FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 1

THE GLOBAL ASSET RECOVERY COMMUNITY

INTRODUCTION

"We don't follow trends, we set them"

ThoughtLeaders4 FIRE is the global Asset Recovery Community bringing together key practitioners across contentious insolvency, fraud litigation and international enforcement.

Based on our expertise and understanding of the market we aim to do things differently, delivering thought provoking industry-led content and events to the full spectrum of civil fraud and contentious insolvency practitioners.

Featuring articles from practitioners in the UK, Singapore, Spain, Switzerland, Panama, Cayman Islands and Russia we are delighted to bring you our inaugural Litigation in Lockdown Edition of the FIRE Magazine, connecting you with the global asset recovery community in the midst of lockdown.

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ABOUT ThoughtLeaders4 FIRE

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Authored by: Rick Brown and David Chalcraft – HFW

In the midst of the COVID-19 pandemic and the far reaching and drastic measures implemented in numerous countries around the world, we are receiving an increasing number of insolvency and restructuring enquiries from our clients.

In these uncharted waters, there are some steps you can take to ensure that you are in the best possible position in the event that a counterparty experiences financial difficulty. This briefing note identifies some of these steps, primarily based on English insolvency law. (Whilst it is not unusual to have contracts, particularly of a cross border nature, governed by a foreign law, there are usually similarities between insolvency processes around the world.)

The key point to remember is that time is critical. Many companies are facing, or will shortly face, cash flow difficulties and without taking timely appropriate action, what may appear to be a small 'blip' could quickly escalate into a serious insolvency situation.

Monitor your counterparties and late payments

Much as you would carry out due diligence on a counterparty before entering into a contract with them, the same is true throughout the performance and lifespan of the contract. Audit your counterparties regularly. Check the Companies Registry where your counterparty is incorporated (in England, the Companies House website) to see if it is up to date with its filings, or if administrators have been appointed or if it has been dissolved. Similarly, most insolvency processes are the subject of advertisement in a governmental or state publication. In the UK, these are published in The Gazette, which is available to search online for free.

If your counterparty is late in making payments, chase these down promptly. If they are unable to pay the full amount due, consider a part payment, payment schedule or interest-only payment option. Most insolvency related issues start with late payments and so it is important to ensure that you are able to recover as much as possible prior to the counterparty entering into a formal insolvency regime. Make sure you record in writing any amendments to your contract, and check other contractual terms which may be relevant to renegotiation, including no waiver, entire agreement and no oral modification clauses.

Terms and conditions/ retention of title clauses

Many supply contracts will contain a retention of title (ROT) clause. This usually provides that the supplier of the goods retains legal title to them until they have been paid for in full by the counterparty. Whilst this may provide some comfort at the negotiation stage, enforcement can be difficult. For example, the goods may have been on-sold to a third party purchaser. If this third party was unaware of the ROT clause and the fact that their counterparty had not paid for the goods, it would be difficult to seek recovery of

them after the counterparty enters into a formal insolvency regime. Matters can be further complicated if several months have passed before the insolvency occurs.

If the goods have been converted or otherwise utilised in the manufacture or construction of a different asset, it is highly unlikely that the retention of title clause would be effective.

Time is important here: if your counterparty defaults and your contract has an ROT clause, take advice and then seek to exercise it immediately. This will assist in minimising any potential losses that may be suffered if the counterparty enters into a formal insolvency regime.

Security

If your counterparty enters into a formal insolvency regime and you do not have any form of security over the amounts owed to you, you are likely to be considered an ordinary unsecured creditor. This means that once the insolvency is largely concluded, you can expect a dividend payment of pennies in the pound of the total debt, shared amongst the other unsecured creditors.

If you have the benefit of a personal guarantee granted by one of the directors or owners of the counterparty, or a parent company guarantee, you should act fast. If a trading subsidiary enters into a formal insolvency regime, it may only be a matter of time before the parent company does likewise. A party with a parent company guarantee would then rank as an ordinary unsecured creditor in both the subsidiary's and parent company's insolvencies.

The moratorium

When a counterparty enters into a formal insolvency regime, a statutory moratorium comes into effect. This means that it is not possible for claims to be commenced or continued without the consent of the insolvency officeholder (in an administration) or consent of the court (in a liquidation). This leaves unsecured parties in a difficult position. Some contracts require a counterparty to notify the other party of its impending insolvency. In practice, this rarely happens.

With all of the above in mind, there are several further steps that parties can take in the event that their counterparty is not financially stable:

Lien over assets

In certain circumstances (either by operation of law or pursuant to contractual arrangements) it may be possible for a lien to be asserted over assets of the party in breach. We recommend that you seek legal advice if this option is being considered.

Termination on insolvency / Automatic Early Termination ("AET") clauses

Some contracts give a party the right to terminate on its counterparty's insolvency, others will contain automatic termination clauses which are triggered in the event of insolvency.

If your contract contains such a clause,

- check the definition of insolvency and the events giving rise to the right to terminate as these can vary widely.
- consider whether you want to terminate. It may be more desirable for the contract to continue and the products, goods or services to be delivered – perhaps so that you can fulfil other contracts.

In March 2020, the UK government announced plans to bring forward reforms to the UK insolvency regime as a matter of urgency in response to the pandemic. One of the significant changes is a proposal to prohibit the use of termination clauses triggered by insolvency. The rationale behind this is to assist companies in financial distress to restructure and/or be rescued. See more information below.

Freezing orders

If there is a strong suspicion of fraud or otherwise intentional dissipation of assets, it may be possible to apply for a freezing order. In England, it is also possible to apply for a worldwide freezing order, although enforcement in different jurisdictions would be subject to the law of those jurisdictions. In order to obtain a freezing injunction, the party applying will need to show (in essence) that they have a good claim and that there is a serious risk of dissipation of the assets. In addition, they must provide an undertaking in damages which will be called upon in the event that it is subsequently found that the order should not have been given and loss has been suffered as a result. As the application is usually made without notice to the other party, there is a duty of full and frank disclosure before the court. This option can be very effective, but it is costly and should not be taken without legal advice.

Third party debt orders (garnishee orders)

If your insolvent counterparty has not paid you and you are aware of a third party who owes them money, it may be possible to obtain a third party debt order (known in other jurisdictions as a garnishee order) to obtain the funds. Following an application to court (again usually without notice), the court will make an order that the third party should pay the applicant directly rather than the counterparty. By way of example, if A is owed £50,000 by B and C owes £25,000 to B, A would be able to apply for a third party debt order compelling C to pay the £25,000 it owes to B directly to A. If C owes £100,000 to B, A would be able to apply for a third party debt order compelling payment directly by C to A of the full £50,000 owed.

Attachment of earnings order

If your counterparty is an individual in employment, it is possible to apply for an attachment of earnings order, following a court judgment in respect of the debt, which if granted means that the individual's employer is ordered to pay a proportion of the individual's salary direct to the debtor, deducted from that employee's pay.

Bankruptcy (if an individual) or liquidation (if a company)

If a debt is outstanding, it may be possible to present a petition to either bankrupt an individual or wind up (liquidate) a company. The process is ordinarily commenced by serving a statutory demand, which requires that the full amount owing be paid within 21 days. If the debt remains outstanding after that 21 days, this will stand as preliminary evidence that the counterparty is insolvent. Following the making of a bankruptcy order or winding up order, an independent insolvency practitioner or the Official Receiver will be appointed to oversee the insolvent estate, to realise assets and to pay creditors in accordance with the statutory hierarchy. Bear in mind that after spending money to place the entity into a formal insolvency regime, you may only achieve a minimal return. This should only be pursued as a last resort.

Participation in foreign insolvency proceedings in a foreign jurisdiction

If your counterparty is incorporated or otherwise carries on business overseas and enters into a formal insolvency regime, it is important to obtain local legal advice as soon as possible. All jurisdictions differ and participating in foreign insolvency proceedings may be considered under local rules to be submission to that jurisdiction. A party participating in the foreign counterparty's insolvency may unwittingly be dragged into further litigation abroad in respect of previous payments or other transactions incurred pre-insolvency.

Recent Developments in the UK as a result of Covid-19

The UK government announced that it will introduce reforms to the English insolvency laws. No timing has been given nor has any legislation been published. The reforms are likely to include a temporary cessation of the rules on wrongful trading (i.e. trading whilst insolvent) to shield directors from personal liability for trading when technically insolvent. This suspension will be retrospective and will be back-dated until 1 March 2020. A temporary moratorium on liquidation has also been proposed which will prevent creditors from putting companies into liquidation if they are undergoing restructuring for a longer period that that currently provided. The City of London's Insolvency Law Committee has suggested a moratorium period of 90 days.

A temporary Practice Direction on insolvency proceedings ("TIPD") was introduced on 6 April 2020 in respect of insolvency proceedings before the courts. Its introduction makes it clear that the courts are intending that hearings continue as normal and provides workable solutions for court users during this pandemic.

The TIPD provides for remote hearings (i.e. by telephone or video conference (predominantly by Skype or Zoom) to be the default position and makes specific provision for urgent hearings in certain circumstances which include, among others, public interest winding up petitions and applications to convene a meeting for a members' scheme of arrangement. In an attempt to tackle some of the logistical difficulties that have arisen as a result of Covid-19, a statutory declaration can now be sworn in the presence of a person authorised to administer the oath by video conference. The TIPD will remain in force until 1 October 2020 unless it is amended or revoked by a further practice direction in the meantime.

ENGLISH COURTS: AT THE FOREFRONT OF FIGHTING FRAUD

Authored by: Jon Felce, Natalie Todd and Anastasia Tropsha – PCB Litigation LLP

As fraud continues to be rife, it is important to develop new tools and strengthen existing mechanisms to enable claimants to pursue, locate and enforce against fraudsters and their ill-gotten assets. Over the past few years, the English Courts have continued to develop the law in this area. We set out below a non-exhaustive snapshot of some of these developments in three areas. These highlight the progress continuing to be made in the fight against fraud, and bodes extremely well for the future.

"As fraud continues to be rife, it is important to develop new tools and strengthen existing mechanisms"

1 Fraud claims

Before even considering the vast array of measures available in support of fraud claims, a potential claimant needs to establish a cause of action and a party to target. What happens, however, where the victim does not know the identity of one or more of the fraudsters? The last few years have seen an increased use of the 'Persons Unknown' jurisdiction for this purpose. Whilst often seen in cybercrime cases[1], this jurisdiction has a wider application and can equally be used in more 'traditional' fraud cases. For example, in *Vneshprombank v Bedzhamov*, we commenced the claim not just against both the alleged fraudster and some of his alleged corporate vehicles but also 'Persons Unknown'. This enabled the claimant in that case to obtain freezing order relief against all such known and unknown defendants.

The *Vneshprombank* case is also noteworthy for the issue of an anonymised claim form. Faced with potential limitation deadlines before an application for without notice ex parte relief could be issued, the court permitted the claim form to be anonymised pending that application. This protected against both asset dissipation and the £1.3bn claim from expiring due to limitation. The respondent was unaware of the issued claim for a number of months before he was then served with ex parte freezing and search orders.

1 For example, the oft-referenced CMOC v Persons Unknown [2018] EWHC 2230 (Comm)

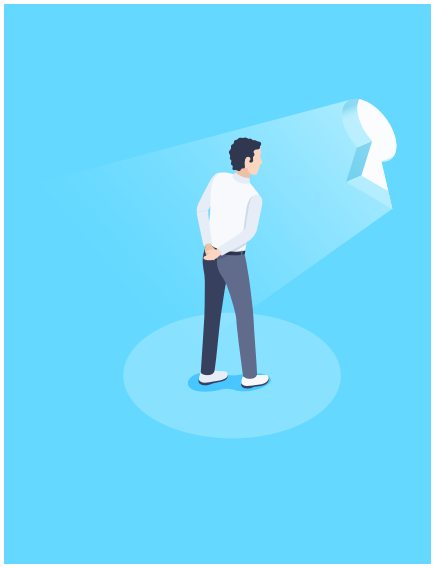
2 Ancillary liability

It can sometimes be the case that the route to recovery is best served by targeting third parties as well as or instead of the primary fraudster/s. Banks and other financial institutions can often find themselves in the firing line, and there have been a host of interesting developments in this area of the law. That, however, is deserving of an article in its own right.

In the meantime, it is apparent that more egregious third parties – the fraudster's associates and the like – are increasingly the subject of new and developing causes of action, with two such cases having reached the Supreme Court. In the first of those, contempt of court constituted unlawful means within the tort of conspiracy to injure by unlawful means (involving dealing with assets in breach of freezing and receivership orders) [2]. The second case was heard in early May, and involves whether the rule against reflexive loss bars creditors of a company from claiming directly against a third party for asset-stripping a company (itself a newly advanced tort) [3].

3 Asset disclosure

Whether in support of a freezing injunction or for the purpose of enforcement, asset disclosure orders can be a very powerful weapon. There have been some helpful developments regarding such orders. First, there has been an increasing movement away from considering legal and beneficial ownership to questions of control over assets. Second, asset disclosure has been required of all assets (including those in excess of the amount frozen), in order to ensure that any changes in value or intentional choice of hard-to-reach assets would not cause prejudice [4]. Third, where asset disclosure is insufficient, the Court is willing to embrace other relief to achieve the same objective. For example, in *Lakatamia v Su*, the claimant obtained an order that the defendant sign mandates to his email and social media providers to disclose details of his accounts to identify assets against which a judgment could be enforced and to give effect to injunctive relief [5]. Indeed, in such cases, the court may be willing to debar a defendant from participating in proceedings. This is available not only for inadequate asset disclosure but disclosure in the substantive proceedings and can be an effective tool in fraud claims.



4 The future…

Whilst there is a lot of uncertainty in the current climate as to what the future may hold, one thing that is clear is that fraudsters will continue to operate and innovate and that the law will need to meet this challenge with similar resolve. Whilst we have no doubt that it will do so, some interesting questions will arise along the way. For example, practitioners will need to develop solutions to the potential practical issues involved in implementing search orders in times of social distancing and self-isolation. Similar considerations will arise when personal service is required, such as in committal proceedings. Meanwhile, in a freezing order context, how will ordinary living expenses be assessed when a respondent's recent spending spans pre- and post-lockdown? Will remote hearings remain the default position, such that cross-examination on asset disclosure and oral examination of judgment debtors takes place via video link as a matter of course? The list goes on.

Whilst this whistlestop tour barely does justice to the variety of tools and developments in the court's armoury, what it does show is the English Court's willingness in appropriate cases to embrace innovative responses to fraud and assist victims vindicate their rights. It is for such reasons that the English Courts often continue to be the court of choice for such cases.

2 JSC BTA Bank v Khrapunov [2018] UKSC 19

3 Marex Financial Limtied v Sevilleja

4 Tatneft v Bogolyubov [2018] EWHC 1314 (Comm)

5 Lakatamia Shipping Company Ltd & Ors v Su & Ors [2020] EWHC 865 (Comm)

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We are delighted to be part of the FIRE Starters community and look forward to helping this next generation initiative grow from strength to strength.

Authored by: Héctor Sbert – Lawants (Spain)

The COVID-19 crisis has caused a perfect storm in which the increase in commercial disputes, fraud-related behaviours and insolvencies has come hand-in-hand with the impossibility of the judicial system to deal with them, as the crisis has also prevented the courts from operating normally.

Faced with this extraordinary situation, many countries have been forced to enact emergency legislation to cope with these difficulties, as well as to avoid judicial collapse once the courts can function again.

Interestingly, some of these legal reforms, despite being presented as momentary responses to an exceptional situation, actually hold the potential for structural change. I am referring to legal changes that, predictably, are here to stay, but also to adjustments in our professional behaviour.

1 Remote hearings

One of the most obvious changes caused by the crisis has been the forced introduction, in many countries, of remote hearings. In Spain, for example, a regulation that came into effect on April 30 requires that hearings during the current state of alarm -and up to three months after its completion- be held through videoconference whenever possible.

From a pure technical point of view, the courts are prepared for this, although with the logical need for practical adaptation. However, there are doubts as to the full adequacy of remote hearings in certain cases, either due to the complexity of the matter, or due to the difficulties in ensuring respect to the due process of law, notably fair and equal treatment.

Having said this, it is foreseeable that practice will allow us to delimit the cases in which a remote hearing is perfectly adjusted to the needs of the case. For this reason, we can imagine a not too distant future in which it is normal not to have to go to court in certain occasions that, to date, required us to do so -out of physical necessity but, above all, out of habit. This is a change that, in my view, we need to embrace, as it will undoubtedly contribute to a better case management, provided that it is used in cases where remote activity is truly adequate. For this reason, we need to get used to this change and make the effort to adapt to a new reality.

2 Insolvency measures

Other possible structural changes have to do with the legal treatment of insolvency. The measures recently adopted in Spain aim to prevent the current COVID-19 crisis from causing the massive closure of businesses and an avalanche of winding-up proceedings. For this purpose, our Insolvency Act has been modified to restrict the cases in which the insolvent debtor has the obligation to apply for liquidation. Thus, the circumstances that allow the renegotiation of restructuring agreements have been relaxed, if and when the debtor foresees difficulties in complying with them, in order to avoid leaving liquidation as sole alternative. Likewise, these measures will be in force during the state of alarm and within a year following its declaration. This means that they also have a potential for structural change in the short to medium term that could mean their definitive implementation in the Spanish insolvency system. This would be positive for the protection both of debtors and of creditors.

3 Our role as professionals

Finally, a few words about our role as litigation and insolvency professionals. Our way of working can also change structurally with this crisis in a positive way. It has always been said that the role of the advisor is to be as close as possible to his or her clients. Well, there is no better time than this to do it. Our clients need more quality guidance than ever. The scenarios are uncertain. At the same time, anxiety and the need for answers are high. With our capacities to act judicially very limited, our professional ability to provide effective answers will be tested. On many occasions, there will be no immediately workable solutions. However, even under seemingly impossible challenges, we will be able to demonstrate to our clients our willingness and ability to support them. For this reason, we have the opportunity to approach our clients in a way that is both professional and, above all, human. An approach where the promotion of our services is not the priority, but the need to listen, to empathize, to share our concerns and to add value, before expecting anything in return. A way in which the priority is to strengthen relationships, to overcome difficulties together and not to sell ourselves. A way in which preparing the future is as important as navigating the present difficulties. If we do so, our clients will be able to distinguish those professionals who accompanied them effectively in complex circumstances and those who didn't. At the same time, we will have the opportunity to use an important set of skills that will allow us to continue to thrive and prosper when this crisis passes.

Authored by: Shaun Reardon-John – Martin Kenney & Co. Solicitors (BVI)

Shaun Reardon-John outlines why pre-action asset investigation and preservation is going to be crucial during the Coronavirus crisis.

As legendary investor Warren Buffet once stated: *"It is only when the tide goes out that you learn who has been swimming naked."*

Right now that statement feels ominously accurate. Those who lived and worked through the last financial crisis will be all too aware that fraud is often exposed during a receding market… and those behind the fraud are not always those creditors expect. Even now, there are still remnants of cases that stemmed from that period in 2008 making their way through the court system.

It is clear that there will be difficult times ahead for many companies, both large and small. Cash is king and even corporate entities backed by the wealth of billionaires are finding themselves in trouble, particularly if their assets are illiquid.

With governments around the world trying to keep economies alive on life support, some inevitable failures will be delayed – but not necessarily prevented.

Nowhere was this seen more clearly than in the mortgage market during the last financial crisis. Large numbers of self-certification mortgages were approved without any checks, based on inflated valuations agreed by valuers who were complacent in a rising market. Exposing those weaknesses in the system then invited fraudsters to run riot, which they did with ease. Law firms were brought down by rogue conveyancing practitioners, who often fled jurisdictions having stolen significant sums before the banks or the firm's other partners had realised what had happened.

"It is only when the tide goes out that you learn who has been swimming naked."

Some companies may be able to ride the storm this time round, or even be able to take advantage of the situation. However, many others will be forced to lay off staff. The airline industry is already undergoing a wave of redundancies (BA alone has announced 12,000 redundancies, Virgin Atlantic 3,000 and Ryanair a similar number). Companies with a quickly contracting workforce could be exposed to internal or external fraud as people adjust to new roles and responsibilities.

Where previously several people might have been involved in approving significant transactions, the reorganisation of companies could see these decisions placed in the hands of one or two personnel. Other areas of concerns will be government grants. In the panic to keep the economy afloat there will be unscrupulous parties seeking government funding for phantom projects. Locating the proceeds of these frauds and assessing the enforcement prospect at the outset will be crucial to prevent the proceeds of crime being layered through corporate structures over several jurisdictions, each fronted by nominees.

After the 2008 crash, our lawyers at Martin Kenney & Co. were heavily

involved in tackling the after-effects of several notorious Ponzi schemes. Those who had invested with Bernie Madoff and Allen Stanford soon found out they faced possible ruin. Those who'd withdrawn their money early often received a windfall from their Ponzi "interest"; those who had not and remained "invested" often suffered catastrophic losses.

The recent Privy Council decision in *Stanford International Bank [2019] UKPC 45*, in which our team was involved, took a divergent approach to the US courts and declared that losses should fall where they landed. In the US, the Receiver was able to recover sums from deemed 'net winners'. These decisions will no doubt lead insolvency and legal practitioners to consider the best jurisdictions for recovery proceedings to be initiated. We may in the end see otherwise competing practitioners working more collaboratively to maximise recovery for creditors.

Looking forward, how claims are pursued could be about to drastically change. If there is a second or third wave of Covid-19, witnesses and experts are likely to be unwilling to travel. Conversely, it will likely be easier to locate people who may otherwise keep on the move. Ourselves and colleagues are already noticing that clients are becoming accustomed to mediation and other alternative dispute resolution methods via remote videoconferencing and depositions. Some judges are also reporting that remote hearings are more efficient, which may lead these becoming the norm for certain types of hearings in the future.

As ever, there will be good claims hampered by a lack of funding. Where there are good claims, the prospects of asset preservation should be considered at the outset to ensure the client (and litigation funder) isn't left with a pyrrhic victory in the courts alone. Practitioners will know that appearances can be deceiving. A corporate structure, owned and controlled by a small group of people, may outwardly appear asset rich but, scratching the surface, turn out to be a mere front, the assets having been stripped by an unknown beneficial owner who has 'layered' their interests. With the ever-increasing ability to remotely create and open companies in several jurisdictions, and to transfer and convert assets online, it is all too easy to create multiple layers across several jurisdictions which allow the fraudster to distance assets from effective enforcement of a judgment or award.

In this scenario, what hope does a claimant have? Ideally, enforcement steps should be taken before the debtor is aware anyone intends to bring a claim. We often undertake asset investigations for clients in several jurisdictions (where the debtor has known links) before commencing an action. Once assets have been identified, one can then advise the client on the jurisdictions where asset preservation and enforcement is likely to be possible – and those where it will be more difficult, allowing more efficient allocation of limited resources.

The most common asset investigation and preservation tools in the BVI are Norwich Pharmacal Relief sought on an *ex parte* basis, coupled with a seal and gag order and, subsequently, a freezing injunction or interim Receiver. In addition, 1782 applications in the US have also been a fruitful source of discovery for our team.

Once sufficient assets are identified, proceedings can be commenced with more comfort. The team here at Martin Kenney & Co. often finds that further assets become discoverable during the course of proceedings, as a result of these initial discoveries, and evasive debtors can lose credibility before the court as a result.

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PASSING THE BUCK: WHO IS RESPONSIBLE FOR A FRAUDULENTLY-DIVERTED PAYMENT?

Authored by: Matthew McGhee – Twenty Essex

A form of fraud which FIRE practitioners are often asked to advise on starts with a contract, where one party is required to pay the other. For example, the paying party might be a buyer under a sale contract. The dispute arises where a fraudster has induced the buyer to pay the fraudster instead of the seller.

Various options are available to the parties in this instance. Sometimes commercial parties have insurance coverage. Alternatively, they may decide to take legal action – either against the fraudster directly (e.g. *CMOC v Persons Unknown* [2019] Lloyd's Rep FC 62 and *AA v Persons Unknown* [2020] 3 WLR 35) or against third parties who are alleged to be legally responsible for the loss (a commonly-targeted class is the banks which handled the fraudulently-misdirected payment, though such claims have their own set of challenges).

However, in the first instance, there is normally a disagreement between the buyer and seller as to which of them is at fault and (they argue) must therefore bear the loss. Does the buyer have to pay the price twice, or does the seller have to forgo payment from the buyer for the goods? This apparently simple question bears different answers in different circumstances. This note highlights some of the main considerations that bear on this question.

What is the contractual obligation?

Generally, the buyer must grant the seller *"unconditional and unfettered right to the immediate use of the funds"*: *K v A* [2019] EWHC 1118 (Comm). However, the specific terms of the contract warrant careful consideration. The obligation may, for example, only be to pay as instructed by the seller's servant. The buyer should consider whether, as a matter of construction, they have performed their obligation.

Who is the fraudster?

They may be the seller's employee, in which case they are likely acting outside of their actual authority but may still be within their apparent authority. The buyer can discharge their debt by paying the seller's apparent agent (*Barrett v Deere* (1828) 173 ER 1131), unless the buyer is on notice that the employee may be acting outside the scope of their agency (*Midland Bank v Reckitt* [1933] AC 1). The buyer may need to exercise reasonable care before they can rely on apparent authority: *East Asia v PT Satria* [2019] UKPC 30.

The buyer can discharge their debt by paying the seller's apparent agent (Barrett v Deere (1828) 173 ER 1131), unless the buyer is on notice that the employee may be acting outside the scope of their agency (Midland Bank v Reckitt [1933] AC 1).

How does the fraudster contact the buyer?

They may use an email address which is confusingly similar to the seller's to send payment instructions. Frequently, the address uses replacement letters or numbers (e.g. @se11er.com vs @seller.com), but the use of punycode is also encountered (e.g. @xn--seler-85a.com is generally rendered @selĺer.com). The confusingly similar email address is identifiable by the buyer alone; this attack by a fraudster takes place without any fault or involvement of the seller. The buyer in this case has simply paid the wrong account and likely remains liable to the seller.

Alternatively, the fraudster may have compromised the seller's email server and used a genuine email address. In this case, the question is whether the fraudster (not the email address, which is not a legal person) has the seller's apparent authority. The difficulty is in identifying the seller's representation that the person (i.e. fraudster) with access to the email address had the seller's authority. Apparent authority was dismissed in *J Brazil Road Contractors v Belectric Solar* (22 January 2018, unreported), where a party's email address had been compromised. However, it may be arguable (by analogy with *Barrett*) that apparent authority can be conferred relying on the seller's control over its email domain.

What if the fraudster tricks an agent, who passes on the false instructions?

If the agent is the seller's agent, the buyer probably discharges their debt. Even if the agent is not authorised to change payment instructions, they may be authorised to communicate that the seller had changed the payment instructions: *First Energy v Hungarian International Bank* [1993] 2 Lloyd's Rep 194. If the agent was the buyer's agent, the situation is the same as if the buyer was contacted directly. Likewise, if the agent was a 'pure intermediary' with no agency function then the message is treated as being passed directly to the buyer: *The Mercedes Envoy* [1995] 2 Lloyd's Rep 559. In the unusual case of a jointly-authorised agent, it is likely that the agent is acting in his capacity as the buyer's agent at all material times (for complex reasons discussed in (2017) 3 LMCLQ 435).

Does it matter if one party was hacked?

The buyer and seller will often claim that the other was responsible for the fraud (e.g. due to poor cyber-security). However, this may be difficult to prove and, in any event, is of limited legal relevance. Various arguments have been raised before, such as:-

- It was an implied term of the contract that the party at fault would take reasonable care to maintain cyber-security. This argument is specific to every contract, but failed in *Sell Your Car With Us Ltd v Sareen* [2019] EWHC 2332 (Ch) and *Rijksmuseum Twenthe v Simon C Dickinson Ltd* (unreported, 30 January 2020). Even if the term can be implied (or is, unusually, express), there will be difficulties in proving breach and causation.
- The party at fault impliedly represented that its emails were secure, with this either establishing apparent agency or (on being false) giving rise to a claim for misrepresentation or tortious liability. For this argument to succeed, a clear representation is required – and found wanting in *Sell Your Car With Us Ltd v Sareen* [2019] EWHC 2332 (Ch).
- On discovering a previous fraudulent email and not notifying the buyer, the seller impliedly represented that the historic fraudulent email was genuine. For this argument to succeed, the buyer must demonstrate the requisite knowledge on the seller's part, which was absent in *Rijksmuseum Twenthe v Simon C Dickinson Ltd* (unreported, 30 January 2020).
- The party at fault assumed a tortious duty of care to the counterparty to protect them from this form of fraud. For the argument to succeed, the buyer must demonstrate a voluntary assumption of duty by the seller, which was found wanting in *Rijksmuseum Twenthe v Simon C Dickinson Ltd* (unreported, 30 January 2020).

Matthew has recently written A Practical Guide to Cyber Fraud Litigation, addressing the procedural and substantive legal issues arising in this burgeoning practice area. The handbook will be published later this month and for further details and pre-orders, readers are encouraged to contact Matthew on Matthew has recently written A Practical Guide to Cyber Fraud Litigation, addressing the procedural and substantive legal issues arising in this burgeoning practice area. The handbook will be published later this month and for further details and pre-orders, readers are encouraged to contact Matthew on MMcGhee@TwentyEssex.com.

USING CREDITOR ADMINISTRATION APPLICATIONS AS A TOOL FOR ASSET RECOVERY IN RESPECT OF CORPORATE TARGETS

Authored by: Luke Harrison – Keidan Harrison LLP

The insolvency process often features as a weapon in the asset recovery arsenal so far as corporate targets are concerned. It's utility not only as a mechanism to recover assets but also as a tool with which to recovery information is well known. The appointment of administrators by creditors with a qualified floating charge is quick and effective and so it is not surprising why it is favoured by secured creditors. It's use by unsecured creditors is, however, much less frequent principally because of the lack of information about the company's business and affairs.

In the context of fraud or suspected fraud very often the victims are unsecured creditors. They do not have the ability to appoint administrators out of court in the same way as a holder of a qualified floating charge. The debts that they claim may very well be disputed (albeit the dispute may be fabricated with a view to seeking to thwart the opening of insolvency proceedings).

Suing using the Civil Procedure Rules ("CPR") Part 7 procedure can be seen as unattractive as the claimant will have to incur costs and expenses in respect of the action knowing that judgment won't be the end of it as further enforcement proceedings will be inevitable. Further, transactions that would be reviewable under sections 238 Insolvency Act 1986 ("IA") (transactions at an undervalue) and section 239 IA (preferences) will unlikely be reviewable if insolvency proceedings are opened after the conclusion of a CPR Part 7 claim.

Pursuing a CPR Part 7 claim also gives the creditor little information which might be used for enforcement unless they have also obtained a freezing order along with the usual information provisions. Even then the information provided may be defective and subsequent committal proceedings may be necessary to enforce the terms of the freezing order, all adding to the time and cost involved.

In certain circumstances creditors may be able to petition for the compulsory winding up of a company. Upon presentation of the petition creditors benefit from the ability of a subsequently appointed liquidator being able to claw back void transactions under section 127 IA. Further the issuing of a petition starts the look back period or "relevant time" (section 240 IA) in respect of preferences and transactions at an undervalue. As noted above, however, the debtor company may very well purport to dispute the debt giving rise to the risk of a defended petition and/or an injunction restraining presentation or advertisement of a petition. Further the time from issue to final hearing of the petition could take several months (this period has increased substantially as a result of COVID19 and the winders list taking place by virtual hearings).

A creditor may of course seek to appoint a provisional liquidator when issuing a petition. The nature of this relief is draconian and so the Court will usually require a cross undertaking in damages to be provided so as to compensate the company for any loss caused to it by the appointment of a provisional liquidator in the event that the petition to wind up the company is dismissed [1]. This means that the application can be high risk particularly if the creditor has little information about the target company.

1 Re Highfield Commodities Ltd BCLC 623.

An application by a creditor to appoint an administrator, however, carries with it much less risk, is swift and relatively inexpensive. It can be made by a creditor even if a debt is disputed on grounds which appear to the court to be substantial (the fact that at debt is disputed being a relevant factor to be taken into account when the Court is exercising its discretion [2]).

The recent decision of Re Gate Ventures plc [2020] EWHC 709 (Ch) highlights the utility of the creditor administration application as an asset recovery tool. Quite unusually the application was the "second bite of the cherry" for the creditor, Zheng Yongxiong ("Mr Zheng"), who had previously made a failed application that was heard before Insolvency and Companies Court Judge ("ICCJ") Prentis on 11th October 2019. ICCJ Prentis considered that the company would be able to trade out of its cash flow difficulties better outside of a formal insolvency process but he did make an order requiring the company to provide certain ongoing management information to Mr Zheng ("the Management Information"). That unreported decision was appealed and came before Mr Justice Zacaroli on 4th March 2020 [3] on an application for permission to amend the grounds of appeal and for permission to appeal.

By way of background Mr Zheng was a shareholder and creditor in the company and was owed approximately £2.5m which was due for repayment in April 2020. The company's evidence at the hearing before ICCJ Prentis included a witness statement of a Mr Carter in respect of which submission were made by Counsel for the company. The evidence and submission were to the effect that the company would be receiving quarterly payments from a related company from August 2019. It later transpired, in part through the provision of the Management Information, that this was not likely to be true. Permission to rely on the new evidence was granted along with permission to appeal on amended grounds. Ultimately, however, the administration order was made on the basis of a second first instance application relying on the new evidence.

In making the order ICCJ Prentice took into account a number of factors including:-

- That the company was by all accounts insolvent on a cash flow basis even if balance sheet solvent;
- The purpose of administration could be met by potentially seeking further investment to continue to trade the company as a going concern and/or by providing better realisations than if the company were to be wound up;
- That the company had failed to achieve the level of income that had been forecast on the previous occasion;
- That certain questionable transactions and misapplication of company assets had been identified which needed to be investigated;
- That by making the order the relevant time for the purposes of s240 IA would start from the filing of the application.

The case illustrates how the Court is willing, on an application for an administration order, to be creative and even if an order is not made initially the Court may conceivably be asked to make an order to provide ongoing Management Information to enable a creditor to make a second application if necessary at a later date.

2 Fieldfisher LLP v Pennyfeathers [2016] EWHC 566 (Ch)

3 Yongxiong v Gate Ventures plc - [2020] All ER (D) 82 (Apr)

COVID-19 CHALLENGES TO CROSS-BORDER INSOLVENCY

Authored by: Ays Lidzhanova – Egorov Puginsky Afanasiev & Partners (Russia)

COVID-19 has had an overwhelming impact on the global economy. Future economic effects of the pandemic will largely depend on the efficiency of government actions. At present, record number of personal, corporate, local, and cross-border bankruptcy filings is being anticipated due to the virus.[1] A vast majority of airlines is likely to collapse without extensive financial support paving the way to a litany of multinational failures.[2]

Cross-border insolvency is a complex process involving opposing interests, contrarian regulations, and multiple jurisdictions. However, coronavirus further exacerbates a myriad of issues that already exist.

1 Race of Creditors

In light of the outbreak, countries are implementing individual measures regarding insolvency proceedings and restructurings. Some have provided for a temporary stay on obligation to file for insolvency (Czech Republic, Germany, and Spain), a moratorium on creditors' initiation of bankruptcy proceedings (Russia), and a "breathing space" period (as proposed in the UK). [3] These steps are intended to alleviate distress caused by the economic impact of the virus.

On the other hand, creditors of such companies are also suffering from the pandemic. Quite possibly, they will not be satisfied with the government response to the crisis, which restrains them from seeking debt recovery. For this reason, they may look for alternative ways of collecting their claims.

In particular, question remains whether such support measures protect those debtors who have vital assets and representative offices in jurisdictions, which do not take equal steps. Will creditors try to get ahead of each other in order to be the first ones to seize assets in such jurisdictions? If so, race of creditors[4] may nullify government attempts to keep businesses afloat.

2 Pari Passu

Such actions would also be contrary to the principle of *pari passu*, a fundamental rule of corporate insolvency law. *Pari passu* means *"proportionally, without preference"* [5] and, in general terms, provides that assets of a company in insolvency are equally distributed between creditors.[6]

It is further possible that due to COVID-19 restrictions some foreign creditors are not even going to be able to effectively take part in the distribution of a debtor's assets. For instance, should the European Union lift internal restrictions on movement but continue to maintain its borders closed to non-EU residents, is that going to mean that creditors outside of the EU have equal representation rights? Would they be able to challenge such distribution? Failing which, value of the insolvency estate and other creditors' interests may end up being damaged.

1 See, e.g., https://www.bloomberg.com/news/articles/2020-04-10/record-bankruptcies-predicted-in-next-year-as-unemployment-soars

2 See, e.g., https://www.businessinsider.com/coronavirus-airlines-that-failed-bankrupt-covid19-pandemic-2020-3

3 See, e.g., INSOL International and the World Bank's Global Guide: an interactive map of measures adopted to support distressed businesses through the COVID-19 crisis at http://insol-techlibrary.s3.amazonaws.com/5685f850-7835-478a-ac58-688cc832e4ba.pdf?AWSAccessKeyId=AKIAJA2C2IGD2CIW7KIA&Expires=1588116491&Signature=4SFnJ24RWpwHPA8q0C5eb%2B81EtI%3D

4 See, e.g., J.A. Kirshner, International Bankruptcy: The Challenge of Insolvency in a Global Economy (2018), I. Merovach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (2018).

5 R. Mokal, Corporate Insolvency: Theory and Application (2005).

6 See, e.g., I. Fletcher, The Law of Insolvency (2017), Philip R. Wood, Principles of International Insolvency (2007).

3 COMI

It is likely that national stimulus measures are going to apply in respect of businesses that have their centre of main interest ("COMI") in such jurisdictions. [7] In case of European companies, jurisdiction of the registered office shall be presumed to be their COMI. [8] However, this presumption is rebuttable based on factual circumstances and shall not apply if the registered office has been moved to another EU member state within three-month period prior to the request for opening of insolvency proceedings.[9]

In this regard, it will be worth following and analysing how above issues are going to be dealt with in bankruptcy proceedings initiated in jurisdictions, which are not debtor's COMI (e.g., country of debtor's registered office) and do not offer protective measures.

4 Conflict of Laws

In some jurisdictions, directors can be found personally liable for failure to request opening of insolvency proceedings and for insolvent trading (Australia, Germany, Singapore, the UK). In these uncertain times, such statutory duties may cause directors to cease trading or pre-emptively file for bankruptcy as a way to avoid potential liability.

In response to directors' anxiety during the pandemic, the above mentioned governments have temporarily waived directors' obligation to initiate bankruptcy proceedings. Additionally, wrongful trading rules were relaxed.

However, the way these emergency measures are going to be perceived in cross-border insolvency proceedings remains unclear. Will it lead to discrepancies in their interpretation and application? Is there a way of challenging such transactions?

5 Court-to-Court Cooperation

The way COVID-19 has impacted global community is unprecedented. The spread of infection has been uneven around the world. As some countries are already relaxing controls, others are yet to reach their peak. Unsurprisingly, whether bankruptcy courts are open or not differs from state to state.

Due to lockdown measures and restrictions to operating hours court-to-court cooperation is going to be hampered. Simultaneously, foreign representatives' involvement, which often requires physical attendance, runs the risk of failing to meet the "maximum extent possible" [10] standard. As a result, communication of insolvency courts and interested parties is more challenging than ever.

Multiple questions regarding efficiency of international insolvency cases in times of COVID-19 remain unanswered. Will creditors and administrators be able to obtain recognition of bankruptcy proceedings in foreign jurisdictions to gain access to assets? What will be the framework for creditors, debtors, administrators, and courts to handle such situations? In order to find successful resolution, cross-border insolvency cooperation will have to develop accordingly.

Should the virus pandemic be brought under control in the foreseeable future, some of these issues may end up getting resolved on their own. However, in case of prolonged contagion, we are likely to see the number of these challenges continuing to rise.

7 See UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.

8 Art. 3 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast).

9 *Id.*

10 Art. 25 of the UNCITRAL Model Law on Cross-Border Insolvency (1997).

ASSET TRACING & RECOVERY IN SINGAPORE

Authored by: Abraham Vergis, Danny Quah, Kenny Lau – Providence Law Asia (Singapore)

1 Singapore is one of Asia's leading centres for conventional banking and financial services, and is fast becoming a hub for digital payments and cryptocurrency platforms. As such, there is an ever-present risk of fraud. This article provides a snapshot of the mechanisms through which victims of fraud may seek to recover assets via civil proceedings in Singapore.

I ***Common causes of action***

2 Commonly invoked causes of actions in respect of fraud litigation include:

a. conversion;

b. unjust enrichment;

c. breach of duty (fiduciary or otherwise); and

d. deceit or fraudulent misrepresentation.

3 It is also common for parties who have assisted the main fraudster or have received or helped transmit the proceeds of fraud to be joined as defendants. The common causes of action are:

a. conspiracy;

b. dishonest assistance; and

c. knowing receipt.

II. ***Interlocutory relief***

4 Plaintiffs can rely on the following tools available under Singapore's court rules to identify, freeze and/or seize assets to aid in the main prosecution of the claim:

a. *Mareva* (or freezing) injunctions coupled with ancillary disclosure orders;

b. *Anton Piller* orders; and

c. pre-action disclosure / interrogatories.

5 *Mareva* injunctions are typically applied for at the commencement of civil proceedings and on an *ex parte* basis, so as to ensure that the defendant does not have notice of the proceedings and does not have the opportunity to dissipate assets. If applied for *ex parte*, full and frank disclosure must be provided by the plaintiff to the court and a minimum of two hours' notification must be provided to the counterparty before the hearing, except in cases of extreme urgency or with leave of court. An undertaking as to damages will also have to be provided by the plaintiff.

"This article provides a snapshot of the mechanisms through which victims of fraud may seek to recover assets via civil proceedings in Singapore"

6 Mareva injunctions may also be sought in respect of third parties who are holding assets on behalf of the defendant or whose assets the defendant has control over.

7 A court can grant a mareva injunction over assets held in Singapore when the following conditions are met:

a. there is a valid cause of action over which the Singapore courts have jurisdiction;

b. there is a good arguable case on the merits of the plaintiff's claim;

c. the defendant has assets within the court's jurisdiction; and

d. there is a real risk that the defendant will dissipate their assets to frustrate the enforcement of an anticipated judgment by the court.

8 A standard adjunct to a mareva injunction is the ancillary disclosure order. This requires the defendant to disclose *all* of his assets, even if the assets restrained are limited to those of a certain value. This will allow the plaintiff to determine whether the defendant has been moving his assets in breach of the *mareva* injunction.

9 *Anton Piller* (or search) orders are taken out for the purposes of searching premises and seizing evidence. Like *Mareva* injunctions, *Anton Piller* orders are usually taken out at the same time as the commencement of civil proceedings and on an *ex parte* basis.

10 A court can grant an *Anton Piller* order if the following conditions are met:

a. there is an extremely strong prima facie case;

b. the potential or actual damage to the plaintiff is serious if the *Anton Piller* order is not granted;

c. there is clear evidence that the defendant has incriminating documents in their possession; and

d. there is a real risk that the defendant may destroy the incriminating documents before the *inter partes* application.

11 Pre-action disclosure or interrogatories can be applied for to obtain information on who to sue and whether there is a cause of action against the suspected fraudsters. Such applications include *Norwich Pharmacal* and *Bankers Trust* orders. A court will grant such orders if the following conditions are met:

a. the person from whom discovery is sought was involved in the wrongdoing, even if the involvement was innocent;

b. the plaintiff must be able to show a reasonable *prima facie* case of wrongdoing against the defendant;

c. the plaintiff must show that the disclosure sought is necessary to enable him to take action, or at least that it is just and convenient in the interests of justice to make the order sought; and

d. there is credible evidence that the intended proceedings have a Singapore nexus.

12 Interlocutory orders obtained from specified foreign jurisdictions may also be amenable to enforcement under Singapore's statutory regime. Under the Reciprocal Enforcement of Foreign Judgments Act, which was recently amended in October 2019, an interlocutory order from a recognised court of a foreign country may be registered in Singapore if it would be just and convenient to do so. The Singapore government gazette will stipulate which specific courts are regarded as a *"recognised court of a foreign country"*; to-date, there has not yet been any such recognised foreign court in respect of the enforcement of an interlocutory order.

III *Enforcement*

13 If the plaintiff is successful in proceedings, and the defendant fails to pay the judgment sum, the plaintiff can take out the following enforcement actions:

a. examination of judgment debtor to compel the judgment debtor to reveal his assets;

b. writ of seizure and sale for the appointment of a bailiff to seize the defendant's property;

c. garnishee orders to collect money from third parties who owe money to the defendant; and

d. bankruptcy and winding up applications.

Authored by: David M. Mizrachi, B.A., J.D – MDU Legal (Panama)

Panama, which infamous "Panama Papers" have put the country in the limelight for the past four years, is not a traditional offshore jurisdiction. It is more of a traditional Civil Law jurisdiction with a (formerly) notable offshore sector. In the strict Civil Law tradition, Panamanian substantive and procedural laws tend to stress legal remedies over equitable remedies. Thus, its judiciary is not prone to issue equitable relief to the same extent it is issued by its Common Law counterparts in England, the British Commonwealth and the United States of America. Among the few examples of equitable relief in Panamanian civil procedure are the provisional remedies known as "General Conservatory or Protective Measures" found in article 569 of Panama's Judicial Code. Following the legislative repeal of article 569 in 2013, said interim remedy was reestablished by the legislature in December of 2019 as we shall explain herein.

Up until March 26, 2013, article 569 was part of the Judicial Code. At that time, the provision was struck down, but it was eventually revived on December 10, 2019. That provision read and currently reads as follows:

569. *In addition to regulated cases, the person having a justified motive to fear that during the time prior to the judicial recognition of its right it shall suffer an immediate or irreparable harm, may request the judge [to issue] the conservative or protective measures [deemed] more appropriate to provisionally secure, according to the circumstances, the effects of the decision on the merits. The petitioner shall present summary evidence, and also, [post] the corresponding bond for damages. The petition shall be handled and decided as it is conducive according to the rules of this Title.*

As evident from the cited text, article 569 provides provisional relief to litigants applying equitable criteria, similar to that applied when granting a temporary restraining order or other usual provisional Common Law remedies. Among the requirements are **1)** providing summary (i.e. prima facie) evidence, **2)** posting a bond and showing **3)** a justified fear, of **a)** suffering immediate or irreparable damage, **b)** to secure the effects of a judgment on the merits. It differs from similar remedies under the Common Law by not requiring the petitioner to show a "likelihood of success on the merits". Yet it is similar to its Common Law counterparts in the sense that a showing of irreparable harm is required.

It is a very generous provisional remedy which grants the judge the power to issue "appropriate" measures to avoid the harm. Prior to its repeal in 2013, some courts tended to be quite creative and liberal in granting the provisional measures available under article 569. The relief granted ranged from suspending the effects of a transaction, preventing transactions from happening, issuing cease and desist orders and other similar equitable relief. In one particular case, a civil court went as far as ordering all private media outlets in Panama not to publish news about a specific public official. In another, a telecommunications company was temporarily banned from providing a service using a specific technology, even though it had been licensed by the telecommunications regulator.

Thus, given the broadness of the remedy and the lack of guidelines to apply it, it came under constant criticism. Such criticism led to the repeal of the provision on March 26, 2013 through the enactment of Law 19 (2013). Law 19 (2013) plainly stated: "**Article 1.** Article 569 of the Judicial Code is derogated….**Article 2.** This Law shall become effective on the day following its promulgation." It was promulgated on the same day it was enacted. Law 19 did not even have a preamble. https://www.organojudicial.gob.pa/uploads/wp_repo/uploads/2016/11/Ley-19-de-2013.pdf It was enacted following a legislative initiative of the Executive Branch. Among the motives for repealing article 569 of the Judicial Code were the "eminent amplitude and discretional nature" of the remedy, its "excessive use" and them becoming an "open door to the detriment of the defendants' rights" in opposition to "the principle of procedural equality". According to its motives, the repeal sought to "eradicate possible practices, supported by the holders of [Judicial] Offices who may be influenced by the plaintiffs for the application of these types of protections." http://200.46.254.138/apps/seg_legis/PDF_SEG/PDF_SEG_2010/PDF_SEG_2013/PROYECTO/2013_P_565.pdf

In spite of the preceding arguments, it may be said that the repeal of article 569 of the Judicial Code created an equitable relief void, as the rights of litigants could no longer by adequately protected, through "generic" measures. In light of this, Panama's legislature recently revived article 569 through the enactment of Law 119 (2019). Law 119 (2019) reestablished the validity of article 569 by repealing Law 19 (2013), and became effective on 11 December 2019. https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/2010/2019/2019_650_3777.pdf

Thus, following the enactment of Law 119 (2019), article 569 of the Judicial Code was restored as previously written, supra. The motives for the enactment of Law 119 (2019) included harmonizing the Judicial Code with other Codes and avoiding "technical-procedural uncertainty" caused by the absence of such measures within the Judicial Code as was the case from March 2013 until December 2019, when Law 119 (2019) was promulgated and article 569 reestablished. https://www.asamblea.gob.pa/APPS/SEG_LEGIS/PDF_SEG/PDF_SEG_2010/PDF_SEG_2019/2019_A_070.pdf

While it is probably too early to assess the effect of the reinstatement of article 569 of the Judicial Code, it is certain that it should be a very useful tool when pursuing asset tracing and recovery matters in Panama.

SWITZERLAND: EASY STEPS TO KICK OFF AN ASSET SEARCH

Authored by: Yannick Poivey – Swiss Forensic & Compliance Sàrl (Switzerland)

Switzerland's recurrent presence in multi-jurisdictional asset tracing exercises is certainly not proportionate to the small size of its territory. For creditors however, the Swiss jurisdiction poses a number of challenges in terms of information retrieval. From the lack of centralized data to the use of three different main languages in business life, conducting research in Switzerland is often perceived as complex and costly. That said, with a bit of time and expertise, a number of easy research steps can bring about significant preliminary information for the purpose of retrieving assets.

Clients at the outset of a case typically ask whether it is possible to locate a subject person and check whether that person owns properties in Switzerland. In spite of the deeply decentralised structure of Switzerland, various providers of credit reports maintain quite thorough databases of residents in the country and foreigners involved in a Swiss company. These reports usually mention current as well as past residential addresses. Although the information delivered is sometimes vague, outdated or confusing due to namesakes, the credit reports often constitute useful starting points for locating individuals and finding their properties.

The next step involves contacting local administrations to ask for residential address confirmation. Residence information is recorded at town level by specific registries. Their level of cooperation depends on their sensitivity to privacy issues, but they would generally not refuse to confirm to the investigator whether a subject person is officially a resident at a given address.

Once the current official address and / or past addresses have been retrieved, identifying the property owner is quite straightforward, with some exceptions. The local land registry provides this information, sometimes through a mere phone call. Documentary evidence is usually available too, although information in the land registry records available to third parties is quite limited.

A few additional public sources may help increase the comprehensiveness of the address search for identifying properties. In a recent case, we conducted a search in a specialised database that keeps records of construction permits filed by property owners. This research led to the identification of an address that was not listed in credit reports or phone directories, where the subject person owned a large villa.

"At the beginning of a case, some clients contend that spending time on commerce registry filings might not represent an optimal use of the resources allocated to the investigator. But in many situations, this assumption is wrong."

When the investigator's interests lean towards corporate entities, commerce registries (usually one per *canton*) can provide valuable information that should not be overlooked. At the beginning of a case, some clients contend that spending time on commerce registry filings might not represent an optimal use of the resources allocated to the investigator. But in many situations, this assumption is wrong.

Firstly, commerce registry filings often provide information about shareholding at some point in time. Typically, detailed information about the founding shareholders is available. If capital increases occurred, further information on subscribers of new shares may be available too. With a bit of luck, such information would be recent and would support some solid assumptions about current shareholding. Commerce registry documentation may even trigger further research abroad: in a past case, the detailed review of old filings showed that at some point, the subject person known to be a shareholder of a commodity trading company in Zug participated in a capital increase through an investment vehicle based in the Caribbean. Since this corporate entity was previously unknown from the client, further research was initiated in the Caribbean jurisdiction.

Secondly, commerce registry filings may help uncover financial information, although Swiss companies are not obliged to file any financial statements. Simplified financial statements may be released and filed at the commerce registry, for instance in the context of mergers or capital increases. Those statements may include some information about subsidiaries.

Thirdly, useful information about corporate officers and individual shareholders may emerge in commercial filings, such as copies of ID documents, dates of birth, addresses abroad or in Switzerland, etc.

Finally, commerce registry filings may include valuable information about the company's bank relationships. In a recent case filed by a creditor against a commodity trading company, the review of corporate filings allowed for the identification of the name of the bank, and the specific bank account where the company's share capital was deposited. The job of the creditor's lawyer was made easier as he leveraged on this information to initiate a freezing injunction. In addition, shareholders may hold personal accounts at the same banking institution as the companies they own.

Although reviewing corporate filings looks like an easy step, accessing the relevant filings is not always straightforward, which leads back to our initial remark on how decentralised Switzerland is. Although in some cantons, records are fully digitalized and may be purchased online, in some other cantons, they are available in hard copies only; in the worst-case scenario, each page should be individually copied and certified with an associated cost of several Swiss francs per page… In some cantons, on-site visit is recommended to browse through the whole file and identify the relevant documents to be copied.

Beyond public domain information, simple observations on the ground may lead to significant breakthroughs. In a past case, the observation of a mailbox at the subject person's address in Zurich allowed for the identification of a Panama company that received post mail there, and was ultimately found to be controlled by the subject. In another case, a luxury car was observed in front of the villa owned by the subject person. In this canton, asking the local administration for the identity of a license plate's holder was possible for anyone. The holder of the luxury car's license plate was a previously unidentified company where a known nominee of the subject person was sole Board member.

All of these research steps, combined with a bit of luck, might be sufficient to meet the objectives of some creditors. In other cases, they will represent an indispensable stepping stone for deeper inquiries, such as interviews.

DON'T FORGET THOSE CHECKS AND BALANCES!

Authored by: Phil Crooks – BRG

The severe economic and social impact of COVID-19 has increased the likelihood of fraud, not just in relation to the government assistance schemes where false claims could be made, but also the risks faced by companies and other organisations who may be subject to fraud as a result of the new working environment. With staff generally working from home and many businesses operating with a reduced workforce, either through furlough or as a result of illness, businesses are grappling with operational, procedural and staff changes that can open avenues for fraud. Now more than ever it is important that firms adapt and maintain the required checks and balances which can help prevent falling victim to some form of fraud.

Fraud can be either "extractive" in that entities or individuals claim or take money they are not entitled to, or it can be "non-extractive" which can arise through entities trying to report embellished results or cover up aspects that they cannot explain. This latter type of fraud is often employed to present a better picture to shareholders, lenders, potential acquirers and other stakeholders or simply just to save face.

There are numerous types and reasons for extractive fraud, all of which have been exacerbated by the economic impact of COVID-19 with many households coming under increasing financial pressure with people out of work or furloughed and not earning their full salaries. Some may feel a heightened motivation to commit fraud and even rationalise what they are doing - perhaps to save their family. As an example, during the financial crisis in 2008, we saw a considerable increase in middle management committing fraud as they sought to maintain their standards of living – including keeping up with their children's school fees, maintaining the ability to going on holiday – when their bonuses fell, jobs were lost and wages stopped rising.

Under such pressures, people may intend to "borrow" funds and may even in the first instance pay it back. If successful, some may have the urge to "borrow" again. This can often lead to a dangerous fraud spiral, where those who do not get discovered continue their "borrowing" practices to the point where it is impossible to pay the debt back.

Against this backdrop, companies should be mindful of the risks and ensure that they maintain adequate checks and balances in this period to try and protect against fraud. Larger businesses that maintain a risk register may want to revisit it in the current environment.

During times of crises, errors can also occur unintentionally as a result of controls or routine procedures being flexed, relaxed or just overlooked along with team changes. With so many businesses reducing the number of active staff due to COVID-19, this can mean that the routine reconciliation of the bank account or other key control accounts are not performed appropriately, or even put on hold. These can be forgotten and can become a major issue when reconciling them subsequently, requiring additional experienced staff to assist in this catch up. Similarly, differences may arise which simply cannot be explained and require a write-off. The subsequent need to restate results can result in downgrading, breach of covenants, claims or company failure.

Another example is inventory, which is often subject to routine physical counting and as such is highly likely to be impacted by the new health and safety measures mandated by the government. Differences between stock and accounting records can arise for many reasons, including poor recording of movements, price changes that have not been properly reflected, or human error.

If these key reconciliations are not performed on a timely basis, differences can arise, creating a black hole in the accounting records.

While larger corporates often have accounting procedures manuals which set out authorisation approval limits, other controls and checks to ensure a secure environment for maintaining accurate accounting records, during volatile times these procedures can be overlooked, controls overridden or assumed to be happening. Unpleasant surprises can arise if these procedures are not complied with, especially if changes are made and the risks are not fully understood, and alternative checks are not put in place. Another avenue for error is with inexperienced staff who may not want to admit that they do not fully understand what their roles entail or are hesitant to highlight an issue they cannot fully grasp for fear of losing their job, promotion or not being treated seriously.

Understandably, spotting errors or anomalies may be more difficult in the current environment. Furthermore, as a result of the lockdown and the rapidly changing environment, the established method of looking at historical trends may no longer be a reasonable benchmark to identify unusual trends, transactions or balances.

With the considerable disruption to the economy and businesses alike recently, it is easy to forget or overlook the importance of controls, but those checks and balances are there for a reason. If there are changes to staff, operations or procedures firms must consider whether the control environment is adequate and, if there is increased risk, assess what mitigation or checks can be put in place to counter this risk. Failing to take appropriate steps in reaction to such a changed environment greatly increases the chance of fraud or errors occurring, whether intentional or unintentional.

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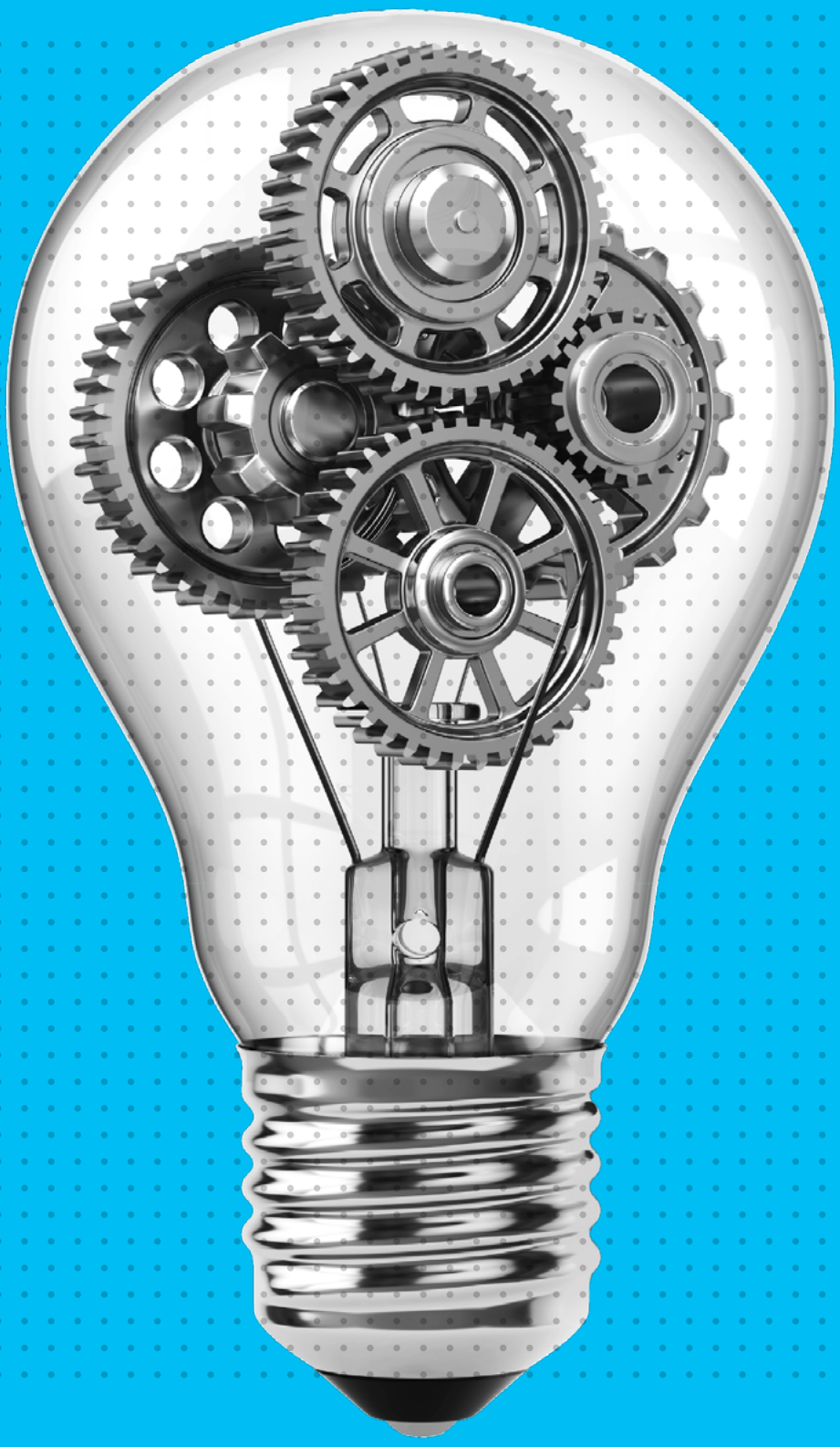

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INSOLVENT TRUSTS AND TRUSTEE DUTIES

Authored by: Emma McCall – Stewarts

Economic uncertainty brought by the Covid-19 pandemic will undoubtedly have a profound effect on the value of trust assets. Industry experts predict steep rises in insolvencies, affecting key industries. Many businesses may become cash-flow/balance sheet insolvent (if they are not already). Trustees of trusts with underlying companies running significant commercial enterprises may already find themselves experiencing insolvency events, rendering the top-level trust "insolvent". As insolvency comes to the fore, trustees should be alive to the changes in their duties such insolvency events bring.

Insolvency in a trust context

Conceptually, "insolvent trusts" are a misnomer: a trust is not a separate legal entity and cannot, as a matter of law, be insolvent. When practitioners speak of "insolvent trusts", they refer to trustees who have incurred liabilities (as trustees) exceeding the amount or value of the trust fund, or have incurred liabilities which they are unable to meet out of liquid trust assets as they arise. Although the test for "insolvency" in this context has not been considered in England, the Jersey court has applied the "cash-flow" test, e.g. whether the trustee can meet the liabilities incurred in that capacity out of the trust assets as they fall due.

How do the duties of trustees change on insolvency?

Fundamentally, trustees owe duties to exercise their powers in the best interests of the beneficiaries. But the interposition of a trust into credit or loan arrangements introduces something of an imbalance between the parties; the interests of significant creditors (who are not beneficiaries) to the trust are, in theory, not held to the same standard as those of beneficiaries.

The duties of trustees of insolvent trusts have been considered by Jersey and Guernsey authorities. Although they would not be binding on trustees outside of those jurisdictions, these provide useful, albeit conflicting, guidance. Taken as a whole, they suggest trustees and other parties (such as settlors with reserved powers) exercising fiduciary powers will need to consider the interests of creditors, and not just their trust beneficiaries, when exercising those powers. What is less clear is the extent to which the interests of the creditors should be given priority over those of the beneficiaries.

The position in Jersey

The *Z Trust litigation* in Jersey raised the question of in whose favour fiduciary powers should be exercised. In the case of *In the Representation of the Z Trust* [2015] JRC196C, the Royal Court considered the exercise of a third party's fiduciary power to appoint new trustees, where the trust in question (the ZII Trust) was insolvent. Although the ZII Trust was not itself insolvent, the prospective trustee explained that the actual insolvency event in this case arose from another related trust's inability to repay a significant inter-trust loan to the ZII Trust.

The court took the view that insolvency triggered a shift towards the interests of the creditors analogous to that seen in company law. A trust that becomes insolvent should be administered as if it were insolvent, with the trustees treating the creditors, rather than beneficiaries, as the persons with the economic

interest in the trust. It concluded that once there is an insolvency or probable insolvency of a trust, "the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors".

As it transpired, the court found that the third party had not exercised the power to appoint in the interests of the creditors, but for the beneficiaries solely; the third party's witness evidence explicitly stated that they had exercised their power to avoid an insolvency regime for another trust holding valuable family assets. Moreover, two significant creditors had not been able to consent to the appointment of the prospective trustees. The court considered that the third party holding the power to appoint owed duties to the class of creditors as a whole, and not just to a majority of those creditors (who otherwise agreed to appointing the prospective trustees).

The position in Guernsey

The Court of Appeal in Guernsey in the case of In Re: F 32/2013 considered, among other issues, two points arising from the first-instance decision by the Royal Court approving (or "blessing") a decision by (at that point former) trustees of the F Trust (a Jersey law trust administered in Guernsey) to refinance a trust asset (a property in London) using trust funds, where that trust was insolvent. The two points were:

- Whether the trustees of the F Trust could exercise powers in relation to trust assets where the F Trust was insolvent;
- Whether the Royal Court could (under its supervisory jurisdiction) approve a decision by a trustee which adversely affected the position of creditors to a trust.

Neither the company owning the property on behalf of the F Trust, nor its parent company, were insolvent. However, they could not, individually or together, meet the refinancing costs. The former trustees' application was to approve the use of other F Trust assets to pay those costs.

The Court of Appeal considered the fact a trust was insolvent did not mean the trustees ceased to have any powers to deal with the trust property, or that the court had no jurisdiction to supervise the exercise of those powers. It said: "The court nevertheless in principle has jurisdiction to bless an application of trust property that is not of benefit to creditors." However, that did not mean the court could ride roughshod over the interests of creditors; in every case the court's task was to consider the matter with regard to all of those interested in the trust property, i.e. including the beneficiaries.

In relation to the refinancing itself, its effect would be to preserve a trust asset for the benefit of anyone who turned out to be entitled to the assets. If the court was satisfied that the trustees had properly taken into account the interests of all those potentially interested, the court was in principle entitled to declare that the refinancing would be a proper exercise of the trustees' power.

How should trustees proceed?

Trustees administering English proper-law trusts are faced with uncertainty on administering trusts which may be insolvent. After all, there are no decisions of the courts in England and Wales to guide them. Moreover, there appears to be a conflict between offshore cases concerning such trusts: on the one hand, the Jersey position (from a court of first instance) says trustees of insolvent, or probably insolvent, trusts owe duties solely to creditors; on the other hand, Guernsey authority (from its Court of Appeal) indicates that trustees could take steps which were not to the benefit of creditors, provided their interests have been considered.

What is clear, however, is that the interests of creditors should not be ignored in trusts which are suspected of being, or are already, insolvent. Prudent trustees should review the factual circumstances surrounding the trust's financial position, and look to canvass both the views of creditors and beneficiaries. Where those interests are not aligned, the question of whose interests should be favoured appears to be more of a grey area. Consequently, we anticipate more litigation in this area.

THIRD PARTY FINANCING AND THE ABILITY TO RECOVER FEES FROM AN OPPOSING PARTY

Authored by: Ken Epstein – Omni Bridgeway

Litigation can be expensive. Very expensive. And the only thing litigants dislike more than paying their own attorneys' fees is also having to pay the legal fees of their adversaries when they lose a case. Unsurprisingly, losing parties assert creative arguments to avoid this outcome. One recent example arose in FastShip, LLC v. United States, a case involving a third-party litigation funder.[1] The losing defendant argued that, since the funder, not the plaintiff, paid the legal costs, the plaintiff lacked standing and its statutory right to recover attorneys' fees was destroyed.

Sensibly, the court rejected this argument and found that the presence of funding does not affect standing. Along the way, the court noted the positive role that litigation funding can play in modern-day litigation. The ruling in FastShip is consistent with existing jurisprudence on this issue arising in other contexts where a plaintiff may not, for various reasons, pay its attorneys' fees directly. Here, we consider this issue further.

FastShip, LLC v. United States

FastShip, LLC discovered apparent patent infringement of its patents for oceangoing vessels by the U.S. Navy, but it was insolvent and had no funds to pursue the case. A reputable contingency-fee law firm was willing to take the case "on risk"—that is, to defer its fees in exchange for a percentage of the litigation recoveries. However, the law firm was unwilling to commit to pay the considerable out-of-pocket costs necessary to retain and pay qualified experts. FastShip entered into a litigation funding agreement with a third party to enable the case to proceed.

After several years of litigation, FastShip prevailed on its infringement claims and was awarded substantial damages against the federal government. The judgment was affirmed on appeal and FastShip moved for an award of attorneys' fees and related expenses.

The government opposed, arguing that since a third party helped the prevailing plaintiff pay for its legal fees, FastShip was not a real party in interest and therefore lacked standing to bring the claim for attorneys' fees and costs. The U.S. Court of Federal Claims rejected this argument. The court concluded that preventing recovery based on the presence of a litigation funding agreement would be anathema to the underlying purpose of fee-shifting statutes.

In reaching its decision, the Court noted the important role fee-shifting statutes and litigation funders play in levelling the litigation playing field for small players. It observed that small entities suing the government face "an opponent with vast resources and a legion of highly skilled attorneys at its disposal," and that given the imbalance in respective resources, "[l]itigation financing agreements [can] help bridge this divide."[2]

The FastShip Ruling is Consistent with Those from Other Courts

The FastShip case is consistent with other recent cases that have addressed the question of whether the presence of litigation funding affects fee awards and answered that it does not.

In NorCal Tea Party Patriots v. Internal Revenue Service, a third-party funder assisted a group of conservative-leaning organizations in suing the IRS over alleged unfair treatment with respect to the organizations' applications for tax-exempt status. The plaintiffs averred that they had been targeted for further scrutiny by the IRS due to inappropriate criteria for screening requests for 501(c) status. The criteria included flagging applications that used words such as "Patriots" or "Tea Party" in the organization's name. The parties ultimately settled the dispute and the

1 No. 12-484C, 2019 WL 2702073 (Fed. Cl. June 27, 2019); see also NorCal Tea Party Patriots v. Internal Revenue Serv., No. 1:13CV341, 2018 WL 3957364 (S.D. Ohio Aug. 17, 2018).

2 FastShip, LLC, 2019 WL 2702073, at *9.

plaintiffs and class counsel sought "an award of reasonable attorneys' fees, costs and expenses to reimburse a portion of the fees and expenses incurred by the third party funder."[3] In granting plaintiffs' motion, the court noted, "there is an important societal interest in rewarding attorneys and third-party funders who engage in public interest litigation." [4] The court reasoned that "[b]y authorizing reimbursement for a portion of the fees and expenses," it would "facilitate the ability of litigants to pursue public interest litigation that otherwise would not be feasible."[5]

Another example is WAG Acquisition, LLC v. Multi Media LLC, a patent enforcement case, in which the New Jersey Federal District Court rejected the proposition that using third-party funding impacted plaintiff's standing to enforce his contractual rights.[6] In WAG Acquisition, the defendants argued that by entering into a series of litigation funding agreements with a third-party funder, the plaintiff had surrendered "substantial rights in the patents-in-suit to [the third party funder]" such that the plaintiff now "lacks constitutional and prudential standing to enforce those patents." [7] The court rejected these arguments, noting defendants' failure to "cite any authority for their position that a party's ability or inability to fund its suit has any bearing on the standing analysis" and stating that the third-party funder's "limited role in settlement decision-making is insufficient to deprive [p]laintiff of standing."[8]

Whether a Party Pays Its Own Fees Does Not Impact the Recovery Analysis

The above cases are consistent with the numerous situations outside of the litigation funding context where parties to litigation do not pay their counsel directly and still retain their ability to get their fees and costs paid:

- **Class Actions:** Class actions are a form of representative litigation where some parties are absent from court, as the "named" plaintiff or defendant is present in the court and litigates the case on their own behalf—and on behalf of the absent class members. Plaintiffs' class action counsel can act on an hourly or contingent fee basis and Rule 23(h) of the Federal Rules of Civil Procedure permits a court to "award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement."[9]

- **Fee-Shifting Provisions:** When an action arises under a statute containing fee-shifting provisions, a prevailing plaintiff recovers attorneys' fees directly from the defendant. And the mere fact that the prevailing party does not pay its lawyers' legal fees directly does not preclude the recovery of those fees from the losing party.

- **Insurance Cases:** In such matters, losing party may seek to avoid paying an award of attorneys' fees to the prevailing party on the basis that the latter did not incur any legal expenses. The argument is usually that since the prevailing party's insurer either represented it in the case or paid the legal expenses on its behalf, it would be inequitable to require the losing party to reimburse attorneys' fees to the prevailing party. Several state courts, including in North Carolina, Florida, Colorado, and Nevada have considered this issue and held that such payments do not preclude an award of attorneys' fees and costs.[10]

- **Shareholder Derivative Suits:** Here, corporate shareholders serve as the plaintiffs, bringing the claim on behalf of the corporation against a third party who is alleged to have harmed the corporation. The defendants in shareholder derivative actions are frequently the officers or directors of the corporation who allegedly engaged in various forms of wrongdoing against the corporation, including breach of fiduciary duty, self-dealing, or fraud. Although the corporation is the ultimate beneficiary of the suit, courts have held that the shareholders who bring the derivative action are entitled to a recovery of attorneys' fees.[11] For example, in Mills v. Electric Auto-Lite Company, involving the dissemination of misleading proxy statements to investors, the U.S. Supreme Court found that "the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders."[12] Accordingly, the Supreme Court granted attorneys' fees and expenses.

Conclusion

These cases, while arising in different contexts, illustrate a very simple premise: plaintiffs rely on a variety of sources to finance high-stakes litigation and courts will not penalize them for such reliance by denying them reimbursement of attorneys' fees by opposing parties. As evidenced above, standing should not be affected by the manner of financing, especially when a third party does not control the outcome of the litigation—as is the case with litigation funders. Third-party litigation funding has proven instrumental to increasing access to justice for both public interest cases as well as for critical business disputes where one party lacks the resources to pursue meritorious claims against a larger corporation or the federal government, for example. This trend will undoubtedly continue as more courts recognize the positive role that third-party funding can play and reject scurrilous arguments that a plaintiff's impecuniosity should have any bearing on standing and the reimbursement of attorneys' fees.

3 NorCal Tea Party Patriots, 2018 WL 3957364, at *1.
4 *Id.* at *2.
5 *Id.*
6 WAG Acquisition, LLC v. Multi Media, LLC, No. CV142340ESMAH, 2019 WL 3804135, at *2 (D.N.J. Aug. 13, 2019).
7 *Id.*
8 *Id.*
9 Fed. R. Civ. P. 23(h).
10 See Copper Sands Homeowners Ass'n, Inc. v. Copper Sands Realty, LLC, No. 210CV00510GMNNJK, 2016 WL 10719389, at *2 (D. Nev. July 18, 2016), report and recommendation adopted, No. 210CV00510GMNNJK, 2016 WL 10719386 (D. Nev. Sept. 27, 2016) (rejecting argument that no attorney fees should be due because the insurance company was the real party in interest); Hoffman v. Oakley, 184 N.C. App. 677, 686, 647 S.E.2d 117, 124 (2007) (upholding grant of attorney fees and costs to the defendants who had prevailed in a personal injury lawsuit); Hough v. Huffman, 555 So. 2d 942, 944 (Fla. Dist. Ct. App. 1990) (upholding award of attorney fees notwithstanding the fact that the "[defendant's] liability insurance company paid the costs in accordance with its insurance contract…"); see also Aspen v. Bayless, 564 So.2d 1081, 1082-83 (Fla. 1990) (approving Hough); Mullins v. Kessler, 83 P.3d 1203, 1204 (Colo. App. 2003); City of Wheat Ridge v. Cerveny, 913 P.2d 1110, 1117 (Colo.1996) ("The court of appeals correctly determined that 'a party need not be obligated to pay attorney fees to be entitled to such an award authorized by a statute.'") (citation omitted).
11 See, e.g., Chan v. Diamond, No. 03 CIV.8494(WHP), 2005 WL 941477, at *3 (S.D.N.Y. Apr. 25, 2005) ("Delaware [law] permits courts to order the payment of counsel fees and related expenses to a plaintiff whose efforts result in . . . the conferring of a corporate benefit.") (citations and quotation marks omitted).
12 396 U.S. 375, 392 (1970) (citation and quotation marks omitted).

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CIVIL REMEDIES FOR IDENTIFYING AND INJUNCTING HACKERS IN SINGAPORE

Authored by: Danny Quah – Providence Law Asia (Singapore)

On 9 May 2020, Bleepingcomputer.com published an article with an ominous sounding title ***"Hacker group floods dark web with data stolen from 11 companies"***. In the article, it was revealed that a hacking group known as Shiny Hunters had hacked into the databases of companies such as Tokopedia (Indonesia's largest online store) and Unacademy (one of India's largest online learning platforms), and had begun selling the user databases over the Dark Web for between $500 to $5,000 each.

Can the victims of the hack take any civil action in Singapore against the hackers to identify and injunct them? While there have not been any published decisions in Singapore on this, this author seeks to draw lessons from two recent English decisions on this issue.

1 AA v Persons Unknown who demanded Bitcoin on 10th and 11th October 2019 and others [2019] EWHC 3556 (Comm) ("AA")

In *AA*, a company's computer systems were hacked and encrypted by hackers (i.e. the 1st Defendant) who demanded a ransom to decrypt the said systems.

The company's insurers paid the ransom in Bitcoin, and subsequently commissioned an investigation to track the movement of the Bictoin. The investigations revealed that a substantial proportion of the Bitcoin was transferred to a specified IP address (i.e. the 2nd Defendant), which was linked to an exchange known as Bitfinex operated by the 3rd and 4th Defendants.

The insurers applied to the English Court seeking, inter alia, a Bankers Trust / Norwich Pharmacal order requiring the 3rd and 4th Defendants to provide certain information in relation to a crypto currency account owned or controlled by the 2nd Defendant and a proprietary injunction in respect of the Bitcoin held in the account of the 4th Defendant, with consequential orders to serve the orders outside of the jurisdiction in the British Virgin Islands.

After determining that Bitcoin was a form of property capable of being the subject of a proprietary injunction, Mr Justice Bryan granted the proprietary injunction against the defendants. He held that the 1st and 2nd Defendants were the persons who in fact committed the extortion and were paid the ransom, while the 3rd and 4th Defendants were holding Bitcoin belonging to the applicant which had come into their possession in the furtherance of a fraud.

Mr Justice Bryan further agreed that an order for service out of jurisdiction should be made on the basis that the claim was being made to prevent the defendants from doing an act within the jurisdiction, and there was a claim by the applicant in tort where damage was suffered within the jurisdiction as the insurer is an English insurance company and had paid the Bitcoin from monies taken from an English bank account. For practical purposes, Mr Justice Bryan also agreed that alternate service on the 1st and 2nd Defendants could be effected via the email which demanded the ransom. Similarly for the 3rd and 4th Defendants, service could be effected via the emails which they used to correspond with the applicant.

As for the Bankers Trust / Norwich Pharmacal order, Mr Justice Bryan held that the 3rd and 4th Defendants ought to provide the identify, address and any associated information of the 1st and 2nd Defendants that they may possess. Mr Justice Bryan also made a self-identification order against the 1st and 2nd Defendants as he considered the information necessary to police the proprietary injunction that he had granted.

2 PML v Person(s) unknown (responsible for demanding money from the Claimant on 27 February 2018) [2018] EWHC 838 (QB) ("PML")

In *PML*, the applicant's computers were hacked and a large quantity of data was stolen. The defendant subsequently sent an email to the directors of the applicant seeking a ransom of £300,000 worth of Bitcoin in exchange for not publishing the data online. In the midst of negotiating with the defendant, the applicant applied to court, without notice to the defendant, for an interim non-disclosure order to restrain the threatened breach of confidence and for delivery-up and/or destruction of the stolen data.

The interim injunction was granted by Mr Justice Bryan at first instance, and the order was served on the defendant via the email address used to communicate with the applicant. Following the applicants' own investigations, the applicant identified a number of websites which hosted the stolen documents, and served the injunction order on them. This resulted in the hosting companies blocking access to the documents or deleting them following service of the injunction order.

On the return date, Mr Justice Nicklin continued the injunction order and further granted an order against the Defendant to identify himself and provide an address for service. Mr Justice Nicklin noted that the Defendant may be overseas, and granted permission to the applicant to serve the claim form out of jurisdiction on the basis that the claim was for breach of confidence and the detriment would be suffered within the jurisdiction were the threatened publication take place.

3 Lessons for Singapore

While the persons unknown injunction and self-identification orders have yet to be deployed in Singapore in the manner utilised in AA and PML, this author is of the view that the Singapore courts will be likely to make similar orders in the appropriate case.

First, the Singapore International Commercial Court has not had any difficulty regarding cryptocurrency as a property in the general sense as seen in the case of *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17. Hence, a proprietary injunction can latch onto cryptocurrency.

Second, an applicant may take the position that an action should not be defeated even if there was no identified defendant at the start of the action, as long as there are actual defendants identified and property joined to the action by the time of the trial. The applicant can point to the High Court's general power in para 5(a) of the First Schedule of the Supreme Court of Judicature Act to grant interim interims in support of legal proceedings at any time, without any express requirement that an actual defendant be invoked before the power can be invoked. Hence, the

Third, pre-action discovery and pre-action interrogatories (i.e. the Singapore equivalent of Bankers Trust / Norwich Pharmacal orders) are expressly permitted under Singapore's Rules of Court. These applications can be deployed to require a party to self-identify or to require a cryptocurrency platform / exchange to identify the individual(s) behind an IP address.

Fourth, alternative or substituted service via social media (e.g. Skype / facebook / internet message board) or email can be granted by the Singapore courts. This was done in *Storey, David Ian Andrew v Planet Arkadia Pte Ltd* [2016] SCHCR 7.

In conclusion, an applicant who has experienced a digital hack will likely be able to avail itself of certain civil remedies under Singapore law to seek relief from the consequences of the hack.

INVESTIGATIVE RECEIVERSHIPS

BRINGING A CANADIAN CONCEPT TO OFFSHORE ENFORCEMENT

Authored by: Mark A. Russell – KSG Attorneys at Law (Cayman Islands)

Judgment creditors are often cursed by asymmetrical information. When it comes time to enforce, a debtor will already know what assets it owns and where those assets are located. Unscrupulous debtors will try to hide or transform their assets through layers of transactions designed to frustrate enforcement. Bridging that informational gap requires the creative deployment of various investigative tools on behalf of the creditor.

In recent years, Canadian law has developed a remedy usually termed an investigative (or investigatory) receivership to help address the informational imbalance between debtors and creditors. An investigative receiver is a court-appointed receiver with investigative powers only. The investigative receiver is not empowered or authorized to seize or freeze any assets or to unduly interfere with a debtor's business. Its purpose is to monitor, investigate and report on a specific matter under a tailored and limited mandate from the appointing court, while leaving the door open for the expansion of the receivership into a more traditional seize and sell process if the circumstances warrant.

The concept has proven sound and effective, and its potential use is not limited to Canada. Investigative receiverships are theoretically possible in Commonwealth offshore jurisdictions like the Cayman Islands, Bermuda and the British Virgin Islands and should be embraced by local practitioners and courts. In Canada, investigative receivers are appointed under the court's jurisdiction to appoint an interlocutory receiver in any case where it appears 'just and convenient' to do so and on terms that the court may set. This familiar wording is also applicable to receiverships in Cayman, Bermuda and BVI, where the jurisdiction was similarly inherited from England. The common source of the courts' jurisdiction to appoint receivers, and the flexible nature of the remedy, strongly support the view that in appropriate circumstances offshore courts should be able to appoint investigative receivers and that the Canadian cases would provide useful guidance on their scope and use.

"The concept has proven sound and effective, and its potential use is not limited to Canada. Investigative receiverships are theoretically possible in Commonwealth offshore jurisdictions like the Cayman Islands, Bermuda and the British Virgin Islands and should be embraced by local practitioners and courts"

In the leading appellate decision on investigative receiverships, *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 368, the Ontario Court of Appeal noted that the primary purpose of an investigative receiver is to combat the informational imbalance that exists between a creditor and a debtor. While the law provides creditors with various remedies to ascertain what assets exist for execution, these may be stonewalled or obstructed by a debtor or other parties.

In those cases, courts have seen the utility in appointing an investigative receiver to look into specific issues, transactions or parties without exercising the usual control and possession functions. The limited mandate provides for an investigation backed by the approval and imprimatur of the court but without committing to a full-blown receivership. The limited nature of the appointment is a feature, not a bug. First, it should be less costly for the creditor than having to fund a traditional receivership. The step-by-step process allows the receivership to be expanded if investigations are fruitful and scaled back or terminated if nothing comes of it. Second, because it is less intrusive than a traditional receivership, some courts have effectively set a lower legal bar for appointment because there are less concerns about the adverse impact on the debtor's assets and affairs. A creditor may therefore secure the appointment of an investigative receiver in circumstances where it may not otherwise be possible to have a traditional receivership order made.

The Canadian experience demonstrates the flexible and practical use of the remedy:

- An employee fraudulently diverted his employer's funds for his personal use. The employer obtained bank records that showed very small balances in the employer's accounts but many high-value purchases and other transactions. The court appointed a receiver to investigate those transactions, identify any property acquired or generated from the transactions and to monitor that property. In particular, the receiver had powers to get in any books and records that would assist in its investigation, but no power to seize or freeze any assets.
- In a bankruptcy proceeding, the trustee identified potentially preferential and fraudulent transfers from the bankrupt companies to several related solvent entities. The trustee sought more information on the transfers using its statutory powers but was either stonewalled or received incomplete, inconsistent or unreliable information. The court appointed a receiver to investigate one of the prima facie preferential transactions with the power to compel cooperation from the recipient solvent entity.
- In a pre-judgment context where the plaintiff made out a strong fraud case, the court appointed a receiver over all of the books and records of the defendants in response to their continued delay and stifling of the plaintiff's contractual right to examine relevant financial information.
- Again in a pre-judgment context, where there was evidence that the defendant had provided misleading information and continued to withhold information about the use of loan proceeds, the plaintiff lender obtained the appointment of an investigative receiver alongside an asset freezing order.

Canadian courts have also addressed the limits on the use of investigative receivers. Importantly, the appointment must be necessary to alleviate a risk posed to the judgment creditor's or plaintiff's right to recovery. It is not akin to a collective proceeding like a liquidation or a bankruptcy. The Court of Appeal in *Akagi* was especially critical of how the receivership in that case, initially obtained on behalf of one judgment creditor, had expanded into a far-reaching investigation for the benefit of non-party victims of the defendant's scheme. The receivership must protect the particular interest of the judgment creditor and be necessary to overcome the inadequacy of the normal judgment enforcement process.

With the guidance from the Canadian cases and a similar legal framework, investigative receiverships could become a useful tool in the judgment enforcement toolkit in the offshore world. Practitioners should consider how this flexible remedy could be applied and look for the right opportunities to bring this Canadian concept to offshore enforcement.

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