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TL4 Disputes MAGAZINE

ISSUE 5

COMPANIES AND SHAREHOLDERS IN THE SPOTLIGHT

INTRODUCTION

"Where I once found it safer to stay in the background… I've stepped from the shadows into the spotlight."

- Salle Merrill Redfield

We are delighted to present Issue 5 of Disputes Magazine, where we put Companies and Shareholders in the Spotlight. Our authors discuss a variety of topics including the new DIAC rules, Section 1140 of the Companies Act 2006, Digital Asset Fraud, and even more. We also find more out about our community with our continued series of 60 seconds with.

Thank you to the continued support from our contributors, members, and community partners. We look forward to seeing you all at more of our Disputes events throughout 2022.

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Disputes

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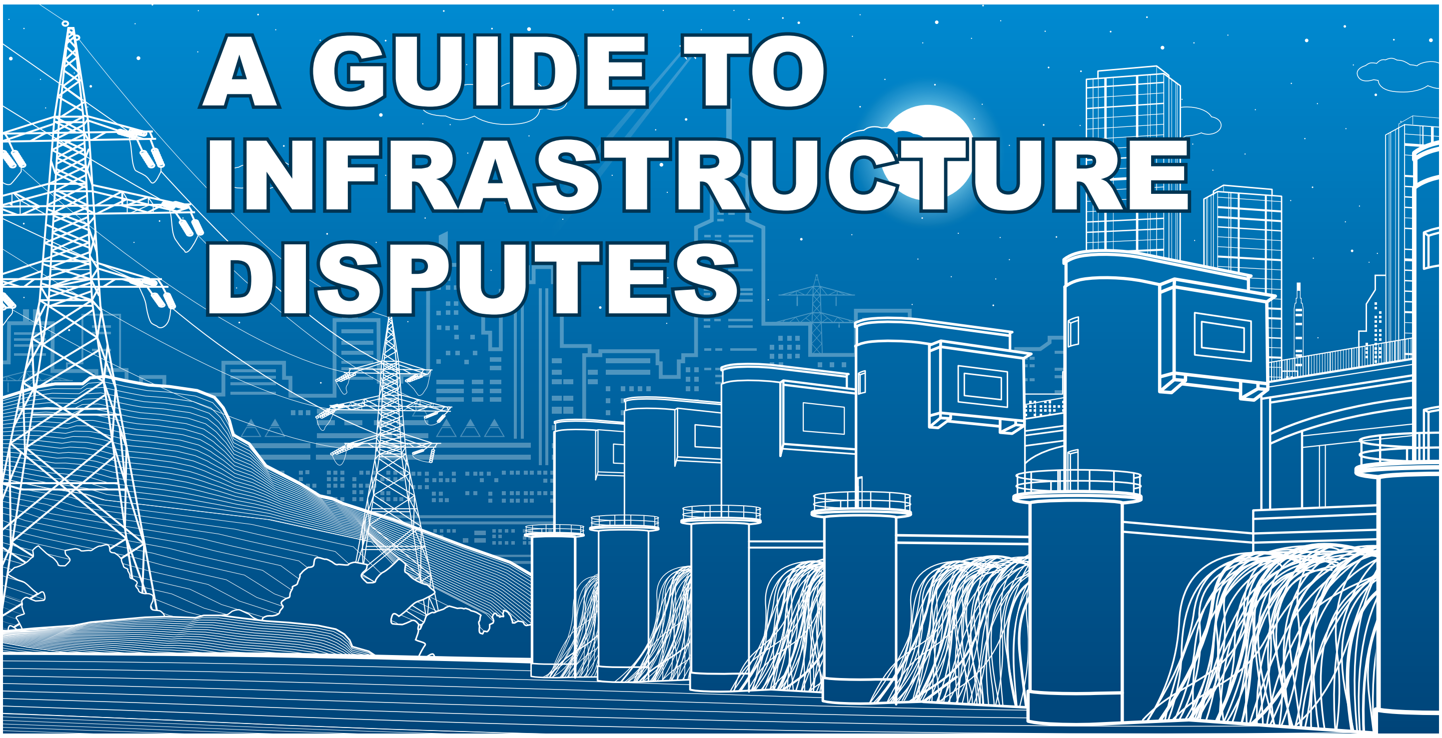
A GUIDE TO INFRASTRUCTURE DISPUTES



Authored by: Peter Bird and Calvin Qiu - BRG

A wide variety of companies encompassing project developers, other equity investors, lenders, engineering, procurement, and construction (EPC) contractors, operators, and insurers are typically involved in the development of costly and strategically important infrastructure projects. These complex projects, often involving multiple parties in multiyear contracts, can give rise to disputes. In this paper, we give a brief overview of factors that are more likely to lead to disputes, common causes of disputes and how project finance can affect the dynamics of disputes. We conclude with three case studies.

Factors affecting prevalence of disputes

In general terms, projects with the following features are more likely to give rise to disputes:

Incomplete allocation of risks: infrastructure-related agreements typically contain terms specifying how risk is allocated between different parties. If risk allocation is poorly defined or incomplete, disputes can arise over the party that is responsible for taking on risks.

Contract terms that are open to interpretation: contracts may contain poorly defined terms that are open to interpretation. Parties involved may have different expectations on their obligations and/or rights based on their interpretation, e.g. over the valuation method that should be used to determine the level of compensation.

Projects with poor underlying economics can give rise to disputes. Where project companies find their involvement unsustainable, the project company may ask the host government to provide compensation or additional support or may engage in behaviour that adversely impacts operational quality. Equally, projects that are excessively burdensome on the offtaker may lead to disputes where the offtaker seeks to evade its obligations.

Causes of disputes

Global Infrastructure Hub, a nonprofit organisation created by the G20 to support infrastructure investment, conducted a study of 165 public–private partnership (PPP) projects where disputes arose.[1] For projects with identifiable causes, the study found that:

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[1] Global Infrastructure Hub, Managing PPP Contracts After Financial Close (2018), pp. 109–110.

Where the dispute notice was issued by the private entity, the most common reason was an increase in costs for which the private part was seeking compensation. The cost increases had a variety of reasons, such as unexpected on-ground conditions or changes in project scope.

Where the dispute notice was issued by the governmental entity, the most common reason was a private partner's ongoing failure to meet certain operational requirements.

Disputes also were caused by the actions of a third party, e.g. decisions by an environmental regulator or ongoing protests by local populations.

Project finance and disputes

The use of project financing can affect the dynamics between the parties in a dispute. Two examples are discussed below: (i) emphasis on the maintenance of cash flows and (ii) dominance of lenders' interests in disputes.

Emphasis on maintaining regular cash flows

The sponsors and lenders to a project-financed company are concerned about maintaining its regular payment schedule, since a project finance–based economic model could be at risk of default without a regular stream of cash flows.

The project company's conduct is heavily influenced by the above consideration. In a dispute, it may lead to greater emphasis on maintaining cash flow, at the possible expense of longer-term value considerations.

Interests of lenders in disputes

Project financing agreements customarily require sponsors and the project company to notify lenders about pending or actual disputes. The interests of the sponsors and lenders typically are aligned, particularly in the early stages of a dispute. However, if the dispute worsens and/or begins to impact covenants, the interests of lenders will become dominant over those of the sponsors.

There also may be direct agreements between lenders and offtakers that contain step-in rights, which give lenders the ability to step in and take over the project. While lenders in practice are reluctant to do so (due to the liability associated with taking on a project), this places pressure on how offtakers react to disputes, and outcomes in a dispute tend to be geared more towards the lenders.

Case studies

Each case study below illustrates different types of risks in infrastructure and how these can lead to disputes between project participants.[2]

Case study 1: geopolitical dispute in relation to a power plant project

The owner (a publicly owned entity) entered into a contract for a large power project. Unusually, its obligations including payment were conditional on the owner's ability to raise project finance. The contractor (a publicly owned entity in another country) started activity before finance was raised. The owner subsequently terminated the project, claiming its inability to raise finance.

The owner and contractor entered into a dispute. The owner maintained that the project could not be financed, despite having declined an offer of vendor finance from the contractor. The contractor claimed that its offer facilitated the financing condition and sought damages for termination.

The experts involved had to testify whether the owner had used best efforts to raise finance. It was alleged that geopolitical factors had influenced the owner's decisions.

This case study illustrates how important political considerations can be in infrastructure projects.

Case study 2: solar power tax credit dispute

A government allowed the owners of solar power systems to claim a percentage of the fair market value of the systems as investment tax credit.

A large solar power system installer applied to receive a substantial investment tax credit, while the government estimated the tax credit to be significantly less.

The parties differed in their assessment due to different valuation methods used. The government valued the project using a cost-based approach by estimating the cost of the system plus a small markup as profit margin to the installer. The installer used a discounted cash flow (DCF) approach, as it had an installation contract for the solar power system, under which it would receive predicable cash flows over a long period of time. The experts in this matter debated whether a cost- or DCF-based valuation approach was more appropriate.

Subsidy regimes are common in infrastructure projects; however, these place pressure on treasuries, which want to find ways to minimise costs. Such regimes can lead to disputes, where governments would end up disputing the amounts of subsidies.

Case study 3: project termination payment dispute

An offtaker terminated a 25-year power purchase agreement (PPA) for a gas-fired power project after 16 years because the power was no longer economically competitive. Under the PPA, a termination payment was due based on the project's expected future cash flow in present value terms.

The PPA tariff incorporated a fixed element to cover capital costs and fixed operations and maintenance (O&M) costs. It also included a variable element to cover fuel costs and variable O&M costs, linked to indicators of fuel and labour costs.

The project company put forward a claim for the termination payment, based on forecasts of labour cost indicators, exchange rates, fuel prices and despatch of the plant. The forecasts were derived from different sources. The offtakers disputed the calculations on the basis that the fuel price forecasts were inconsistent with the despatch assumptions.

Projects may have to be terminated when they are no longer economically feasible. Disputes may arise between parties over how to allocate the costs/residual economic benefits of a project. When formulating scenarios based on inputs from different sources, it is important to ensure overall internal consistency.

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[2] The case studies are provided for illustrative purposes only.

LEAPS OF FAITH:

‘GOOD FAITH’ OBLIGATIONS BETWEEN SHAREHOLDERS

Authored by: Richard Clayman – Kingsley Napley

Introduction

During lockdown no.2, I attended a virtual seminar panelled by (amongst others) two former lord justices. The theme of the seminar was recent trends in contractual construction, comprising a genial canter through a variety of contract case studies. However, when the chairman of the panel slipped in a question about implied duties of good faith, one of the senior benchers nearly keeled off of his chair. The judiciary, it transpires, are not particularly keen on having swarthy, continental-looking, jurisprudence besmirching the pristine English legal doctrine of contractual certainty. However, where the circumstances absolutely demand it, the lexical corset can be loosened a finger to accommodate the unspoken intentions of the parties. However (like a jaunty weekend away in Amsterdam) it must not be allowed to become a regular thing.

This orthodox view was succinctly put by Lord Ackner in Walford -v- Miles [1992] 2 AC 128:

> **“the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiation”.**

In short, the parties must protect their own interests, in particular through the negotiation of a clear and concisely worded contract; not by placing vague and subjective burdens upon the other party.

What exactly is a duty of good faith?

A significant difficulty with the concept of a duty to act in good faith is that it is ill-defined, and reliant upon both contractual context and factual circumstance to give it meaning. This difficulty was highlighted by Vos J (as he then was) in CPC Group -V- Qatari Diar [2010] EWHC 1535 (Ch), in which he noted that the doctrine could, for example be deployed to: underwrite the ‘spirit’ of the contract; encompass a duty to have due regard to the legitimate interests of the other party; and/or require faithfulness to an agreed common purpose and the expectations of the other party. It is this nebulousness that underpins the judiciary’s reluctance to welcome the doctrine more readily into the canon of English law.

Relational contracts: Yam Seng Pte Ltd v International Trade Corp Ltd

Notwithstanding the judicial stiffness brought on by debates concerning duties of good faith, there has clearly been a growing acceptance of the concept in recent case-law, and indeed even a willingness to imply a duty to act in good faith in particular circumstances. This trend took root in the case of Yam Seng . In that case, Leggatt J (as he then was) noted that the English jurisdiction was lagging behind civil law jurisdictions and even (surprisingly) other common law jurisdictions in terms of its readiness to imply duties of good faith into commercial agreements. He went on to identify a variety of contracts in relation to which the Court may be prepared to imply such a duty. A common characteristic of such contracts was that they were 'relational' in nature, i.e. they involved a long-term relationship between the parties, entailing considerable communication, cooperation, and mutual trust and confidence. Keen not to appear too exotic however, the judge couched the decision by reference, in particular, to two steadfast and sober English law concepts:

- **To be implied, the duty to act in good faith must be necessary to give business efficacy to the arrangements; and**
- **The test of good faith is objective, i.e. transgressed by reference to behaviour that reasonable and honest people would regard as commercially unacceptable.**

The judge further added to, and elaborated upon, his thinking in the later case of Astor Management -v- Atalaya Mining [2017] 2 B.C.L.C, in which he confirmed that the duty reflected the expectation that the parties would act honestly toward each other and not deliberately seek to frustrate the purpose of the contract, but the burden of the duty is a lesser one than the requirement to use all reasonable endeavours at achieve a desired contractual outcome.

Good faith between Shareholders

Perhaps no other area of English law encapsulates the tension between contractual certainty and the emerging recognition and application of the duty to act in good faith than relationships between shareholders. On the one-hand, relationships between shareholders (and indeed as between shareholders, directors and the company itself) are governed by statute, the company's constitution and any shareholders' agreement, the latter two of which are (in theory) freely negotiated.

However, as recognised by the Court's extensive equitable jurisdiction under section 994 of the Companies Act 2006, inter-shareholder relationships can be fraught with constitutional and contractual lacunas, such that equity is required to step in to fill the gap. This is particularly evident for 'quasi-partnerships' where the Court will readily look beyond agreed written terms in order to give effect to fundamental understandings that underpin the relationship between the parties, where it would otherwise be unconscionable not to do so (and, exceptionally, even where the act complained of is expressly permitted by the company's constitution). As such, in quasi-partnerships, a duty of good faith will readily be implied, although this arguably adds little to tools of equity already at the Court's disposal in such cases.

More broadly however, shareholder and joint venture agreements are archetypal 'relational' contracts in which the parties could reasonably be expected to act in accordance with the good faith principles outlined above. On this view, you might anticipate that the Court would take a relaxed approach to implying a duty to act in good faith generally. Not so. As stated in Hollington on Shareholders' Rights , the current view remains that:

"…[the minority shareholder] should be aware of their vulnerable and uncertain position and consider the need for and risks of a customised agreement. They should ponder the fate of the grasshopper, in the fable by La Fontaine, who enjoyed the good times and got no sympathy from the diligent and unsentimental ant during the bad times."

Making the leap of good faith

The recent cases of Unwin v Bond and Faulkner & Ors v Collin Holdings Ltd & Ors illustrate the utility (if you are act for a minority shareholder) of including an express duty to act in good faith within a shareholders' agreement. In the former case, the majority shareholder was required to deal fairly and openly with the minority and to have regard to his interests, and it made no difference that the act complained of was in the best interests of the company. In the latter case, even though the Companies Act 2006 allowed the majority shareholders to remove the minority founder directors, they had to exercise that right in line with their good faith obligation, and their failure to do so left them open to a claim for unfair prejudice.

Nevertheless, it is also clear that relying upon an express duty of good faith can still be something of a lottery. The Court's interpretation of what the duty entails on any given set of facts is likely to vary from judge to judge. As such, parties negotiating a shareholders' agreement may be well advised to think deeply and carefully about what it is they actually expect the other party to do and how they expect their relationship to be conducted on a long-term basis, rather than to simply rely upon what seems, on its face, like a reasonable 'catch-all' obligation to play nicely. It's clear the judicial appetite remains deeply rooted in favour of clearly articulated obligations familiar to English law.

So for now, to [mis]quote George Michael: "I guess it would be nice if [good faith obligations] could touch your body [of law], I know not everybody [of law], has a [set of obligations] like you... Because I gotta have [good] faith…"

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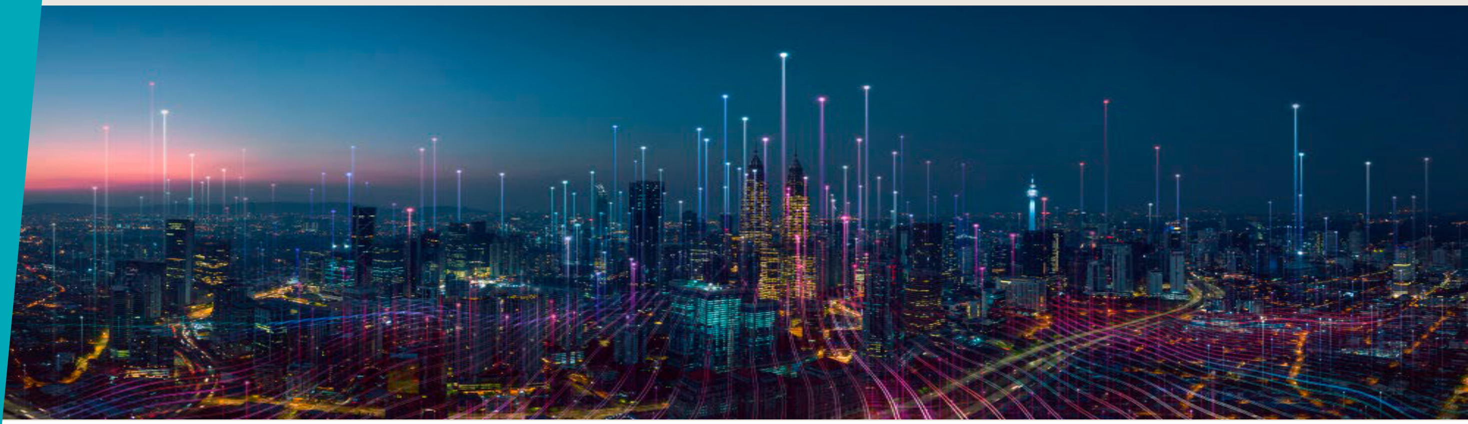

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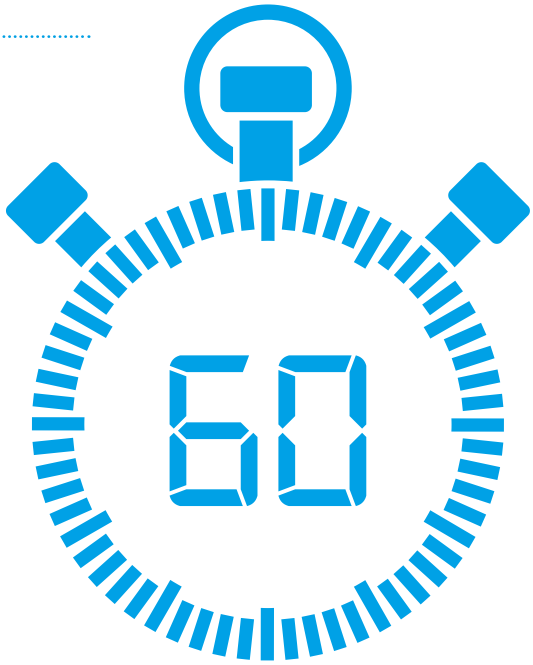

Q **What do you like most about your job?**

A That it gives me the opportunity to do what I love; strategizing, working with a team, digging into the facts of a case and understanding competing agendas to formulate a plan to get the best possible outcome for my clients.

Q **What would you be doing if you weren't in this profession?**

A Something that would allow me to put my nerd-like tendencies to good use. My first degree was in Applied Economics; the application economic theory in the real world and in particular how policy makes can make better decisions, so maybe I'd be your local MP!

Q **What's the strangest, most exciting thing you have done in your career?**

A Moving to Dubai. An opportunity came up somewhat unexpectedly to work there, so I packed my life into four suitcases and headed to a place I had never even visited before moving there! Exciting/terrifying, but I loved every minute of the two years I spent living and working there.

Q **What has been the best piece of advice you have been given in your career?**

A The less you say, the less chance you have of messing up. I pass that on to every one of my trainees; keep focused, get to the point.

Q **What is the most significant trend in your practice today?**

A All things Blockchain. We are seeing more and more cryptocurrency cases, but DAOs, smart contracts, NFTs are all coming and will have a huge impact on the fraud and asset recovery landscape.

Q **What personality trait do you most attribute to your success?**

A Perseverance. It means that I am at my best when working under pressure, I get into every detail of a case, and do not give up even when others would.

Q **Who has been your biggest role model in the industry?**

A Nicola Boulton. She is a truly brilliant lawyer, smart, funny, formidable, strategically brilliant, but fiercely supportive of her team and always working to push us forward and help us achieve success. I wouldn't be where I am without her.

Q **What is something you think everyone should do at least once in their lives?**

A Live abroad, even if for a few months. It gives you a whole new perspective on life and your place in the world.

Q **What is the one thing you could not live without?**

A Coffee or my iPhone. I am not proud of either of those!

Q **What is a book you think everyone should read and why?**

A The Alchemist by Paulo Coelho. I pick it up when I need reminding that failures and set backs are the experiences that will most help me to get where I want to be.

Q **What would be your superpower and why?**

A Superspeed. Imagine how much I could get done in a day!

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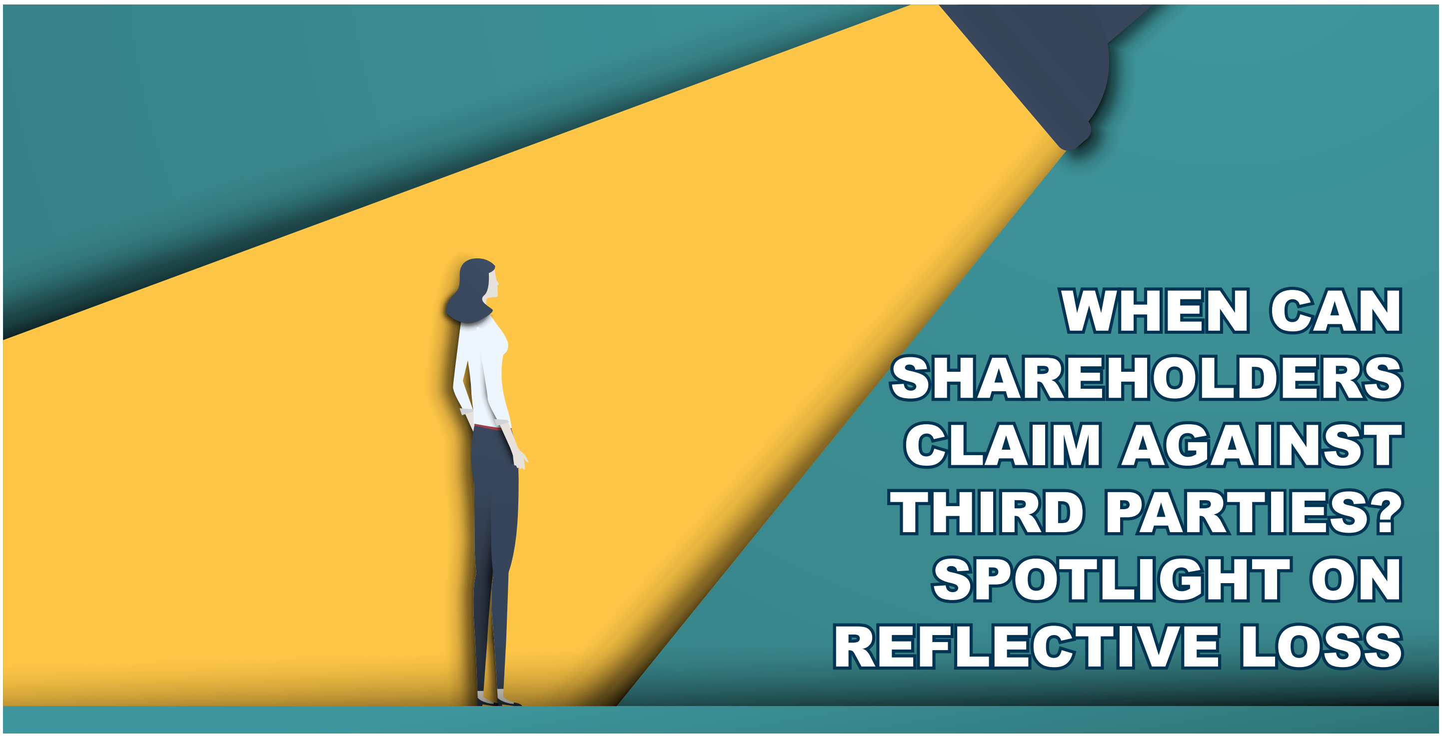

WHEN CAN SHAREHOLDERS CLAIM AGAINST THIRD PARTIES? SPOTLIGHT ON REFLECTIVE LOSS

Authored by: Michael Barron, Harriet Campbell and Gruffydd Ellis – Stephenson Harwood

When a company suffers loss because of a wrong done to it by a third party, the company can sue that third party for redress. But what happens when the company does not sue? Can a shareholder ever directly sue a third party for a wrong done to the company? Enter the rule against reflective loss, and a series of complex court decisions. In this article, we distil the latest legal thinking from the courts on when shareholders may – and may not –pursue third parties for losses. We also address the practical steps that claimants can take to seek redress when faced with the rule against reflective loss.

What does the rule against reflective loss mean?

Where a duty owed to both a company and a shareholder is breached and that breach causes loss to the company and 'loss' to the shareholder (either because the share value falls or the company is unable to pay dividends), the shareholder's 'loss' is not considered to be separate from that of the company. In law, it is 'reflective' loss and the rule against reflective loss prevents the shareholder bringing a claim to recover it.

Is there an easy way to tell if your claim is barred by the reflective loss rule?

In theory, yes. In the latest case to examine the scope of the reflective loss principle (Burnford & Ors v Automobile Association Developments Ltd)[1], the court rejected an argument that the law on reflective loss was so 'fiendishly complex' and uncertain that it was inappropriate to decide it on a summary basis. It held that following the Supreme Court's decision in Sevilleja v Marex[2], the position was clear.

If (and only if) the following six conditions are met, a claim by a shareholder against a third party will be barred:

i) the shareholder suffers loss;

ii) in the capacity of a shareholder;

iii) in the form of a diminution in share value or in distributions;

iv) which is the consequence of loss sustained by the company;

v) in respect of which the company has a cause of action; and

vi) against the same wrongdoer.

If I'm not a direct shareholder is my claim still barred?

Possibly. In Broadcasting Investment Group v Smith[3], the High Court held that the rule does not apply to indirect shareholders. By indirect, the court gave the example of A owning shares in B, B owning shares in C and C owning shares in D. If D suffers a loss which lowers the value of its shares / restricts dividends resulting in loss to A, B and C, it held that only C's claim (the immediate and direct shareholder in D) will be barred by the rule against reflective loss. However, on appeal the Court of Appeal (while not deciding the point) suggested that the rule against reflective loss could bar A and B's claim as well. Further judicial clarification is required to decide this point.

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[1] Burnford & Ors v Automobile Association Developments Ltd [2022] EWHC 368 (Ch)

[2] Sevilleja v Marex Financial Ltd [2020] UKSC 31

[3] Broadcasting Investment Group Ltd v Smith [2020] EWHC 2501 (Ch) and Broadcasting Investments Group Ltd v Smith [2021] EWCA Civ 912

If I'm no longer a shareholder when I bring my claim, is it still barred?

Probably. While there are conflicting authorities, the likelihood is that the loss must be assessed at the time it is suffered and not when the claim is brought. However, the position is not clear. In Nectrus v UCP[4] (a judgment given on an application for permission to appeal), the court held that the time for assessing the loss should be the date the claim was issued. Subsequently, however, in Primeo v Bank of Bermuda[5], the Privy Council concluded that Nectrus was 'wrongly decided' and the time for assessing loss should be the date the loss was suffered. In Burnford, the court considered these conflicting authorities and determined that it was bound to follow Nectrus and not Primeo. Because it was able to distinguish Nectrus on the facts, however, it ultimately followed Primeo. While not wholly certain, for reasons discussed below, it seems likely that Primeo is the preferred judicial position.

If my loss crystallised when my shares were sold, is my claim still barred?

Probably, although it may be easier to argue that the rule against reflective loss does not apply. In Nectrus, the court held that losses incurred by an ex-shareholder who sold their shares at a loss were 'separate and distinct' from the company's losses. It was this 'passing on' of the loss which occurred in Nectrus but not in Burnford, on which the cases were distinguished. However, in Allianz Global Investors[6] (decided after Burnford), the Court of Appeal (while not deciding the issue) suggested Primeo was authority for the date for assessing loss as being the date it is incurred. Once the loss has been assessed as 'reflective' it cannot, it held, be converted into an actionable loss by the subsequent selling of the shares. Unfortunately, as this point was not directly relevant to the appeal, there remains a degree of uncertainty.

Practical considerations for shareholders

In an economic environment where insolvencies are on the increase, there may be many reasons why companies do not pursue litigation. At the time loss is sustained (and a company elects not to pursue a claim), shareholders therefore need to think carefully about how best to protect their investment.

As can be seen from this summary, significant uncertainty remains surrounding the scope of the rule against reflective loss. It is therefore worth considering whether there are any grounds for arguing that the rule against reflective loss does not apply. In particular, while the company's choice not to pursue a claim will not suffice, there may be cases where the company simply does not have a cause of action against the same wrongdoer. Further, if Primeo is to be followed, it seems likely that a claim for losses sustained prior to the claimant acquiring shares will not be barred by the rule. On the other hand, if Primeo is not followed, shareholders whose loss is crystallised on the sale or redemption of their shares may not be prevented from subsequently bringing a claim in respect of that loss. There may also be scope for arguing that claims by indirect shareholders may also not be barred. Finally, it is worth bearing in mind that in exceptional circumstances, shareholders may be permitted to bring or continue to bring a claim on behalf of the company. In that instance, the rule against reflective loss will not apply.

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[4] Nectrus Ltd v UCP plc [2021] EWCA Civ 57

[5] Primeo Fund v Bank of Bermuda (Cayman) Ltd [2021] UKPC 22

[6] Allianz Global Investors GmbH v Barclays Bank Plc [2022] EWCA Civ 353

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COMPANIES AND SHAREHOLDERS IN THE SPOTLIGHT:

THE LAW IN THE BVI ON THE RECOGNITION OF FOREIGN OFFICIALS AND ORDERS IN AID OF FOREIGN PROCEEDINGS FOLLOWING THE COURT OF APPEAL'S DECISION IN NET INTERNATIONAL PROPERTY LIMITED

Authored by: Tameka Davis and Allana-J Joseph - Conyers

Introduction

This article considers Parts XVIII and XIX of the Insolvency Act, 2003 (the "Act") of the BVI in the context of the Eastern Caribbean Supreme Court appellate decision Net International Property Limited v Adv. Eitan Erez BVIHCMAP2020/0010 (delivered 22 February 2021) ("Net International").

Background to Proceedings

In Net International, the BVI Commercial Court was being asked to grant recognition in the BVI to Adv Eitan Erez, a trustee in bankruptcy appointed in Israel (the "Trustee") over the assets of an Israeli citizen Mrs Rachel Sayag Sofer the "Debtor", namely her "interests" in Net International Property Limited ("Net International" or the "Company") a company incorporated in the BVI.

1. In its decision of 21 March 2016, the District Court of Israel found that Mrs Sofer was the owner of the bearer shares and the controlling owner and 'moving force' of Net International and stated that the Trustee ought to take steps in the BVI to register himself as shareholder of Net International in accordance with the Company's articles and under the law of the British Virgin Islands.

The decision of the District Court was appealed by Mrs Sofer.

On 3 October 2018, the Supreme Court of Israel affirmed the decision by the District Court that Mrs Sofer was the owner of shares in the Company and its moving force. As a consequence and to gain control of Net International in the jurisdiction in which it was domiciled, the Trustee brought a claim in the BVI seeking an order that he be recognised in the BVI as Trustee of the assets of Mrs Sofer in the BVI, namely her beneficial and legal interests in the shares of Net International, and for ancillary orders that may be reasonably required to assist in his duties as Trustee in view of satisfying the claims of the Debtor's creditors, including but not limited to an order compelling the registered agent of the Company to deliver up the register of members of Net International. Since Israel was not on the list of countries designated under the Act, the Trustee sought to invoke the Court's common law power to recognise a foreign official.

First-Instance Decision

On 9 June 2020, the Commercial Court Judge Justice Adrian Jack [Ag] recognised the Trustee in the BVI. The Judge went on to direct inter alia that the Trustee be registered as shareholder of Net International and that the registered agent rectify the register of members to reflect that change. In arriving at that decision, the Judge relied on the Court's common law and inherent jurisdiction to grant both recognition and assistance to the Trustee. Net International appealed that decision.

Appellate Decision

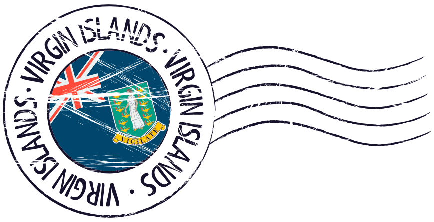
On 22 February 2021, the Court of Appeal affirmed the first-instance decision recognising the Trustee as the trustee of the assets of Mrs Sofer in the BVI but set aside the orders granting assistance to the Trustee. While recognising the limiting effect of its decision, the Court of Appeal concluded that while the Court retained a common law jurisdiction to grant common law recognition, the common law on assistance had been superseded by section 466 of the Act.

As a result the court did not have the jurisdiction to grant assistance to the Trustee because, having been appointed in Israel, he was not a foreign representative appointed by a court in a relevant foreign country.

Recognition and Assistance Distinguished

In effect, the Court of Appeal's decision confirmed that a Trustee could be recognised in the BVI and thus treated as if he/she was a BVI trustee, but stated that the Court could not grant orders in aid of a foreign representative under the Act.

In its judgment, while the Court of Appeal emphasised that recognition was the formal act of a local court recognising or treating a foreign office holder as having status in the BVI in accordance with his appointment by the foreign court, it took the view that assistance was a different concept as it aimed to provide the foreign office holder with the means and power to deal with the BVI assets. In making this important distinction, the Court of Appeal accepted that the two concepts were at times blurred in practice, as recognition will usually be accompanied by assistance.



Relevant Legislation: Parts XVIII and XIX of the Act

Part XVIII provides the regulatory framework for recognition of foreign office holders and was drafted for the purpose of promoting cooperation between foreign countries in cases of cross-border insolvency, and for facilitating the protection and maximisation of the value of a debtor's assets. Part XVIII, however, is not yet in force.

Part XIX provides a comprehensive scheme for assisting foreign office holders without the need to apply for recognition under the common law. Part XIX prescribes a wide array of orders in aid of foreign proceedings including conferring on the Court the power to grant any such relief it considers appropriate to facilitate, approve or implement arrangements that will result in the co-ordination of cross-border insolvency proceedings. Significantly, section 470 under Part XIX affords the BVI Court further powers by providing that "nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or under any rule of law of the Virgin Islands.":

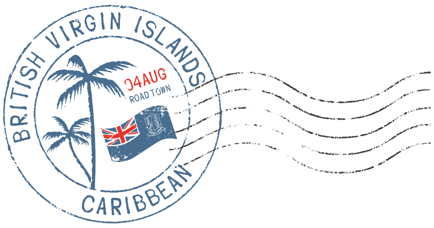
> **A significant aspect of Part XIX is that it is only available to those foreign office holders appointed by the courts of a "relevant foreign country".**

The relevant foreign countries are designated by the Financial Services Commission of the Territory of the Virgin Islands, and are Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and United States of America (the "Designated List"). The designations took effect on the 23rd day of August 2005 and remain the same as of the date of publication of this article.

On the Court of Appeal's analysis, the Commercial Court Judge was right to grant recognition to the Trustee as recognition was a part of the common law of the BVI before the passing of the Act, and would remain the case while Part XVIII was not yet in force. While Part XVIII remains ineffective, there can be no express or implied abrogation of the common law right of recognition. On the other hand, Part XIX expressly abrogated the common law right of assistance as those provisions are in effect. In circumstances where the Trustee was appointed in Israel, a country not on the Designated List, the Court had no power to grant assistance to the Trustee and that included the rectification order against the registered agent of Net International.

What Next?

The clarification by the Court of Appeal that the common law jurisdiction to recognise a foreign official wherever appointed remains and has not been superseded by subsequent decisions or the Act, is a welcomed development not least because until the decision in that case, opinions on the boundaries of that jurisdiction were conflicting.



> **It is the view of these authors that a trustee recognised by a BVI court with the consequence that that trustee is treated as if he/she were appointed by a BVI court would have the authority to bring an action on the Company's behalf, take corporate steps on behalf of the company, require disclosure from former officers etc. so there are very tangible practical benefits to recognition.**

However, that there is no jurisdiction to grant orders in aid of a foreign official if that official is not appointed by the courts of a designated country is limiting, and the need for legislative change enlarging the countries designated for the purpose of the Act becomes even more important. Perhaps in part as a result of that decision and a clear recognition of the need for further change, on 29 October 2021 a few months after the Net International decision, the Financial Services Commission, by letter to key stakeholders, sought a view on whether or not the list of nine jurisdictions designated under section 466 should be extended, and if so, to which countries. An expansion of the list of designated countries coupled with clarity on the common law position in the BVI is likely to be invaluable to practitioners seeking creative solutions to corporate cross-border dilemmas: more commonly the tracing, identification and the ability to deal with assets for the benefit of the estate of a BVI corporate entity or a judgment or award creditor.

A NEW DAWN IN DUBAI: WILL COMPANIES AND THEIR SHAREHOLDERS EMBRACE THE NEW DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC) RULES?

Authored by: James Glaysher - Candey

The stated aims of the new DIAC Arbitration Rules, which came into effect as of 21 March 2022, are to: (i) enhance the "efficiency and cost-effectiveness" of the practice of arbitration, and (ii) include provisions that "deliver flexibility and choice to the parties" to arbitration. These have been long-term priorities for companies that use the arbitral process, and other leading arbitral institutions have in recent years amended their rules to address these concerns. But how well do the DIAC's new Rules measure up to those of their competitors?

Expedited proceedings

The previous version of the DIAC Rules, issued in 2007, provided for expedited formation of the arbitral tribunal only by written request in cases of exceptional urgency, but did not contain any provisions allowing for expedited procedures once the tribunal had been constituted. Although tribunals constituted under the old DIAC Rules might have considered themselves vested with a general power to order specific measures to expedite proceedings when it saw fit, there has been a perception that arbitrators would be more inclined to do so if the rules expressly stated that it could expedite the procedure.

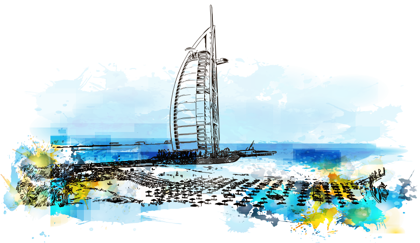
The DIAC Rules now do so.

Expedited procedure rules will apply where: (i) the parties agree in writing, or (ii) where the total sums claimed and counterclaimed in the arbitration is below or equals AED 1 million, or (iii) in cases of exceptional urgency as determined by the DIAC Arbitration Court upon application by a party (Article 32).

Under the expedited procedure, the DIAC will seek to appoint a sole arbitrator within 5 days of the DIAC Arbitration Court's decision that the expedited procedure is to apply (Article 32.3), and the sole arbitrator has just 3 months to issue the final award from the date it receives the case file from the Centre (Article 32.5). The procedure to be adopted in the expedited arbitration is left to the discretion of the sole arbitrator, with a "limit [to] the scope of any evidence to be submitted" the one practical example suggested by the Rules (Article 32.4).

The DIAC's approach differs to that of the LCIA, which in 2020 included within its updated rules a non-exhaustive list of eight measures, some or all of which a tribunal could adopt in any arbitration entirely at its discretion, and regardless of the amount in dispute.

The new DIAC Rules instead leave the decision on whether there should be expedition up to the parties (and both parties must agree), or prescribe them where the amount in dispute is under AED 1 million (unless the parties opt out) – which does provide some greater certainty to companies and their shareholders that select the DIAC in their arbitration agreements.



Settlement

The facilitation of settlement has attracted much less attention from other leading arbitral institutions than provisions designed at saving time and cost. This is despite both anecdotal and recent statistical evidence suggesting that arbitrations are far less likely to settle than equivalent court litigation cases. This will trouble companies that use arbitration (and their shareholders alike) because settlement will obviously very often be preferable to seeing an arbitration through to final award.

Set against this background, the DIAC's inclusion of a conciliation process in its new Rules (Appendix 2, Article 3) should be applauded. The process can be commenced by an application for conciliation by one of the parties, and is presided over by one conciliator, appointed by the Arbitration Court (unless parties agree to a panel of three), who will have absolute discretion to determine the procedure of the conciliation. The conciliation process is to be concluded within two months (unless the parties agree to extend the period). If the attempt at conciliation fails, the conciliator terminates the conciliation proceedings without prejudice to the merits of the dispute.

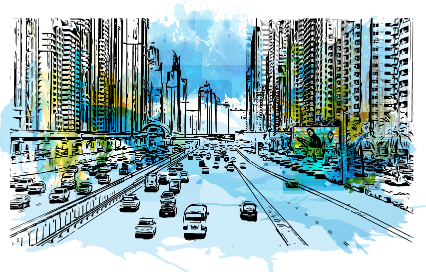
This process has features of, but is surely a vast improvement on, "med-arb" – a process where parties attempt mediation, and if no settlement is achieved the mediator becomes the arbitrator. A concern with this process is that it may discourage open dialogue at the mediation stage, and risks an arbitrator being influenced by information presented off the arbitral record.

In contrast, the DIAC's provision of a "conciliator-in-reserve", operable on request of the parties, should increase the likelihood of parties attempting to resolve their dispute by mediation. This likelihood might have been increased still further if the new Rules imposed on tribunals a positive duty to encourage parties to consider applying for conciliation; but it is anticipated that the conciliation process will be endorsed by counsel and arbitrators in any event given its undoubted benefits.

DIFC as the Default Seat

Unless the parties have agreed otherwise, the Dubai International Financial Centre ("DIFC") shall be deemed to be the seat of the arbitration (Article 20.1) – a change from the 2007 Rules which provided for onshore Dubai as the default seat.

The new Rules do however specify that the tribunal retains the power to finally determine what the seat will be, absent any agreement by the parties, and with due regard to the relevant circumstances. Instances of corporate parties neglecting to specify a seat in their arbitration agreements are likely to be few and far between, but specifying the arbitration-friendly DIFC as the default supervisory courts for DIAC arbitrations is certainly a positive development.



Legal fees are recoverable

The new DIAC Rules specify that the costs of the arbitration now include the "fees of the legal representatives and any expenses incurred by those representatives" (Article 36.1), and that the Tribunal may make decisions on these costs of the arbitration (Article 36.2). This is an important inclusion given the Dubai courts' previous ruling that tribunals were not empowered under the 2007 DIAC Rules to award legal costs unless parties explicitly provided for this, for example in the terms of reference or in the arbitration agreement itself.

Consolidation

The new Rules broaden the power of tribunals and the DIAC Arbitration Court to order consolidation of arbitrations made under the same agreement to arbitrate; or where the arbitrations involve the same parties and arise out of the same legal relationship(s), the same principal contract, or the same transaction / series of transactions (Article 8). When used in practice, this provision will undoubtedly increase efficiency and reduce costs.

Note that the new DIAC Rules (like the latest LCIA iteration of 2020) permit consolidation only if no tribunal has not yet been constituted in the other arbitration(s) (there is no such restriction for consolidation under the HKIAC Rules, for example). Companies may therefore consider providing for a broader consolidation mechanism, if so desired, in their arbitration agreements.

Conclusion

The new DIAC Rules will be well received by companies and shareholders alike that operate in Dubai, the MENA region and beyond. The amendments and additions incorporate measures which will promote cost and time efficiency, will maintain the reliability of the process, and undoubtedly consolidate the DIAC as one of the eminent global arbitral institutions.

FAIR PLAY IN OFFSHORE COMPANIES

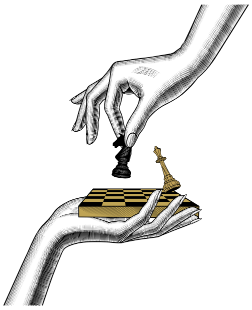
Authored by: Joe Royster – Bedell Cristin (Jersey)

Abuse by directors

The directors of a company must manage the business of the company in accordance with the relevant statutory framework and the constitutional documents of the company. The directors also owe a number of duties (arising under statute or general law). On the whole, directors are entitled to manage the company as they think appropriate, provided they act within this framework. One of the key duties of directors is to act in the best interests of the company as a whole.

One challenging area is where the directors appear to act within the scope of their powers but against the interests of minority shareholders - for example, if the directors decide to take the company in a new direction against the wishes of minority shareholders.

Another key duty of a director is to exercise powers for a proper purpose. It is arguable that the courts are showing greater willingness to examine the purpose behind the use of powers by directors and to hold the directors to account if the purpose is improper. In this way, principles of fairness are being emphasised to enforce “fair play” when dealing with minority shareholders.



Abuse by shareholders

In addition, equitable constraints may also be imposed on the use of shareholder power. In normal situations, a shareholder may exercise voting rights purely to advance the interests of that shareholder. In other words, the shareholder can exercise voting rights to advance his or her own selfish interests without regard to the interests of others. However, there are circumstances where the courts will limit how a shareholder may act. Equitable considerations may be used to curtail an abuse of shareholder power.

Recent cases – motive and fairness

There have been a number of recent cases (both onshore and offshore) looking at what equitable constraints there may be on how a company is managed.

Re Virginia Solution

In the recent Cayman decision of Re Virginia Solution SPC Ltd (10 February 2022) concerning a petition for the just and equitable winding up of a Cayman company, issues of quasi-partnership, deadlock, and proper purpose were considered.

Virginia Solution was (from 2014 onwards) a two member captive insurance company, both shareholders being large US-based healthcare providers, Augusta and Valley Health.

In 2017, a dispute arose about the handling of a dividend and how it should be paid between the two shareholders. The dividend policy required the board of directors to declare dividends in accordance with the advice of the company's actuary, calculated according to a blended equity and claims experience formula. When dividends were proposed on this basis, Augusta repeatedly vetoed the dividends (as it technically had the right to do as a shareholder) unless Valley Health agreed that the dividends would be made on a basis more favourable to Augusta than the actuary had proposed.

Although a detailed discussion of the nature of quasi-partnerships is beyond the scope of this article, the important feature in this case is that a relationship of trust and confidence between the parties, giving rise to a quasi-partnership, was found despite the two shareholders being large community healthcare corporations. Augusta's argument that a quasi-partnership could not arise between two such impersonal entities failed, with the judge observing that, although this was novel, the courts should not be timorous in giving the words "just and equitable" full force.

The court further held that Augusta's position was in bad faith: their purpose in "slow-playing the dividends" and adopting the position they did was to force Valley Health to withdraw from the company entirely. If they did so, then Valley Health as the "last man standing" would obtain a significant windfall due to the complex nature of the way shareholders were rewarded in accordance with the company's constitutional documents.

Accordingly, whether on the basis of legitimate expectation (in a quasi-partnership context) or on the basis of a finding of bad faith, an order for the just and equitable winding up of the company was appropriate despite the solvency of the company.

Financial Technology Ventures v ETFS

In the Jersey case of Financial Technology Ventures v ETFS Capital Limited [2021] JCA 176, the court considered the doctrine of proper purpose in the context of an unfair prejudice petition.

This was a case where the managing director (also the majority shareholder) took the business of the company in a new direction against the wishes of a minority shareholder (who wanted to exit the company).

In the judgment, two principle director duties were considered:

a. A director owes a duty to exercise his or her powers honestly in what he or she believes to be the best interests of the company. This test is applied subjectively.

b. A director owes a duty to exercise his or her powers for the purposes for which they were given. Under this duty, the question is not whether the director acted in good faith. It is possible for a director to act in a way he or she genuinely believes to be in the best interests of the company, but nevertheless to act in breach of this duty to exercise powers for a proper purpose.

Although the decisions made by the managing director were within the scope of his power, the court found that the substantial purpose behind the exercise of his powers was to force the minority shareholder (who wanted to exit) to sell its shares in the company at a discount. This was found to be an improper purpose.

Onshore case law

The view can be taken that recent onshore cases show an increased scope to employ equitable principles in shareholder disputes.

In Pagden v Soho Square Capital LLP [2020] EWHC 944, the shareholders of a company were required to vote on whether or not the liquidators of a company should remain in office. The majority of the shareholders by value were defendants to proceedings which had been brought by the liquidators; they claimed the liquidators lacked independence and competence, and wished to replace them. The liquidators sought to argue that the majority decision, being solely designed to remove liquidators who were bringing a claim against them, was unfairly oppressive of the minority.

The High Court found that, when considering whether or not to intervene in the vote of shareholders of a company, "it should consider whether the majority decision has been brought about by unfair or improper means, fraud or illegality or is oppressive towards the shareholders who oppose it, and whether no reasonable person could consider that the member's vote was cast for the company's benefit". The High Court further considered that any operative oppression of the minority "must involve an element of abuse or unfair subjugation of the minority's will".

The starting principle is of course that shareholders can vote in their own interest. There have always been narrow exceptions to that principle, but it might be thought that the wording of the test quoted above may appear to involve an extension of those exceptions. On the facts of the case, the High Court decided that the circumstances of the vote were not sufficiently oppressive to justify intervention, because there was no basis on which to impugn the proposed replacement liquidators, who could consider the claims independently.

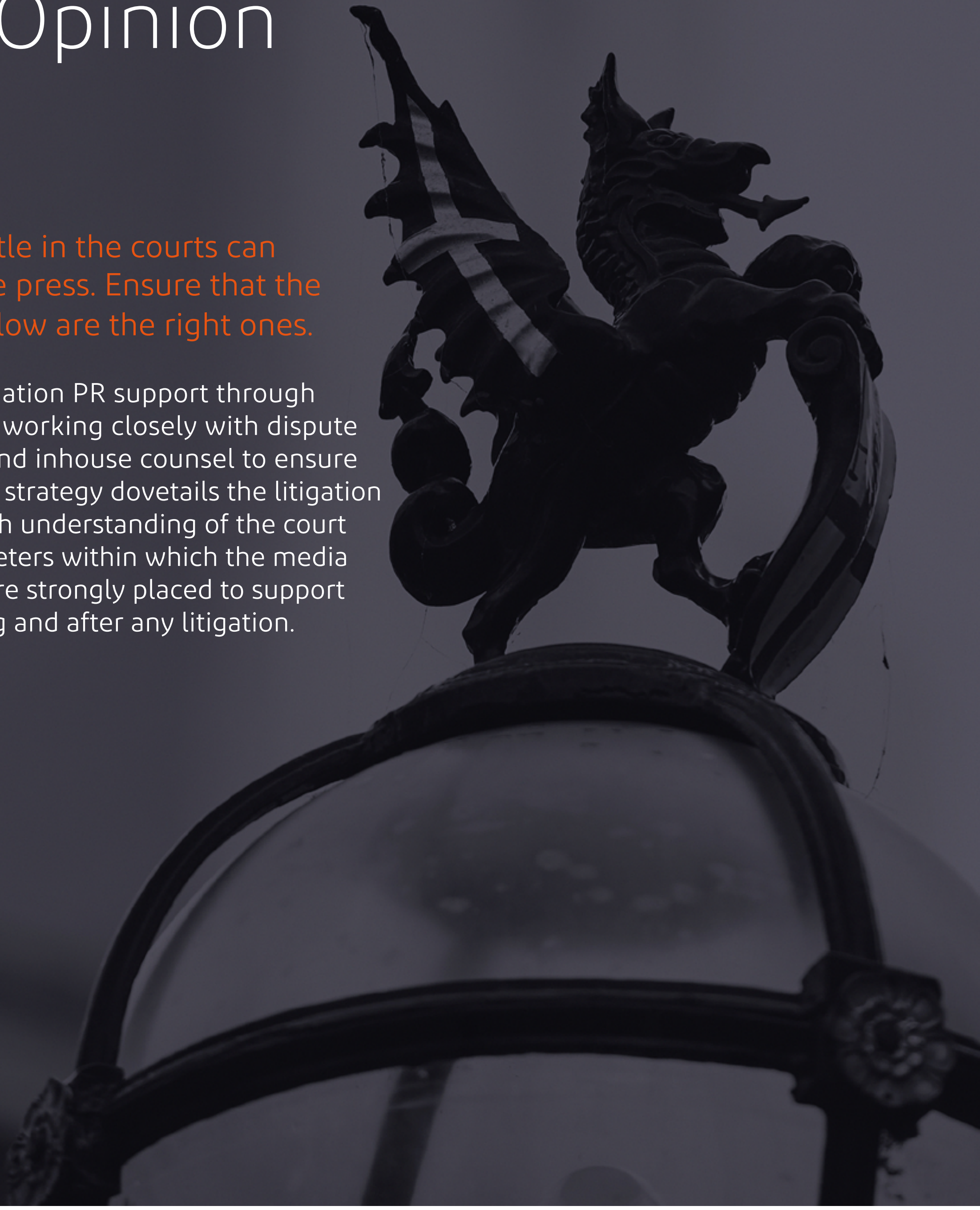
Another example is Re Compound Photonics Group Limited [2021] EWHC 787. This is an unfair prejudice case in which an express contractual obligation of good faith in a shareholders' agreement had a dramatic and wide-ranging effect on the outcome, placing onerous obligations on the parties to take into account the interests of their counterparties when making decisions, despite the commercial context in which the shareholders' agreement was drafted.

Conclusion

The equitable principles discussed in this article have always been broadly available to the courts of common law jurisdictions. Any development in this area is a question of nuance rather than any radical development of principle, but it is hard to escape the impression that the judiciary, both offshore and onshore, is becoming more open to making judgments based on motive and proper purpose in cases where they might not have previously interfered.

The tools available to a disgruntled shareholder are likely to focus on unfair prejudice claims and applications for a just and equitable winding up but the courts are increasingly looking at issues of motive and proper purpose when dealing with these claims.

Directors should be increasingly careful not to rely simply on their wide powers of management to justify their actions; they should be asking themselves not just whether they have the simple power to act, but also whether the power is being used appropriately.



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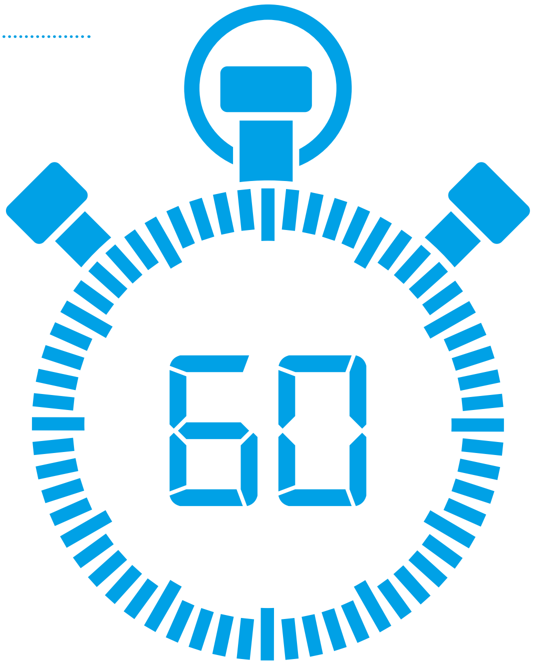

PHILIP MARSHALL QC
BARRISTER
SERLE COURT

Q What do you like most about your job?

A Its variety – no case is the same.

Q What would you be doing if you weren't in this profession?

A Writing history books. I have a few projects in mind if I ever got time.

Q What's the strangest, most exciting thing you have done in your career?

A The strangest was probably making an application in the Old Bailey. I had to explain the technicalities of equitable tracing claims to a senior criminal judge in the court the Krays had been tried in, quite surreal. The most exciting was obtaining freezing orders in three jurisdictions in a single day.

Q What has been the best piece of advice you have been given in your career?

A Don't allow personal feelings to lead you into litigation.

Q What is the most significant trend in your practice today?

A There has been a move away from work coming for clients from former Soviet jurisdictions given recent events and more work coming from China.

Q What personality trait do you most attribute to your success?

A Trying to find a solution even if not a standard one and not being put off by initial impressions.

Q Who has been your biggest role model in the industry?

A Christopher Carr QC, a superb advocate who was both a brilliant lawyer and great mentor.

Q What is something you think everyone should do at least once in their lives?

A Go to the Galapagos islands. A truly unique place which may not last.

Q What is the one thing you could not live without?

A Sunday lunch with the family.

Q What is a book you think everyone should read and why?

A Paine's Common Sense – one of the greatest political pamphlets ever written.

Q What would be your superpower and why?

A To win every case – life would be so easy.


ingenuity
wins

UNJUST ENRICHMENT: A DISPUTES MECHANISM TO REBALANCE CLIMATE CHANGE-LINKED GAINS?

Authored by: Imogen Winfield and Abdur-Razzaq Ahmed - Brown Rudnick

The increasing focus on environmentally sustainable business and climate change has thrown a spotlight on conduct and profits in industries seen as direct and indirect contributors to the global problem of climate change.

Climate-related litigation has traditionally targeted governments, including through the use of judicial review to challenge decisions (and potential violations of the Climate Change Act, international standards and human rights law). Mass tort litigation and nuisance claims against fossil fuel companies have also featured in other jurisdictions. These types of actions typically seek loss-based relief (e.g. compensation) or declaratory relief to prevent loss events arising. At present, English law remedies for climate change victims remain largely untested. Claims in tort are likely to encounter substantive problems relating to causation and are procedurally complex (and therefore time and cost intensive). Human rights related claims are still experimental and the link between climate change and human rights is underdeveloped to say the least. Whether or not English courts are asked to adopt the same approach as the Dutch court in Netherlands v. Urgenda Foundation also remains to be seen (imposing a duty of care on the government to protect individuals' human rights from the effects of climate change).

We also see claims emerging against corporates in England and Wales and the potential claims landscape against directors and companies for breach of statutory duties (under the Companies Act and Financial Services and Markets Act), negligence and misrepresentation has been widely acknowledged. We consider another approach and potential role for climate-related litigation: when a person or organisation is enriched at the expense of another in circumstances that the law sees as unjust. The branches of restitution and unjust enrichment are relatively young as a matter of English law. While the case law is long-standing, the subject was only authoritatively dealt with by the House of Lords in 1991 in Lipkin Gorman v Karpnale Ltd. It is also one of the few areas of English law that has formally received (in 2012) a "restatement" – a powerfully persuasive, but non-legislative, statement of the law with the input of the judiciary.[1] Unjust enrichment reflects a "corrective justice" theory of law: that citizens have a right to restoration in equity when a party has deliberately externalised to them the costs of a climate-related activity, while asymmetrically internalising the benefits (usually in the form of profits).[2]

Unjust enrichment in English law

Unjust enrichment requires that:

i. **A defendant was enriched or received a benefit (which could include goods, services or cost savings);**

ii. **The enrichment occurred at the claimant's expense (where a sufficient causal connection exists between the transfer of the benefit by the claimant and the enrichment of the recipient); and**

iii. **The enrichment was unjust (which may be demonstrated by a broad range of factors including duress, undue influence, exploitation, ignorance, illegality, and failure of consideration among others).**

There are several defences that may be deployed by defendants. Among those is the 'change of position' general defence that can apply to almost all unjust factors and where the defendant's circumstances have changed detrimentally as a result of the unjust enrichment. Where there is no available defence, remedies in restitution may (among other things) require the defendant to reimburse the claimant according to the value of the enrichment, or enable a claimant

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[1] A Restatement of the English law of unjust enrichment (2012). Andrew Burrows, assisted by an advisory group of academics, judges and practitioners (including Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Mance, Lord Justice Moore-Bick and Mr Justice Etherton)

[2] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1066&context=penn_law_review_online

to trace into the defendant's assets. Whereas compensatory damages look at the claimant's loss, restitution looks to restore the benefit from the defendant to the claimant, providing a disincentive to making unjust gains.

Unjust enrichment in the BAT Litigation

Last year one action in tort and unjust enrichment was given the green light to proceed against two multinational tobacco groups alleged to have facilitated unlawful, exploitative and dangerous conditions of Malawian tobacco farmers – an example of litigation that focusses on the 'social' limb of the term 'Environmental, Social and Governance'.

The claimant farmers argue that the tobacco groups benefited from the receipt of valuable tobacco leaves and agricultural services at a cost well below market value.[3] The claimants argue their degree of vulnerability, the extent and egregiousness of their exploitation and the size of the profits made in consequence of that exploitation are so exceptional as to require the availability of a restitutionary remedy for unjust enrichment even if the defendants' enrichment is indirect. While the defendants had not received the benefits directly from the claimants, they are alleged to have structured their involvement in a way deliberately intended to give the outward impression of separation from the tobacco farms.

If the farmers succeed at trial, unjust enrichment may become a popular additional claim in similar supply chain litigation against UK companies, and which could extend to climate change issues.

Discussion

"At the claimant's expense" is the general (and controversial) concept within the law of unjust enrichment that describes the need for causation between a claimant and a defendant's enrichment. In the past, practitioners described the need for a "transfer of value" or that the defendant's enrichment must be a "subtraction from the claimant". However, the 2012 restatement of unjust enrichment by English judges makes clear that neither active conduct by the claimant or a loss on the part of the claimant is required, so long as the enrichment of the defendant is "from" the claimant – an approach supported by the House of Lords in Sempra Metals Ltd v IRC.[4]

ESG (and the relevance of litigation as a tool for driving ESG values) has gained traction among lawyers and companies in recent years. Although there is no cause of action specifically designed for ESG, the approach to "causation" in unjust enrichment (as described above) is reflective of the values of ESG. In the climate change context, unjust enrichment could be used as a basis for liability when a defendant has been enriched "at the claimant's expense", relieving claimants from satisfying the otherwise high bar of causation set by tort or the problems associated with using human rights as a proxy. Instead, unjust enrichment enables litigants to bring claims based on "factors" that render a defendant's enrichment "unjust".

Other jurisdictions

In the US, where the volume of climate-change litigation dwarves that seen to date in England and Wales, unjust enrichment has been pleaded ancillary to other causes of action in claims against companies and directors:

i. **A claim against a shoe manufacturer was recently dismissed after the plaintiff (a consumer) failed to establish that the company's environmental impact claims were materially misleading, and so the remaining claims which included unjust enrichment in respect of the company's profits similarly failed and were also found to have been inadequately pleaded. In dismissing the unjust enrichment claim the court also was not convinced that it was not merely duplicative of other causes of action.[5]**

ii. **Fossil fuel producing companies are being sued by local governments for having knowingly and substantially contributed to the climate crisis while concealing and misrepresenting the associated dangers. The companies are alleged to have profited from the manufacture, distribution and sale of fossil fuels and by not incurring the costs necessary to reduce the impacts of their contributions to climate change, at the expense of the plaintiffs and plaintiff communities.[6]**

iii. **A shareholder derivative action against the directors of a company which produces a purportedly biodegradable plastic alternative alleges failure to correct the company's false and misleading statements including as to the product's biodegradability and exposing the company to reputational and financial damages as a result. The unjust enrichment claim points to the compensation received by the directors, which was allegedly either tied to the false and misleading statements or to the company's performance/ inflated valuation, or was unjust in light of the directors' bad faith conduct.[7]**

iv. **A separate derivative claim against a fossil fuel company for material misrepresentations around its use of carbon proxy costs and damage to the company's image and goodwill (as well as the financial liability associated with related investigations and a securities class action) also alleges unjust enrichment based on the compensation and remuneration received by directors while breaching their fiduciary duties to the company.[8]**

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[3] Josiya & Ors v British American Tobacco Plc & Ors [2021] EWHC 1743 (QB)

[4] [2007] UKHL 34

[5] Dwyer v. Allbirds, Inc., No. 21-CV-5238 (CS), 2022 WL 1136799 (S.D.N.Y. Apr. 18, 2022)

[6] Boulder County Commissioners, et al v. Suncor Energy Inc., et al., No. 19-1330 (10th Cir.)

[7] Perri v. Croskey, No. 1:21-cv-01423 (D.Del.)

[8] In re Exxon Mobil Corp. Derivative Litig., No. 2:19-CV-16380-ES-SCM, 2020 WL 5525537 (D.N.J. Sept. 15, 2020)

Considerations for litigants

Targets for future litigation

The targets for such climate-related unjust enrichment litigation are broad – they include fossil fuel companies benefiting from the exploitation of land (and relatedly workers), as well as institutions and governments that facilitate and finance companies or projects where unjust factors such as ignorance, incapacity or misrepresentation are at play. Investigative journalists at Global Witness estimated that certain financial institutions received $1.74 billion in interest, dividends and fees from financing the parts of agribusinesses groups that carry the highest deforestation risk – primarily soy, beef, palm oil and pulp and paper.[9] They note that tropical deforestation is responsible for 8 per cent of global CO2 emissions and has played a key role in driving up global temperatures and biodiversity loss. Financial institutions are therefore a realistic target for unjust enrichment claims, as well as other claims commonly pleaded with unjust enrichment (such as negligence and misstatement-related causes of action).

Procedural and substantive barriers

While unjust enrichment claims may be seen as a mechanism to "strip" companies of profits obtained by one or more of the various "unjust factors", this is subject to a claimant (or claimants) having legal standing to bring a claim – as discussed above, there must be a connection between (i) the defendant's enrichment and (ii) the enrichment being at the claimant's expense. That discussion has not occurred in respect of climate change issues. Claimants bringing a claim on a representative basis or group basis may also face practical and procedural issues, such as whether a representative or "test" claimant is representative of a wider group or class.

Litigation risk for companies and directors

The employment of unjust enrichment claims in English (and international) disputes to date, together with the reports of investigative journalists such as those by Global Witness, are important indicators for multinational corporations operating in the energy, manufacturing and financial services industries (among others). These industries have been marked as direct and indirect contributors to climate change and face the biggest risk of "corrective justice" applications of the unjust enrichment claim.

Provided the necessary components are established, unjust enrichment claims could prove to be a valuable tool in the absence of (or alternative to) statutory, contractual or tortious causes of action, to redress the balance between those contributing to the climate crisis and those paying the price. That said, the nature of climate-related litigation means that parties will often be amenable to settlement and so it may be some time before such an action is tested. In the interim, companies and directors should keep in mind the framework of unjust enrichment in the context of their activities, from managing supply chains to setting board remuneration.

Where unjust enrichment claims against companies succeed, companies may face a second wave of litigation from shareholders for any misstatements linked to the facts of a given unjust enrichment dispute. Directors may also face investigations or derivative claims to account for remuneration linked to those funds. Much then depends on whether and to what extent, the unjust enrichment claim is used to rebalance gains obtained by parties and industries that are seen as the root of climate change.

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[9] https://www.globalwitness.org/en/campaigns/forests/deforestation-dividends/#conclusion-ill-gotten-gains

ARE YOU BEING SERVED? SECTION 1140 COMPANIES ACT 2006 – A DIRECTOR'S HOSTAGE TO FORTUNE?

Authored by: Jon Felce, Natalie Todd and Andrew Flynn – Cooke, Young & Keidan

The personal responsibility and duties assumed when accepting an appointment as director or secretary of a company are considerable. However, the decision to serve as an officer of a company can have an impact far beyond any matters relating to the business of the company itself, as a number of unwitting defendants have found out in recent years. This is because of the "surprising" (as one judge has described it) operation of a sometimes-overlooked provision of the Companies Act 2006: section 1140. This provision most recently received attention in Abu Dhabi Commercial Bank PJSC v Shetty & Ors [2022] EWHC 529 (Comm) (Shetty).

The Rule: an alternative way to serve

Although CPR Part 6 will invariably be the starting point when considering how to serve document, rules 6.3 and 6.20 also permit service on companies or LLPs to be effected in accordance with any method permitted by Companies Act 2006. Section 1140 of that Act, however, permits service on any person who is a director or secretary of a company, who has registered an address for service at Companies House.

> **Any document may be served on a director or secretary "by leaving it at, or sending it by post to, the person's registered address", "whatever the purpose of the document in question", and service does not need to be related to either the person's appointment or the company for which they are an officer.[1]**

A person subject to this rule may provide an address out of the jurisdiction for service, in which case the usual rules for seeking permission from the Court to serve a document out of the jurisdiction apply. [2] Whilst a notice of change can be filed at any time to change the service address, the previously registered address will remain valid for a further 14 days after such filing. [3] If termination of all appointments to which the registered address relates has been registered, then the address can no longer be used for service. [4]

The Courts: it means what it says

There appears to be no shortage of defendants, frequently outside the jurisdiction, who have been unwittingly caught out by section 1140, and a number of High Court judges have given the section a wide and unqualified reading.

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[1] ss. 1140(1) and (3).

[2] s1140(8).

[3] s1140(5).

[4] s1140(6)(a).

It appears to have been first considered in Key Homes Bradford Limited v. Patel [2015] 1 BCLC 402, where a claim form was served at an address for the defendant under section 1140; unbeknownst to the claimant, the defendant was outside the jurisdiction when service was effected. Nevertheless, the claim form was validly served and the court therefore had jurisdiction.

This approach has now been followed in a number of subsequent High Court cases, from which the following conclusions can be drawn:

- It has now been firmly established that claim forms can be served on a defendant who is neither physically present, nor resident or domiciled, in the jurisdiction, using section 1140.[5] Such a rule is a specific exception to the general English law principle that the courts will only exercise jurisdiction over persons in the jurisdiction.
- The provision that any document can be served on a director or secretary through section 1140 for any purpose means what it says. As a result, search orders were properly served on directors' registered service address, notwithstanding they were not present or even within the jurisdiction.[6]
- It does not seem there should be any qualifications on the consequences of service under section 1140. It is therefore possible to obtain default judgment against an overseas defendant, relying solely on service at that defendant's registered service address – even for a period of 14 days after the registered address has been changed.[7]
- While some judges have acknowledged that the effect of section 1140 is "surprising",[8] they have invariably been unmoved by protestations from overseas directors, who have generally regarded filings at Companies House as administrative exercises and who have not been consulted on or appreciated the consequences of giving a service address in the jurisdiction on those forms.[9]

It is hardly surprising then that HHJ Pelling QC considered in Shetty that any arguments against service under this section were simply not arguable below the Court of Appeal. Albeit, he expressed some sympathy for the particularly stark consequences in this case where a defendant had lived in the UAE for almost 50 years and was known by the claimant to be living in India when he had been served under section 1140.

In this case, service on the first defendant also meant that it was a possibility that other defendants could be brought within the English court's jurisdiction under the "necessary or proper party gateway" under CPR Practice Direction 6B. HHJ Pellinq QC did not accept that this would have an "exorbitant and arbitrary" effect, noting that introducing a more ambiguous requirement for the served defendant to have a certain degree of tangible connection to the jurisdiction would "itself be at least potentially arbitrary"; he also considered that there was no reason to impose this requirement when none existed for service in the jurisdiction by a contractually agreed method under CPR 6.11. Further, service under section 1140 would not automatically bring further defendants under the Court's jurisdiction via the "necessary or proper party gateway", as there were several more hurdles to overcome before a claimant could establish jurisdiction.

Conclusion

While the approach taken to this question seems very clear and consistent, it remains to be seen what view the Court of Appeal will take when this question comes before it.

Further, one point that does not yet appear to have been considered is what happens where service is purported to be effected on an address that does not comply with the rules for registering company officers' addresses.

Regulation 10 of the Companies Act (Annual Return and Service Addresses) Regulation 2008/3000 require that any such address "must be a place where— (a) the service of documents can be effected by physical delivery; and (b) the delivery of documents is capable of being recorded by the obtaining of an acknowledgement of delivery." It remains to be seen what approach the courts might take to purported service of a document on a registered address which does not, or ceases to, comply with these requirements (for example, a previously serviced office building may fall out of use).

In the meantime, for the claimant searching for a way to seise jurisdiction, section 1140 offers an enticing alternative to the usual CPR Part 6 methods of service.

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[5] Idemia France SAS v Decatur Europe Limited [2019] EWHC 946 (Comm); Arcelormittal USA LLC v Essar Steel Limited [2019] EWHC 724 (Comm); PJSE Bank "Finance and Credit" v Zhevago [2021] EWHC 2522 (Ch); Farrer & Co LLP v Julie Marie Meyer [2022] EWHC 362 (QB).

[6] Arcelormittal USA LLC v Essar Steel Limited [2019] EWHC 724 (Comm). It is not clear the degree to which a Court may, notwithstanding section 1140, order that such orders must be served personally in a particular case, and more attention will need to be given to how this interacts with the usual rules for executing such orders (such as the right to receive an explanation from the supervising solicitor).

[7] Farrer & Co LLP v Julie Marie Meyer [2022] EWHC 362 (QB).

[8] Njord Partners SMA Seal v Astir Maritime [2020] EWHC 1035 (Comm).

[9] PJSE Bank "Finance and Credit" v Zhevago [2021] EWHC 2522 (Ch).

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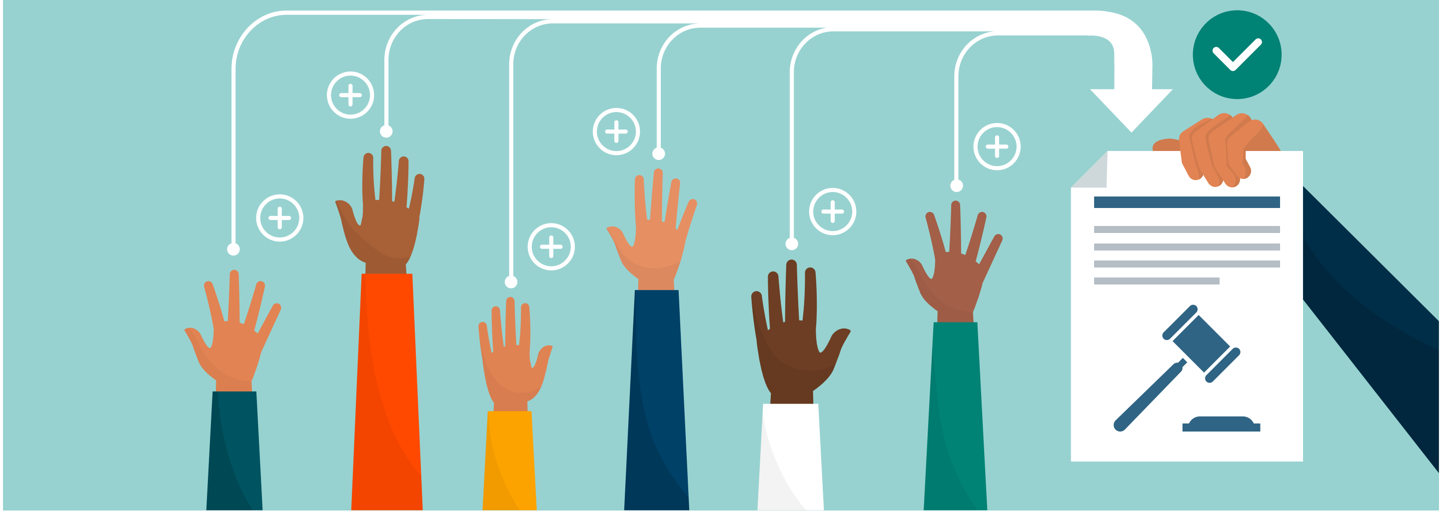
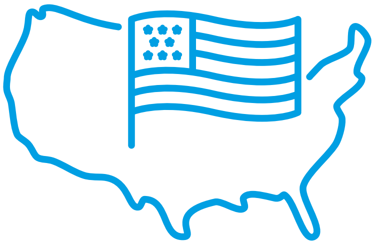
SHAREHOLDER CLAIMS AND COLLECTIVE ACTIONS



Authored by: Sarah Clarke - Gatehouse Chambers

Although a fixture of the US legal system, collective actions have not traditionally formed a significant part of the English legal landscape. Recent years have seen an increased interest in this kind of litigation in many jurisdictions outside the US, with collective shareholder actions tipped by many to be a significant growth area in UK litigation.

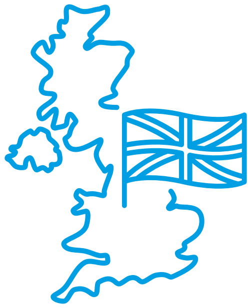


Class Actions in the US

In the US, class actions proceed on an ‘opt-out’ basis: the claim is made on behalf of all those who fall within the defined class unless they opt out. Individual class members do not need to be identified or authorise the claim brought on their behalf.

The main cause of action relied upon in shareholder class actions in the US is section 10(b) and rule 10b-5 of the US Securities Exchange Act 1934, which concerns fraud and misrepresentation in connection with the purchase and sale of securities. Unfortunately for overseas investors, the US Supreme Court decision in Morrison and others v National Australia Bank Ltd and others 130 S Ct 2869 (2010), resolved uncertainty as to the international reach of those provisions by concluding that they do not have extraterritorial application. As a result, investors who purchased securities outside the US cannot participate in US class actions.

This exclusion has forced overseas investors to look elsewhere for relief and, coupled with other factors conducive to class actions such as the rise of litigation funding and adverse costs insurance, appears to have contributed to growth of interest in this area in England.



Collective action processes in England

In England, the only dedicated procedural mechanism comparable to the US opt-out class action is the procedure under the Competition Act 1998 s.47B. Outside competition law, the next closest to the US opt-out model is the representative action under CPR 19.6, which permits claims to be brought on behalf of non-parties without requiring their consent, provided that they have the same interest in the claim. Although the order made will be binding on all represented parties, it will only be enforceable by or against them with the permission of the court. In practice, this regime has not been widely used, due to the difficulty in satisfying the “same interest” requirement. This was recently illustrated by the rejection of the claim in Lloyd v. Google LLC [2021] UKSC 51 as a result of differences between the losses suffered by individuals as a result of the data protection breaches that were subject to the claim. Although the Supreme Court emphasised that the “same interest” requirements could have been satisfied if the representative action had been confined to liability, given the costs implications of a split trial, these observations may do little to salvage the utility of representative actions in practical terms.

The more commonly used procedure is a Group Litigation Order (GLO) under CPR 19.10. This not a class action proper, but a case management mechanism, allowing claims giving rise to common or related issues of fact and law to be managed together. Each claimant issues and establishes their own claim and non-parties are not automatically included in the action. Typically GLOs are used as a means for the determination of preliminary issues or test case.

In addition to these bespoke procedures, existing provisions of the CPR enable case management directions to be given to informally facilitate a test case and permit claims to be brought jointly by multiple claimants. Although joint claims are typically used for smaller groups of claimants (due to the requirement that the claimants’ interests are sufficiently aligned to justify the claims being heard together) there is no limit on the number of claimants who may join together: 48,105 shareholders in Railtrack plc jointly brought a misfeasance in public office claim against the Secretary of State in Weir and others v Secretary of State for Transport and another [2005] EWHC 2192.

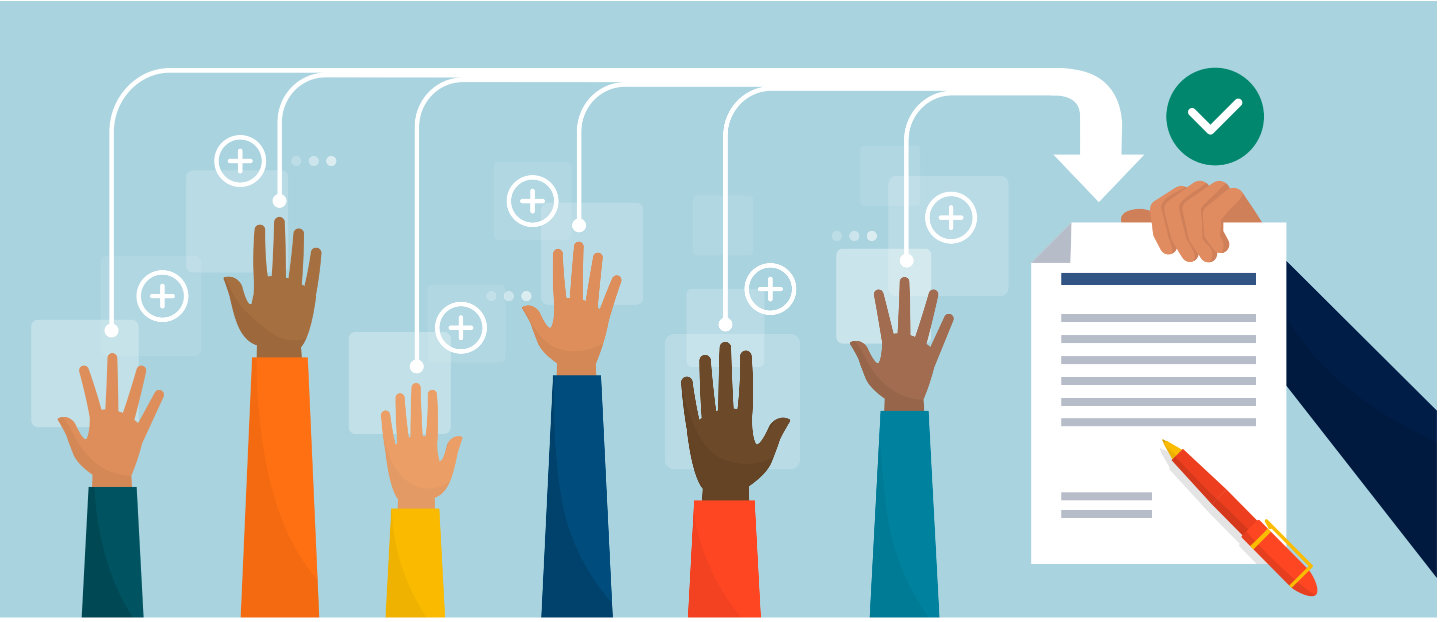
Finally, although it is not a collective action as such, unfair prejudice petitions under s.994 Companies Act 2006 effectively operate as a form of opt-in or opt-out collective action by reason of the practice, following Re a Company (No. 007281 of 1986) [1987] BCLC 593 of either joining all shareholders as respondents to the petition or, if joinder was not necessary in the circumstances, giving them notice to them so that they can apply to be joined.

Causes of Action

The statutory claims relating to misleading information in respect of UK listed companies and/or securities traded on the UK securities market are contained in the Financial Services and Markets Act 2000 sections 90 and 90A and Schedule 10A. Under section 90, a shareholder who acquires shares in reliance upon misleading statements in a prospectus may bring a claim against the person responsible (usually the issuer or its directors). Section 90A and Schedule 10A allows shareholders who acquires, retains or disposes of shares in reliance upon misleading published information to claim relief against the issuer. Establishing reliance on the misleading information can be challenging for claimants, particularly in the context of collective actions and to date no successful collective claims have been brought to trial under under these sections, the RBS Rights Issue litigation and the Tesco shareholder litigation both having settled shortly before trial.

Collective actions can also be brought in respect of other shareholder claims under the Companies Act 2006 and/or the common law, see for example the GLO in respect of the Lloyds/HBOS litigation. This originally concerned allegations of breach of fiduciary duty and negligence against the defendant directors in relation to information provided to shareholders ahead of a vote on the acquisition of HBOS. By trial the issues had narrowed to two allegations of negligence which failed a consequence of the Claimant’s inability to prove causation of loss: Sharp v Blank [2019] EWHC 3078 (Ch).

Although interest in collective shareholder actions remains significant, it appears that this may only translate into the anticipate upsurge in claims once precedents are established which can serve as a guide to navigating these complex evidential issues.

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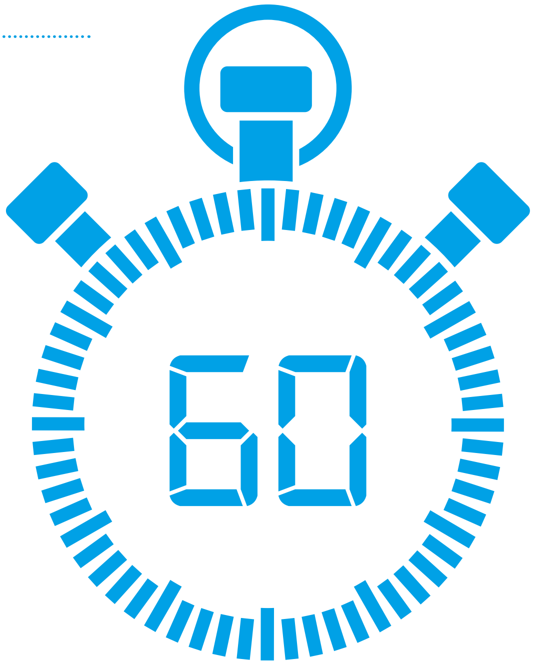

Q What do you like most about your job?

A I love that in my role at Chainalysis I'm focused on others being successful. It's about giving others what they need, whether that's knowledge or the tools, so they can successfully track, trace, secure and recover crypto and perform compliance and monitoring operations. We support everyone from accountants, lawyers and banks to government, law enforcement and regulators and it's a real pleasure to see their successes in the news. Helping others achieve success allows far more good to be done, far more widely in the world than trying to achieve success for yourself.

Q What would you be doing if you weren't in this profession?

A I'd likely still be in law, but if we are talking dream jobs I'd quite like to be selling luxury property having watched too many reality shows on this recently! I do love talking to people, understanding their needs and solving problems. The combination of swanning around incredible estates and getting paid (pretty well!) for it seems like a no brainer.

Q What's the strangest, most exciting thing you have done in your career?

A I've had to conduct a few morning raids, serving orders on (typically fraud affected) businesses who didn't know we were coming, that's probably the most exciting. The strangest was probably moving from being a lawyer to a crypto educator. I suddenly had a captive audience, of the sort of people I'd never have dreamed of being in a (virtual) room with, sitting and voluntarily listening to me talk to them for days on end.

Q What has been the best piece of advice you have been given in your career?

A "You can't amplify collective intelligence with homogeneous groups". This really amplifies the need for diversity in all its forms. Being around people who are like you can be very comfortable but if you only recruit similar people, even if they are diverse by ethnicity or by gender, then you aren't giving yourself diversity of thought and experience. That is so important if you want to be accessible and innovative, not to mention inclusive.

Q What is the most significant trend in your practice today?

A The vast increase in the adoption of cryptocurrency and regulation which brings with it an exponential need for knowledge and tools. Everyone thinks "oh that must be great for you" and of course it is, but I also think it puts a lot of responsibility on our shoulders to deliver products and data which continue to meet the growing demand, whilst keeping up with the evolution and innovation in the space. I'm not sure the regulations would be implementable without all the work our amazing teams here do.

Q What personality trait do you most attribute to your success?

A I think communication skills are pretty central to most of what I have done which is slightly more eloquent than "the gift of the gab" which would be my gut reaction.

Q Who has been your biggest role model in the industry?

A People who I'm impressed by are typically those who broke new territory or demonstrate great values. What's crazy is that the circle of people who are really accomplished when it comes to crypto investigations is so small and tight knit that many of the people who would therefore be my role models are also my friends. That is a huge work perk.

Q What is something you think everyone should do at least once in their lives?

A Watch the lights on the Eiffel Tower twinkling at midnight. It's the best time to see the Eiffel Tower without all the noise. It's quite serene.

Q What is the one thing you could not live without?

A Cuddles from my kids!

Q What is a book you think everyone should read and why?

A Investigating Cryptocurrencies by Nick Furneaux, it's what got me into crypto investigations. Nick is a great writer, it is situational, tangible and funny - which differentiates it from every other technical crypto book I've ever read.

Q What would be your superpower and why?

A Time travel, a rather selfish superpower as it's not to help anyone, it's just because I'd love to see more of the world and people at different points in time, to see the past and the future.

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COMMERCIAL DISPUTES LAWYERS

CYK is delighted to welcome TL4 FIRE and Disputes founding committee members Jon Felce and Natalie Todd to its team of tenacious, innovative and personable lawyers

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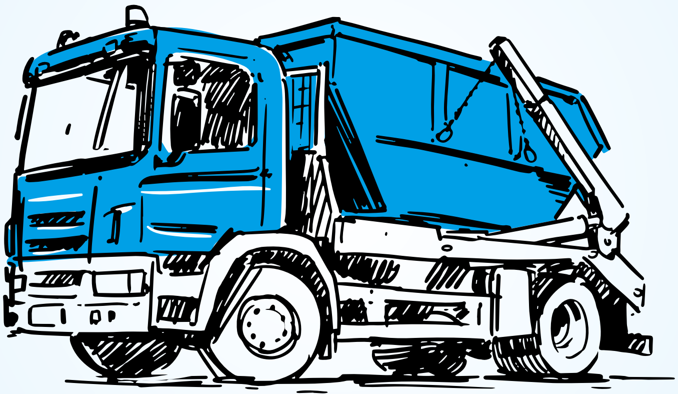
MINORITY SHAREHOLDER



PREJUDICE AND DELAY

Authored by: Jonathan O'Mahony - Conyers

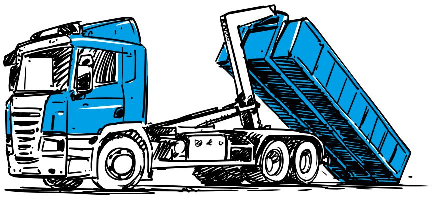
In a recent judgment given by the English Court of Appeal in Bailey v Cherry Hill Skip Hire [2022] EWCA Civ 531, the Court was asked to consider whether, prior to trial, the Court at first instance was wrong to dismiss in its entirety a petition seeking relief under sections 994 to 996 of the (UK) Companies Act 2006 i.e. unfair prejudice, on the grounds of long delay or acquiescence by the petitioner.

The equivalent section under the (Bermuda) Companies Act 1981 is section 111; an important difference between the provisions is that under section 111 petitioners have to additionally establish that the facts of the case would justify the making of a winding up order in respect of the company on the ground that it was just and equitable to do so: see De Shaw Oculus v Orient-Express Hotels [2010] Bda LR 32.

The origins of the claim lay in a bitter family dispute between members of the Bailey family. Cherry Hill Skip Hire Ltd ("the Company") was incorporated in 1982 and 51% of the shares were allotted to Norma Bailey, the mother, and 49% of the shares to her son Andrew; both became directors.

There was a falling out between mother and son and by 1985 the son was excluded from any management in the business. He was removed as a director by resolution in 1999 and replaced by his daughter, Jenna Dudley-Bailey; by then Andrew and Jenna had too fallen out.

Between 2001 and 2003 solicitors for Andrew wrote to the Company's solicitors seeking copies of its accounts from 1997 onwards and other information relating to the Company's affairs; Andrew complained that he had no accurate idea as to the present position concerning the Company's financial state and whether steps had been taken to devalue his shareholding.



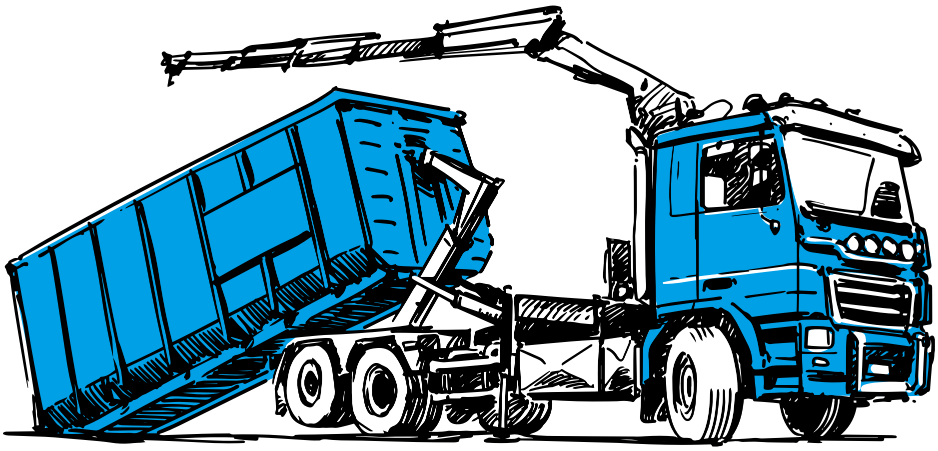
Although the solicitors threatened an unfair prejudice petition if the enquiries were not satisfactorily met, no such petition was issued until July 2020, over 17 years later. Andrew's mother and daughter were the defendants. They sought to strike out the petition on the grounds of delay. It was said that Andrew had been excluded from participation in the running of the Company and had been denied his rights as a shareholder.

At first instance the Judge found that by 2003 at the latest Andrew knew enough to have been able to take legal proceedings in respect of the matters he now complained about and dismissed the petition in grounds of delay and acquiescence. On appeal Andrew argued that the Judge was wrong in principle to dismiss the petition on this basis at this stage.

Andrews LJ, giving judgment in the Court of Appeal, highlighted certain extraordinary features of the case including the fact that the allegations in the original petition were between 12 and 37 years old and the allegations now sought to be made in an amended petition were between 12 and 19 years old.

The Court of Appeal then considered the correct approach to delay in the context of unfair prejudice petitions. In England, as in Bermuda, there is no statutory limitation period applicable to unfair prejudice petitions. Also, given that the relief usually sought (a share buy-out) is not equitable, the doctrine of laches does not strictly apply where this is so.

The Court of Appeal found that the correct approach was that which was adopted in Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd and another v Singh and others [2018] EWHC 1715: to consider whether there was unjustified delay resulting in prejudice or an irretrievable change of position and whether there was any evidence that the petitioners have previously acquiesced in the state of affairs of which they now complain; and whether, in view of the delay and the reasons for the delay, it was unfair or inappropriate in all the circumstances for the petitioners to obtain the relief that they seek.



In Re Edwardian Group Ltd, Fancourt J concluded at that it would be disproportionate to deny the petitioners a remedy for the unfair prejudice which they had proved, and that their conduct in delaying the issue of the petition did not make it inequitable for them to be granted one, given the nature of the wrongdoing and the consequences of refusing a remedy. In reaching that conclusion, he weighed the reasons for and seriousness of the delay against the nature of the unfairly prejudicial conduct, and the consequences for the petitioners of refusing relief against that background. The Judge considered that the behaviour of the company had been seriously prejudicial and unfair and that the respondents could be adequately protected or compensated in other ways for the effect of culpable delay by valuing the petitioners' shares at an earlier date, and, where appropriate, making them account for dividends received during the period of such delay.

In an important passage in Andrews LJ's judgment, she found that there was a distinction to be drawn between a shareholder who knows he has been excluded from active involvement in the company's affairs and fails to complain about that for many years, and a passive shareholder who knows he is not getting the company's accounts or an invitation to the AGM and is not receiving dividends and does nothing about any of those matters, but then discovers years later that money or corporate opportunities have been diverted from the company for the benefit of its directors, and moreover, that his shareholding was apparently expropriated ... The distinction lies in the fact that in the absence of evidence to the contrary, a shareholder is entitled to assume that the company is being managed properly by its directors in accordance with their fiduciary and statutory duties, and that its constitution has been followed.

Accordingly, in both England and Bermuda misfeasant directors necessarily cannot expect the Court's sympathy even in the face of extensive delay and a passive shareholder (who knows he is not getting the company's accounts or an invitation to the AGM and is not receiving dividends and does nothing about any of those matters) who then decides to petition. Combined with the absence of a statutory limitation period applicable to unfair prejudice petitions, this should give pause to those who assume that they are off the hook even after a decade or more of inaction by disgruntled minority shareholders.

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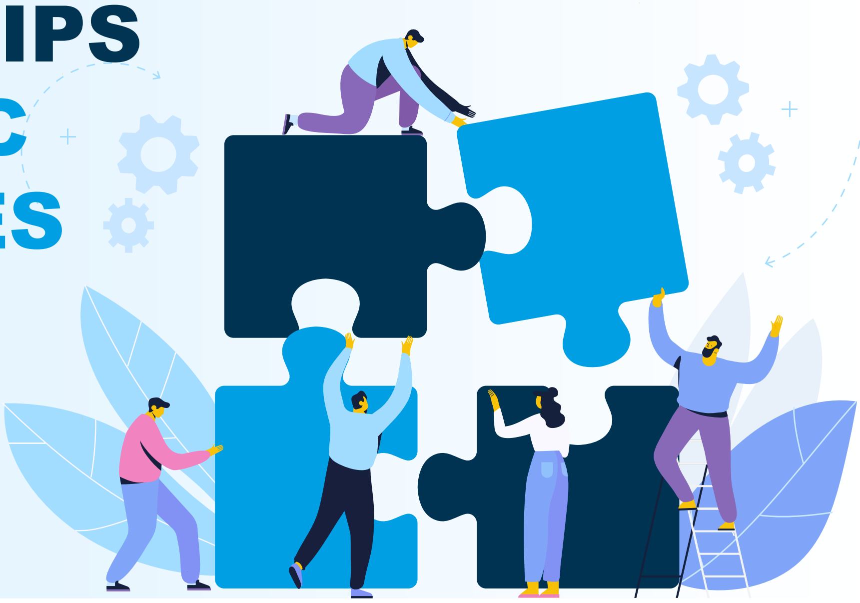
QUASI-PARTNERSHIPS IN PUBLIC COMPANIES



Authored by: Daniel Lightman QC and Max Marenbon – Serle Court

When people think of a quasi-partnership company, they tend to imagine a small private company, owned and managed by its founders, operating like a partnership. But the term ‘quasi-partnership’ is (as Lord Wilberforce stressed in Re Westbourne Galleries Ltd [1973] AC 360, at 379D-H) no more than a “convenient but… also confusing” shorthand for a company in which equitable considerations make it unjust or inequitable for those behind it to insist on their legal rights or exercise them in a particular way. Shareholders in large public companies will welcome recent case law suggesting that they too, on appropriate facts, could rely on equitable considerations as grounds for an unfair prejudice petition under section 994 of the Companies Act 2006.

Since Re Astec (BSR) Plc [1999] BCC 60, the orthodox view has been that there is no room for equitable considerations in listed public companies. Jonathan Parker J there described their introduction in that context as “a recipe for chaos”.

> **“The orthodox view has been that there is no room for equitable considerations in listed public companies… However, the law is on the move in this area…”**

However, the law is on the move in this area, and support is growing for the New Zealand Court of Appeal’s assessment in Latimer Holdings Ltd v SEA Holdings NZ Ltd [2005] NZLR 328, at [106], that Jonathan Parker J’s concerns were “distinctly overdrawn”.

Prior to Astec, the courts occasionally recognised the existence of equitable considerations in public companies. In McGuinness v Bremner plc (1988) 4 BCC 161, the Scottish Court of Session (Outer House) held that the directors’ decision to convene a meeting requisitioned by the petitioners on a date almost seven months after deposit of the requisition was unfairly prejudicial to the petitioners’ interests, even though it was lawful under section 368 of the Companies Act 1985. In Bradman v Trinity Estates plc [1989] BCLC 757, at 759B, Hoffmann J seemed to regard it as arguable that a departure from the company’s prospectus could be unfairly prejudicial. And when Alan Sugar and Terry Venables clashed in Re Tottenham Hotspur plc [1994] 1 BCLC 655, Sir Donald Nicholls V-C appeared to assume (without deciding the point) that equitable considerations could in principle arise in a public company in any case where the evidence suggested that the major shareholders had assumed obligations to each other that went beyond their legal rights. In this regard, he noted, at 660b-c, that:

“Tottenham is a very special type of company. Its shareholders were attracted, not by commercial considerations, but by the wish to become more closely linked with and involved in the affairs of the club they support, often passionately. They are football enthusiasts.”

> **“Tottenham[‘s] shareholders were attracted, not by commercial considerations, but by the wish to become more closely linked with and involved in the affairs of the club they support, often passionately. They are football enthusiasts.”**

Against the backdrop of this cautious recognition came Astec, which drew on the similar but less emphatic reasoning of Vinelott J in Re Blue Arrow Plc (1987) 3 BCC 618, where he held that breaches of the Listing Rules and the Cadbury Code (a predecessor of the UK Corporate Governance Code) could not amount to unfairly prejudicial conduct.

Professor Jennifer Payne (L.Q.R. 1999, 115(Jul), 368-372, 369) criticised Astec for failing to distinguish between equitable considerations (i) founded on personal expectations based on informal arrangements between members and (ii) arising from the universal expectations of all members (for example, as in Bremner, the expectation that requisitioned meetings should not be unreasonably delayed). She argued that the latter category of equitable considerations exists in all companies, including public ones.

Payne's approach is consistent with the subsequent reasoning of the Hong Kong Court of Appeal in Luck Continent Ltd v Cheng Chee Tock Theodore & Ors [2013] HJLRD 181, which upheld an unfair prejudice petition that relied on breaches of the applicable Listing Rules, Lam LJ stating, at [86]:

"… what are the terms on which the shareholders acquired the shares of the company? In my view, in the context of CYF, one of the fundamental terms must be that it should maintain its listing status. That must be the common understanding of all the shareholders when they acquired the shares of CYF. That common understanding can properly be described as a common understanding inter se between the shareholders." .

If Luck Continent is followed in this jurisdiction, activist shareholders aggrieved by corporate governance failings will be able to add the credible threat of a section 994 petition to their arsenal. Indeed, Arden LJ's suggestion in In Re Tobian Properties [2013] Bus LR 753, 762F-G, that whether a director's remuneration was excessive, and so unfairly prejudicial, may be assessed by reference to extra-statutory guidance, such as the Association of British Insurers' Principles of Remuneration, raises the prospect that, contrary to the reasoning in Astec, the courts may treat breaches of such guidance (in relation to corporate governance issues generally, and not just remuneration) as unfairly prejudicial conduct of a company's affairs.

"If Luck Continent is followed in this jurisdiction, activist shareholders aggrieved by corporate governance failings will be able to add the credible threat of a section 994 petition to their arsenal."

Furthermore, three recent cases pave the way, in an appropriate case, even for Professor Payne's first category, that of equitable considerations founded on informal arrangements between members, to form the basis of an unfair prejudice petition in a public company.

In Waldron v Waldron [2019] Bus LR 1351, HH Judge Eyre QC (sitting as a High Court Judge) concluded, at [41]-[42], that the court can grant relief based on equitable considerations arising between some members of a company only, if it can do so without infringing the rights of members who are not party to the relevant understandings.

In Il v Yesilkaya [2021] EWHC 1695 (Ch), ICC Judge Prentis developed this theme, holding, at [50]:

"In principle, it is no necessary bar to the establishment or continuation of a quasi-partnership relationship that it is between some only of the members. However, as Fancourt J in Re Edwardian Group Limited [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171 discussed at [130]-[136], such a relationship is unlikely to arise or subsist in a way which is binding on the company except where it is between members constituting a majority of voting rights."

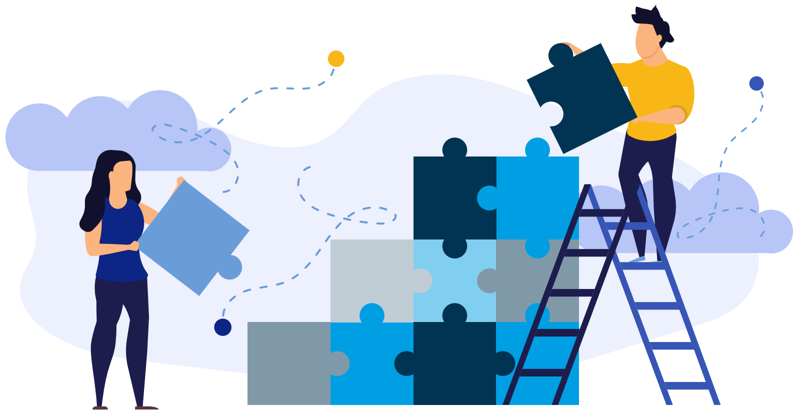
These cases suggest that in public companies where informal understandings exist between shareholders holding a majority of voting rights between them, those shareholders could in theory rely on a breach of those understandings as the basis for an unfair prejudice petition.

If Edwardian, Waldron and Il paved the way for unfair prejudice petitions in public companies relying on this first category of equitable considerations, the recent judgment in Re Klimvest Plc [2022] EWHC 596 (Ch) has now opened the door to them. It was a petition to wind up a Euronext-listed PLC on the just and equitable ground, which relied partly on informal understandings arising from the founders' and controlling shareholders' personal relationship. HH Judge Cawson QC (sitting as a High Court Judge) held, at [269], that it was unnecessary to determine whether Astec had been correctly decided (the petition succeeding on a different ground) but went on to observe:

"… on appropriate facts, equitable considerations might arise as between shareholders in a public listed company, but that this would be a rare event given that the parties would, in almost all cases, have submitted themselves to acting on a purely commercial footing. I can see that there might, conceivably, be circumstances where the existence of those equitable considerations might found the basis for some limited form of relief under Section 996 of the 2006 Act provided that the various considerations identified with regard to a public listed company and referred to in [Astec and Blue Arrow] were not impinged upon."

"If Edwardian, Waldron and Il paved the way for unfair prejudice petitions in public companies relying on [informal understandings]… the recent judgment in Re Klimvest Plc [2022] EWHC 596 (Ch) has now opened the door to them."

Daniel Lightman QC and Max Marenbon represented the successful petitioner in Re Klimvest Plc [2022] EWHC 596 (Ch).



DIGITAL ASSET FRAUD AND ASSET TRACING:

AN UPDATE FROM THE BRITISH VIRGIN ISLANDS

Authored by: Christopher Pease, Megan Elms – Harneys and James Drury - Kalo

The BVI is a popular jurisdiction for companies providing services relating to cryptocurrencies and digital assets. It is home to various exchanges, token issuers, blockchain projects and crypto funds. Inevitably, there are an increasing number of related disputes with a BVI nexus.

While the nature of these disputes can be wide-ranging, a common theme is beginning to emerge: smart contracts are being exploited by hackers and used to misappropriate tokens; stolen tokens are transferred through numerous wallets, in a series of transactions, to disguise their origin. The use of decentralised 'mixer' protocols often play an important role in this process.

The recent case of ChainSwap v Persons Unknown is a prime example of how blockchain analysis can be combined with well-established asset tracing and recovery tools and court remedies to meet the challenges thrown up in this relatively new arena. Harneys and Kalo acted for ChainSwap, the successful claimant.

An increasingly familiar tale

The facts in the ChainSwap case demonstrate how tokens can be stolen pursuant to the hacking or exploitation of smart contracts that are used to provide blockchain services.

In this case, a smart contract allowed ChainSwap's users to transfer tokens across blockchains (known as a cross-chain bridge). The smart contract would receive the tokens to be 'transferred' and would send them to a 'vault wallet' where they would be locked away or 'burned', following which an equivalent token would be minted on the 'receiving' blockchain and deposited into the user's designated wallet. As is typical for smart contracts, the code underpinning it was open- source and could be viewed publicly.

The smart contract was exploited on two separate occasions, roughly a week apart, in July 2021.

Following the first hack, tokens received by the smart contract were sent to a wallet designated by the hacker(s) rather than the vault wallet. Tokens were then drawn into the smart contract from user wallets that had been pre-authorised to interact with the bridge, without the users' authorisation. The result was that the hacker(s) diverted tokens from user wallets into his/her own wallet.

As part of the second hack, the smart contract's requirement for tokens received into the vault wallet to tally with those being minted was removed. This allowed the hacker(s) to mint substantial numbers of tokens and direct them into their own wallet (the initial transfers were sent to the same wallet that had been used as part of the first hack, but the majority were sent to a second wallet owned by the hacker(s)).

Affected users and projects were compensated, leaving ChainSwap seeking to recover the loss from an unknown wrongdoer or wrongdoers.

The starting point

As is the case for the most widely used blockchains, the transactions pursuant to which tokens had been stolen by the hackers were recorded permanently and could be viewed publicly.

With the use of blockchain explorers, such as Etherscan, it was possible to identify that the hacker(s)had exchanged many of the stolen tokens for stablecoins (a digital token designed to be pegged at a fixed rate to fiat currency), which had then been transferred to other wallets and exchanges.

This preliminary analysis informed what further steps could be taken to trace and recover the tokens or their equivalent value.

Token functionality

One type of stablecoin that the hacker(s) acquired with the stolen tokens, and which therefore became the proceeds of the wrongdoing, could be ‘burned’ (i.e. permanently locked or disabled) by the token issuer, wherever held. This meant that the token issuer could reissue the same number of tokens to another wallet.

This function was used effectively in this case: ChainSwap satisfied the token issuer that the hacker(s) was not the rightful owner of the tokens in question (because they could be traced back to the hacks) and provided appropriate assurances to allow the token issuer to burn the tokens in the hands of the hacker(s) and re-issue tokens to ChainSwap. It provided an effective and efficient method of remedying (in part) the loss caused by the hacking.

Tracing through a mixer

Further blockchain analysis revealed that a significant portion of the remaining proceeds from the hacks had been routed through Tornado Cash, which provides a mixing service (also known simply as a ‘mixer’ or ‘tumbler’).

Tornado Cash describes itself as a fully decentralised protocol for private transactions. Users transfer tokens to the Tornado Cash smart contract by sending them to a receiving wallet, which mixes the tokens with those belonging to other users. Upon transferring tokens, users receive a code. When the user elects to withdraw the tokens they provide the code and nominate a different wallet into which a new token can be sent. The paying or outgoing Tornado Cash wallet will then pay out the tokens, less a small proportion of the tokens which are sent to different wallet as a ‘relay fee’. The intended effect is to break the link in transactions of tokens and obfuscate the origin of the tokens exiting Tornado Cash.

While not inherently improper, mixers provide hackers and fraudsters with a useful tool for laundering the proceeds of their wrongdoing. Their decentralised nature (they run purely on algorithms) and the ease with which they can be accessed means that they are a common hurdle to overcome when tracing the proceeds of hacks.

One would be forgiven for losing hope of tracing and recovering digital assets that pass through mixers. The common perception is that they are impenetrable. However, the permanent ledger of all transactions in and out of Tornado Cash is an important counter-balance and one that can be used highly effectively with the right forensic tools.

ChainSwap’s legal advisors, Harneys, teamed up with Kalo, who boast a deep knowledge of digital assets and blockchain data analytics, with a view to proving that it was possible to trace assets through a mixer.

Using bespoke software and forensic analysis, Kalo identified transfers out of Tornado Cash that very closely matched the numerous transfers that the hacker(s) had made in (via numerous wallets).

Kalo set out their findings in a comprehensive forensic investigative report detailing the web of transactions, transaction hashes and wallet addresses used.

It concluded that, given the number and size of payments in and out of Tornado Cash and the time between them, it was more likely than not that the transfers out to a separate wallet were related to the payments in from the wallets that were known to be associated with the hacker(s).

Identifying the gateway

The ability to identify the new wallet, which received the tokens from Tornado Cash, as likely belonging to the hacker(s) meant that subsequent transactions could be analysed. These included transactions with a centralised exchange based in Croatia. Whilst the exchange was unable to provide material information voluntarily, it was clear that it would be required to hold information that would reveal the identity of those using its services, as well as details of any bank accounts into which payments had been received from a sale of digital tokens..

It is unsurprising that the hacker(s) sought to use a centralised exchange at some point during the chain of transactions.

Exchanges continue to be the primary avenue for the exchange of fiat currency and digital assets – whether purchasing crypto (on-ramping) or selling crypto in exchange for fiat currency (off-ramping).

They provide the necessary gateways for entering and exiting the self-contained blockchain universe.

These gateways, and the information they hold, will often provide the key to unlocking crypto recovery cases.

Familiar tools in a brave new world

Having identified that a wallet belonging to the hacker(s) had interacted with the Croatian exchange, ChainSwap commenced legal proceedings against the unknown hacker(s)in the BVI seeking compensation for tortious wrongs and/or restitution of unlawful gains.

In addition to the main underlying claim, ChainSwap applied to freeze the assets of the unknown hacker(s), particularly anything held in the hacker’swallets.

ChainSwap also sought disclosure of information from the Croatian exchange via a letter of request from the BVI Court, which would reveal the identity of the hacker and any bank accounts used to receive fiat currency. Whilst other courts have recently been willing to grant third party disclosure orders directly against entities out of the jurisdiction, there was doubt as to whether the exchange would comply with such an order in this instance.

ChainSwap also commenced other investigations and proceedings, including in other jurisdictions, to obtain further information and with a view to speeding up the recovery process.

Pursuing "persons unknown"

Legal proceedings can be commenced, and interim relief sought, against unknown persons. However, to do so a claimant must define the defendant(s) in a way that:

1. Makes it possible to determine those that fall within the class of persons and those that fall outside of it; and
2. Allows the defendant(s) to be served with the claim or application.

In this case the categories of persons being pursued were: (i) those responsible the initial hacking or exploits of the smart contract; (ii) those that had received the tokens diverted pursuant to the hacking; and (iii) those that had received, dissipated and attempted to launder the proceeds of the hacks. In reality, the same person or people were likely to make up all three categories.

ChainSwap had been able to obtain an email address that was believed to be associated with category (i). Those in categories (ii) and (iii) could be identified by reference to digital wallet addresses and their interaction with the Croatian exchange. Accordingly, the defendants in this case were sufficiently identifiable.

Interim relief

The BVI Commercial Court was persuaded that this was an appropriate case in which to grant a freezing order and to issue a letter of request to the Croatian authorities seeking information from the Croatian exchange. It granted the relief ex parte and on an urgent basis (within a day of the application having been filed).

Importantly, the BVI Court also permitted the claim and other documents to be served on the hacker(s) via: (i) the email address; and (ii) the Croatian exchange, on the basis that the exchange was believed to hold contact information for the hacker(s).

Despite the hacker(s) acknowledging that they had received the served documents, they did not appear at the return date for the continuation of the freezing order. The court's judgment in respect of the return date hearing is available here.

The importance of identifying pseudonymous actors

Through its various legal actions, ChainSwap was closing in on uncovering the identity of the hacker(s).

The pseudonymous nature of crypto ownership means that whilst bad actors can hide behind obscurity, if and when their real identity is revealed, all transactions associated with them will be laid bare. This should be of particular concern to those that have carried out numerous hacking attacks that appear to be unconnected: once exchange accounts and digital wallets are revealed to belong to a hacker, blockchain records can be analysed to determine where else tokens have come from. Obscurity can be a hacker's greatest asset; revealing their identity their greatest weakness. There is also a question as to who else might be exposed in what might be a wider network of wrongdoing.

It is unsurprising then that with the walls closing in the hacker(s) made contact and sought to settle the claim on condition of remaining anonymous, demonstrating the leverage to be gained by obtaining (or even just seeking) information.

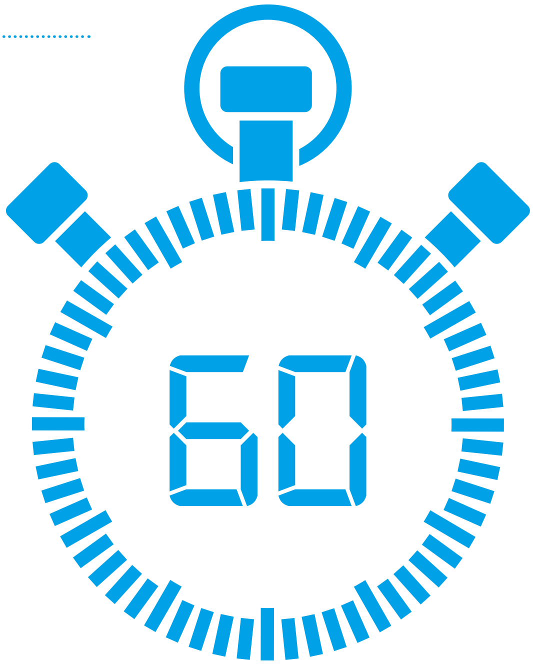
Conclusion

As the use of digital assets continue to increase worldwide, the BVI's nexus to multiple exchanges, token issuers and projects suggests it will be a key jurisdiction for disputes in the sector.

The ChainSwap matter, which is a landmark case in the BVI, is a welcome decision which demonstrates that the BVI, including its courts, are on top of the issues posed by digital asset fraud and offers a variety of tools to overcome them.

There are of course key variables in any crypto recovery case and every case is likely to differ in terms of complexity of the tracing exercise and the practical and legal steps that should be taken to achieve recovery, The methods used by wrongdoers to obfuscate transfers of digital assets and obstruct tracing exercises are becoming far more sophisticated. Legal advisors and forensic experts need to adapt their tracing and recovery tools and techniques to keep pace.

60-SECONDS WITH:



JESSICA LEE
ASSOCIATE
BROWN RUDNICK

Q **What do you like most about your job?**

A The constant variety and challenge.

Q **What would you be doing if you weren't in this profession?**

A A marine biologist so I could scuba dive every day.

Q **What's the strangest, most exciting thing you have done in your career?**

A Obtaining and executing multiple delivery up orders in a short period of time. During one, the Defendant had to describe in detail how they destroyed the evidence, including by hitting it with a hammer and dowsing it with water.

Q **What has been the best piece of advice you have been given in your career?**

A Be authentic to yourself and your values.

Q **What is the most significant trend in your practice today?**

A Digital fraud – from cyber attacks to crypto scams, the digitization of our world means that fraud in this area is only likely to increase.

Q **What personality trait do you most attribute to your success?**

A Being open-minded and willing to learn.

Q **Who has been your biggest role model in the industry?**

A I have been lucky to work with many inspiring and extremely clever individuals and it would be unfair to name just one.

Q **What is something you think everyone should do at least once in their lives?**

A Scuba dive!

Q **What is the one thing you could not live without?**

A My peloton.

Q **What is a book you think everyone should read and why?**

A Talking to Strangers by Malcolm Gladwell – a book which makes you think twice about how you interact with others and an interesting view on why we are so bad at identifying liars – especially insightful for a fraud litigator.

Q **What would be your superpower and why?**

A Teleportation – imagine the places you could visit, and the time saved!

RPC

#Disputespowerhouse

EQUALITY AND EQUITY – SAME BUT DIFFERENT – GUERNSEY'S NEW DISCRIMINATION LAW

NOBODY WANTS TO BE LIKE EVERYBODY ELSE. GUERNSEY PRIDES ITSELF ON ITS DIFFERENCE. IT IS OUR USP WHEN IT COMES TO EMPLOYMENT LAW.

Authored by: Carly Parrott – Bedell Cristin (Guernsey)

The Universal Declaration of Human Rights opens with "all human beings are born free and equal in dignity and rights". This is one of the fundamental truths that sometimes gets erodes as we grow – thus precipitating the need for discrimination law. When we join the workforce, we want and expect equality in our employment. What we need though is equity. We are all the same, but fundamentally we are all different. Guernsey recognises those similarities but seeks to embrace those differences in its legislative approach to laws. The proposed new discrimination law is no exception. Guernsey is similar to the UK, to Jersey and to the IOM. But, it is different. Guernsey prides itself on that difference. Sometimes the differences are stark and sometimes more subtle and those differences can often be tantalisingly attractive for employers operating in Guernsey. With the introduction of new discrimination law in Guernsey on the horizon (due in May 2023), those differences are likely to receive a mixed reaction from Guernsey employers.

We explore three of the more topical "same…but different" aspects of the proposed Prevention of Discrimination (Guernsey) Ordinance, 2022 – those surrounding the definitions of carer status, religious belief and disability.

Carer status

Guernsey is looking to lead the way in its introduction of the protected ground of "carer status" – emphasising the "difference" in a novel and practical way. The concept of "carer status" is obviously not new – it a concept long recognised indirectly in the UK, Jersey and IOM, but it has not been granted specific stand-alone protection previously in discrimination legislation.

This is a trail-blaze in discrimination protection and removes the need for employees to rely on backdoor, indirect claims based on "association with disability". The concept is very much the "same" but the difference lies in the stand-alone protection to be provided to carers in Guernsey. Naturally, though the devil is in the detail. The protection is expected to extend only to those persons who provide care or support on a "regular, continuing or frequent basis" to another person who lives with them or is a close relative of theirs who has a disability, and for whom they provide that care. For us employment lawyers, what constitutes a "regular, continuing or frequent" basis will no doubt create some interesting arguments, however at least given the proposed definition of disability, at least we won't be arguing over whether or not the person cared for has a disability (see below).

Religious belief

Rather than adopting the UK's protected ground of "religion or belief" which applies to both religious and non-religious philosophical beliefs, the States of Guernsey applied its "same but different" philosophy and determined that the protection accorded in Guernsey shall follow the Irish model and extend to "religious belief" but not to non- religious philosophical beliefs.

Whilst to some this may seem like a play on words, the impact of the little word "or" makes a huge difference to the extent of the protection.

Whilst religion is clearly a belief, in the context of discrimination law, religion and belief are two very different concepts, with the exclusion of the latter representing a significant departure from the breadth of the protection offered in the UK and the IOM.

Interestingly, Jersey does not (yet) provide any protection for beliefs - religious or otherwise

The maintenance of that difference is perhaps a welcome decision for employers in Guernsey who will not be subject to the raft of claims based on philosophical belief that have inundated the UK Tribunals. For example, reported cases in the UK include claims of "veganism" and "the fear of catching COVID-19" as philosophical beliefs, neither of which were found to be protected "beliefs".

Disability - COVID-19 and Long-COVID-19

The difference in Guernsey's proposed definition of disability is less likely to be as warmly "welcomed" by employers. The States have voted to adopt a broad definition based on the social model of disability which switches the focus from whether an individual is "disabled enough" to the prevention of discriminatory acts. Disability will be defined by reference to an "impairment" which "lasts or is expected to last for not less than 6 months". Relevantly to Covid-19, what is an impairment will be defined by a reference to "the presence in the body of organisms or entities causing or likely to cause chronic disease or illness".

The definition of 'disability' is Guernsey's crowning glory of "same but different". The States deliberately elected to move away from the UK, Jersey and the IOM and create a definition almost identical to the Irish definition. What remains to be seen is whether in this post pandemic world is whether such a definition could see those suffering from COVID-19 or more likely, those experiencing "Long-COVID-19" will be protected from discrimination on the ground of "disability".

In October 2021, WHO released a definition of "post covid-19 condition":

"Post COVID-19 condition occurs in individuals with a history of probable or confirmed SARS CoV-2 infection, usually 3 months from the onset of COVID-19 with symptoms that last for at least 2 months and cannot be explained by an alternative diagnosis. Common symptoms include fatigue, shortness of breath, cognitive dysfunction but also others* and generally have an impact on everyday functioning. Symptoms may be new onset following initial recovery from an acute COVID-19 episode or persist from the initial illness. Symptoms may also fluctuate or relapse over time".

Applying the proposed wording of the Guernsey definition of "impairment" and accepting the definition of "post COVID-19 condition", there is a strong argument that "post COVID-19" would be caught by that definition and even an argument that any person who contracts COVID-19 has an impairment which has the potential "to last" for more than 6 months. Interestingly, ACAS (in the UK) have provided guidance which advises employers not to try and determine if Long-COVID-19 is a disability but rather focus on providing reasonable adjustments for their employees. Sounds a little like the Guernsey model, but introducing it by the back door.

Conclusion

For many years, Guernsey has been more "different" than "same" when it comes to its employment (and in particular discrimination) laws. Since 2005, the only protected grounds have been related to sex (i.e. sex, marital status, sexual orientation and since 2016, pregnancy and maternity). The Discrimination Ordinance will be the single biggest piece of employment legislation to be introduced since the Employment Protection Regime was launched in 1998. The commitment to maintaining Guernsey's USP will ensure that Guernsey's discrimination laws are familiar to all but with tangible differences to ensure Guernsey maintains its distinctive legal landscape.

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(The Times, 2021)

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- according to the Legal 500
United Kingdom 2022 edition.

Contact us at: info@pcb-byrne.com

JURISDICTION IN COMPANY CASES:

ARTICLE 24 OF THE BRUSSELS I (RECAST) REGULATION (1215/2012)

Authored by: Clara Browne - PCB Byrne

Background

The Brussels I (Recast) Regulation (1215/2012) (the "Recast Regulation") is intended to lay down common rules governing jurisdiction assumed by member states. Persons domiciled in a member state should generally be sued in that member state (article 4), but pursuant to article 5 may also be sued in the courts of another member state in certain cases (specified in sections 2 to 7 of Chapter II of the Recast Regulation). Article 8 provides, among other things, that a person domiciled in a member state who is one of a number of related defendants may be sued in the courts of the place where any one of them is domiciled, provided the claims are closely connected.

The cases of exclusive jurisdiction within article 24 comprise situations where reasons exist to recognise an especially strong and fixed connection between the subject matter of a dispute and the courts of a particular member state. For the cases falling within article 24, the principle of exclusive jurisdiction cuts across and takes priority over the other principles underlying the Recast Regulation, including the principle of jurisdiction for the courts of the member state where the defendant is domiciled and the principle of respect for party autonomy referred to in recital (19) and reflected in various provisions of the Regulation. Article 45(1)(e) provides that the recognition of a judgment shall be refused if the judgment conflicts with the provision for exclusive jurisdiction contained in article 24, and article 46 states that enforcement of a judgment shall be refused in cases falling within article 45.

Effect of Brexit on the applicability of the Recast Regulation

The Recast Regulation now applies to proceedings instituted before the end of the transition period (11pm on 31 December 2020). For proceedings instituted after the end of the transition period, the Recast Regulation does not apply, and such proceedings are instead governed by the 2005 Hague Convention on Choice of Court Agreements (where applicable) or common law rules.

Therefore, decisions of the Court of Justice of the European Union (CJEU) relating to the Recast Regulation made before the end of the transition period continue to be binding on all courts in the UK for disputes instituted before the end of the transition period.[1] CJEU decisions made after the end of the transition period relating to the Recast Regulation are not binding on courts in the UK when interpreting the Regulation, but they should have due regard to them. [2]

Consideration of Article 24 of the Recast Regulation by the Courts

In Akçil v Koza Ltd [2019] UKSC 40, [3] the Supreme Court unanimously overturned the decision of the Court of Appeal [4] regarding the interpretation of the exclusive company law jurisdictional provisions in Article 24(2) of the Recast Regulation.

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[1] Article 4(4), Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European and the European Atomic Energy Community ("Withdrawal Agreement").

[2] Article 4(5), Withdrawal Agreement.

[3] https://www.supremecourt.uk/cases/docs/uksc-2017-0195-judgment.pdf.

[4] ([2017] EWCA Civ 1609).

The Turkish parent company, Koza Altin, operates a gold mining business and is part of a group of Turkish companies known as Koza Ipek Group (“the Group”), formerly controlled by Mr Ipek.

Mr Ipek claimed that the Turkish government had launched unfounded criminal investigations into the Group. The Turkish criminal courts appointed trustees to control Koza Altin and in response, Mr Ipek changed the constitution and structure of Koza Ltd, an English subsidiary of Koza Altin. These changes were designed by Mr Ipek to prevent alterations to the articles or directors of Koza Ltd by the trustees, without his consent.

The trustees subsequently served a notice first under s303 and then s305 of the English Companies Act 2006 (the “2006 Act”) to convene a general meeting of Koza Ltd to amend its articles of association and change its directors, to remove Mr Ipek. Mr Ipek and Koza Ltd applied for an injunction to prevent the meeting, on two bases:

1. that the two notices were void under s303(5)(a) of the 2006 Act as Mr Ipek did not consent to the proposed resolutions, required by the new provision in the articles which he had introduced (“the English company law claim”); and
2. that the English courts should not recognise the authority of the trustees to cause Koza Altin to do anything as a shareholder of Koza Ltd, because they were appointed on an interim basis only and in breach of Turkish law, the European Convention on Human Rights and natural justice, so that it would be contrary to public policy for the English courts to recognise the appointment (“the authority claim”).

The parties agreed that the English court had exclusive jurisdiction to determine the company law claim, under Article 24(2) of the Brussels I Regulation (EC 1215/2012) (“Article 24(2)”) as follows:

> **“The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: […] (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies […], or the validity of the decisions of their organs, the courts of the Member State in which the company […] has its seat. In order to determine that seat, the court shall apply its rules of private international law”.**

However, Koza Altin and the trustees filed a jurisdiction challenge to the authority claim. Asplin J considered that the authority claim was inextricably linked to the English company law claim. The Court of Appeal upheld that decision. The Supreme Court unanimously disagreed with the interpretation of Article 24(2) by the Court of Appeal, concluding that:

i. Article 24(2) must be interpreted narrowly because it is an exception to general principles (in providing for exclusive jurisdiction).

ii. The ‘evaluative judgment’ as to what the case principally concerned was designed by the European Court to narrow the scope of Article 24(2) to focus on the key issues in the case, not to expand it to include ancillary claims not inextricably linked to the company and its place of incorporation.

iii. There must be a ‘particularly close link’ between the dispute and the state whose courts are said to have exclusive jurisdiction, so that those courts are best placed to decide the issue (EON Czech Holdings AG v Dedouch). [5]

iv. Article 24(2) only applies to disputes in which a party is challenging the validity of a decision of a company, rather than the decision itself, or an organ of a company under the applicable company law or the company’s articles of association (Hassett v South Eastern Health Board). [6] It also does not apply when ancillary claims are made challenging the company’s powers, such as in a dispute as to the validity of a contract said to be ultra vires, as in Berliner Berkehrsbetriebe (BVG) v JP Morgan Chase Bank NA. [7]

Commercial Relevance

This line of case law impacts litigation involving multinational corporate groups, preventing litigants from using a dispute about the internal affairs of one company to include all other claims concerning the group and, in the process, undermine normal jurisdictional rules.

It also emphasises that the courts of the place of incorporation are best placed to decide on issues which genuinely concern the validity and internal affairs of the company. This principle applies equally to companies incorporated in non-EU member states.

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[5] Case C-560/16) [2018] 4 WLR 94.

[6] Case C-372/08) [2008] ECR I-7403.

[7] Case C-144/10) [2011] 1 WLR 2087.

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