BVI Asset Tracing: Looking Forward and Backward

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If a wrongdoer spends his ill-gotten gains, is the claimant effectively limited to recovering a maximum sum from a subject bank account? What if the proceeds of the wrongdoer are transferred into an overdrawn bank account?

This was the thorny, but very real question that has recently been answered by the Privy Council in The Federal Republic of Brazil and another (Respondents) -v- Durant International Corporation [2015] UKPC 35. The case, although an appeal from Jersey, concerned BVI companies used to secrete the proceeds of bribes. Moreover, as a Privy Council decision, it has persuasive authority in the BVI.

The central issue in the Appeal was the effect of a bank account, used to hold bribes, being depleted, and then replenished. Given that tracing is a proprietary relief, does the depletion have the effect of removing from the scope of a tracing exercise any further funds? The appeal therefore considered the validity and scope of two principles of tracing: “backwards tracing” and “the lowest intermediate balance rule”.

In the sole opinion of the Court, Lord Toulson identified different approaches applied to date in seeking to examine these principles. In particular, he considered the exhortation by Scott V-C in Foskett -v- McKeown [1998] Ch 265 that one should have regard to the substance of the transaction or transactions and not “the strict order in which associated events happened”. The Privy Council accepted this approach: it refused to rule that backward tracing was not an available concept, noting that “a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect”. This observation was made in the context of observing the increasingly sophisticated and elaborate form of money laundering now being witnessed.

However, the Privy Council also eschewed a general and flexible approach. It will be necessary, looking at the whole of the transaction for a victim to establish coordination between the depletion of the trust fund which can readily be traced into, and the acquisition of, the new asset that is sought to be the subject of the tracing exercise.

The decision is a welcome reminder to practitioners engaged in asset tracing exercises that the remedy is a flexible one, capable of giving relief based on the substance of the arrangements, not merely their strict date of occurrence. Innocent parties who deal with the wrongdoer also seem protected under what may, in any particular case, be a delicate balancing exercise.

Given the use in the past of BVI companies by a select few to further their fraudulent schemes, we await the application of Brazil -v- Durant with interest.
This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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