

## BRITISH VIRGIN ISLANDS COMMERCIAL COURT

### ***Hornbeam Corporation -v- Halliwell Assets Inc* Claim No. BVIHC (Com) No. 105 of 2014 (December 2014)**

### THIRD PARTY COSTS ORDER - WHETHER POWER TO PERMIT SERVICE OF APPLICATION OUT OF THE JURISDICTION - CPR 7.3(10) CONSIDERED - WHETHER NECESSARY FOR APPLICATION TO BE SERVED OUT IN ANY EVENT

In this case, the Defendants successfully resisted applications by the Applicant (a Panamanian company) to continue *ex parte* injunctive relief granted previously by the Court and to appoint a provisional liquidator over the Respondent company. Costs followed the event and were awarded against the Applicant. However, the Respondents' case was that this order, as a practical matter would likely be worthless given that the Applicant was merely a shell entity registered overseas.

The Respondents applied for a third party costs order against the ultimate beneficial owner (the "UBO") controller of the Applicant, on the grounds that he was the real beneficiary of the failed proceedings and the real party. This application was based on express powers in the Eastern Caribbean Supreme Court Civil Procedure Rules (the "CPR") to make third party costs orders. However, since the UBO, like the Applicant, was resident outside the jurisdiction of the BVI Court, this necessitated an application for leave to serve the application out of the jurisdiction.

The Commercial Court held that the service out provisions in the CPR contained no specific provision that was applicable to such an application. He went further and remarked that in his view the service out provisions were not designed to deal with applications to render non-parties liable for costs. Accordingly, he refused permission to serve out.

The decision is unfortunate since the net result is that whilst BVI does have power to make costs orders against non-parties, as a consequence of this decision, that power can only be enforced against resident entities, or at least, against entities against

whom permission to serve out is not required. An appeal has been heard, but not yet determined.

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