings before the foreign Court, other than simply to contest jurisdiction;
- if the defendant appeared as a party in the proceedings before the foreign Court;
- if the defendant expressly agreed to submit to the jurisdiction of the foreign Court, by contract or conduct.

The Cayman Court will only recognise or enforce a foreign judgment that is final and conclusive, rather than interim or interlocutory. A judgment will be regarded as final and conclusive even if it is under appeal in the foreign court. If execution has been stayed, the Court will usually also stay enforcement of the judgment which it grants in Cayman. The Court would not enforce a foreign judgment which is contrary to public policy. Where there are issues of fact or law to be established or whether the foreign Court had jurisdiction under Cayman law, a trial will be necessary. Execution remedies for the Grand Court order to enforce the foreign judgment are as discussed above under Court Practice and Procedure.

Pre-Trial Injunctions

Where there is a possibility of a defendant dissipating assets prior to enforcement of a foreign judgment the plaintiff may apply for a Mareva injunction preventing the removal or dissipation of assets from Cayman Islands. Similarly, Chabra injunctions may be granted by the Grand Court to restrain disposal of assets held by third parties

Jurisdiction in Enforcement of Foreign Judgments

If the defendant to the enforcement of a foreign judgment is non-resident for purposes of service of the writ then the Grand Court rules for service out of the jurisdiction apply. The rules applicable to jurisdiction in enforcement of foreign judgment applications to Grand Court are no different to other proceedings commenced by writ of summons. The court has jurisdiction over any person or corporate entity that is properly served in accordance with the rules. Therefore, a defendant that is non-resident may be sued for enforcement of a foreign judgment in the Cayman Islands.

Foreign Proceedings

The Companies Law Part XVII (2011 Revision)

The Companies Law Part XVII (2011 Revision) provides a mechanism whereby the Grand Court may make an order to recognise the right of a foreign representative, which is appointed in respect of a debtor for the purpose of a foreign bankruptcy proceeding, to act in the Cayman Islands on behalf of or in the name of the debtor. This provision was applied in the case of the Securities Investor Protection Corporation trustee for Bernard L. Madoff Investment Securities to gain recognition in Cayman.

Norwich Pharmacal Orders

Third party disclosure orders (Norwich Pharmacal) are granted as appropriate by the Grand Court in aid of foreign proceedings. This area of law usually gives rise to concerns about protection of confidential information. Following a separate application the court deals with additional orders pursuant to the Confidential Relationships (Preservation) Law 1976. In the case of *Gianne v. Miller 2007 CILR* the Grand Court granted a Norwich Pharmacal Order which was upheld on appeal.

Free Standing Injunctions

This is a relatively new area of law developing in the Caribbean region. Referred to as The Black Swan Jurisdiction – *Black Swan Investment I.S.A. V Harvest View Limited and Sablewood Real Estate Limited BVI HCV (Com) 2009*.

The case concerned the continuation of an injunction obtained by the claimant Black Swan in support of proceedings commenced in South Africa. The Respondents were BVI companies and the claimant sought to freeze assets in the BVI jurisdiction in aid of the South African proceedings. There were no stand alone proceedings pending in the BVI and the claimant could not mount a case there in any event which differentiates this new body of law from what went before. The remedy flies in the face of earlier jurisprudence that a court may not grant a freezing injunction unless the injunction is made in support of a claim which the court granting it has jurisdiction to enforce by final judgment. In other words a pre-existing cause of action which the claimant could rely on to justify the granting of relief sought. The freezing injunction was granted in the Black Swan case.

The opportunity to consider the Black Swan jurisdiction at appellate level in BVI arose in *Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited, September 2011*. The issue on appeal was whether the trial judge was correct in holding that the Black Swan principle did not apply in that particular case. The Court of Appeal endorsed the earlier Black Swan decision thereby affirming the availability of freestanding injunctions in the British Virgin Islands.

The Grand Court in Cayman adopted the Black Swan formula in granting leave to serve a writ out of the jurisdiction for a freestanding order against non-resident defendants in *Gillies-Smith v Smith (Unreported) Justice Quin 12 May 2011*.

However Justice Cresswell, Grand Court, in the Cayman Islands case *VTB Capital PLC v Konstantin Maloofeev , 10 January 2012*, came to the conclusion that previous Court of Appeal decisions in the Cayman jurisdiction provided ‘no room for a Black Swan type jurisdiction in the Cayman Islands’. He felt that the Black Swan decision was not consistent with the state of the law in the Cayman Islands. Certainly the provisions of Order 11 Rule 1 (1)(b) appears to prevent service out of the jurisdiction unless an injunction is sought to order the defendant to do or refrain from doing anything in the jurisdiction.

In summary, a freestanding injunction is available in the BVI in support of foreign proceedings. The Cayman Islands jurisdiction, although initially following the Black Swan precedent in the Gillies-Smith decision, has now reverted to the law as it stood prior to that decision in accordance with the judgment of Justice Cresswell above. An appellate court decision is necessary for finality in the Cayman Islands. (Justice Cresswell's judgment in VTB Capital PLC V Konstantin Maloofeev is under appeal.)

The Court in the VTB Capital case commented on the lack of a statutory framework, as exists in the UK, permitting the grant of freezing orders in aid of foreign proceedings. Enforcement of Judgments and related matters is for consideration by the Law Reform Committee in the Cayman Islands.

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