FIRE STARTERS

Fraud • Insolvency • Recovery • Enforcement

ISSUE 16

THE FIRE STARTERS EDITION 2024

A COLLABORATION WITH THE RISING STARS OF ASSET RECOVERY

INTRODUCTION

'The greatest leaders of tomorrow are the thinkers of today.'

Bill Gates

Our first issue of 2024 is here, and we are delighted to present the **FIRE Starters Edition,** in conjunction with the FIRE Starters Global Summit that recently took place in Dublin. In this engaging edition, our practitioners explore the effects of asset fraud, sanctions, expert evidence, and lessons from recent cases. Our issue features a series of *60 seconds with* interviews, where our FIRE Starters community give us an insight into some of their thoughts around and beyond work.

As we prepare ourselves for another busy year in the FIRE community, we thank all of our partners, contributors and members for their support. We look forward to seeing many of you throughout the course of 2024!

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CONTENTS

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HOW THE BVI COURT IS ASSISTING VICTIMS OF DIGITAL ASSET FRAUD AGAINST PERSONS UNKNOWN

Authored by: Fay O'Halloran (Associate) - Collas Crill

We have recently seen positive examples of the BVI and English Courts showing flexibility and innovation to help protect victims of digital asset fraud.

The Eastern Caribbean Supreme Court (ECSC) delivered its novel judgment in the case of **AQF v (1) XIO, (2) VQF and (3) CGN** on 23 November 2023, highlighting interesting developments in the BVI. At the ex parte hearing, the BVI Court:

(1) Ordered interim mandatory injunctive relief against non-cause of action defendants; and

(2) Permitted service by alternative means on a person unknown outside of the jurisdiction by way of non-fungible token (**NFT**) airdrop to their digital wallet.

Background

The Applicant, a Dubai resident businessman who provides broker services for gold bullion transactions, intended to transfer over 3 million USD of cryptocurrency in return for approximately 50kg of gold bullion.

However, whilst transferring the cryptocurrency, the Applicant became victim to an address poisoning (zero-value transfer scam) where the scammer produced a near identical wallet address to give the impression that the transaction was being made to the legitimate wallet.

The Applicant reported the scam to police in Dubai almost immediately, and instructed a blockchain investigations specialist to trace the stolen funds. The cryptocurrency had been transferred into three different wallets within 24 hours. The Applicant successfully applied to the Singapore Court against Persons Unknown to freeze the cryptocurrency and for disclosure orders against the exchanges, who were ordered to provide the wallet balances, KYC information and transaction details.

The cryptocurrency was issued and centrally controlled in the BVI and, therefore, with the Singapore Court's permission to commence proceedings, the Applicant applied to the BVI Court for (i) a freezing injunction up to the value of the claim, and (ii) a mandatory injunction to restrict the transfer or disposal of the cryptocurrency.

Mandatory Injunctive Relief Against Non-Cause of Action Defendants

Notwithstanding that there was no substantive claim being brought in the BVI against the Second and Third Respondents, the Applicant was granted, amongst other relief, a

mandatory injunction against them to prevent the transfer or disposal of the cryptocurrency. The second and third respondents were the issuers of cryptocurrency on the Ethereum and TRON networks.

Recent case law (including the Privy Council decision in ***Broad Idea International Ltd v Convoy Collateral***) and the BVI Supreme Court Act (as amended) provides the Court with jurisdiction to grant interim relief in relation to foreign proceedings against non-cause of action defendants.

The applicable principles for interim mandatory injunctions are summarised as:

(1) The general principle is to take the course which involves the least risk of injustice if it turns out to be "wrong";

(2) The court should keep in mind that ordering a positive step to be taken may involve an increased risk of injustice for the defendant if the decision turns out to be "wrong";

(3) It is legitimate to consider whether the court does feel a "high degree of assurance" that the claimant will succeed at trial; and

(4) Even where the court does not feel this high level of assurance there are still exceptional cases in which it is correct to grant an interim mandatory injunction because that course involves the least risk of injustice.

The ECSC Civil Procedure Rules (Revised Edition) 2023 (the 2023 CPR)

The 2023 CPR introduced key practice changes to the jurisdiction from 31 July 2023, including in relation to service out of the jurisdiction. This has simplified the way in which foreign defendants located outside the BVI can be served with "court process" (as defined). The change has been welcomed as a natural progression by practitioners in the BVI, as a popular offshore jurisdiction which often involves proceedings filed against foreign defendants.

Previously, a party was required to seek the Court's permission, often on an ex parte basis, before it could serve proceedings on a foreign defendant located outside the BVI.

In accordance with the 2023 CPR, the applicant can self-certify that (i) they have a good cause of action, (ii) an available gateway under the 2023 CPR applies, including mandatory or prohibitory injunctions, (iii) the court is the appropriate forum for the trial, and (iv) the proposed method does not infringe the law of that foreign state. If the requirements are met, court process can be served out of the jurisdiction without advance permission. However, service can still be challenged by the defendant or set aside by the court if, for example, the claimant incorrectly certified that the claim was one in which advance permission of the court was not required.

Service Out Of The Jurisdiction and By Alternative Means

In this case, the Applicant sought to serve out of the jurisdiction and by an alternative method with permission of the BVI Court.

Therefore, the Applicant needed to show that there was "good reason" for the Court to approve service by alternative means. For example, a good reason may be that there is difficulty identifying, locating or serving the defendant. Here, the First Respondent was unknown and unidentified (save for their digital wallet addresses) to the Applicant.

The Court considered the decision of Trower J in ***D'Aloia v (1) Persons Unknown (2) Binance Holdings Limited and others*** in 2022 in which the English Court permitted service of court proceedings by an NFT, described as "a form of airdrop into the tda-finan wallets in respect of which the claimant first made his transfer to those behind the tda-finan website" and by email. Mangatal J considered the analysis of Trower J to be "logical" and permitted service by email and NFT airdrop.

Summary

The case of ***AQF v (1) XIO, (2) VQF and (3) CGN*** is an example of the BVI Court demonstrating its ability to be flexible and reactive to modern technological advancements. This is a positive step for victims of digital asset fraud, allowing immediate action to be taken even when the identities and location of the respondents are unknown, and we hope to see further examples of this flexibility in the near future.

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A NIGERIAN TRAGEDY: HOW TO SET ASIDE A US$11 BILLION ARBITRAL AWARD

ANALYSIS OF THE FEDERAL REPUBLIC OF NIGERIA V PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED [2023] EWHC 2638 (COMM)

Authored by: John Grocott-Barrett (Barrister) and Ernest Leung (Barrister) – Wilberforce Chambers

Nigeria v P&ID concerned a document, signed between two parties, one a state and one a company, just twenty pages long. The document was a Gas Supply and Processing Agreement ("**GSPA**") whereby Nigeria would supply quantities of "wet" gas to P&ID to be stripped into "lean" gas which would then be delivered to Nigeria for power generation. P&ID accused Nigeria of a repudiatory breach under the GSPA and the dispute was referred to the arbitral tribunal.

The resulting arbitral award rendered Nigeria liable to P&ID US$6.6 billion. With interest awarded by the arbitral tribunal, the amount stood above US$11 billion. The sum was so substantial that, as the judge noted, it was material to Nigeria's entire federal budget.

Aside from the inverse correlation between size of award and length of contract, the decision is notable for laying down the relevant principles on the legal effect of bribery on an arbitral award, the requirements for setting aside an arbitral award for serious irregularity, and the circumstances where a party may lose the right to challenge an arbitral award.

Bribery and All Things Naughty

Knowles J made various findings of impropriety and misfeasance:

- The GSPA was had been secured through a bribe paid by P&ID to the legal director of Nigeria's Ministry of Petroleum Resources;
- Important witnesses were kept 'on-side' and silent during the arbitration process through bribery by P&ID;
- Nigeria's internal legal documents which were subject to legal privilege were passed on to and retained by the P&ID's legal team during the arbitration; and
- P&ID's witnesses gave knowingly false evidence on the inception of the GSPA, especially in concealing the existence of the bribe.

Nigeria relied on s. 68(2)(g) of the Arbitration Act 1996 as a gateway to challenging the arbitral award, i.e. 'the way in which [the award] was procured being contrary to public policy'. If respect for the arbitration process is based on respect for the parties' freedom to determine the forum for resolving their dispute, then where an award is obtained by fraud or contrary to public policy, that cannot be what the parties have agreed to when they agreed on arbitration; as the judge puts it, '[t]his architecture meets the requirements of justice'.

One argument advanced by Nigeria under s. 68(2)(g) was that since the underlying contract was procured by a bribe, the arbitral award was procured in a way contrary to public policy. The court rejected this submission holding that:

- Under English law, a contract which has been procured by bribes is not unenforceable as a matter of public policy: ***Honeywell v Meydan Group LLC*** [2014] EWHC 1344 (TCC) (per Ramsey J).
- The fact that the contract was procured by bribery does not mean that there is a 'real and direct link' between the bribe and the arbitral award. There were too many steps in between: Nigeria's failure to perform, P&ID's acceptance of the repudiation and the entire arbitral process leading to the award.
- However, where it could be shown that the whole underlying contract was an overall fraudulent enterprise from the start to procure an award, that would certainly fall within s. 68(2)(g). Yet, Nigeria could not show that this was an overall fraudulent scheme.

Setting Aside an Award for Serious Irregularity

The judge, however, found in favour of Nigeria that there were serious irregularities in the arbitral process which caused substantial injustice for the purposes of s. 68, citing the statements of law in ***RAV Bahamas v Therapy Beach Club*** [2021] UKPC 8 (at [30]-[37]) with approval.

In ***RAV Bahamas,*** the Privy Council considered s. 90 of the Bahamas Arbitration Act 2009 (which is modelled on s. 68 of the English Arbitration Act 1996). Substantial injustice requires something which 'has happened [that] is so far removed from what could reasonably be expected of the arbitral process…[it is] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.

The threshold is very high. Two further points should be noted from the ***Nigeria*** judgment:

- The focus is not on whether the decision reached by the Tribunal is a correct one; rather, the court is concerned with the question of due process.
- The court will also consider whether the irregularities would have made a difference to the outcome of the case; there will be no substantial injustice if it could be shown that the outcome of the arbitration would have been the same regardless of the irregularities: Africa ***Sourcing Camerous Ltd v LMBS [2023] EWHC 150*** (Comm).

On this analysis, the judge concluded that the outcome of the arbitration would have been completely different and in ways strongly favourable to Nigeria had the bribery and the various impropriety been uncovered. There was indeed substantial injustice.

Speak Now or Forever Hold your Peace

P&ID also relied on s. 73 whereby a party who continues to take part in proceedings without making any objection on any irregularities is barred from raising those objections unless if it could be shown that the irregularities could not be discovered with reasonable diligence.

One of the questions before the judge was how the provision interacts with the Supreme Court decision in ***Takhar v Gracefield Developments Ltd*** [2019] UKSC 13 (16-year litigation which members of Wilberforce Chambers continue to act in).

In ***Takhar,*** at [54] it was said: 'where it can be shown that a judgment has been obtained by fraud […] a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment'. The judge held that while ***Takhar*** states the general position under common law, it cannot have the effect of altering the statutory bar under s. 73.

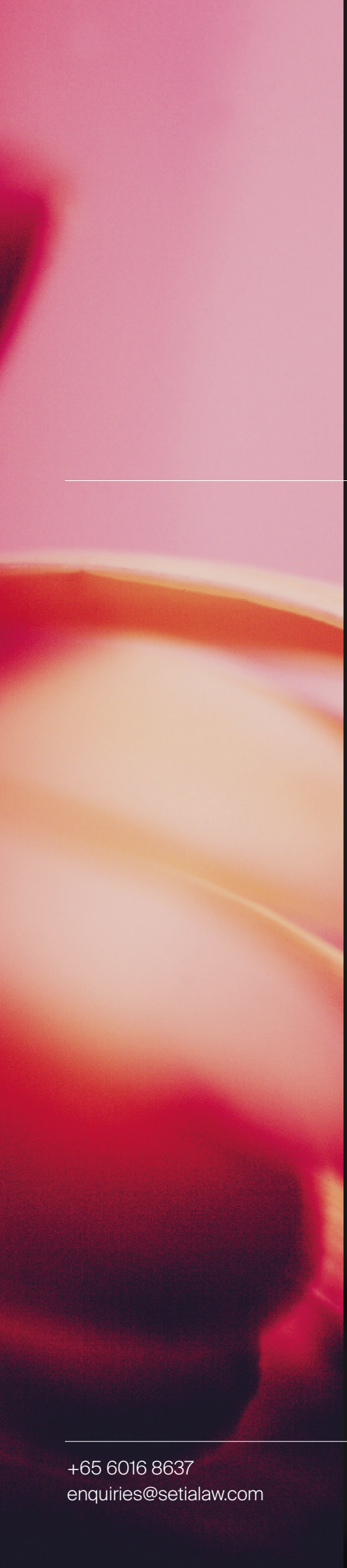
However, what ***Takhar*** does lay down is the general presumption that a reasonable person is 'entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that the other persons are dishonest'; the same presumption applies when the court looks at s. 73.

In this case, the judge placed considerable emphasis on the fact that since there was a deliberate concealment of bribery and something must have happened to cause the concealment to start to breakdown; no such event could be identified and there was nothing on the facts to suggest that Nigeria should have looked for bribery. As a result, s. 73 did not bite.

A Health Warning

The judgment is also worth reading as the judge laid down four points as food for thought for legal practitioners:

- Professional standards in drafting major commercial contracts
- The importance of disclosure in litigation in allowing the underlying impropriety to be discovered
- The possibility of a more interventionist Tribunal where there is clearly no equality of arms
- The unintended effect of confidentiality in arbitrations involving states and significant sums of money where there is no public scrutiny or visibility



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DEATH AND DEBTS

INTERIM RECEIVERSHIPS AGAINST THE ESTATE OF DECEASED DEBTORS

Authored by: Jian Jun Liew (Barrister) – New Square Chambers

Introduction

The Court's jurisdiction to appoint receivers where it is "just and convenient" to do so under s.37(1) of the Senior Courts Act 1981 needs little introduction. The exercise of this jurisdiction is one of the most flexible and powerful weapons available to a Court to enforce various rights and preserve property.

Less well-explored is the specific power contained in the insolvency regime for the appointment of an interim receiver over a debtor's property. This power, contained within s.286 of the Insolvency Act 1986 (the Act), provides that the Court may appoint an interim receiver "if it is shown to be necessary for the protection of the debtor's property", but the question of what this necessity entails has not previously been the subject of any reported judicial analysis. Even less considered is the interaction between this power and the Administration of Insolvent Estates of Deceased Persons Order 1986, which amends the Act in the context of the estate of a deceased person, most notably by introducing a further requirement to s.271 of the Act

"that there is a reasonable probability that the estate will be insolvent".

This is relevant, in particular, as Rule 10.51(e)(i) of the Insolvency Rules 2016 (the **Rules**) provides that an order appointing an interim receiver must contain a statement that the Court is satisfied that the debtor is unable to pay the debtor's debts.

Re The Estate of Zhang Zhenxin (Deceased) [1]

These matters were considered for the first time in a relatively brisk judgment of Chief ICC Judge Briggs in *Re The Estate of Zhang Zhenxin (Deceased)*. The deceased was the controller of a business group which spanned numerous jurisdictions. Following the collapse of that group, the Petitioning Creditor petitioned for an insolvency administration order, relying on personal guarantees given by the deceased in respect of convertible bonds issued by a company in the business group in the amount of HKD500m. The petition was opposed by a beneficiary of the estate principally on the ground of the agreements being tainted by illegality, such as to be unenforceable. Amidst that backdrop, the Petitioning Creditor applied for an interim receiver to be appointed over the deceased's property, which principally consisted of shareholding interests in various TopCos in the business empire.

The first difficulty facing the Judge was what the appropriate legal test was. The Petitioning Creditor contended that the application was akin to one for interim injunctive relief, such that the Court should apply the usual principles in *American Cyanamid*. [2] The opposing beneficiary instead contended that the same principles applicable to the appointment of provisional liquidators under s.135 of the Act should apply. [3]

The Judge concluded that the applicable test is similar to that for the appointment of provisional liquidators under s.135 of the Act, but with one distinction: the appointment of a provisional liquidator may be and often is a public interest decision, but in respect of an interim receiver, the emphasis is instead on whether it is "necessary for the protection of the [deceased] debtor's property".[4] In those circumstances, the test was as follows: [5]

(i) The debtor is unable to pay the debtor's debts, which may lead to a conclusion that a bankruptcy order or appointment of an insolvency administrator is "likely".

(ii) Security is or will be provided, as required by Rule 10.52 of the Rules.

(iii) The appointment is "necessary for the protection of the debtor's property".

(iv) The exercise of discretion favours an appointment, with the "working approach" being to ask whether in the circumstances of the case it is right to appoint.

Applying the test, the Judge concluded that:

(i) Given the lack of visibility as to the estate, a failure to provide information and undertakings, the existence of post-death transactions, and an expressed intention to continue to deal with the assets of the estate, it was necessary to appoint receivers for the protection of the estate. [6]

(ii) The dispute needs to satisfy a threshold of a serious and genuine defence. While a defence has been raised, the Judge was not satisfied that it met that threshold.[7] In respect of the evidence available of the estate at the hearing, it appeared that the estate was balance sheet and cash-flow insolvent. [8]

(iii) In respect of the discretion to be exercised, the balance of prejudice was in favour of appointing interim receivers. [9]

(iv) In respect of security, the Petitioning Creditor has produced a cross-undertaking in damages late in the day which was satisfactory for the purpose of security when fortified with a sum of £500,000 paid into Court. [10]

Analysis

This case is the first of its kind, opening up the jurisprudence in respect of the appointment of interim receivers under the insolvency regime. The clarification of the appropriate legal test is welcome, but the case may present some uncomfortable implications in respect of how the test is addressed:

(i) In respect of necessity, it may be necessary to look beyond the property directly held by a debtor and consider indirect interests arising out of said property. In this case, the deceased debtor's property comprised shareholding interests in the TopCos, but for the purpose of addressing this test the Judge considered it appropriate to take into account transactions approved

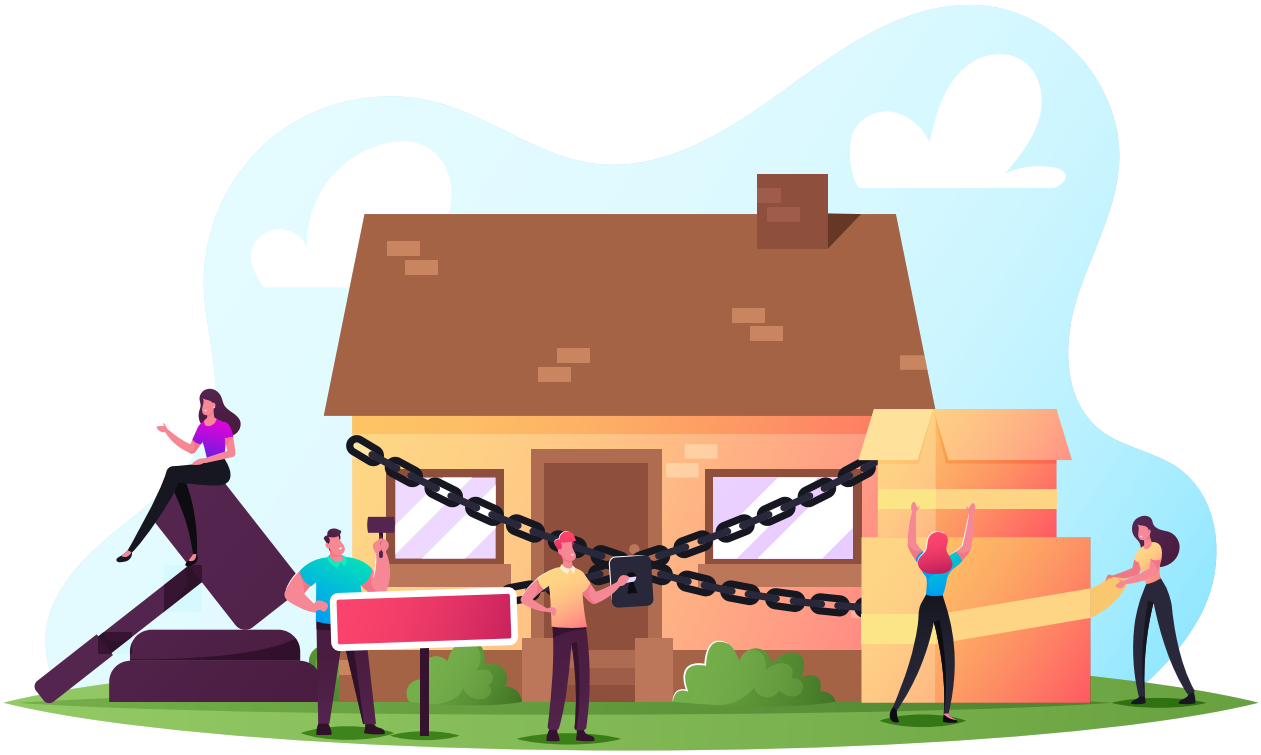
1 [2023] EWHC 2744 (Ch).
2 [53].
3 [61].
4 [64].
5 [65].
6 [69].
7 [82].
8 [88].
9 [91]-[104].
10 [105]-[110].

by the boards of directors in various trading companies further down the chain. This could well expand the scope of inquiry and accordingly the evidence required to be investigated in bringing and defending such applications.

(ii) There is a further question as to the respective investigatory obligations of the parties where a deceased debtor is concerned. One factor leading to the Judge's conclusions on necessity was the lack of visibility as to the extent and the value of the estate, in addition to the failure by the opposing beneficiary to provide information as to the estate.[11] A similar matter was also addressed in respect of solvency of the estate.[12] However, a beneficiary is not a personal representative of the estate, and is not obliged to incur expenses in investigating the estate. Criticising a beneficiary for not providing information in respect of something they were not obliged to do is unusual. Given that an insolvency administration order is usually sought at a point where the estate is not being administered by a personal representative, it is perhaps inevitable that there would be some degree of lack of visibility as to the estate. Nevertheless, this analysis appears to place the investigatory obligation on a Respondent to the interim receiver application to disperse the clouds over the estate, as opposed to the more usual position that an Applicant needs to prove the elements of their application.

(iii) The way security was granted via the cross-undertaking was not entirely satisfactory. A cross-undertaking was only tendered by the Petitioning Creditor late in the application "at the end of the hearing".[13] This was considered by the Judge to be appropriate following further submissions as to the point.[14] Nevertheless, this appears to be an unusual course – it is typically the case that where a proffered cross-undertaking is deficient, it is too late at the hearing to reserve the opportunity to consider whether something better could be offered.[15] It does appear to suggest, however, that any deficiencies in the interim receiver application (including in this case a failure to comply with the requirements in Rule 10.49 of the Rules)[16] could be resolved as long as they are remedied before judgment is handed down or an order sealed.

The upshot of these implications is that one strays into a relatively Applicant-friendly world for an interim receiver application over the estate of a deceased debtor. It remains to be seen how the Courts will apply the now-clarified test in respect of such applications, but it would appear that the arsenal doors to one of the Courts' most powerful weapons has been fully opened up following this case.



11 [69].
12 [83]-[88].
13 [105].
14 [110].
15 See e.g. [39] in Hunt v Ubbi [2023] EWCA Civ 417.
16 [40].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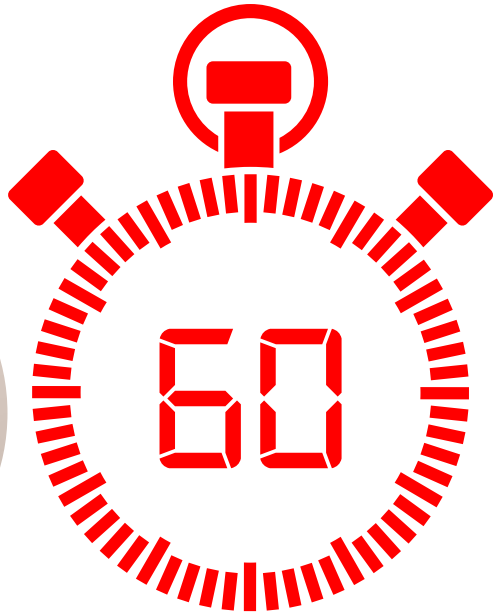

Q What would you view as the 'best' part of your job?

A Every day is different. As an investigator I never know what will cross my desk from one day to the next, and as a result there is never a boring day. As investigators our work is diverse and wide reaching, ranging from desktop research and source interviews to on the ground work.

Q If you could give one piece of advice to our FIRE Starters practitioners, what would it be?

A Ask questions. There is no such thing as a stupid question and it's better to ask a thousand questions and understand the project rather than suffer in silence and provide a poor piece of work.

Q What do you see as being the biggest trends of 2024 in FIRE?

A As the Russia-Ukraine war enters its third year and Russian sanctions remain in place with no signs of being reduced, disputes linked to the viability of the imposition of sanctions on individuals or entities, as well as disputes related to the performance of contracts are likely to continue into 2024 and beyond.

Q What has been your most memorable experience during your career so far?

A Joining DGA in 2023. Here, we are building a global intelligence practice to serve our clients in both the disputes and due diligence space.

Q What is one important skill you think everyone should have?

A Communication. The intelligence world can be full of excitement, gossip, and rumours which can distract us from the facts. As investigators we're hired to find facts that can be evidenced and often used to support legal proceedings rather than present a narrative of entertaining anecdotes.

Q What does the perfect weekend look like?

A A long swim with friends followed by lunch at Broadway market with a lazy afternoon followed by drinks with friends in an east London pub.

Q What is one country you would love to visit and why?

A Sudan – it is home to over 200 pyramids primarily dating from 300 BCE to 350 CE which mark the tombs of royalty of the Kingdom of Kush. Although recognised as a UNESCO World Heritage site they are relatively unknown and under-visited.

Q What book would you recommend everyone to read, and why?

A The Powerful and the Damned by Lionel Barber. As former editor of the FT during the tech boom, global financial crisis, Brexit and the rise of China, Barber's diaries provide a fascinating portrait of power in the modern world – and the media's role within it.

Q What is one thing people might not know about you?

A I like to swim! Wherever I am in the world I love to swim either in the pool or the sea.

Q If you could choose any two famous people to have dinner with, who would they be and why?

A Francis Walsingham and Ruth Bader Ginsburg. Walsingham, better known as Queen Elizabeth I's spymaster, ran the Secret Service and served as Secretary of State. I'd love to hear more about his network of spies and how he foiled Mary's attempt to overthrow Elizabeth I. For Ginsburg, I'd like to hear her tales of rising to the top of the Supreme Court in her quest for gender equality and women's rights.

Q What cause are you passionate about?

A Gender equality in the workplace. Women are sadly still underrepresented in the legal industry and in many cases still earn less than their male counterparts. There is still much to be done to retain, promote and support women at every level of the industry.

Q As a speaker at our FIRE Starters Global Summit 2024, what are you most looking forward to at the conference?

A A good gossip.

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FIDELITY TO THE CONTRACT AND RUSSIAN SANCTIONS

RENAISSANCE SECURITIES (CYPRUS) LIMITED -V- CHLODWIG ENTERPRISES LIMITED AND ORS [2023] EWHC 2816 (COMM)

Authored by: Kit Smith (Managing Associate) – Keidan Harrison

Introduction

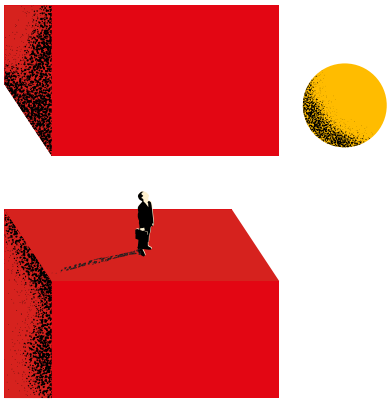
In November of last year, the Commercial Court was faced with the question of whether to grant urgent injunctive relief against Defendants domiciled in Russia, where there was an apparent conflict between Russian statute and an arbitration clause.

The decision demonstrates the Court's willingness to uphold arbitration agreements and to take proactive steps to prevent sanctioned entities from pursuing litigation in Russia, in breach of a previously agreed contract.

UK Sanctions and Russia's Response

On 24 February 2022, Russian forces attacked Ukraine in a major escalation to the long-running Russo-Ukrainian war. The invasion was internationally condemned, including by the United Nations, the International Court of Justice and the Council of Europe.

Upon leaving the EU and in continued support of the EU sanctions against Russia, the UK enacted the Russia (Sanctions) (EU Exit) Regulations 2019[1] (**the "Russia Regulations"**) which cover all number of matters including designation of persons, asset freeze provisions, regulation of transferrable securities and loans, immigration and trade.



Many businesses bound by the Russia Regulations now find themselves "between a rock and a hard place"[2] – between sanctions regimes and contractual obligations. This was the scenario that befell Renaissance Securities.

Renaissance Securities v Chlodwig Enterprises and Others[3]: The Parties

Renaissance Securities (**"RenSec"**) provides investment and brokerage services to an international client base, including a group of entities originally incorporated in Cyprus (**the "Defendants"**). The First and Second Defendants, Chlodwig Enterprises Limited (**"Chlodwig"**) and Adorabella Limited (**"Adorabella"**) subsequently re-domiciled to Russia following the imposition of sanctions.

The Defendants are beneficially owned by a Mr Andrey Guryev, his wife and daughter. Mr Guryev became a sanctioned person by the Office of Financial Sanctions Implementation in

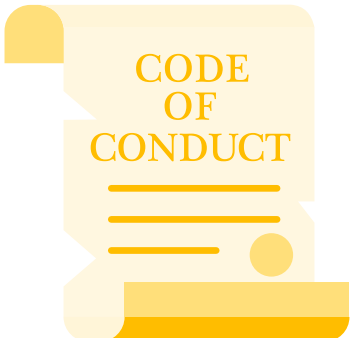
1 Made under the Sanctions and Anti-Money Laundering Act 2018
2 s. 44 of the Sanctions and Anti-Money Laundering Act 2018 should provide some comfort to those parties who find themselves in such a scenario
3 Renaissance Securities (Cyprus) Limited -v-Chlodwig Enterprises Limited and Ors [2023] EWHC 2816 (Comm)

the UK[4] . The US followed suit. Both Chlodwig and Adorabella became sanctioned since they held assets for trusts benefitting Mr Guryev.

RenSec v Chlodwig: The Claims

Each of the Defendants was a client of RenSec and a party to an Investment Services Agreement (**"ISA"**). The ISAs contained an English governing law clause and a dispute resolution clause subject to LCIA rules (seated in London).

RenSec holds substantial assets and securities for the Defendants, some of which were held with Euroclear Bank SA/NV (**"Euroclear"**) in a sub-custody account of the Russian National Settlement Depositary[5], which in turn held a sub-custody account for RenSec. Post-sanctions, Euroclear segregated and froze assets within its control belonging to the Defendants. RenSec followed suit by blocking the Defendants' trading accounts and freezing their assets. RenSec thereafter refused the Defendant's request for the transfer of funds into accounts held by Chlodwig and Adorabella. In turn, RenSec received Letters Before Action, which referred to commencing proceedings in "the appropriate forum".



Claims in Russia and the Russian Commercial Procedural Code

In light of the Letters Before Action, RenSec monitored Russian court websites. Proceedings were commenced against it on/around 13 October 2023 with preliminary hearings listed for early November, despite the fact that Rensec had not been served with papers, nor submitted to the Russian jurisdiction.

The Russian Commercial Procedural Code[6] (**the "Code"**) was introduced to provide Russian parties with a route to litigation when faced with "restrictive measures" (sanctions), outside of Russia. Under Article 248.1 of the Code, Russian courts will have exclusive jurisdiction over disputes involving sanctioned parties where:

"a) There is no arbitration or choice of court agreement; or

b) There is a valid agreement to arbitrate, or litigate, outside Russia, but it becomes unenforceable as a result of sanctions creating "obstacles" for "access to justice"."

A sanctioned party may also apply to a Russian court to obtain an anti-suit injunction (**"ASI"**) prohibiting proceedings being commenced in another jurisdiction[7]. The provisions of Article 248 have been interpreted widely so that anti-suit relief can restrain foreign proceedings, regardless of the existence of a jurisdiction clause.

RenSec's Response: ASI

RenSec urgently sought an ASI and an anti-anti-suit injunction (**"AASI"**). The judgment summarises some the key principles governing the grant of ASIs and AASIs, including that:

(1) An ASI will standardly be granted where proceedings are brought in breach of an arbitration clause[8]. This is so, even where the seat of the arbitration is not England and Wales[9], as recently confirmed by the Court of Appeal in UniCredit v RushChemAlliance.

(2) Arbitral proceedings do not have to have been commenced at the point that the ASI is sought[10] - ASI and AASI relief can (and should, in light of point (4) below) be sought expeditiously and even pre-emptively.

(3) Damages are not an adequate remedy for breach of an arbitration clause[11] - such award would be unenforceable without a licence.

(4) An Applicant must act promptly when seeking relief and before foreign proceedings are too far advanced, albeit the commencement of foreign proceedings is not a bar to the grant of ASI and/or AASI relief.

The Court granted the ASI restraining the Defendants from furthering the litigation in Russia. Dias J viewed the commencement of the Russian litigation as a deliberate breach of the ISAs, since there was no express requirement for them to do so under the Code.

RenSec's Response: AASI

An AASI ensures that steps taken by an Applicant to protect its contractual rights are not undermined by counter/pre-emptive steps taken by a Respondent e.g. if the Defendants were to obtain their own ASI from the Russian Courts. An ASI obtained from a foreign court will

4 https://www.gov.uk/government/news/uk-imposes-sweeping-new-sanctions-to-starve-putins-war-machine
5 Itself sanctioned by the EU meaning that any assets held in or via the Russian National Settlement Depositary are inaccessible: The National Settlement Depository has been included in the list of entities which need to have their funds and economic resources frozen, in Annex I of Council Regulation 269/2014.
6 Introduced by Federal Law No. 171-FZ dated 8 June 2020
7 Article 248.1(3)(2) of the Russian Commercial Procedural Code
8 The Angelic Grace, [1995] 1 Lloyd's Rep. 87
9 See Deutsche Bank AG v. RusChemAlliance LLC [2023] EWCA Civ 1144
10 See Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower LLP [2013] UKSC 35; [2013] 1 WLR at [48]
11 The Angelic Grace

usually be recognised in England and Wales[12].

However, if the foreign ASI is in itself a breach of a jurisdiction or arbitration clause, the English Courts can proactively grant an AASI prohibiting the foreign proceedings and mandating steps to be taken to discontinue the same.[13]

Given the deliberate steps taken by the Defendants to circumvent the arbitration clause, and the availability of anti-suit relief under the Code, the Judge granted an AASI in favour of RenSec.

RenSec's Response: Alternative Service and Penal Notice

The service of the ASI and AASI was not straightforward. Russia is a signatory to the Hague Convention and has entered a reservation in respect of Article 10, which has the effect of precluding service via other direct means. Service in compliance with the Hague Convention could have taken 17 months or more. Accordingly, RenSec sought (and was granted) permission to serve Chlodwig and Adorabella via alternative means, pursuant to CPR6.15.

Dias J agreed with the Claimant that Mr Guryev, his wife and his daughter be named in the contempt penal notice, since the Defendants were, RenSec averred, under their control. Mr and Mrs Guryev objected at the return date hearing[14], submitting that the notice should not be addressed to the Guryevs since where an injunction is made against a corporate defendant, natural persons should only be named if they are a director or an officer of that defendant.

The "Body Corporate Provision"[15] provides that for a corporate defendant's breach of an order, only the directors or officers attract civil contempt liability, not UBOs. The Guryevs argued this provision extends to de jure or de facto directors, but not to shadow directors[16] - a point accepted by Butcher J.

Comment

The decisions in RenSec demonstrate the willingness of the English courts to act expeditiously to uphold contractual agreements between parties. Efforts by defendants to circumvent these agreements and to "shoe horn" proceedings into another jurisdiction will be strictly opposed.

Given the apparent breadth of the Code, including the power of the Russian Courts to summarily determine cases and grant ASIs of its own, the value of monitoring the Russian court websites and a timely without notice ASI and/or AASI application cannot be overstated.

The decisions also provide comfort to parties faced with parallel or duplicative proceedings in Russia under the Code. The English Courts have shown a degree of irreverence to the same and have therefore declined to be waylaid with potential issues of comity.

12 See Raphael, The Anti-Suit Injunction (2nd Edition, OUP)
13 See Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd [2013] EWHC 1276 (Comm); [2013] 2 All ER (Comm) 983
14 Renaissance Securities (Cyprus) Limited -v-Chlodwig Enterprises Limited and Ors [2023] EWHC 3160 (Comm)
15 See Olympic Council of Asia v Novans Jets [2023] EWHC 276 (Comm)
16 See Integral Petroleum v Petrograt [2018] EWHC 2686 (Comm)

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APPOINTING AN INTERIM RECEIVER IN BANKRUPTCY PROCEEDINGS:

ETERNITY SKY INVESTMENTS V ESTATE OF ZHANG

Authored by: Wilson Leung (Barrister) - Serle Court

This article looks at the court's power to appoint an interim receiver in pending bankruptcy proceedings, pursuant to s.286 of the Insolvency Act 1986. This power, though potentially potent, has been infrequently invoked by petitioners. The recent decision in Eternity Sky Investments Ltd v Estate of Zhang Zhenxin [2023] EWHC 2744 (Ch) is a rare illustration of the court deploying this power, which provides useful guidance on the applicable test. (The author acted as counsel in the case.)

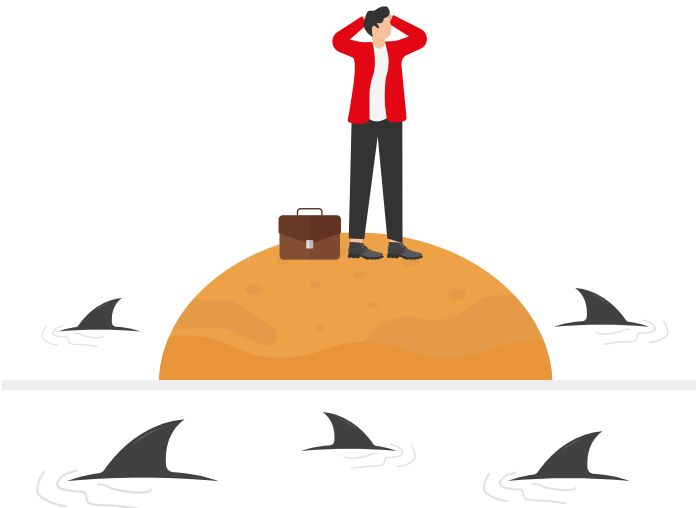
Interim Receivers in Bankruptcy Proceedings

Interim protective measures are a central feature of commercial litigation. In the insolvency sphere, the court has power (under s.135 of the Insolvency Act 1986 ["IA 1986"]) to appoint a provisional liquidator over the assets of a company that is subject to a pending winding-up petition. That power is regularly used and has been analysed extensively in the case law. What is less commonly invoked is the court's analogous power under s.286 to appoint an interim receiver over the assets of an alleged debtor against whom a bankruptcy petition has been presented.

Under s.286(1), the court has power to appoint an interim receiver over the asset of a debtor if it is shown to be "necessary for the protection of the debtor's property". The power can be exercised "at any time" after the presentation of the petition and before a bankruptcy order is made.

A "Draconian" Power

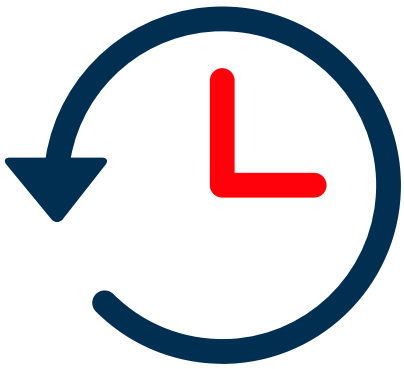
The appointment of an interim receiver under s.286 has been described by one commentator as a "draconian measure"[1]. Upon appointment, the interim receiver takes immediate possession of all of the debtor's property (including even property that would not form part of his bankruptcy estate).[2] The interim receiver would, by default, have wide powers over



1 Doyle, Keay & Curl: Annotated Insolvency Legislation (11th edn 2023), commentary to section 286
2 ss. 286(4) and 286(8)

the debtor's property, including (i) the same powers as a "receiver or manager appointed by the High Court"[3] ; (ii) the power to sell any goods that are likely to diminish in value [4]; (iii) the power to "take all such steps as he thinks fit for protecting the debtor's property" [5]; and (iv) the ability to apply for a private examination of anyone who has information about his assets.[6] Hence, an interim receivership order can cause enormous disruption to the debtor, his lifestyle, and his financial affairs – even before any bankruptcy order has been made.

Despite the potent nature of the power, it has not been commonly resorted to by petitioners. The English court has observed that the appointment of interim receivers under s.286 is "unusual".[7] In Hong Kong, a similar legislative provision[8] appears to have been the subject of only two applications in 20 years.[9] It is unclear why this is the case, but it is likely related to the expense of an appointment. The interim receiver's remuneration and expenses are paid from the debtor's property; and that remains so even if the bankruptcy petition is ultimately dismissed.[10] This is in addition to the legal costs of making the application. The upshot is that in cases where the alleged debtor's assets are only of low or moderate value, it is unlikely to make commercial sense for the petitioner to pursue such an application.



Eternity Sky v Estate of Zhang: Background

The decision of Chief Insolvency and Companies Court Judge Briggs in *Eternity Sky Investments Ltd v Estate of Zhang Zhenxin* [2023] EWHC 2744 (Ch), [2024] BPIR 96, provides a rare illustration of the court deploying this power.

Mr Zhang Zhenxin ("Mr Zhang") was a businessman who died in England in 2019. An alleged creditor ("Eternity Sky") claimed that, prior to his death, Mr Zhang had given a personal guarantee to Eternity Sky, and consequently Mr Zhang's estate was indebted to Eternity Sky for £52 million. Eternity Sky presented a petition seeking an insolvency administration order ("IAO")[11] over Mr Zhang's estate (which is similar to a bankruptcy order against a debtor who is alive). The petition was opposed by Mr Zhang's widow. Before the petition was substantively heard, Eternity Sky applied for the appointment of an interim receiver over the estate. Mrs Zhang opposed the application.

The Applicable Test

Drawing on both the statutory wording and the case law on provisional liquidation (which he described as giving "helpful guidance"[12]), CICCJ Briggs identified four elements to the test for appointing an interim receiver.[13]

3 s.287(2)(a)
4 s.287(2)(b)
5 s.287(3)(a)
6 ss.366 and 368
7 Barker v Baxendale-Walker [2018] EWHC 2518 (Ch), [38]
8 s.13 of the Bankruptcy Ordinance (Cap.6)
9 Re Wu Chun Kwan [2019] HKCFI 2802, [1]
10 Insolvency Rules 2016 ("IR 2016"), rr. 10.52(3)-(4) and 10.53(3)-(4)
11 under the Administration of Insolvent Estate of Deceased Persons Order 1986
12 [54]
13 [65]

First, the court must be satisfied that the debtor is unable to pay his debts, thus potentially leading to a conclusion that a bankruptcy order (or IAO) is "likely" to be made. This derives from the statutory requirement that an order appointing an interim receiver must contain a statement that "the debtor is unable to pay the debtor's debts"[14]. It also echoes the jurisprudence on provisional liquidation.[15]

Second, the appointment must be "necessary for the protection of the debtor's property". This requirement is found in the wording of s.286(1).

Third, the exercise of discretion must favour an appointment. The overriding principle is that the court should take

"whichever course seems likely to cause the least irremediable prejudice to one party or the other."[16]

Fourth, the proposed receiver must provide monetary security for the proper performance of his functions.[17]

The Court's Decision

Applying the test above, CICCJ Briggs found that all elements were satisfied on the facts.

As to whether Mr Zhang's estate was unable to pay its debts: Mrs Zhang opposed the petition on the ground that the personal guarantee was vitiated by illegality (because the underlying debt was part of an illegal scheme).

Analysing the evidence before him, CICCJ Briggs held that it did not provide sufficient support for that ground of opposition and therefore it was likely that an IAO would be made (albeit he acknowledged that this view was provisional only).[18]

CICCJ Briggs also concluded that an interim receiver was necessary for the protection of Mr Zhang's estate. He agreed with Eternity Sky's argument that there was a lack of visibility regarding the value of the estate, which was exacerbated by the fact that Mrs Zhang had not applied to be its personal representative (despite Mr Zhang having died 4 years prior) and had refused to provide information to Eternity Sky. He also focussed on the fact that there had been dealings in the estate's assets after Mr Zhang's death, including the disposal of two substantial properties.[19]

In relation to discretion, CICCJ Briggs was unpersuaded on the evidence by Mrs Zhang's argument that the estate would suffer substantial prejudice in the form of disruption to the operating businesses which it (indirectly) owned.[20]

Thus, CICCJ Briggs ordered the appointment of an interim receiver.[21] This was on condition that Eternity Sky's parent company provided a cross-undertaking in damages, to be fortified by a payment into court.[22]

Conclusion

Eternity Sky v Estate of Zhang offers a helpful exposition of the applicable test for the court's power under s.286 to appoint an interim receiver pending the determination of a bankruptcy petition. It also provides a practical illustration of how, in appropriate circumstances, the power can be wielded to protect the (potential) bankruptcy estate.

The judgment leaves several areas to be clarified, however. One is the extent to which there is symmetry between the test for provisional liquidation and the test for interim receivership. In some parts of the judgment, CICCJ Briggs appeared to be of the view that there was "little difference" in the tests.[23] Elsewhere, however, he highlighted certain differences between the powers (for instance, that the appointment of a provisional liquidator is often a "public interest decision", whereas for interim receivership the focus is on protecting the debtor's assets);[24] this suggest that the tests might not be wholly identical. It is to be hoped that further elucidation will emerge in the case law.

14 r.10.51(1)(e)(i) of IR 2016
15 Revenue & Customs Commissioners v Rochdale Drinks Distributors Ltd [2011] EWCA Civ 1116, [2012] 1 BCLC 748, at [77]: The applicant must demonstrate that he is "likely to obtain a winding-up order on the hearing of the petition".
16 [89]. See semble Rochdale Drinks, [109]
17 ss.388(2)(a), 390(3) of IA 1986; and r.10.52 of IR 2016. This does not apply if it is the official receiver who is being appointed.
18 [70]-[82]
19 [66]-[69], [96]-[97]
20 [90]-[100]
21 [111]
22 [105]-[110]
23 [54], [62], [64]
24 [63]-[64], [95]

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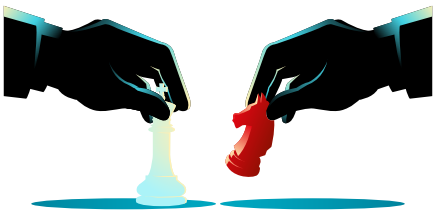
DISPUTES ARISING FROM THE RED SEA DISRUPTION

Authored by: Edward Hart (Senior Consultant), Aakash Brahmachari (Principal), Cormac McGarry (Director), Victoria Mitchell (Analyst), Ramon Ghosh (Partner) – Control Risks and Akshay Misra (Managing Associate) - Penningtons Manches Cooper LLP and Mio Takemoto (Associate) - Amemiya Law Office

Since November 2023, Houthi rebels in Yemen have been launching attacks on commercial shipping transiting the Red Sea. While the attacks were initially focused on Israeli-linked vessels, in response to the ongoing Israel-Gaza conflict, targeting over time has become more unpredictable. Despite the US and UK initiating targeted air strikes against the Houthis on 12 January 2024, with the aim of securing transit for global shipping through the waterway, an end point for the attacks remains unclear.

While the waterway, through which around **12% of global trade, including 30% of global container volume** passes, is still open for business, many major shipping companies, including Maersk and several large Japanese players, have announced that they have suspended transit through the route, instead diverting around the Cape of Good Hope, adding over 6,000km to transits. So far, the disruption has not led to a major upswing in disputes as the majority of the vessels have continued using the route. However, in the coming months and years, and following advisories from shipping associations such as BIMCO and INTERTANKO, we expect an increase in diversions across ship types and a corresponding increase in legal disputes arising from costly diversion decisions.



Owner/Charterer Disputes

The most prominent area of potential disputes will be between vessel owners and charterers. Actions might relate to imposition of additional chartering rates, choice of route and compensation for damage to vessels or cargo. Key to these disputes will be the terms of war risk clauses in contracts, including the Charterparty and Bills of Lading.

War risks are defined broadly, as an "act of war, civil war, hostilities; warlike operations; … acts of piracy and/or violent robbery and/or capture/seizure … blockades (whether imposed against all vessels or imposed selectively against vessels or certain flags or ownership…) by any person, body, terrorist or political group, or the Government of any state,"

a definition that appears applicable to much of what we have seen in the Red Sea, to date.

More recent versions of standard contractual terms have tended to favour vessel owners. For example, the War Risks Clause for Voyage Chartering 2013 (VOYWAR 2013) provides that if at any stage of a voyage it appears that in the reasonable judgement of the

master and/or owners, that the vessel may be exposed to war risks on any part of the route, the owners are entitled to order another route to be taken. Ship owners are also entitled to charge extra fees if the alternative route is more than 100 miles in excess of the original route. However, if VOYWAR 2013 or other standard clauses are not used, then the Hill Harmony decision, which states that charterers are able to direct the route a vessel takes unless the route compromises the safety of the ship, may be relevant.[1] Another decision which may be of relevance here is the recent UK Supreme Court judgment in *Herculito Maritime Ltd v. Gunvor International BV*. The court held that shipowners cannot exercise general liberties to deviate from their original route and go around the Cape of Good Hope in order to avoid war risks unless there has been a qualitative change in circumstances.[2] The case emanated from a piratical seizure of a vessel in the Gulf of Aden from 30 October 2010. The timing of the judgment adds to its significance given the current situation in the same waters.

Parties could also disagree on who is responsible for the extra bunkering costs associated with longer journeys.

Southern African bunkering ports will likely see increased demand, and it is not clear whether they have the capacity and sufficient infrastructure in place to meet this demand. This could potentially give rise to further owner/charterer disputes and additional risks to vessels should they have to wait for a significant length of time for bunkering, or worse still, are unable to refuel, and run out of fuel mid-journey.

Third Party Disputes

Beyond vessel owners and charterers, many disputes are likely to involve third parties and have wide-ranging knock-on effects. For example, claims may be brought by consignees or receivers whose products have been delayed by the extra journey time. In the case of just-in-time manufacturing, delays to key supplies could lead to production line shutdowns and cancelled orders, and potentially claims for huge amounts in lost revenues. Perishable cargo may be unfit for use after spending extra weeks at sea, which will likely lead to claims for damages.

Vessels, whether they go through the Suez Canal or around Africa, may employ additional specialised security contractors during this period to try to ensure the safety of their cargo. Should these contractors fail to prevent losses of vessels or cargo, or lengthy delays, then this will likely lead to claims of negligence or failure to fulfil contractual obligations in protecting the vessel. The rebels' move to use of missiles and drones suggests that assistance from security contractors may only be of limited use in preventing damage to vessels, and shipping companies transiting the Red Sea may also decide to forgo any additional protective services.

In the short period since the start of the disruption, insurance premiums have already risen significantly and are expected to rise further. Insurance claims may also lead to a large volume of disputes, should insurers refuse to pay out for lost or delayed cargos or damage to vessels. Claims will depend on the terms of each individual policy, but insurers may refuse to pay out on grounds that owners or charterers acted negligently with regards to their safety by continuing to sail through the Red Sea or claim an Act of God with regard to unforeseeable risks relating to war.

Prepare For Unavoidable Disputes

The above is just a fraction of the many kinds of disputes that are likely to arise as a result of current, and prolonged disruption to shipping routes in the Middle East. While in some cases ship owners, charterers, consignees and other third parties can take measures to ensure safe passage and delivery of cargos, many disputes will be inevitable. Each case should be assessed on a case-by-case basis and legal strategy should be informed by actionable intelligence.

1 [2001] UKHL 68
2 [2024] UKSC 2

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EXPERT EVIDENCE – AVOIDING FATAL FAILURE

Authored by: Claudine Morgan (Legal Director) and Clare Mallein (Trainee Solicitor) – Charles Russell Speechlys

On 29th November 2023 the Supreme Court released its decision in the eagerly awaited case of TUI UK Ltd (Respondent) v Griffiths (Appellant) [2023] UKSC 48.

TUI tells a catastrophic tale in failing to challenge expert evidence adequately at the appropriate time and the latent risk of relying on **'trial by ambush'** tactics. It provides useful guidance on the correct procedural approach to follow where expert evidence is likely to be disputed.

Background

While on an all-inclusive package holiday, Mr Griffiths suffered a serious gastric illness which caused him long-term problems. As a result, Mr Griffiths sued TUI for breach of contract. He relied on expert evidence from a microbiologist as to the cause of his sickness to prove his claim. The expert concluded that the illness was, on the balance of probabilities, caused by contaminated food and / or drink.

TUI did not require the expert to attend cross-examination and it did not submit any evidence of its own. The evidence was therefore uncontroverted. Remarkably, TUI waited until the eleventh hour to criticise the expert report and only did so as part of its closing submissions. Nevertheless, TUI successfully convinced the judge that deficiencies in Mr Griffiths' expert's report meant that Mr Griffiths had failed to prove his case.

On appeal, the High Court overturned the trial judge's decision, concluding that it could only reject an uncontroverted expert report if it was a bare ipse dixit, i.e. just a one-sentence report stating the expert's conclusion (which, in Mr Griffiths' case, it was not). However, the Court of Appeal subsequently upheld an appeal by TUI, concluding that there were no authorities to support the bright line rule adopted by the High Court.

The Supreme Court's Decision

When the case reached the Supreme Court, the Court stressed the critical importance of the quality of the expert's reasoning. However, in conducting a trial in an adversarial system, the judge must ensure that the trial is fair. In this regard, Lord Hodge (giving the unanimous decision) endorsed the long-established rule set out in Phipson on Evidence (itself deriving from the rule in Browne v Dunn (1893) 6 R. 67), (**the Phipson Rule**).

The Phipson Rule states that a party must challenge in cross-examination the evidence of any witness if it wishes to submit to the court that the evidence should not be accepted on that point, and that if a party decides not to cross-examine on a particular point, it will be difficult for it to submit that the evidence should be rejected.

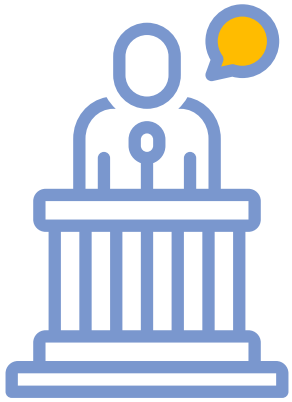
The Supreme Court also clarified that the Phipson Rule applies to both witnesses of fact and expert witnesses and regardless of whether the challenge is made on the basis of dishonesty, accuracy or other inadequacy. Its application is universal.

However, the Court did explain that the rule is flexible and will depend on the circumstances of the case. The court identified 7 potential exceptions to its application. Notably, these included where the expert has already been given sufficient opportunity to address criticism or clarify his or her report (such as by way of focused CPR 35.6 questions) but has failed to respond satisfactorily; potentially where there has been a serious failure to comply with the requirements of CPD PD 35; or where the report is based on an incorrect/incomplete history or ill-founded assumptions.

Key Take Aways Going Forward

Expert evidence is often critical to the determination of complex, high value claims. Getting it wrong can be fatal. The key points arising from TUI are as follows:

- Oppose the other side's evidence at the earliest opportunity, whether that is achieved by obtaining your own expert evidence, cross examination, written questions via Part 35.6, or relying on one of the exceptions listed by Lord Hodge.
- If using Part 35.6 questions, ensure they are specifically focused on and give adequate notice of the challenges you wish to make. Note that TUI had raised CPR 35.6 questions, but these did not adequately alert the other side to the challenges it ultimately made in closing submissions. Be clear at the outset.
- Cross examination need not be long, it just needs to be focused on the challenges to the evidence.
- Parties must ensure that the expert's report complies with the relevant rules (and note that the Guidance for the Instruction of Experts in Civil Claims 2014 goes further than CPR 35 by stating that "generally the summary [of conclusions] should be at the end of the report after the reasoning.").



TUI followed several other cases in 2023 where the Court specifically criticised deficiencies in relation to expert evidence. Examples included:

- Failure by an expert to remain impartial and address all the evidence fairly, and advancing explanations for the first time during cross-examination[1].
- Expert evidence that was unsatisfactory and ill thought through, and where the Claimant's experts had intended to give oral evidence without fully addressing key changes in evidence since their reports had been compiled [2].
- Failure by the parties to agree a joint expert, where the Claimant had failed to engage properly with the appointment of an expert and only did so at a late stage [3].

Conclusion

The above examples underline the importance of following best practice whenever expert evidence is required, whether you are obtaining or challenging such evidence. Whilst they certainly aren't rocket science, the key considerations set out above should be at the forefront to ensure there is no risk of them inadvertently being overlooked by the urgency of a matter or the unusual nature of the expert evidence required. We are yet to see decisions following TUI, but it certainly presents a credible risk of uncontested (or inadequately contested) evidence being accepted at face value.

Ultimate care must therefore be taken, not only to ensure the quality, compliance and robustness of your expert's own report, but also that you shout loud and clear at the outset, and indeed consistently thereafter, with any challenges to the other side's report.

1 Rowbottom v Howard (Deceased) [2023] EWHC 931 (KB)
2 Scarcliffe v Brampton Valley Group Ltd [2023] EWHC 1565 (KB)
3 Gheewalla v Rasul [2023] EWHC 2074 (Ch)

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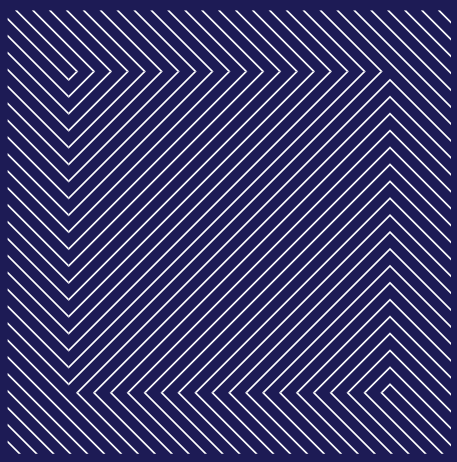

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ENFORCEMENT OF 'UNENFORCEABLE' FOREIGN JUDGMENTS AT COMMON LAW

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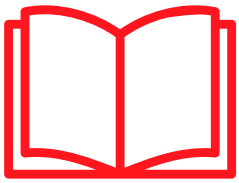
Currently the common law rules of enforcement will apply by default to the enforcement of a foreign judgment in the UK should any of (i) the legacy EU regime, (ii) the Hague Convention on Choice of Court Agreements 2005, (iii) the Administration of Justice Act 1920, or (iv) the Foreign Judgments (Reciprocal Enforcement) Act 1933 not apply.

To enforce a foreign money judgment at common law, the enforcing party must sue on the foreign judgment as a judgment debt and must satisfy the English court that the foreign judgment is final and conclusive in its jurisdiction of origin. A foreign judgment will be incapable of enforcement at common law if the English court determines that: (i) the foreign court lacked competent jurisdiction, according to English rules of private international law; (ii) the judgment was obtained by fraud; or (iii) enforcement would be contrary to public policy or the requirements of natural justice.

There is, however, no rule of the common law that a foreign judgment which has res judicata effect in its jurisdiction of origin is incapable of enforcement by the English court simply because it is not presently or fully capable of enforcement in the jurisdiction of origin. This was the finding of Stephen Houseman KC sitting as a Deputy High Court Judge in ***Invest Bank PSC v Ahmad Mohammed El-Husseini*** and others [2023] EWHC 2302 (Comm), wherein res judicata judgments of the Abu Dhabi court were deemed capable of enforcement in England despite them not being enforceable in Abu Dhabi.



Background

The case dealt with two credit facilities given to two UAE companies by Invest Bank, both of which were secured by a personal guarantee provided by Mr El-Husseini. Invest Bank brought claims against the borrowers and guarantors in Abu Dhabi in 2021, securing monetary judgments for a total sum roughly equivalent to £20 million. With these judgments, Invest Bank pursued enforcement proceedings in Abu Dhabi and then in England.

Invest Bank's enforcement action in England resulted in a default judgment against Mr El-Husseini, who failed to file a defence. Invest Bank's claim also consists of a claim under the guarantees, and a claim against the family members of Mr El-Husseini under section 423 of the Insolvency Act 1986.

In September 2022, while the English proceedings were underway, the UAE Federal Decree Law No 14 of 2018 was amended to introduce Article 121 bis, which required that financial institutions obtain "in-kind" security to enforce any claims under credit agreements against individuals or sole enterprises. A personal guarantee, such as the one provided to Invest Bank, was not considered to be "in-kind" security without more.

Mr El-Husseini then secured execution judgments in Abu Dhabi which declared that by reason of Article 121 bis, the monetary judgments obtained by Invest Bank were unenforceable against the guarantor as the guarantees were not deemed to be 'sufficient security'. The enforcement actions by the Bank were therefore vacated.

In the English proceedings, the Sixth Defendant applied to set aside the default judgment and have the issue of D1's liability under the UAE judgments determined as a preliminary issue to the trial listed in July 2024. Essentially, the Sixth Defendant argued that Article 121 bis rendered the monetary judgments unenforceable in the UAE and therefore they could not be enforced in England.

The Decision

Stephen Houseman KC, sitting as a Deputy High Court Judge, found that the monetary judgments were final and conclusive as to liability within the UAE. The UAE execution judgments were procedural and did not interpret or amend the final determinations made on the merits in the monetary judgments. The judge found that there was no rule under the common law that prevented a foreign money judgment from being enforced in England as a result of its lack of enforceability in its jurisdiction of origin. As such, the monetary judgments were res judicata in the UAE and enforceable by the English court, whilst the execution decisions were irrelevant to that enforcement.

The judge further found that Mr El-Husseini was liable to the Bank under the guarantees, which remained valid under UAE law despite Article 121 bis. He refused to set aside default judgment, finding that Mr El-Husseini had no reasonable prospect of defending the enforcement claim.

The decision is valuable confirmation that once a party obtains a res judicata judgment, the common law will enforce it (subject to its other requirements). The ratio of this decision may have a more limited impact given that it is a more unusual case where a res judicata judgment is unenforceable in the country of origin. That said, and as was recognised by the court, the decision results in the common law providing a more favourable route for enforcement than the statutory regimes under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which requires local enforceability as a condition of recognition and enforcement in England and Wales.

Looking Forward

The judgment was not appealed and sits as an authoritative exposition of this narrow question of private international law. The judge, however, noted that the issues were perhaps suitable for consideration by an appellate court, so this may not be the final word on the issue should the opportunity arise.

Whilst this decision helpfully confirms the position at common law, the ambit of the common law rules of enforcement is likely to be redefined in the near future with the UK having signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 on 12 January 2024. Although the Convention only comes into force roughly a year after ratification or accession, these rules will come to govern enforcement of judgments from the EU (except for Denmark) in proceedings commenced after 31 December 2021 and a potentially growing list of countries, including Israel, the Russian Federation and the United States which have all signed (but not yet ratified) the Convention. The signatories are only likely to increase over the coming years, making for a more streamlined, statutory process to enforce foreign judgment in the UK and UK judgments abroad. In the meantime, the unenforceable can be enforceable at common law.

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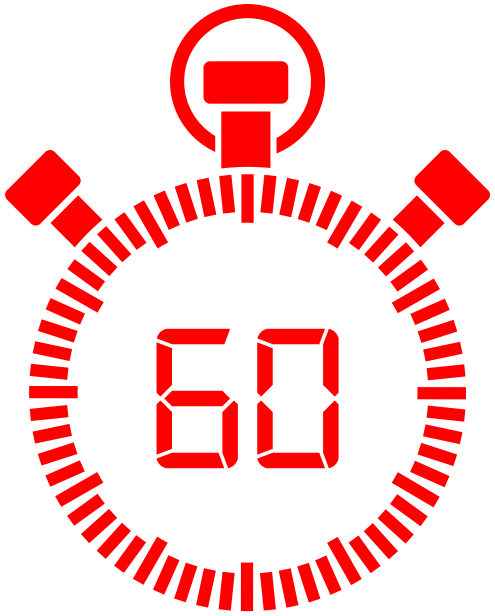

Q What would you view as the 'best' part of your job?

A Aside from all the different people we meet, interesting cases we work on and industries we get to learn about, I think the best part of our job is that at any moment something unexpected can happen. How many times have you come into work on a Tuesday morning with your action list and meetings planned out for the day only to sit down at your desk and receive and email or phone call that completely changes everything you were going to do that day. Whilst it can be stressful (knowing that the to do list is still waiting for you), I don't think there are many 'office' jobs that are as exciting.

Q If you could give one piece of advice to our FIRE Starters practitioners, what would it be?

A Remember to look after yourself. Our work and lives can get particularly stressful and hectic, and so it is important to remember to take a bit of time for yourself. Go for that run, make yourself a nice dinner or unwind with some music for half an hour. I find that after taking a bit of a time out I can come back to the other commitments in my life (whether personal or professional) with renewed enthusiasm and interest.

Q What do you see as being the biggest trends of 2024 in FIRE?

A I think there is going to be a continued increase in the number of Insolvency, fraud and enforcement actions. With the number of insolvencies up higher than pre-pandemic numbers and high interest rates squeezing individuals and industries alike, the number of frauds that will be uncovered and distressed debt that will be called in is bound to go up.

Q What has been your most memorable experience during your career so far?

A Early in my career I worked on a yearlong trial in the Cayman Islands, which required me to be on the island for much of that year. It was an incredible experience, if often challenging, and really set me up for the rest of my career as a litigator.

Q What is one important skill you think everyone should have?

A Listening properly to what people are saying is a skill that I think is underrated. It's important for building connections as well as learning more about the people in our lives. Everyone responds better when they can tell that what they are talking about is really being taken onboard.

Q What does the perfect weekend look like?

A Getting up on a Saturday grabbing a coffee from a local café and going on a long walk with my wife and dog. Coming home in the afternoon and cooking an amazing dinner and relaxing with a glass of wine (or two) and watching a good film. Then on Sunday heading to a local pub with friends and having a roast dinner and maybe watching some sport in the afternoon.

Q What is one country you would love to visit and why?

A Argentina has been on the top of my list for a long while. I've heard some amazing things from friends and colleagues that have visited. Great food, great wine, amazing cities and vast forests and mountain ranges to explore. It is difficult to find the time to be able to explore a country properly and having recently returned from an incredible trip to Australia I will definitely want to make sure that when I go to Argentina I do it right.

Q What book would you recommend everyone to read, and why?

A I should probably recommend an intellectual book (like A Brief History of Time by Stephen Hawking) or a biography from an influential person (Dreams from My Father by Barak Obama), but to be honest we already do a lot of serious reading for our jobs. Therefore, I love to kick back (usually on a beach or next to a pool) with a fantasy or science fiction book. Inspired by the release of the films, I recently re-read Dune (having first read it about 20 years ago) and absolutely loved it. So that's what I'll recommend!

Q What is one thing people might not know about you?

A When I was 18 I did a ski season in Andorra. It was amazing honing my snowboarding skills whilst working with and meeting some incredible people. It has definitely contributed to my desire to head out to the mountains at least for 1-week every year since!

Q If you could choose any two famous people to have dinner with, who would they be and why?

A A bit controversially, I think I would pick Donald Trump and Hilary Clinton. It would be really interesting to see what Trump is like in real life and I think Hilary (love or hate her) has had an amazing career and would be able to give some real insight to US and Global politics. It would also be amusing to see if they could get through a meal with each other without resorting to a shouting match.

Q What cause are you passionate about?

A Donating blood is an extremely important and an incredible thing to do if you can. Currently only about 7% of people in the UK donate regularly and the NHS relies on these donations to literally save lives. There are never enough donations and so if it is something you can do (and more people than ever can now donate) I would urge everyone to look into it! As someone who has given blood nearly 50 times, I promise it's not as bad as you think.

Q As a speaker at our FIRE Starters Global Summit 2024, what are you most looking forward to at the conference?

A I might be bias because it is a talk that I am chairing, but the session on the Kagazy Case is going to be excellent. It is a massive case and we are extremely lucky to have panel members that were so intimately involved, their insight and lessons I'm sure will be invaluable. It would also be amiss to say that I wasn't also looking forward to the fancy dress reception!

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NEW TOOLS FOR FRAUD AND ASSET TRACING BETWEEN HONG KONG AND CHINA?

Authored by: Stephen Chan (Partner) and William Payne (Trainee Solicitor) – Charles Russell Speechlys

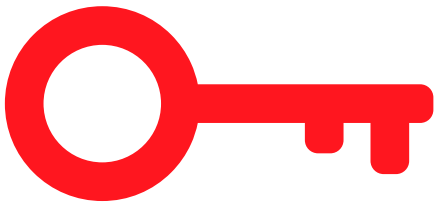
Introduction

Many experienced fraud and asset tracing practitioners have come to realize over the years that when defrauded monies are dissipated into Mainland China, asset tracing becomes extremely difficult and more often than not, victims of fraud are advised to focus their efforts for recovery in other jurisdictions.

With the new reciprocal of enforcement of judgment regime between Hong Kong and Mainland China coming into effect on 29 January 2024, it may be time to revisit what tools may potentially be available from a Hong Kong perspective.

What's New in Hong Kong?

The new regime in Hong Kong covered by the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) ("REJ") will supersede previous arrangements under the Mainland Judgments (Reciprocal Enforcement) Ordinance Cap 597 ("MJREO").



Two key features of the new regime:

Non-Monetary Judgments: The availability of reciprocal enforcement for non-monetary judgments is game-changing. Previously, only monetary judgments could be the subject of reciprocal enforcement between Hong Kong and Mainland China.

Removal of Exclusive Jurisdiction Requirement: Previously, only contractual disputes containing an exclusive jurisdiction clause for either Hong Kong or Mainland China could be the subject of reciprocal enforcement. This is no longer the case and arguably removes the single most significant barrier for reciprocal enforcement.

While there are a number of exclusions under the new regime, it is important to bear in mind that interim measures such as injunctions and freezing orders cannot be the subject of reciprocal enforcement under the new regime.

Disclosure Orders Against Mainland Chinese Banks?

One of the primary barriers for asset tracing in China is the very difficult task of obtaining information from Mainland Chinese banks.

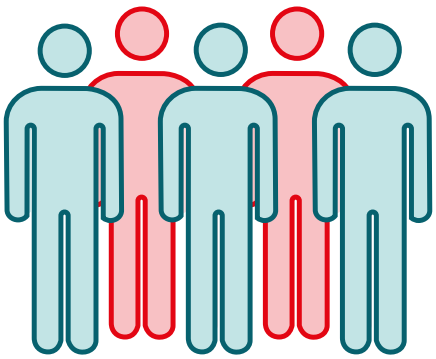
In Hong Kong, the Courts regularly grant disclosure orders ("Bankers Trust Orders") against banks alongside freezing orders.

However, these orders are arguably interim in nature as they do not form a standalone proceeding and would not therefore meet the requirements for reciprocal enforcement pursuant to the REJ.

On the other hand, a Norwich Pharmacal application is arguably a standalone proceeding in Hong Kong capable of being a full and final judgment. There is some support for this view in the UK case of *AB Bank Limited v Abu Dhabi Commercial Bank [2016] EWHC 2082 (Comm)* where it was held that for the purposes of service out of the jurisdiction, a Norwich Pharmacal order constitutes full and final relief rather than interim in nature.

If the usual requirements for a Norwich Pharmacal order can be satisfied and there is a sufficient factual connection to Hong Kong (e.g. monies passing through Hong Kong bank accounts to Mainland China), the resulting disclosure order can potentially be enforced in Mainland China giving valuable intelligence to an otherwise hopeless recovery.

This intelligence can then be used to establish a proprietary interest in assets. Even if such assets are based in China, a Hong Kong court declaration may be effective for enforcement against those Chinese assets.



Public Policy Considerations

It is important to note that once a judgment is registered for enforcement pursuant to the new regime, there is still discretion to set that registration aside.

For the Hong Kong side, the REJ provides that the Hong Kong courts may set aside registration of a Mainland Chinese judgment if enforcement of that judgment would be contrary to public policy.

On the Mainland China side, matters are less clear.

The new regime will be promulgated by way of a judicial interpretation of the Supreme People's Court (**"SPC"**) which, as at the time of writing, has not yet been published although it is likely that the SPC interpretation will reserve similar discretion as the REJ in Hong Kong.

The comprehensive data privacy laws of Mainland China passed in 2021 must also be critically borne in mind when seeking any disclosure of information from Mainland China. Practitioners will need to work closely alongside their Mainland Chinese counterparts to obtain relevant exemptions and waivers to give practical effect to any information obtained.

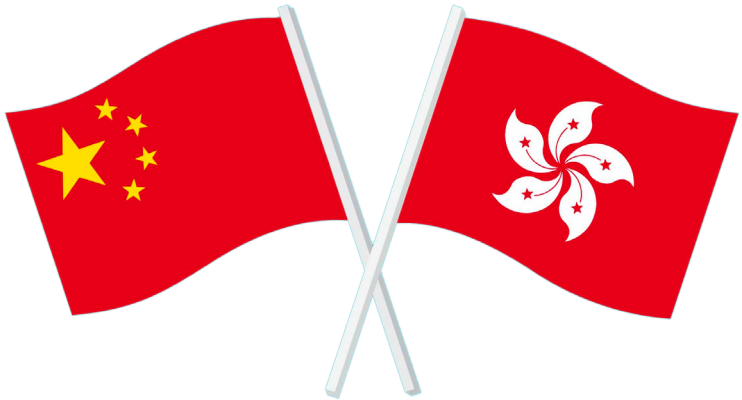
Final Remarks

Some degree of asymmetry is to be expected given prior experience of reciprocal arrangements between China and Hong Kong.

On one hand, insolvency practitioners will be aware that since 2021, mutual recognition and assistance to insolvency proceedings between Mainland China and Hong Kong has resulted in only a few Hong Kong liquidators being recognised in China despite many more requests for assistance being made.

On the other hand, for international arbitration practitioners, the Mainland China and Hong Kong interim measures in aid of arbitral proceedings arrangement has been in force since 2019 and has produced remarkable results with more than US$2.3 billion in assets being the subject of freezing orders as at October 2023.

Overall, the ability to enforce Hong Kong common law remedies in China more readily is truly ground-breaking and has potentially wide-ranging implications. Time will tell whether such remedies will be of practical use in asset recovery across Mainland China and Hong Kong.



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THE STAMP OF SUCCESS:

PAIRING STRATEGY AND FUNDING FOR ASSET RECOVERY

Authored by: Josie Pennicott (Manager) and Jamie Taylor (Manager) – Grant Thornton

The recent Post Office scandal has very publicly shown the damage a lack of swift justice can cause on people's lives. The failure to protect the 900+ Post Office workers has highlighted the significant hurdles individuals have in funding, organising and executing a claim that they have the right to bring. However, these challenges are not exclusive to unrepresented individuals.

Furthermore, the litigation funding industry was shaken by the PACCAR judgment in 2023, however the importance of funding in the sub-postmasters' claim has since led to the Government announcing plans to address the implications of PACCAR to avoid the prevention of access to justice.

Funding is a significant and ever-present hurdle when seeking a judgment, and challenges continue post-judgment, where the balance of recovering a judgment must be weighed up against the debtor's asset base. Below is a whistlestop tour of the asset recovery tools that can be used to support a funding proposal - from identifying assets, to protecting them and finally, enforcement.

Disclosure

Before crafting a recovery strategy, it is important to understand as much about the debtor's asset position, including the details of assets held by the debtor both directly and indirectly. Well-structured corporate intelligence can uncover key information that focuses disclosure applications and drives a successful recovery strategy. It can also be vital to demonstrate to a funder that it is worth their investment.

Legal disclosure routes available to creditors vary depending on the jurisdiction, but commonly used tools ahead of insolvency appointments are the Norwich Pharmacal Order (NPO), Bankers Trust Order (BTO) and a US Section 1782 application.

A NPO is used to recover information from a third party that is mixed up in wrongdoing, often innocently, and may have relevant information on a debtor's dealings. A BTO is a similar remedy, but in relation to banks. This information can confirm the ownership status of an asset and can uncover historical ownership information that may be useful later in the recovery process.

The 1782 application is similarly effective where the debtor has a nexus in the US and legal proceedings are anticipated, particularly when combined with corporate intelligence. This focuses the scope of the application to ensure that the discovery sought is as relevant as possible.

Protection

Once assets belonging to the debtor have been identified, the next question is how to preserve asset and share value and prevent the debtor from further divesting their asset base whilst enforcement is undertaken. The tools available depend on several factors, in particular the jurisdictions involved.

Freezing injunctions are amongst the most powerful of these tools, provided that real risk of dissipation can be proven.

A successful freezing injunction application will prevent the debtor from dissipating their assets above a determined value. This gives comfort that future enforcement actions are proportional and commercial when compared to the asset pool available.

However, freezing injunctions carry several downsides, including the requirement to provide full and frank disclosure of the debtor's possible defences, and potential adverse cost orders if the creditor's claim is ultimately dismissed.

Should a freezing injunction not serve the desired purpose, court-appointed Receivers can be seen as a 'super freezing injunction'. Receivers hold the ring before, during or after proceedings, and ensure that shares or assets remain available to the creditor in the event they successfully obtain a judgment. A Receiver's powers are defined by the Court and can be extended if found to be insufficient on application of the Receiver. They allow the creditor to be secure in knowing that the debtor's underlying asset base will be protected.

If neither a freezing injunction nor Receivership is possible or desirable, fast enforcement action can be just as effective. Formal insolvency may be available resulting in protectionary powers granted to an appointed insolvency practitioner (IP). Alternatively, swift legal action can reduce the risk of asset dissipation.

Enforcement

Ideally, the debtor will repay the debt without need for further action, but if no funds are forthcoming, the outstanding debt can be used to petition for the debtor's bankruptcy or liquidation in the case of an individual or company respectively, and if the application is successful, an IP will be appointed by the Court.

The IP's powers are wide in the case of both a bankruptcy and a liquidation. The IP will be experienced in negotiating with litigation funders to fund costs of the insolvency and any litigation. In relation to the IP's own fees, if there is limited or no funding, the IP may be willing able to work on a contingent and risk-sharing basis and can provide other funding solutions including the purchase of a claim outright.

The IP is entitled to make enquiries of anyone who may hold information in relation to the debtor's affairs to seek disclosure of information. If appropriate in the context of a specific insolvency, an IP may seek recognition of their insolvency process in the US under Chapter 15 of the US Bankruptcy Code. The IP may use this recognition to seek disclosure, including records of all US dollar transactions made, and analyse this disclosure to trace the route of funds transferred in US dollars to identify the "end user" of the funds, against whom they could then seek to make a claim.

The IP is also entitled to bring specific insolvency claims in relation to antecedent transactions, to clawback assets that have been transferred away. These claims are fact-specific and the IP has powers to gather evidence from third parties to support such claims.

In Conclusion

Funding continues to be one of the most challenging and restrictive issues when delivering a recovery strategy, even for a well-resourced business. While a good strategy implementing the right tools has all the prospects to succeed, without appropriate funding, it's unlikely to get off the ground. Similarly, funding without a tailored recovery strategy will often only compound losses. However, the ability an asset recovery and enforcement specialist has to combine a focused asset recovery strategy with bespoke funding means that success is much closer than you may think.

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TREASURE HUNTING:

AN INVESTIGATOR'S JOURNEY NAVIGATING CHANGES IN CORPORATE TRANSPARENCY

Authored by: Elisabetta Goi (Senior Analyst) – Vantage Intelligence

One: Find the Assets

Her target, Mr. X, is suspected of embezzling tens of millions from his employer, a London-based global commodity trader. The employer is looking to sue for damages and wants to see what Mr. X has done with the money. Jane has been hired to perform the asset tracing investigation.

On paper, Mr. X has no assets, and finding anything has proved harder than what Jane's client had hoped for. No car, no house, no corporate assets in his name.

Jane's first lucky break; Mr. X's teenage daughter. Saved in her public Instagram profile's "highlighted stories" are several blurry videos of her 18th birthday. The setting appears to be an English countryside estate worthy of a Saltburn sequel. In one of the videos, Jane spots a framed family photo featuring a smiling Mr. X. Unlikely a teenage daughter would bring family photos to her birthday, so could Mr. X own this property? There's no indication of a location, but Jane is patient and knows social media is a powerful tool. Jane searches through the posts of other party attendees and finally sees a photo from the same party geotagged to Henley-on-Thames, Oxfordshire. Using satellite imagery and OSINT geolocation tools like crowd-sourced OpenStreetMap, Jane finally has an address.

Two: Trying to Prove Beneficial Ownership

The UK land registry shows a Limited Company incorporated in Nevis (part of the small island nation of Saint Kitts and Nevis) purchased the mansion – worth more than 15 million pounds – the previous year. This is not ideal. Jane will need to prove Mr. X is the beneficial owner of the Limited Company in a jurisdiction so obscure it doesn't even offer an online corporate registry. The timing of the purchase is certainly interesting; if Mr. X's bought the mansion during the time of alleged wrongdoings, and with proceeds of his embezzlement, this would likely help with recovery efforts. But one thing at the time.

Jane picks up the phone and calls the Nevis Financial Services Regulatory Commission. After several minutes on hold, multiple phone transfers, and 30 US dollars later, Jane confirms the Limited Company exists, is active, and was incorporated around the same time Mr. X allegedly began stealing from his employer. For the inexperienced, this would probably be the end of the road. Proving Mr. X is the beneficial owner of the Nevis Limited Company is almost impossible in the current data environment.

A recently introduced tool promising clarity in such circumstances has quickly proven to be a disappointment. The UK introduced its Register of Overseas Entities in August 2022, as part of the *Economic Crime (Transparency and Enforcement)*

Act 2022. Its goal was to "require anonymous owners of UK property to reveal their identities."

However, for over 70 percent of properties held via overseas shell companies, beneficial ownership information is missing.

Unfortunately, but predictably for Jane, the Oxfordshire mansion falls within the 70 percent.

In recent years, obtaining beneficial ownership information in most jurisdictions has become futile exercise. In November 2022, a landmark decision by the European Court of Justice effectively negated public access to beneficial ownership information in the EU, ostensibly due to privacy concerns.

Since the ruling, key offshore jurisdictions including the British Virgin Islands, Bermuda, Belize, UK crown dependencies, and others have reversed commitments toward publicly available beneficial ownership information with the rationale that if the EU doesn't, why would we? Sadly for Jane, Nevis followed the same path.

Even an established beneficial ownership registry like the UK's Persons of Significant Control registry, introduced in 2016, is famous for non-compliance and inaccuracy of entries (so much so, there's an entire Twitter hashtag - #funkyfilings - dedicated to obvious misinformation overlooked by UK's Companies House).

Jane seeks out an alternative.

Three: Lucky Leaks and Knowing Where to Look

Jane knows one powerful and often overlooked source for information is court records. Lawsuits, in particular, can be treasure troves of data, shedding light on an individual's or company's past actions, relationships, and finances. Interestingly, even those maintaining a low profile often become more transparent in litigation, disclosing significant details about themselves and their activities.

Of course, the public availability of court records varies in each jurisdiction. In the US, for instance, records are generally more available than the UK or EU, though this can differ at US federal, state, and county levels.

When Jane encounters Mr. X's potential Nevis company, she seeks out her favorite place for offshore litigation, the Eastern Caribbean Supreme Court. This Supreme Court has jurisdiction over six independent states, including St Kitts and Nevis, and three British Overseas Territories, including the British Virgin Islands. Almost miraculously for such obscure jurisdictions, the court's judgements are public and searchable online.

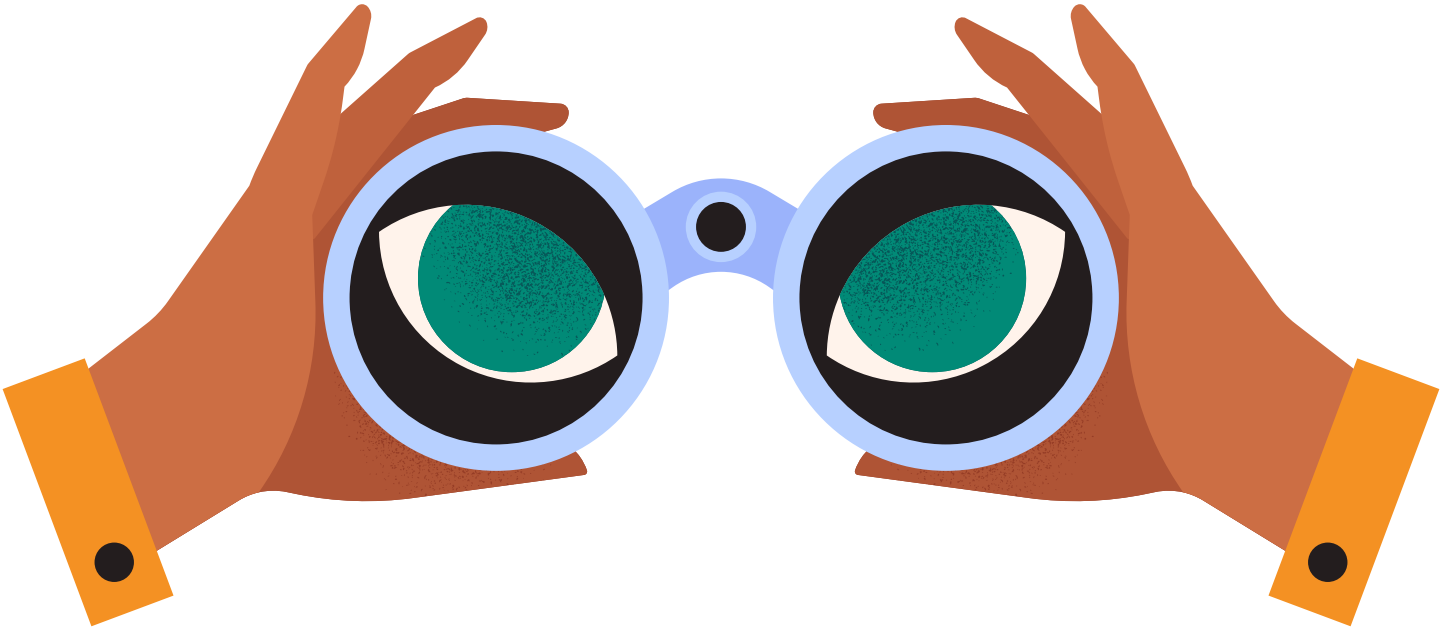
Jane's second stroke of luck; Mr. X is named in court proceedings as the director of the Nevis company, but the litigation leaves out the company's owner. This could be as far as Jane goes, knowing Mr. X is connected, but without proof he's the actual owner, except a Nevis corporate service provider has recently been hit by several data leaks.

Leaks and data breaches have been on the rise in recent years, and are publicly available, albeit most are only accessible through the "dark web." Admissibility of these records in court has been subject to debate, but the UK generally admits evidence obtained via leaks.

Going through the leaked Nevis datasets, Jane finds documents mentioning Mr. X, which he signed on behalf of the Limited Company as its owner. The mansion is his, and the timing of its purchase, coupled the Nevis Limited Company's incorporation date, could prove crucial for recovery.

Conclusion

Access to corporate ownership information has made asset tracing investigations a constantly evolving enterprise, fraught with seemingly insurmountable hurdles and obscure jurisdictions with little to no public information. However, with expertise, creativity, and a bit of luck, some of these challenges can be overcome.



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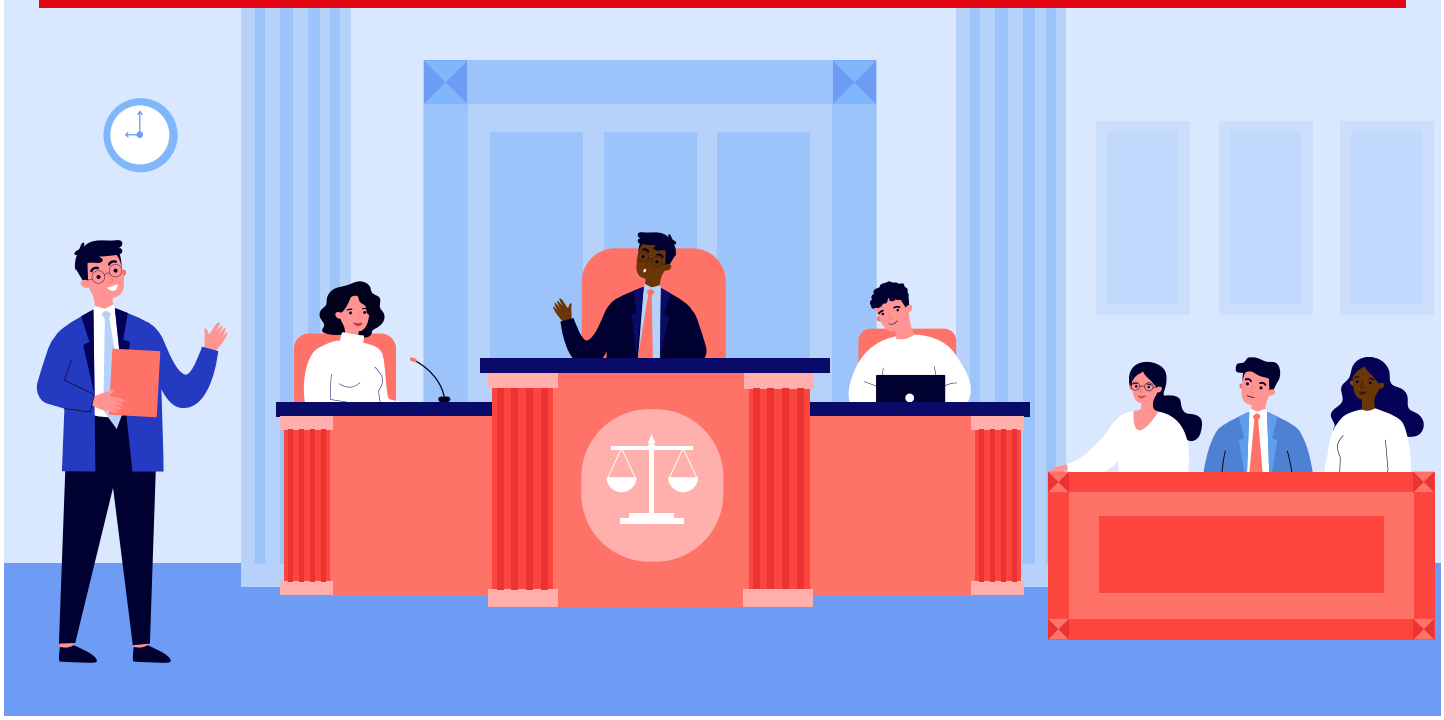
THE IMPORTANCE OF CONTEXT AND APPLICATION WHEN ASKING THE COURTS TO GRANT DISCLOSURE ORDERS



Authored by: Jennifer Craven (Legal Director) and Sam Ballin (Associate) – Pinsent Masons

Jennifer Craven, Legal Director at Pinsent Masons, comments:

"Applicants who wish to pursue applications for disclosure orders from the UK High Court must take into account from the outset the high thresholds and likely scrutiny that the High Court will apply to such applications. This is particularly the case where remedies in other jurisdictions may well be available. Proper assessment of the grounds against the facts of the case with the applicant's lawyers at an early stage can mitigate against any negative impact on the outcome of the application, and that costs are not wasted."

In *Kingdom Bank Corp v Moorwand Ltd [2023] EWHC 3069 (Comm),* the Claimant, Kingdom Bank Corp (**"the Bank"**) was an offshore bank registered in the Commonwealth of Dominica. In May 2021, the Bank entered into a business agreement with an electronic money issuer based in the Czech Republic called SPS. Under that agreement, SPS opened up accounts and the Bank gave instructions to transfer money in and out of those accounts.

In February 2022, payments out of the accounts were stopped. Around that same time, SPS provided the Bank with the Defendant's (**"Moorwand"**) address and the details of an account with Moorwand said to be used for receiving and sending electronic payments (**"the Master Account"**). Moorwand is an electronic money institution (**"EMI"**) and payment services provider authorised and regulated by the FCA, which has granted it a formal license to issue electronic money (stored digitally and accessed via e-wallets).

Subsequently, SPS stopped trading and later went into liquidation. The Bank alleged that around €1.4m of its money (and that of its customers) had been paid into the Master Account but that the money had gone missing.

The Bank made a Part 8 claim under the Civil Procedure Rules, in which

it sought a specific disclosure order, a *Norwich Pharmacal order (NPO),* against Moorwand requiring disclosure of information relating to the Master Account. Such an order from the Court obliges disclosure of specified documents. The NPO would oblige Moorwand to provide disclosure of documents or information to the Bank. The Bank claimed that it needed the information in order to determine where its money was and what claims were to be pursued.

Moorwand was a company incorporated in England and Wales. It had initially not objected to the Claimant's application but now opposed it on grounds that: (i) the court lacked jurisdiction since any claim against SPS was subject to an exclusive Czech Republic jurisdiction clause and, to the extent any claim was against Moorwand it should be brought under CPR 31.16 where disclosure can be sought from the Court, via an application, before proceedings have been issued; (ii) the threshold conditions for Norwich Pharmacal relief were not made out (that is to show a good arguable case of wrongdoing, that the victim needs the NPO in order to take action against the wrongdoer, that the respondent has been 'mixed up' in the wrongdoing, that the respondent is likely to have the relevant documents/information and that granting the NPO would be reasonable and disproportionate); and (iii) the court should refuse to exercise its discretion in favour of the Bank.

By the date of the hearing, the Bank sought disclosure from Moorwand of categories of information including, amongst other things, lists of transactions, a statement of the balance of the relevant accounts, documentation showing payment out of sums and details of transferees, and the agreement between Moorwand and SPS for any e-wallet held by SPS.

The Bank's application failed on the following grounds:

1. **The Bank's case for an NPO was not sufficiently strong to justify an exceptional order on the basis that it would enable the Bank to pursue Moorwand's wrongdoing. That is to say, pre-action disclosure pursuant to CPR 31.16 could have been utilised;**
2. **The Bank did not need an NPO in order to pursue SPS for recovery of the sums in question. It already had sufficient information to pursue SPS for its wrong and an NPO would not be available solely on the basis of SPS's wrongdoing;**
3. **The absence of a proprietary or equitable right to funds paid to an EMI meant that tracing claims and those based on a resulting or constructive trust did not meet the threshold of a good arguable case; and**
4. **The Bank had failed to establish the basic threshold conditions for the grant of Norwich Pharmacal relief. It had no need for an NPO in order to pursue SPS so SPS's wrong would not justify relief. In addition, it could not establish a good arguable case against another wrongdoer or that the information requested was needed in order to enable action to be brought against such wrongdoer.**

This case demonstrates the importance of (i) only applying for specific orders such as NPOs if the context of the case demonstrates the need for one in order to prove a case; and (ii) if the application for such an order is considered necessary, to ensure that the basic threshold conditions are met.

Sam Ballin, Associate at Pinsent Masons, has successfully obtained NPOs and Bankers Trust Orders against a multi-billion pound cryptocurrency exchange in proceedings relating to crypto-fraud and commented: "This case clearly demonstrates the necessity in taking a step back and asking whether the disclosure order you are seeking is necessary in order to successfully pursue the Defendant. If you determine that such an order is necessary, you must be confident that you have a good arguable case in meeting the threshold conditions for relief".

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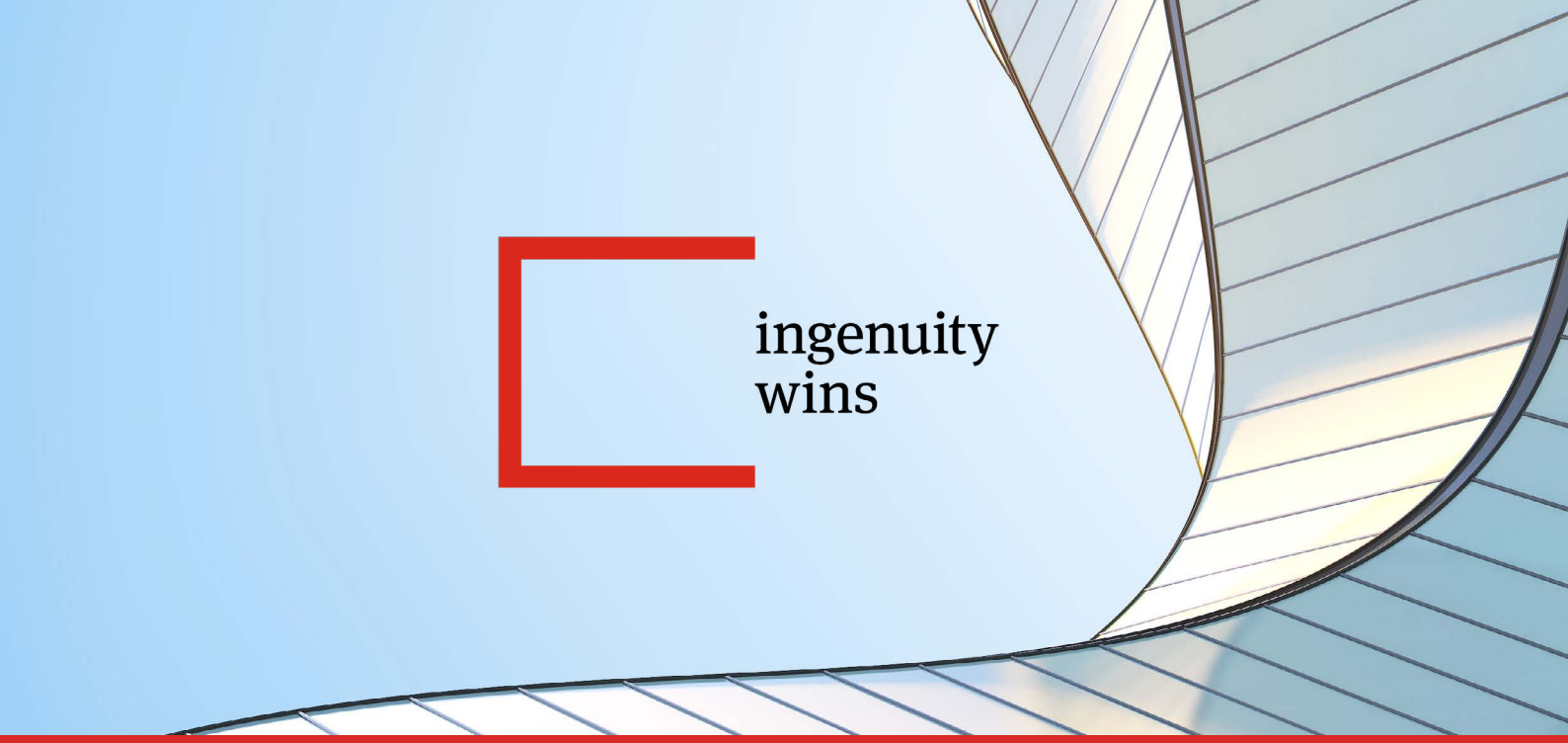

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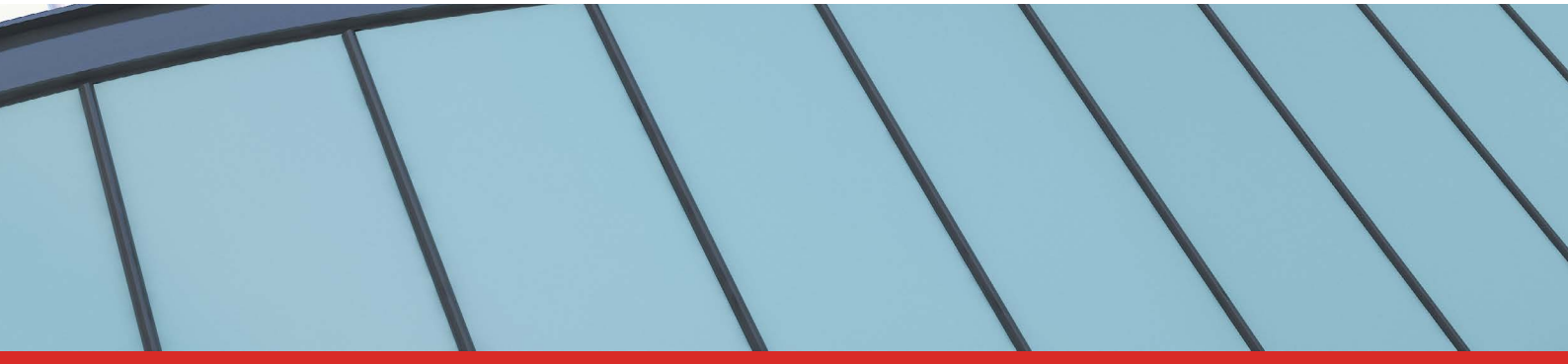

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RECENT CHANGES TO CORPORATE LIABILITY IN THE UK

Authored by: Michael Milton (Associate Director) – Forensic Risk Alliance

The UK's Economic Crime and Corporate Transparency Act (ECCTA) – which became law in October 2023 – is part of a trilogy of new legislation in support of the UK Government's three-year Economic Crime Plan (2023-2026) to clamp down on dirty money funnelled through the UK. The ECCTA aims to improve corporate criminal liability in the UK and drive a change in corporate culture.

True to its name, the ECCTA introduces greater transparency and accountability across a number of areas, all of which should have a material impact on anti-fraud and asset recovery work on UK-related matters and make it easier for prosecutors to hold corporates to account for economic crimes:

i. **C orporate reform will provide Companies House greater authority as the gatekeeper to the registry;**

ii. **Transparency reforms for limited partnerships;**

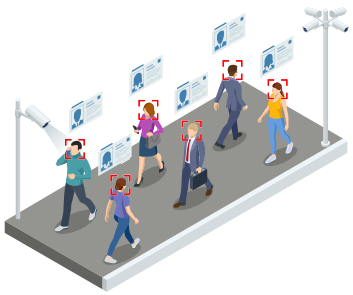
iii. **Improvement to real estate transparency and the register for overseas entities;**

iv. **Stronger regulations around the misuse of crypto assets;**

v. **Changes to the Identification Principle; and**

vi. **The introduction of a failure to prevent fraud offence to hold companies criminally liable for fraud committed by an employee.**

In this article, I take a closer look at these last two elements – implications of the expansion to the Identification Principle and the new Failure to Prevent Fraud offence – reforms which can have extraterritorial reach to both companies and conduct outside of the UK. The reforms to the identification principle took effect from 26 December 2023 and the new FTPF offence could come into force in early 2024.



The Identification Principle Simplifies the Attribution of Corporate Criminal Liability

With changes to the Identification Principle, the ECCTA has sought to simplify the attribution of criminal liability to specific individuals bringing into scope a wider range of employees able to trigger corporate criminal liability. If a "Senior Manager" of a corporation or partnership acting within the scope of their authority now commits a relevant offence, then the organisation is also guilty of the offence. A Senior Manager is defined as an individual who play a significant role in managing the corporate's activities or making

decisions about how such activities are managed.

This means that prosecutors will no longer have to prove that the 'directing mind and will' of a company were complicit in a fraud, an area which has proven troublesome for law enforcement. Previously, it was a requirement for a senior member of the corporation, often sitting on the board, to have been aware of the criminal conduct for criminal charges to be levied on the corporate. That proved a high bar for prosecutors to satisfy and was frequently criticised when dealing with large corporates with often complex management structures.

Failure To Prevent Fraud Is Now An Offence, For Large Companies

To mitigate the difficulty in proving corporate criminal liability, the ECCTA has introduced the 'Failure to Prevent' (FTP) Fraud offence intended to benefit the corporate. This brings the fraud offence into line with the current legislation preventing bribery and tax evasion. However, instead of attaching criminal liability to the corporate, the ECCTA attributes a strict liability offence for failure to prevent the fraud. In further contrast to the existing failure to prevent bribery and tax evasion, section 199 of the ECCTA limits the scope of the Failure to Prevent Fraud offence to large corporates.

This proved a bone of contention when passing the bill through the House of Lords and Commons where amendments to the scope of the act were passed back and forth. It was eventually restricted to large corporates by the House of Commons due to the potential compliance burden it would place upon small businesses.

To qualify as a "large" corporate, and fall into the crosshairs of the FTP Fraud offence, an organisation must meet at least two of the three criteria per the Companies Act 2006 during the financial year preceding the offence: have more than 250 employees, more than £36 million turnover, and more than £18 million in balance sheet assets.

One of the key aspects of the reform is its extraterritorial reach. If an employee, agent or subsidiary commits fraud under UK law, or targeting UK victims, the corporation could be prosecuted, even if the corporate (and the employee) are based overseas.

Organisations will be able to avoid prosecution if they have reasonable procedures in place to prevent fraud, and there may be circumstances where it is reasonable to have no fraud prevention procedures in place where the risk is extremely low. The home secretary is due to publish statutory guidance on the expectations for 'reasonable procedures', and the offence will not come into force until this guidance is available.

Whether these changes will lead to a greater number of court cases and enforcement action remains to be seen. However, once the Government produces the statutory guidance, it will be important that all large corporates act to ensure they have "reasonable procedures" in place to have a defence against any employee actions.

Even before this, large corporates could be taking the following minimum steps to build out their FTP Fraud risk assessment:

- Identify and define 'Senior Managers' within their organisation who would qualify under the Identification Principle,
- Review existing fraud risk assessments to consider the risk of fraud that benefits the company,
- Review and reinforce anti-fraud policies and procedures within their organisation, and
- Deliver training to ensure that qualifying employees are aware of the updated legislation.

The ECCTA reforms mean that large companies can be found guilty of the fraudulent conduct of employees, subsidiaries and agents and that companies of all sizes can be prosecuted for the fraudulent actions of their 'senior managers', as they will not have the reasonable procedures defence.

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THE DEBT RESPITE SCHEME: MORATORIA TALKING POINTS

Authored by: Philip Judd (Barrister) – South Square Chambers

The Debt Respite Scheme Regulations 2020 (**"the Regulations"**) came into force on 4 May 2021. The scheme is designed, at least in theory, to help both debtors and creditors devise a realistic plan for repayment.

With personal insolvencies peaking at their highest rates in years1, moratoria under the Regulations will become an unavoidable feature in many enforcement exercises.

It is beyond the scope of this article to set out the Regulations in full but, in summary, there are two types of moratoria: 'breathing space' and 'mental health crisis'. To initiate a moratorium a debtor, or their adviser, will approach a debt advice provider (**"DAP"**) likely to be a debt counsellor or local authority. A DAP must then initiate a breathing space moratorium (**"BSM"**) if (amongst certain other criteria) the debt is a qualifying debt and the debtor has not had the benefit of another BSM within the previous 12 months. The DAP must also be of the view that the debtor is unable, or is unlikely to be able, to pay some or all of their debt as it falls due, as well as that a moratorium would be 'appropriate', which of course gives the DAP a wide range of discretion.

For a mental health crisis moratorium **("MHCM"**), the debtor must meet the same criteria, as well as be receiving 'mental health crisis treatment' as evidenced by an approved mental health professional (**"AMHP"**). This is defined in five ways but, broadly, it means either that they have been detained under statutory powers (under Regulations 28(2)(a)-(d)) or that they are receiving treatment from a specialist mental health service for a "mental disorder of a serious nature" (under Regulation 28(2)(e), and more on this below). 'Disorder' and 'serious nature' are not defined, though a specialist mental health service refers to one provided by a crisis home treatment team, a liaison mental health team, a community mental health team or another specialist mental health service. Once in receipt of the required information the DAP must, as with a BSM, consider whether a moratorium is appropriate.

Three elements have received recent judicial treatment: time limits; injunctions; and the seriousness of any condition for MHCM.

Applications To Cancel

Creditors can seek a review of a moratorium with a view to its cancellation, and must do so within 20 days of it taking effect in respect of their debt. Any request is on either or both of two grounds: that the moratorium unfairly prejudices their interests or there has been some material irregularity. That review must be carried out and the creditor notified out of the outcome within 35 days of the moratorium starting; if the DAP decides not to cancel, the creditor must then apply within 50 days to court.

There are a number of points to note here. Firstly, the simple reality is that, as BSM expire after 60 days, a creditor is unlikely to get a hearing date, certainly in the county court, before expiry. Secondly, there is no prescribed format for the request to the DAP; it may be an email or a letter, and a creditor can include any evidence they wish. Thirdly,

1 118,000 personal insolvencies and 87,000 individual voluntary arrangements in the last year, according to R3.

whilst Regulation 19 prescribes that an application must be made to the county court, it is clear that the High Court will exercise the power of the county court[2]. Fourthly, the Regulations set up a tension between the interests of creditors and debtors[3]. Unfair prejudice is left undefined, and it is perhaps unsurprising that 'unfairness' has been held to be assessed objectively as part of a balancing exercise. In assessing whether unfairness is made out, it has been held that sufficient detail as to duration, severity, prognosis and the timescale for improvement is essential[4]. In practice this requires directions for disclosure before the hearing, on which the Regulations are silent, though certain courts have taken matters by the horns[5]. Current practice suggests that where debtors fail to provide sufficient (or any) evidence when so directed, courts are willing to cancel moratoria despite that balancing exercise being effectively impossible.

Fifthly, and perhaps of most importance for those advising creditors, the time limits are mandatory. There is no discretion to consider reviews or applications out of time, even when there are very good reasons as to why a creditor is in that position[6]. It is also clear that a creditor cannot avail themselves of the court's jurisdiction if they fail to first seek a review from the DAP within 20 days, as a specific requirement of Regulation 19(1)-(2), permitting a creditor to apply to court, is that a DAP has first carried out a review and declined to cancel a moratorium[7]. Whilst the Regulations are silent on the issue, it follows that if a DAP does not complete the review in time, then the creditor is left without recourse to court.

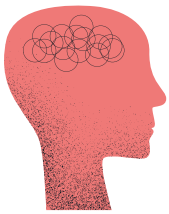
The prescriptive nature of the time limits will lead to harsh results for creditors, particularly in the case of MHCM. Whilst breathing space moratoria expire after 60 days, MHCM are open-ended. They continue until either cancelled by the DAP upon review, or until the expiry of 30 days after the debtor stops receiving mental health crisis treatment, per Regulation 32(2)(a)-(b). It is conceivable that a creditor may take a sensible view of the prejudice suffered at the outset and decide not to seek a review within the first 20 days. However, MHCM being open-ended, it is conceivable that the relative unfairness to a creditor will increase (perhaps dramatically) as the MHCM continues, the creditor being kept out of funds, interest being paused, and so on. But in these circumstances a creditor – who has no right to be made privy to the debtor's treatment, or its trajectory – will just have to sit and wait. This very scenario was contemplated in Kaye v Lees [2022] EWHC 3326 (KB) and accepted as a harsh result that follows from Parliament's having determined debtors' interests outweigh those of creditors in these circumstances.

Injunctions?

It is perhaps a surprising aspect of the Regulations that there is nothing stopping a debtor from applying for successive MHCM, even after the court has acceded to a creditor's cancellation application.

For MHCM there is no corresponding eligibility criterion that a debtor has not had the benefit of a moratorium in the previous 12 months.

Whilst in West One Loan Limited v Salih (unreported) HHJ Monty KC considered that the jurisdiction to cancel for unfair prejudice was wide enough to allow the court to grant injunctive relief where successive applications were made simply to delay enforcement, that is no longer the case following the decision of David Lock KC in the latest round of the Kaye v Lees litigation. Mr Kaye sought to continue an injunction granted by HHJ Dight in order to prevent Ms Lees from applying for successive – in this instance, her fifth – MHCM in 18 months. HHJ Dight initially found that the High Court has power to restrain potential abuses of the scheme by placing sensible limits on the ability to access it. David Lock KC, however, declined to continue the injunction as, in his judgment, debtors were afforded an unfettered right to apply for MHCM, even where a previous one was cancelled by the court. The decision on whether to grant a moratorium lies each time with the DAP, and the Regulations provide that, if the DAP considers a moratorium is appropriate, that will affect the right of a creditor to take enforcement action. It would not be right to set up a different judicial decision-making procedure and to remove a debtor's statutory rights or subject those rights to judicial supervision when that is not part of the statutory scheme, and, in the judge's view, a creditor does not have a legitimate right to proceed with enforcement of a judgment without facing the risk that a moratorium will be imposed. As a result, a creditor does not have an interest which merits protection such as to provide a basis for injunctive relief[8].



Mental Illness

The final element that has received judicial attention is the seriousness of the mental condition of a debtor seeking a MHCM. Many practitioners had seen a spate of applications relying on Regulation 28(2)(e) by those suffering from anxiety, depression, and other conditions. Whilst Regulation 28(2)(a-d) concerned situaitons in which debtors had been detained or removed to a place of safety, Regulation 28(2)(e) is much broader: it simply concerns mental disorders of a serious nature. This has now been narrowed significantly, and (e) is read in light of (a-d). Evidence is now required to demonstrate that a debtor is suffering from a severe condition "which in other circumstances would justify overriding the free will of the debtor in detaining or removing them in their own best interests or that of the public"[9]. This puts to bed the idea that more commonplace conditions with which people suffer will not qualify, and gives some comfort to creditors given the indefinite period for which MHCM can endure.

Conclusion

Whilst practitioners await the development of jurisprudence surrounding these Regulations, the experience of the last 24 months would suggest that creditors must act promptly and, in the case of MHCM, scrutinise the evidence of any mental crisis. Otherwise – and this cannot have been the purpose of the scheme – they risk being left out in the cold.

2 See e.g. Axnoller Events Limited v Brakes [2021] EWHC 2308 (Ch) and IV Fund Limited SAC v Mountain [2021] EWHC 2970 (Ch).
3 'Chalk and cheese', as described in Axnoller at [35].
4 See Axnoller at [39].
5 As was ordered, for instance, in IV Fund and Kaye v Lees.
6 In Kaye v Lees, the creditor had, in good faith, understood that the moratorium did not apply to his debt and had sold the debtor's property over which he had a charging order following an unsatisfied judgment debt for harassment.
7 Kaye v Lees [2022] EWHC 3326 (KB).
8 See paragraphs [46-7].
9 Kaye v Lees [2023] EWHC 152 (KB) at [27-8].

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