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THE FLAGSHIP ASSET RECOVERY EVENT FOR THE FRAUD & INSOLVENCY COMMUNITY

INTRODUCTION

The real voyage of discovery consists not in seeking new landscapes, but in having new eyes.

Marcel Proust

We are delighted to present Issue 17 of the FIRE magazine in conjunction with the flagship Asset Recovery event for 2024, FIRE International in Vilamoura, Portugal. In this FIRE International edition, our authors dive into all the pertinent issues facing practitioners, including the evolving insolvency regimes in the Middle East, the UK's first sanctions strategy and a special FIRE Americas supplement by Collas Crill including 60-second interviews and articles surrounding asset recovery in the Cayman Islands, with contribution from Twenty Essex. We thank those who joined us in Vilamoura, we hope you enjoyed our flagship event, and for those who were unable to join us, we hope you enjoy this thought-provoking issue. Thank you to all of our partners, authors and members for their ongoing support to this ever-growing community.

Paul Barford
Founder/Managing Director
020 7101 4155
email Paul

Chris Leese
Founder/Chief Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder/Chief Operating Officer
020 7101 4191
email Danushka

Maddi Briggs
Strategic Partnership Senior Manager
020 3398 8545
email Maddi

Yelda Ismail
Senior Marketing Manager
020 3398 8551
email Yelda

Amelia Gittins
Strategic Partnership Executive
020 3059 9797
email Amelia

CONTRIBUTORS

Luke Gunning, **Control Risks**
Jessica Thorpe, **Dentons Global Advisors**
Ryan Hockling, **Gatehouse Chambers**
Phillip Patterson, **Gatehouse Chambers**
Nick Ractliff, **PCB Byrne**
Katie McKernan, **PCB Byrne**
Anna Snead, **Ogier**
Laura Coad, **Keidan Harrison**
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James McDermott, **Ogier**
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Tom Wright, **Collas Crill**
Annalisa Shibli, **Collas Crill**
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FIRE Americas: Cayman
5th - 7th June 2024 | Ritz Carlton, Cayman

FIRE Channel Islands
18th - 19th June 2024 | The Royal Yacht, Jersey

FIRE UK Circle
July 2024 | Down Hall Hotel, UK

FIRE Summer School
August 2024 | Downing College, Cambridge, UK

Contentious Trusts Next Gen Summit
18th - 20th September 2024 | Conrad Hotel, Dublin, Ireland

FIRE Asia Circle
October 2024 | Singapore

FIRE Middle East 2024
10th - 12th November 2024 | Shangri-La, Dubai

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+44 (0)7971 871 229
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Jennifer Craven
Legal Director, London
+44 (0)20 7054 2596
+44 (0)7545 426 770
jennifer.craven@pinsentmasons.com

Andrew Barns-Graham
Legal Director (Barrister), London
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UK COMPANIES HOUSE REFORM

A STEP IN THE RIGHT DIRECTION?

Authored by: Luke Gunning (Associate) - Alaco

The introduction of the UK's Economic Crime and Corporate Transparency Act (2023) has been widely hailed as the most pivotal reform of UK Companies House ("UKCH") in its 180-year history, transforming UKCH from a passive depository of information into a regulator in its own right with enhanced powers. The UK's notoriously lax approach to monitoring and verifying information upon company incorporations has seen a proliferation of money laundering and fraud occurring via UK-registered entities, and so the reforms are a welcome, if overdue, step in the right direction.

The reform of UKCH is part of a wider push by UK government to address some of the shortcomings regarding UK entities being used in money laundering and fraud operations – for example the introduction of the Register of Overseas Entities, which has required offshore companies owning property in the UK to publicly disclose their ownership. The latest Companies House reforms also touch on transparency of ownership information, but are mostly aimed at ensuring the accuracy of information on the register.

One of the more promising reforms for those dealing with the fallout from economic crime and money laundering is the requirement of identity document inspection for directors, partnership members and Persons with Significant Control, i.e. majority beneficial owners. This will result in fewer examples of the most egregious frauds committed using false information and/or stolen identities (or companies listing their directors as Donald Duck and suchlike). Prior to the reforms, UKCH could in theory prosecute for submission of false or misleading evidence to the register, but the only case where it is known to have done so was in the case of a campaigner who registered several companies in the name of Vince Cable MP in order to highlight the shortcomings of the system.

The registrar also has greater powers to demand verification of the information sent to it, rather than passively processing whatever information it receives. A ban on corporate entities serving as directors should also result in less fewer instances of frauds committed by entities with an offshore registered company registered as director - usually a significant barrier to identifying the perpetrator(s). UKCH will also proactively share information with the UK's National Crime Agency, Serious Fraud Office and other policing agencies and regulators.

Perhaps one of the greatest improvements for those involved in asset recovery is the requirement for companies to file more detailed financial information; small companies are now required to submit full annual accounts instead of the currently permitted abridged statements. Time and time again we see small UK companies as the cornerstones in corporate structures used in the transfer of assets, often sitting properties or other investments with anything but a 'small' price tag. Given that companies are already required to submit such statements already to HMRC, this reform will have limited additional administrative burdens on business owners.

Another area of improvement is in the restriction of a company's ability to delay filing its annual accounts by adjusting the reporting date. This tactic has been used on multiple occasions by entities in financial distress not wanting to publicise their latest position for whatever reason.

But What About Areas Where The Bill Could Have Gone Further?

UKCH has prosecutorial powers to challenge directors who fail to comply with their duties as set out in the Companies Act (2006). Over 2,200 people were charged with an offence in 2022 to 2023, mostly for failure to deliver financial statements. 40% of these cases resulted in a conviction. This is ultimately a good deterrent, but now UKCH has new powers to levy fines of up to £10,000 without the need for criminal prosecution. Given the high costs of going to court it is possible that UKCH will seek to utilise the non-prosecutorial route more often, and for many fraudsters a £10,000 fine may be seen as the cost of doing business (if it is even enforceable).

Furthermore, continuing vulnerabilities in UKCH's systems were rudely exposed in March 2024 when hundreds of charges placed over major corporates were filed as satisfied by a rogue individual, raising questions over the secureness of information on the register which is crucial for lenders and other parties.

The fee to incorporate a UK entity has previously changed. It previously stood at £12 – the price of a large G&T in a London pub – but has now been increased to £50. One of the previous criticisms levelled at UKCH was that the fee to incorporate a company was too low, thereby encouraging bad actors. A £50 fee is probably insufficient to deter committed fraudsters but will likely reduce levels of the most obviously fraudulent incorporations.

Ultimately the latest batch of reforms of the UK's regulatory environment for corporates will no doubt have a positive impact on reducing the most blatant frauds as well as increasing accountability at all levels for those acting via a UK-registered entity. The more rigorous oversight of UKCH represented by these changes combined with recent overseas ownership disclosures on property should make the UK less of a light-touch jurisdiction when it comes to money laundering.

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EVOLVING INSOLVENCY REGIMES IN THE MIDDLE EAST

Authored by: Ryan Hockling (Barrister) and Phillip Patterson (Barrister) - Gatehouse Chambers

Introduction

The Gulf Cooperation Council ("GCC") region is currently experiencing both rapid development and also significant cultural change. Ambitious projects such as the FIFA World Cup in Qatar and the Saudi Vision 2030 have been underpinned by significant investment, both from regional Governments and international funders. There is an increasing awareness in the region that this investment requires alongside it a stable and modern system of insolvency and debt recovery. This has required some similarly significant legislative reforms.

Reforms In The Region

In Saudi Arabia, the current insolvency regime was put in place in 2018, soon after the launch of the Vision 2030 project. Prior to 2018, the legislative control of insolvency in the Kingdom was limited and widely thought to be unsuited to the challenges brought about by the implementation of Vision 2030. The New Saudi Insolvency Law (Royal Decree M50 of 1439, Resolution No. 264 of 1439) introduced concepts familiar to common lawyers, namely a form of moratorium through the Protective Settlement procedure and the use of independent insolvency practitioners to take over control of insolvent companies in the Financial Restructuring and Liquidation procedures. There is also an innovative concept of Administrative Liquidation, a slimmed down procedure available where the insolvent company has no or minimal assets at the point of insolvency. More recently, the Saudi Civil Transactions Law has been introduced to offer greater prescriptive guidance for Judges in the interpretation of laws in the Kingdom and reducing the recourse to the discretionary Sharia principles.

In the Abu Dhabi Global Market freezone ("ADGM") the Insolvency Regulations 2022 now provide the applicable insolvency regime. A number of clear parallels can be drawn between these Regulations and the Insolvency Act 1986 and Insolvency (England and Wales) Rules 2016. Practitioners in the ADGM have access to the familiar concepts of administration, receivership and winding-up. The UNCITRAL Model Law is also given the force of law in the ADGM by virtue of Regulation 271.

Elsewhere in the United Arab Emirates ("UAE"), the Dubai International Financial Centre ("DIFC") Insolvency Law (No. 1 of 2019) contains some processes familiar to common lawyers: CVA, receivership, and forms of compulsory and voluntary liquidation. The DIFC's Insolvency Law also makes provision for Rehabilitation Plans, which bear some similarity to the Scheme of Arrangement regime under the English Companies Act 2006. Finally, there is an administration regime, though this process is only available upon application by one or more creditors, de-emphasising its utility for corporate rescue.

Outside the freezones, onshore insolvencies in the UAE are governed by its Bankruptcy Law (Federal Decree-Law No. (9) of 2016), which allows for protective compositions, financial restructuring, and liquidation of companies registered in the UAE. From 1 May 2024, the new Financial and Bankruptcy Law (Federal Decree-Law No. (53) of 2023) will come into force, replacing protective compositions with a new, less stringent protective settlement regime, clarifying certain definitions, and carving out labour claims and personal status actions from the scope of any moratorium (in common with many other jurisdictions). This new law will also introduce a specialist Bankruptcy Court. In tandem with the recent first appointment of international bankruptcy trustees in the UAE (in October 2021, over the KBBO Group), this appears to signal a change in attitude towards insolvency and corporate rescue in the jurisdiction and a steady maturation of its regime.

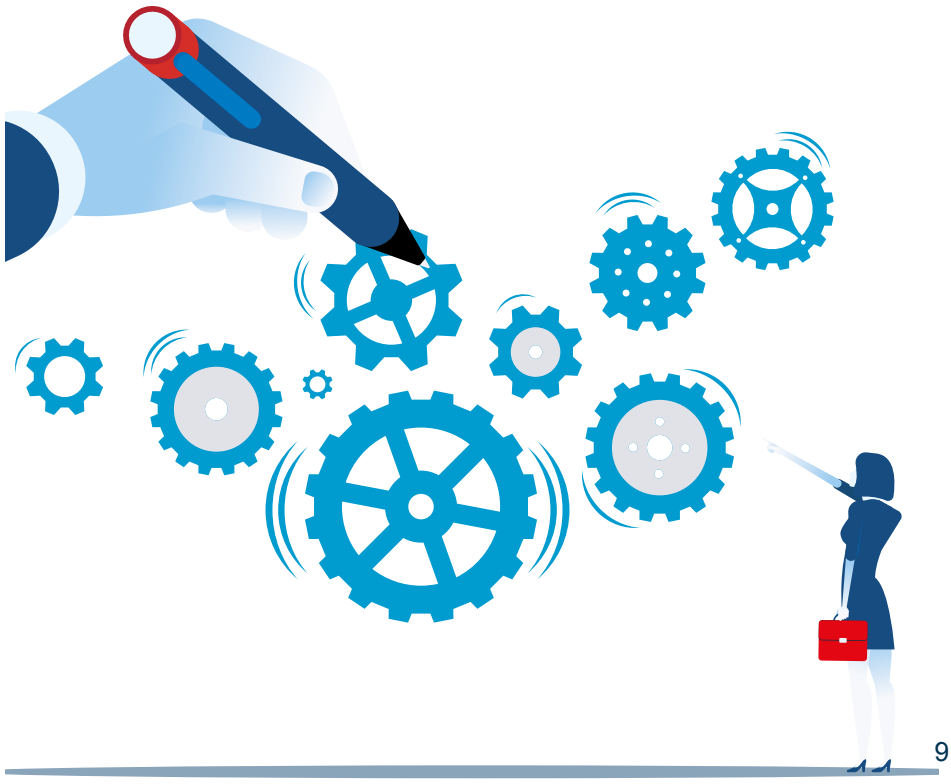
In Qatar, the QFC freezone applies the QFC Insolvency Regulations 2005 which operate alongside the Commercial Law No 27 of 2006 which governs local matters outside the QFC. Within the QFC, the familiar concepts of administration and winding-up apply. Article 7, prescribing as it does the purposes of administration bear a striking similarity to the purposes set out in paragraph 3 of Schedule B1 to the Insolvency Act 1986.

Kuwait undertook a wholesale upheaval of its insolvency regime in 2020 with the passing of the Kuwait Law No. 71/2020. This legislation included the creation of a Specialist Bankruptcy Court presided over by a senior specialist Judge. Importantly, it introduced a greater suite of 'rescue culture' type measures aimed at offering flexible solutions to companies in financial difficulties.

Bahrain sought to bring its own domestic insolvency legislation in line with other major commercial jurisdictions in 2018 with the passing of the Insolvency Law (Law No. 22 of 2018). In Bahrain, practitioners can make use of the familiar procedures of administration and liquidation. In the same year, the Business Companies Regulations 2018 were passed in the Ras Al Khaimah International Corporate Centre.

Conclusion

The region's ambitious development plans will no doubt generate disputes and defaults under contractual payment obligations. This will test the scope and effectiveness of these various new legislative regimes. It will be interesting to see how well these regimes cope and how the Courts will apply them in jurisdictions where debt has historically been viewed as something of a taboo in cultural terms. Given the overlap between these new regimes and the Insolvency Act and Rules in the UK, the jurisprudence and knowledge base here in the UK may come to be of increasing use and relevance in the GCC area. Indeed, it is understood that UK lawyers have often been called upon to assist in the drafting of this legislation. What has historically been seen as a region where insolvency principles are of limited application may come to be an important focal point in coming years.

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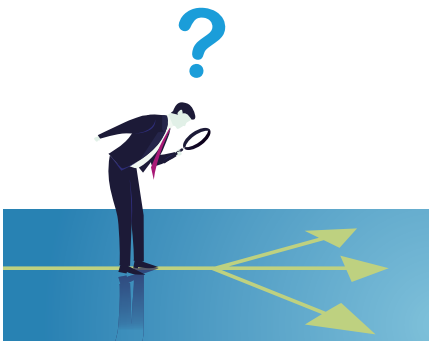
THE MURKY WORLD OF VESSEL OWNERSHIP AND WHY IT MATTERS

Authored by: Jessica Thorpe (Director) - Dentons Global Advisors

Every respectable fraudster loves a boat. An oligarch often opts for a luxury yacht, a good old-fashioned crook might choose an antique sailing boat while an industrious embezzler may indulge in a flotilla of tankers.

In the new world of sanctions and the old world of fraud, identifying the ultimate owner of a vessel can save time and mitigate any complications in the recovery of funds. Regardless of the type of issue (e.g. an asset trace, dispute, or due diligence) identifying the ultimate owner of a vessel is critical. This is necessary to facilitate the pursuit of the correct party be it to enforce a judgement, comply with sanctions, sue the actual owner following the failure to honour a contract or renege on an sale and purchase agreement, amongst other things.

Identifying a vessel's ultimate owner is of course easier said than done, as vessels often have multiple layers of ownership and connected bodies, for example registered owner, beneficial owner, ship operator, charterer, technical manager, and commercial manager. Once an investigator has obtained a ship's identification details (such as IMO, MMSI and flagged state) from the array of well-known publicly available maritime databases, one can obtain a ship's certificate of registration and vessel transcript.



Note that the certificate of registry and vessel transcript provide different information, with the certificate of registry issued at the point of registration and valid upon change of ownership or up to a period of five years, while a transcript (current and historical) details changes of ownership (where applicable) and details of any mortgages registered against a vessel. Dependent on the age of the vessel and the ownership structure, both documents could be lodged in different jurisdictions.

Honest vessel owners, tax-efficient businessmen and the suspicious characters that cross our desks opt to flag their vessels in far flung, opaque jurisdictions such as Liberia, Marshall Islands, Palau, Panama and Vanuatu, amongst others. It is no secret that certain countries offer so-called flags of convenience for vessel owners, providing easy-to-access registration, lower taxes, lighter regulatory checks, lower corporate disclosure, and minimal safety checks required by international maritime regulations. Although the 1982 United Nations Convention on the Law of the Sea requires

"a genuine link between the state and the ship"

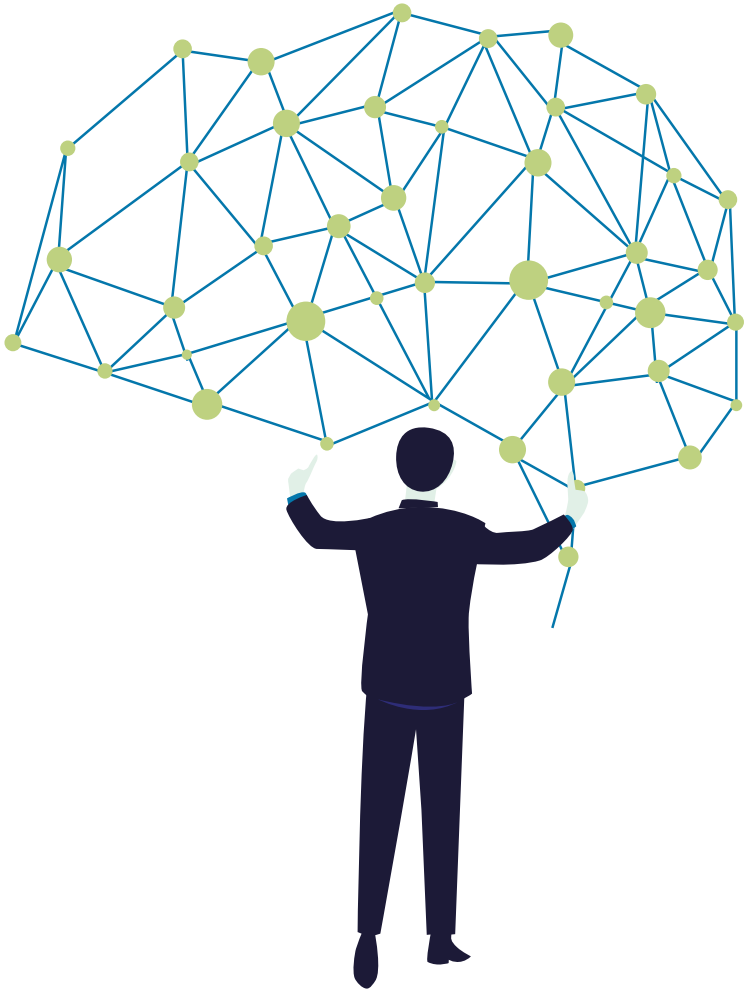
this is seldom enforced. As such, obtaining proof of ownership is certainly possible but requires some navigation and patience.

If a vessel's UBO has been particularly canny, he or she will have used a respectable lawyer to set up a Special Purpose Vehicle whose shares are owned by the ultimate owner or better still by a trust which is then listed as the vessel's owner. If the UBO has been a little less thoughtful he or she will have used an entity (preferably offshore) to act as one of the many corporate layers of ownership. Cue the matryoshka and the untangling of layers of corporate ownership (which was briefly easier before the European Court of Justice rejected the wholesale implementation of UBO registers in the European Union, apparently encouraging the offshore jurisdictions to follow suit).

It is worth noting that each ship registry has its own nuances. For example, the UK Ship Registry registers vessels with 64 shares with the only possible reason being that a shareholding can be divided in two. Further, despite being landlocked, Bolivia has an active shipping register. The Liberian registry is headquartered in Vienna and Virginia (USA), and Panama is the world's most prolific registry, with approximately 8,000 vessels sailing under its flag. Worthy of note also is that registers of beneficial ownership for vessels do surprisingly exist, however only 37 countries with such registers mandate "regular" (Enlarged) updates and only six states publish a register of vessels' UBOs. To muddy the waters further, the definition of a UBO varies from country to country. A large proportion of states declare a UBO as an individual or entity with more than 25% of the shares, while Ecuador (and a few others) require a company or individual with one or more shares to be listed.

Of course, all of the above assumes that a vessel is listed in the International Maritime Organization and is sailing under the advertised name or flag, which in the world of increasing sanctions and illicit trade is more and more questionable. A recent survey by S&P Global Market Intelligence of 70,000 vessels showed that 12.2% had unknown owners. The same 2022 survey also showed that 23,000 of the surveyed vessels had links to watchlists or were engaged in "deceptive shipping practices". Where vessels are not listed in the IMO, the risk of identifying links between the ships and sanctioned countries, as well as evidence of re-flagging, turning off the AIS broadcast or carrying out ship-to-ship cargo transfers in high-risk jurisdictions naturally increases. Despite this, identifying a ship's historic movements as well as its owner(s) and operator(s) remains possible with a little more research and imagination.

Naturally, hiding the ownership of a vessel is not a crime but vessel screening should become part of a standard asset trace investigation, overall risk and due diligence strategy and at the very least on a compliance check list for any commercial partner or financial body.



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GFH CAPITAL V HAIGH: THE IMPORTANCE OF DRAFTING

Authored by: Nick Ratcliff (Partner) and Katie McKernan (Associate) - PCB Byrne

The recent case of GFH Capital v Haigh is a useful reminder of the potential pitfalls in drafting the terms of a Freezing Order, and the importance of ensuring consistent drafting.

Facts

Mr Haigh was previously the Deputy CEO of GFH (a financial services and wealth management firm, incorporated in the DIFC). In May 2014, GFH brought a claim against Mr Haigh in the DIFC, alleging he had embezzled approximately US$5m from GFH.

On 3 June 2014, the DIFC granted GFH a worldwide freezing order against Mr Haigh (continued until further order of the DIFC Court).

Following this, in August 2014, GFH issued a claim (pursuant to CPR Part 8) in England against Mr Haigh, seeking a freezing order (without notice) pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 in support of the DIFC worldwide freezing order. The freezing order in England was granted ("the English Freezing Order").

In doing so, Males J referred to comments made by Lord Bingham CJ in Credit Suisse Fides Trust SA v Cuoghi that "to the effect that on any application under s25 the English Court must recognise that its role is subordinate to and must be supportive of the primary court" (which, in this case, was the DIFC).

Pursuant to the terms of the paragraph 4 of the English Freezing Order it was to remain in place: "Until the disposal of the Claim or further order of the court, [Mr Haigh] must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of US$5m". In this paragraph, claim was referred to with a capital C. However, at further paragraphs in the same English Freezing Order, an uncapitalised c was used – for example, in schedule B, where it stated: "[GFH] will not without the permission of the Court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in the DIFC or in any other jurisdiction, other than this claim." The inconsistency proved to be important.

Following a trial in the DIFC, GFH eventually obtained judgment against Mr Haigh in the DIFC and was awarded damages with interest and indemnity costs. This judgment was handed down on 4 July 2018.

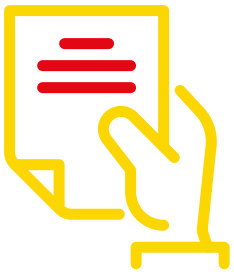
GFH then sought to enforce the DIFC judgment in England, and in May 2020, obtained summary judgment against Mr Haigh.

First Instance

Following this, in November 2021, Mr Haigh sought an order from the Court that the English Freezing Order be set aside. This was on the basis that paragraph 4 of the English Freezing Order provided for it to remain in place until "the disposal of the Claim".

His position was that, in light of the judgment handed down, "the Claim" had already been "disposed of", and there was "no valid reason" for the freezing order to continue.

At first instance, the English Court found that the English Freezing Order had "expired on its own terms" on 4 July 2018 (when judgment was handed down in the DIFC). This, essentially, came down to interpretation of "the Claim" at paragraph 4 of the English Freezing Order – which, at first instance, Baker J noted he had "no doubt at all" that this was a reference to the DIFC proceedings. Indeed, he noted that "any sensible recipient of that Order" would understand this to be a reference to the DIFC claim. On this interpretation, the English Freezing Order could no longer continue (given judgment had been handed down in the DIFC proceedings in July 2018).



Appeal

GFH appealed. In doing so, they argued that the reference to "the Claim" in paragraph 4 of the Order must be a reference to the English CPR Part 8 proceedings, as this is "clear from the wording of the Order itself and as a matter of what was necessary to give practical effect to the Order". They also contended that it could not be right that the Court intended that the English Freezing Order would expire upon an event in foreign litigation (e.g., in the DIFC) over which the English Court has "no control" and "of which the parties might not have advance warning".

In his judgment, Lord Justice Phillips noted that the issue to be considered on appeal was "whether, properly interpreted, the Injunction expired on disposal of the DIFC proceedings it was designed to support, or whether it has continuing force until the Part 8 claim in which the Injunction was granted has been formally terminated."

In considering the appeal, the Court of Appeal focused on the construction and interpretation of the English Freezing Order. Lord Justice Peter Jackson noted that "no question of law arises. We are concerned with the construction of the Order, which was not happily drafted." In considering the appeal, the Court noted that the English Freezing Order "significantly" departed from the standard form of freezing order. Indeed, Lord Justice Arnold stated in his judgment that the inconsistencies in the drafting of the English Freezing Order

"are one of the reasons why the standard form of freezing Order should always be used unless there is good reason to depart from it…".

Ultimately, in interpreting the drafting of the English Freezing Order, the Court of Appeal dismissed the appeal. It also rejected the argument regarding foreign litigation. Lord Justice Arnold noted that he saw "no real force" to this argument, and "the courts require a claimant availing itself of the "nuclear weapons" of civil litigation to monitor actively their use and effect and to be astute to apply to the court to maintain their effectiveness and fairness."

The English Freezing Order was held to have expired.

Conclusion

Freezing Orders are part of the nuclear weaponry in a litigator's arsenal. When seeking such extreme relief, it is essential that a freezing order is drafted in a way that limits any scope for doubt on interpretation. The comments made by the Court of Appeal in this case highlights the importance of ensuring that they are carefully drafted, and defined terms are consistently used, so there can be no ambiguity as to their meaning. An unclear Order can have repercussions.

The Court of Appeal also observed that for parties engaged in multi-jurisdictional litigation (as is often the case in matters involving fraud and the dissipation of assets) it is important to, and they should proactively monitor the litigation in other jurisdictions.

NOT-SO-SECRET 'SECRECY' JURISDICTIONS: INFORMATION THAT CAN BE OBTAINED IN CONNECTION WITH POTENTIAL LITIGATION

Authored by: Anna Snead (Counsel) - Ogier

Both the Cayman Islands and British Virgin Islands (BVI) are often viewed as "offshore hubs of secrecy", with information about a company being considered impossible to obtain. In fact, it is possible to obtain far more publicly available information than many people realise and both jurisdictions have extensive information gathering and asset preservation tools to assist third parties to find out more about a company, its assets and/or its financial position in connection with potential litigation.

Publicly Available Information

In the Cayman Islands and BVI, it is possible for various searches to be run[1], quickly and easily:

1. A search on the online companies registry (CORIS[2] in the Cayman Islands; VIRRGIN[3] in the BVI) will reveal certain information about a company, including the date on which the company was incorporated; the name and address of its registered office; its current status (i.e. whether it is active, struck-off or dissolved); the type of entity; and in the BVI, share/capital information.[4]
2. Recent developments now allow a search to be made for the current directors of an active company.
3. If a company is suspected to have been involved in litigation or (for example) the subject of a winding up petition, an online search can be conducted for originating processes and any judgments or orders given in those proceedings.
4. Both Cayman and BVI have registered land and searches may therefore be made on a parcel of land to confirm ownership.
5. Both Cayman and BVI have maritime registers in relation to which the ownership of vessels may be checked.

In the BVI, it is possible to obtain certain documents from the BVI Registrar, including the certificate of incorporation and any certificate of change of name; the memorandum and articles of association and any amendments or restatements.[5]

Beyond this, in order to obtain further information about a company and its assets, there are a number of potential Court applications which could be made, which we discuss below.

1 Certain searches will need to be conducted by individuals who have registered with, and therefore have access to, the relevant search platform. Ogier would be able to coordinate all of the searches outlined here.
2 Cayman Online Registry Information Service.
3 Virtual Integrated Registry and Regulatory General Information Network.
4 For further details about the specific information that can be obtained in each jurisdiction, please contact the authors of this Article.
5 If the BVI company has elected to make the following publicly available, it would also be possible to obtain the Register of Directors, Register of Members and the particulars of security created by the company over any of its assets.

Norwich Pharmacal Orders

A powerful discovery tool is the Norwich Pharmacal jurisdiction, which allows an applicant to obtain disclosure from a third party who has become "mixed up" in wrongdoing.

In the Cayman Islands and the BVI, exempted companies (i.e., not companies that conduct only local business) are required to have a registered office and a registered agent physically present in the Islands. The registered agent handles the basic administration of the company and all of its filings and will therefore hold a substantial amount of information about that company, including KYC, beneficial ownership information and corporate records. This makes such service providers prime targets for Norwich Pharmacal applications, particularly given that the Courts have accepted that the mere fact of being the registered agent is sufficient to establish that the services provider was "mixed up" in the apparent wrongdoing.

Both the Courts of the Cayman Islands and BVI have taken a broad and flexible approach to granting Norwich Pharmacal orders, and in recent years, such applications have been used in novel situations, including to assist applicants to decide whether or not there is a sound basis for bringing proceedings, and and to obtain information in order to enforce a foreign arbitral award overseas. It is also possible to obtain Norwich Pharmacal relief in Cayman and the BVI notwithstanding those jurisdictions having statutory regimes for obtaining evidence for use in foreign proceedings. [6]

Bankers Trust Orders

Another powerful discovery tool is a Bankers Trust order, which allows a party to obtain discovery from banks (or other fiduciaries) where there is a prima facie case of fraud, and disclosure is required in order to trace and preserve assets in support of a proprietary claim.

A Bankers Trust disclosure order is generally granted in exceptional circumstances, where the applicant is able to satisfy the Court that there is compelling evidence that the applicant was defrauded or otherwise wrongfully deprived of its assets; that there is good reason to believe that the assets held by the third-party institution belong to the applicant; delay may lead to dissipation of the assets; there is a real prospect that the disclosure sought may lead to the location or preservation of the assets; and the information disclosed will be used only for tracing the applicant's assets.

Ancillary Disclosure Orders In Support of Injunctive Relief

The Cayman and BVI Courts recognise that disclosure has long been a standard feature of freezing orders and that it is the imposition of disclosure obligations that really makes the order effective, enabling the applicant to see, and if necessary, take further steps to protect the assets claimed.

In order to obtain a freezing injunction and ancillary disclosure order in support of local proceedings, an applicant must show: (i) it has a good arguable case for damages on the merits; (ii) that there is a real risk that, unless restrained, the respondent will take steps to dissipate the assets to avoid enforcement of any judgment against it; and (iii) that it is just and convenient in all the circumstances for the injunction to be granted.

It is now also possible to obtain a freezing injunction, and ancillary disclosure orders, in support of foreign proceedings[7]. In order to obtain this relief, an applicant needs to establish: (i) that there are foreign proceedings (actual or prospective); (ii) which give rise to a judgment which would be enforceable locally; and (iii) that there is a good likelihood of assets within the jurisdiction. If that can be established, and the criteria for seeking injunctive relief is met, the court will then consider whether it is "unjust or inconvenient" (in Cayman) or "inexpedient" (in the BVI) to grant the order. In practice the exercise will always be fact sensitive and the considerations (principles of fairness and convenience) are likely to be the same.

From a practical step, even if the disclosure reveals that there are not, in fact, any assets in the jurisdiction this does not vitiate the injunction and the disclosure may reveal other jurisdictions in which assets are held (or have been moved to).

Conclusion

In addition to obtaining information which is publicly available about a company, the Courts in Cayman Islands and BVI will assist victims of wrongdoing to obtain information they need to support a claim and/or trace assets, often relatively quickly.

For further information or assistance with information gathering tools in the Cayman Islands and/or BVI, please reach out to your usual Ogier contact or one of the authors of this Article.

6 This represents an important departure from the position in the Courts of England & Wales
7 in the Cayman Islands, this jurisdiction was placed on a statutory footing in 2014, and in the BVI, by way of amendment in 2021

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E amaechi.nsofor@uk.gt.com

Hannah Davie
Partner
Estates and Family Disputes
T +44 (0)20 7865 2849
E hannah.davie@uk.gt.com

Colin Diss
Partner
T +44 (0)20 7865 2511
E colin.diss@uk.gt.com

Hugh Dickson
Partner
T +1 345 769 7203
E hugh.dickson@uk.gt.com

Margot MacInnis
Partner
T +1 345 769 7203
E margot.macInnis@uk.gt.com

Nick Wood
Partner
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E nick.s.wood@uk.gt.com

David Bennet
Partner
T +1 284 346 9975
E david.bennett@uk.gt.com

Nick Nicholson
Partner
T +44 (0)20 7184 4352
E Nick.W.Nicholson@uk.gt.com

Prashan Patel
Partner
T +44 (0)20 7865 2328
E prashan.p.patel@uk.gt.com

John Skelton
Partner
T +44 (0)20 7728 2039
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LIMITATION AND SECTION 994

THG PLC V ZEDRA TRUST COMPANY (JERSEY) LIMITED [2024] EWCA CIV 158

Authored by: Laura Coad (Associate) and Nathan Tidd (Paralegal) - Keidan Harrison

Introduction

In THG v Zedra, the Court of Appeal was asked to determine whether there was an applicable limitation period to a petition brought under Section 994 of the Companies Act – an Unfair Prejudice Petition ("UPP"). The Court found that a statutory limitation period does apply. The ruling also posed some interesting questions on judicial precedent, all of which is discussed below.

Unfair Prejudice Petitions

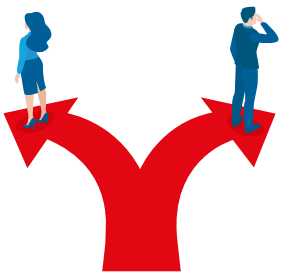
UPPs allege that company affairs have been, or are being, conducted in a manner that is unfairly prejudicial to the petitioner. Such prejudice may involve a breach of rules or duties, including articles of association and collateral shareholder agreements.

So long as the effect is that which equity would regard as contrary to good faith, the court has discretion to grant a remedy.

The remedy sought is often a buy-out order for the petitioner's shares, providing for compensation and a clean break between the parties. If untimely, the court may order that the price of the shares be based on a historic date. Similarly, the court will be critical of unjustified delays which result in additional prejudice or an irreversible change of position. The position prior to Zedra has therefore been how the doctrine of delay should affect the exercise of the court's discretion to make an order.

Limitation

The premise of limitation is to ensure that cases are pursued and enforced within a reasonable time. A defendant's rights are also protected because delay impoverishes evidence, prolongs uncertainty and impedes definitive settlement. Whilst a good cause of action may be defeated, a limitation period is not to be seen as an arbitrary cut off point; society is best served by reasonable and timely action.



Pre-Zedra Trust position

The existence of a statutory limitation period has not been supported by jurisprudence in this area. The accepted position was that no statutory limit applied to UPPs. In Bailey v Cherry Hill Skip Hire [2022] EWCA Civ 531,

the Court of Appeal approved Re Edwardian [2018] EWHC 1715 (Ch), as did Lord Leggatt's comments in Smith v RBS [2023] UKSC 34. Various iterations of legal commentary, as well as two Law Commission reports, have also adopted this stance. Because UPPs often rely on a course of conduct to cumulatively prove unfair prejudice, it has been accepted that the entire history should be considered when deciding whether or not to grant relief.

Despite the wealth of jurisprudence against, or silent on, there being statutory limitation in respect of UPPs, the Court in Zedra held that it was not bound by any earlier authority. Lewison LJ stated that where a superior court merely assumes the correctness of the law, a judge in a later case is not bound. Therefore, since this proposition had not been considered, on the assumption it was correct, the Court was free to reach a different conclusion to that in Cherry Hill.

THG Plc v Zedra Trust

Zedra Trust, a minority shareholder in THG Plc, presented an UPP in January 2019. Among the allegations includes a breach of statutory duty in relation to the power to allot shares and capitalise and appropriate profits to shareholders. The effect being, Zedra say, to dilute their shareholding in the company. The principal claim for relief was an order for compensation in respect of a share issue that took place more than 6 years prior to the issue of the UPP.

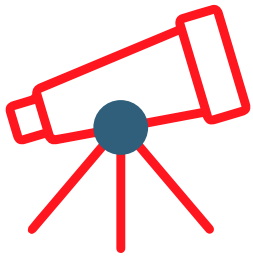
The Court found that it was possible for an UPP to fall within the scope of the Limitation Act 1980 (the "Act"). Section 8 provides that an action upon speciality must be brought within 12 years of the cause of action accruing. Since the right to petition is created by neither common law nor equity, but arises from a breach of statutory duties, Section 8 applies. Accordingly, relief under Section 994 is subject to a 12-year limitation period, accruing when the petitioner knows, or should have known, of such prejudice.

If an action is to recover damages however, under Section 9(1), Section 8 is disabled and the claim must be brought within 6 years. Therefore, if a petitioner is seeking a monetary award, a

6-year limitation period will apply.

Helpfully, the Court clarified that an UPP seeking a buy-out order is non-pecuniary relief and subject to a statutory limitation period of 12 years. Only when the share certificates are tendered against the purchase money does the debt become real, and the claim for the recovery of money. There is no entitlement to money until a consequential order for the payment is made.

Limitation will therefore be affected by the form of relief sought. Whilst a petition may in one part seek an order to regulate company affairs, and in another an order for compensation, different limitation periods will apply. Whether an action is governed by Section 8 or 9 is determined therefore by the nature of the relief sought; the critical distinction is between claims under an enactment for pecuniary and non-pecuniary relief.



Looking Forward

Zedra confirms that not only are UPPs subject to a statutory limitation period, but that period will turn on the relief sought. Petitioners seeking an order for monetary relief will need to bring their action within 6 years, whereas those pursuing a non-monetary award are subject to a longer 12-year period.

The Court considered whether a claim can be struck out for delay if it is brought within the limitation period.

The accepted position, as has been the theme of this piece, was that it was impossible for a court to dismiss a claim by virtue of delay if brought within time.

In the right circumstances, the Court found this was **"possible"**(and that Judges should not be discouraged. The limitation periods should, therefore, be seen as longstop dates and parties should still bring UPPs expeditiously.

In many cases, the allegations supporting the petition will be a continuing course of conduct, unlikely to be defeated by the 12-year period. However, it will remain to be seen whether the court's original discretion on delay was more appropriate. Notwithstanding, given the arbitrary distinction imposed upon claims brought under the same statutory provision, as well as the progressive interpretation of precedent, Zedra will undoubtedly be looking to appeal. For now, solicitors need to be alert to the different limitation periods and think carefully about the requisite relief sought.

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KNOWING RECEIPT CLAIMS IN FRAUD LITIGATION:

REFLECTIONS ON THE SUPREME COURT DECISION IN BYERS V SAUDI NATIONAL BANK

Authored by: Benjamin John (Barrister) - Maitland Chambers

The recent decision of the UK Supreme Court in Byers v Saudi National Bank [2023] UKSC 51 decided an important aspect of the law of knowing receipt in the context of international fraud litigation; and answers, raises or poses a number of other questions of interest to the fraud litigator.

Introduction - Knowing Receipt: A Recap

Of obvious relevance in both domestic and, increasingly, in cross-border fraud litigation, English law claims in knowing receipt have three basic elements:

1. A Claimant's assets are disposed of in breach of trust or fiduciary duty;
2. Those assets, or assets which are traceable as representing them, have been received (other than merely ministerially) by the defendant;
3. With knowledge that those assets are traceable to a breach of trust or fiduciary duty.

Crucially for the relevance of this cause of action to the full range fraud litigation:

1. There is no need for a conventional institutional trust at the start of the story (even much fraud litigation, including the Byers case, does start with such a situation). For example: the claim lies where assets of a company are disposed of in breach of fiduciary duties by a director (as confirmed and explained in Byers); and, as now seems more likely in light of Byers, in situations with other types of constructive trust at the start of the story (such as where assets have simply been stolen or otherwise fraudulently misappropriated).
2. Liability is personal, not proprietary: so the claim in knowing receipt is of real use in circumstances where a proprietary remedy attaching to the assets themselves is not available - a key example being where the knowing recipient no longer holds the assets and has disposed of them in such a way that they can no longer be found or traced.
3. Despite the name, knowledge does not necessarily need to coincide with actual receipt (although it very often does): the liability arises if at any point while the defendant continues to hold the assets, he acquires the necessary knowledge.
4. The equitable tracing rules which underpin many knowing receipt claims – and other aspects of the remedy – are superior to the common law remedies available for the recovery of property.

Background to Byers: the Al-Sanea fraud

The Byers case was part of the extensively litigated complex frauds of Maan Al-Sanea involving companies in the Saad Group. As part of the financial arrangements relating to the Saad Group's holdings, Mr Al-Sanea held shares in five Saudi companies on trust for a Cayman company, SICL. In breach of trust, Mr Al-Sanea transferred those shares to a Saudi bank to settle personal debts he owed to the bank (and the case proceeded on the basis that the bank had the requisite knowledge of that breach of trust). However, the law governing the transfers of the shares was Saudi Arabian law (as the lex situs of the shares): under that law, which does not recognise the concept of a trust or the existence of any equitable proprietary interests, SICL's beneficial interest in the shares was overridden or extinguished on the transfer to the Saudi bank, which obtained an absolute title to the shares on registration.

The Central Point in Byers

The central, and previously unresolved, question which therefore arose was whether a claim in knowing receipt requires that the claimant has an existing beneficial interest in the assets at the point when they were received (or held) by the defendant with the requisite knowledge. If the answer was "yes", then the bank could not be liable for knowing receipt, because the Saudi law-governed transfers of the shares expunged the claimant's beneficial interest under the trust. If the answer was "no", then the bank was liable.

The issue is one of real practical significance in fraud litigation: the author has had two cases in the last few years where this question arose - and would have provided a complete answer to valuable knowing receipt claims against foreign defendants had the cases not settled.

The answer given by the Supreme Court is "yes":

to establish knowing receipt the claimant must show an existing beneficial interest in the assets at the point when they were received (or held) by the defendant with the requisite knowledge.

The reasoning of Lords Briggs and Burrows do not entirely match; but – in essence – the analysis is as follows:

1. Personal claims in knowing receipt in respect of assets are closely allied to proprietary claims to the assets themselves, often coming into play when the alleged knowing recipient no longer has the property, preventing a proprietary claim;
2. Such proprietary claims are (of course) defeated if the claimant's beneficial (proprietary) interest is overridden or extinguished by the time the recipient comes into possession; and
3. It would be logically inconsistent for the law to allow the knowing receipt claim to survive in those circumstances, when the allied proprietary claim is defeated.

Key Takeaways For Practitioners

So, in an international or cross-border fraud case, if the assets the subject matter of the fraud have been transferred pursuant to any governing law which provides (by one route or another) for the extinguishment of any prior existing beneficial or equitable interests in the assets, the claim in knowing receipt will not lie. A foreign governing law may have this effect simply because it recognises no division between legal and equitable or beneficial interests.

The point is important to bear in mind when acting for a defendant in international fraud litigation: it is always worth considering the chain by which assets are alleged to be traceable into your clients hands, the proper law of all relevant transfers of assets and then the position – under those laws – in relation to the extinction (or not) of prior (English law) equitable/ beneficial interests.

On the other hand, when instructed by a claimant, don't be down-hearted! Whilst it is certainly essential to consider the chain of asset transfers (insofar as possible as a Claimant) in order to advise properly on available claims and to strategise, the fact that the proprietary base for a knowing receipt claim has been destroyed is not the end of the road. In most cross-border fraud cases there will be other avenues which may avail the client: obvious examples are equitable claims in dishonest assistance (which provide similar remedies, but require no proprietary base; and indeed, no receipt is required at all); and common law claims in conspiracy.

Two Further Reflections

First, the Claimant argued that the consequence of the Court's decision would be to incentivise fraudsters to route assets through accomplice third parties in foreign jurisdictions where the law extinguishes equitable/beneficial interests: it would be a "money launderers charter".

The Court rejects this point on the basis that the law of dishonest assistance would likely ride to the rescue in such a situation (where all the third party accomplices were acting dishonestly pursuant to a common design) and Lord Burrows added that anti-money laundering criminal laws (of this and other countries) would be a more appropriate disincentive to such behaviour.

But Lord Briggs also said this:

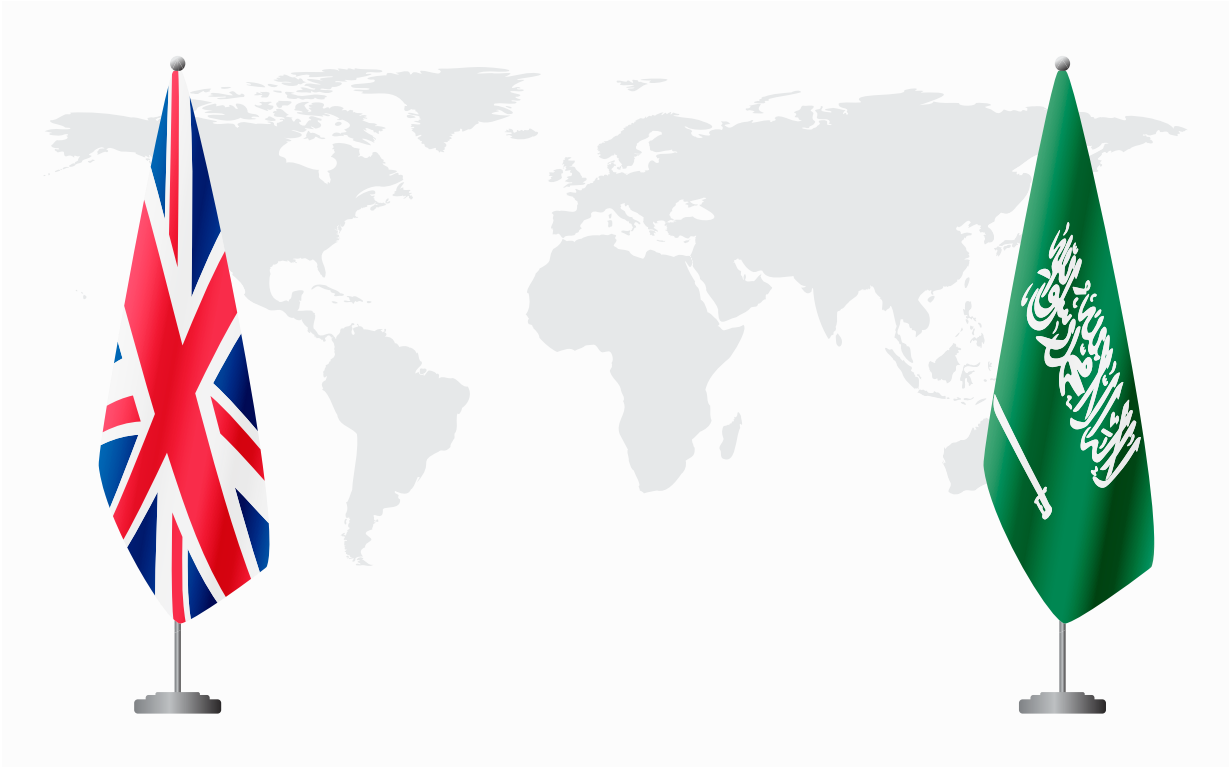
"Of course if all the parties to the offshore transactions alleged to have cleared off the claimant's equitable beneficial interest are co-conspirators in the same fraud, then they will not be permitted to rely for that purpose upon their own wrong."

He may simply be referring back to the point about dishonest assistance (outlined above). But the more natural reading of the comment suggests that Lord Briggs doesn't mean just that there is likely to be an alternative route to some similarly effective alternative form of liability, but that in the circumstance he posits, the defendant(s) would not be permitted to rely on their (wrongful) series of offshore transactions to defeat a knowing receipt claim on the basis of those transactions having cleared the beneficial interests. It is obviously a point for litigators to consider on a case by case basis; but – if Lord Briggs had in mind the application of the "illegality principle" to bar a litigant from relying on their own illegal conduct – it is not clear that the doctrine, as relatively recently recast by the Supreme Court in Patel v Mirza[1], would necessarily apply in all such circumstances. It might be argued that to apply the illegality principle would run counter to the thrust of much of the reasoning in, and policy considerations underlying, Byers itself (especially as stated by Lord Burrows).

Secondly, Lord Briggs (though obiter) explains the legal basis on which company assets disposed of or transferred in breach of directors' fiduciary duties may form the basis of a claim in knowing receipt (and other claims requiring a proprietary base). It is that a constructive trust in favour of the company arises at the moment of the transfer which constitutes the misapplication of assets in breach of fiduciary duty. So legal title passes to the transferee, but the beneficial interest remains with the company such that a claim in knowing receipt will lie.[2]

Lord Briggs' clear-eyed analysis that a trust arises in such company cases may throw a clarifying light on other fact patterns in fraud litigation in which knowing receipt claims might be useful. An example is the scenario, famously posited by Lord Browne-Wilkinson in Westdeutsche[3], of the simple theft of assets. Lord Browne-Wilkinson held that a constructive trust in favour of the victim arose at the point of the fraud – the theft or taking. That has long attracted at least some controversy (and the involved arguments are beyond the scope of this short article).

But Lord Briggs' willingness to clarify that a trust arises upon the act of misfeasance in the company context may indicate further support for (at least a version of) Lord Browne-Wilkinson's analysis. That, in turn, raises the possibility of knowing receipt claims against subsequent transferees of stolen assets.



1 Patel v Mirza [2016] UKSC 42
2 It is not entirely clear whether Lord Burrows wholeheartedly endorses that view, although what he says on the subject is consistent with Lord Briggs' views
3 Westdeutsche [1996] AC 669

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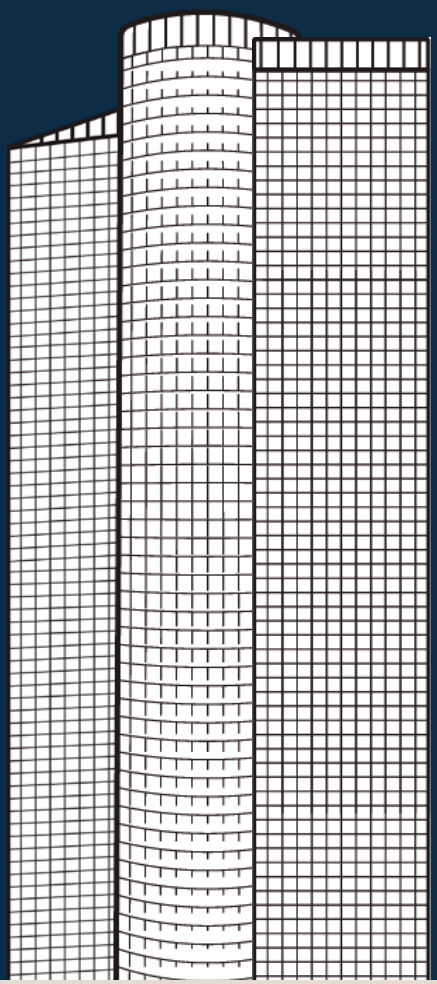

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baruch.baigel@asserson.co.uk

Yisrael Hiller
Partner
yisrael.hiller@asserson.co.uk

Shimon Goldwater
Partner
shimon.goldwater@asserson.co.uk

Elliot Lister
Partner
elliot.lister@asserson.co.uk

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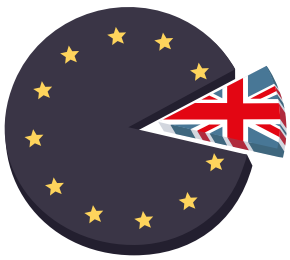
UK PUBLISHES ITS FIRST SANCTIONS STRATEGY AND OTHER SANCTIONS DEVELOPMENTS

Authored by: Shimon Goldwater (Partner) and Jonah Cowen (Associate) - Asserson Law Offices

The UK government has published its first sanctions strategy paper, laying out how the UK uses and intends to use its sanctions legislation.



Since Brexit the UK has run its own autonomous regime, independently from the EU. That regime has grown at rapid speed in the few years since Brexit. In particular, the wide-ranging sanctions imposed against Russia in response to the invasion of Ukraine have substantially changed the landscape and led to much greater awareness of sanctions issues among practitioners.

The UK government has not until now set out how it intends to use sanctions as part of its foreign policy. It has now published the UK sanctions strategy, which can be accessed here.

The Contents of the Sanctions Strategy

The sanctions strategy describes how the UK's sanctions regime has been built up, the government departments responsible for sanctions and how they collaborate, as well as the resources which have been dedicated to implementation and enforcement of sanctions.

It also sets out the three aims of the UK sanctions regime:

1. To deter human rights abuses and other malign activity
2. To disrupt ongoing malign activities
3. To demonstrate the UK's readiness to defend international norms.

Much of the strategy paper focuses on the UK's efforts to undermine Russia's ability to wage war against Ukraine through sanctions. This includes efforts to deny Russia access to critical goods and technology, to isolate Russia on the world stage and to target efforts to circumvent international sanctions. The strategy paper reports that the UK has sanctioned 96% of the goods traded with Russia in 2021 and frozen £22 billion of Russian assets.

Other recent sanctions highlighted in the strategy paper include:

- Sanctions against the Iranian regime, following the crackdown on protests since 2022
- Sanctions against Hamas, following the 2023 terror attack against Israel
- Sanctions against arms dealers to the Myanmar military
- Sanctions targeted at the Wagner Group's activities in Africa

The strategy paper emphasises that the UK seeks to minimise any humanitarian harm caused by sanctions regime. This includes excluding basic food and

medicines from sanctions prohibitions and granting licences in specific cases to facilitate humanitarian assistance and relief. There is also a new commitment to legislate to introduce a humanitarian exception to the financial sanctions. Alongside this, a voluntary process is being developed to allow sanctioned individuals to apply for frozen funds to be released for the express purpose of supporting Ukraine's recovery and reconstruction.

The implementation of sanctions is deployed alongside other foreign policy efforts, including diplomatic efforts, as part of the UK's overall strategy. Generally the UK tries to reach agreement on the international level, whether at the UN or bilaterally with the UK's allies, as far as possible, to align the UK's rules with those implemented by other nations. However, the specific action which the UK takes will always be tailored to its strategic objectives.

One new update included in the paper is that the UK intends to legislate in 2024 to introduce a prohibition against sanctioned individuals acting as a director of a UK company. At this stage trading companies incorporated in the UK are unlikely to have a sanctioned person as a director, but this will further increase the pressure on sanctioned individuals who still have business interests in the UK.

Mints v PJSC: Permission To Appeal Granted

The Supreme Court granted permission to appeal on 25 January 2024 in the case of Mints v PJSC National Bank Trust [2023] EWCA Civ 1132. The Court of Appeal had concluded that the UK sanctions regulations do not prevent a court from entering judgment in favour of a sanctioned Russian entity.

The Court of Appeal also considered the test for "ownership and control" (Englarged) under the UK Russian sanctions regime. It concluded, in obiter comments, that if a sanctioned individual controls an entity solely by virtue of their political office, that constitutes sufficient control for that controlled entity to also be subject to sanctions. The case in question concerned a company owned by Russia's central bank and the court concluded that, given that the governor of the central bank reports to Vladimir Putin (a sanctioned individual), the company was practically under the control of Mr Putin and therefore subject to the sanctions regulations.

The court even went so far as to state that all Russian companies might be considered under the control of Mr Putin:

"Mr Putin is at the apex of a command economy. In those circumstances […], in a very real sense (and certainly in the sense of Regulation 7(4)) Mr Putin could be deemed to control everything in Russia."

The UK Foreign Office issued a statement in response to this judgment stating that it is considering the impact of the decision, and noting that it does not automatically presume that all private companies in Russia are controlled by political officials in Russia. Although the Court of Appeal's comments were obiter and therefore not strictly binding on lower courts, practitioners will be closely monitoring developments to see if the Supreme Court has anything to say about these comments in its judgment.

Other Recent Developments

Some other noteworthy developments in the area of UK sanctions include the following:

1. To mark the second anniversary of the invasion of Ukraine, the UK added 50 names to its list of designated persons. This list includes a variety of individuals and entities involved in supplying goods used by Russia's armed forces, trading in the Russian energy sector or associated with the metal and diamonds industries.
2. The Office for Financial Sanctions Implementations (OFSI) has published further sets of guidance on the sanctions regulations. This includes guidance on new reporting requirements introduced in December 2023. There is also a new website containing guidance on financial sanctions licensing.
3. The UK's Treasury Select Committee has opened an inquiry into the effectiveness of the UK's economic sanctions, in particular whether it is hampering the ability of the Russian state to fund Russia's armed forces. They are seeking evidence on the effectiveness of sanctions to date and whether any further measures should be introduced, for example the confiscation of frozen assets or the introduction of trade sanctions against the purchase of Russian oil and gas.

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THE NCA'S ART WORLD ALERT

Authored by: Dr Angelika Hellweger (Legal Director) - Rahman Ravelli

Angelika Hellweger outlines the main points in the National Crime Agency's amber alert relating to the art storage sector, the factors that made it necessary and the challenges it presents.

For almost as long as time, the wealthy and the art world have been inextricably linked. Those with money to invest have often chosen to spend it on various forms of art and cultural artefacts.

The art world, however, has come under intense examination since Russia's 2022 invasion of Ukraine, and the overall geopolitical shifts and the ever-changing sanctions that have followed. There has been a heightened focus on the anonymous and secretive sales often seen in the art world, the movement and storage of high-value items and, in particular, the conduct of Russian high net worth individuals.

Last year saw the UK's Office of Financial Sanctions Implementation (OFSI) release guidance aimed at helping high-value dealers and art market participants (AMPs) identify and mitigate sanctions risks.

It was a move that pointed out that those targeted by sanctions may view the art world as a top-price way of circumventing the restrictions imposed on them.

Warning

That has now been followed by an alert from the UK National Crime Agency (NCA). The NCA's

"Amber Alert: Financial Sanctions Evasion, Money Laundering & Cultural Property Trafficking Through the Art Storage Sector"

is a warning to all those in the art sector, from the dealers, galleries, auction houses, transport firms, agents and service providers through to those providing insurance and storage facilities. The message is clear: they need to be alert to sanctions evasion, money laundering and cultural property trafficking in their line of business, as well as tax evasion, fraud, bribery and corruption.

The alert points out the possibility of high net worth individuals trying to evade sanctions regimes by holding billions of pounds' worth of art and

luxury items like fine jewellery and cars in warehouses and freeports. Many pieces of art of huge value, for instance, have not left specialist storage facilities in decades, often exempt from import taxes and duties, and even transaction taxes if and when they are sold.

Such a situation obviously suits the ultimate owners of such items. But the alert is putting the onus on those who represent and assist them to identify wrongdoing. It states that those operating in the art sector need to check international sanctions listings, lost and stolen art registers and other due diligence systems on a daily basis against the details of their clients and their clients' assets.

Scrutiny

The alert also highlights situations that should prompt increased scrutiny of a client's activities and business associates. These include when attempts are made to transfer artwork to another person, when a sale is set to be made at an artificially low or inflated price, and when the source of any payment or the ultimate beneficial owner (UBO) is unclear.

The NCA has also pointed to the use of offshore accounts, unusual payment and trading arrangements, shell companies, complex corporate structures or intermediaries that ensure buyer and seller remain unknown to each other as possible red flags for those in the art sector.

The alert is a detailed and fairly lengthy document, complete with case studies and details of the relevant offences. Arguably, it needs to be comprehensive because of the unique nature of the art world. The combination of huge amounts of money in the hands of those who are looking to invest it, little or no regulation and very few checks on sales makes the art world particularly challenging for the authorities – and attractive to those trying to avoid the punitive effect of sanctions and / or conceal their gains from other wrongdoing.

Clarity

The NCA states that those working within the sector should file a Suspicious Activity Report if they identify activity that may be linked to offences detailed in the alert: it places responsibility on them.

The approach that is often used involves high-value items of art being bought and sold secretively and on the basis of a handshake, with little or no diligence being carried out. But this is an approach that will have to be abandoned in order to avoid attention from the enforcement authorities.

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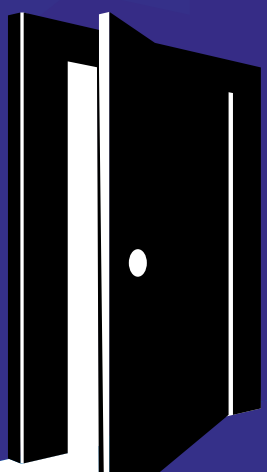
SETTING ASIDE JUDGMENTS FOR FRAUD: NOT AN "OPEN SESAME" FOR REPEAT LITIGATION



Authored by: Belinda McRae (Barrister) - Twenty Essex

It has long been "well-established" that a judgment that would otherwise have res judicata effect "can be impugned if it was obtained by fraud".[1] The English appellate courts have nonetheless recently had occasion to clarify the circumstances in which a party may set aside a domestic judgment[2] where a claimant can show that it was procured by fraud, and in particular, where it will be an abuse process to seek to do so.

The basic principles are well-known. First, there must be a "conscious and deliberate dishonesty". Second, the fresh evidence proving that dishonesty must be "material". This requirement will be met if "the fresh evidence would have entirely changed the way in which the court approached and came to its decision".

In other words, to establish materiality, the fresh evidence must show that the fraud was "an operative cause of the court's decision".[3]

If a party dissatisfied with a judgment can prove both elements, a free-standing cause of action in fraud will lie to impeach the impugned judgment.

In 2019, the Supreme Court had occasion to consider this cause of action in Takhar v Gracefield Developments.[4]

1 This note does not address the circumstances in which a foreign judgment can be set aside on grounds of fraud.
2 DPP v Humphrys [1977] AC 1, 21.
3 Royal Bank of Scotland plc v Highland Financial Partners LP [2013] 1 CLC 596, para 106. On the test for materiality, see also Tinkler v Esken Ltd [2023] EWCA Civ 655; [2023] Ch 451.
4 [2019] UKSC 13; [2020] AC 450.

In that case, the claimant sought to set aside a judgment on grounds of fraud, relying on evidence that the defendants had forged her signature. The defendants applied to strike the claim out as an abuse of process on the basis that the claimant could have obtained the fresh evidence of forgery before trial, had she used reasonable diligence. The key question before the Court was whether a requirement of reasonable diligence should be imposed on a party seeking to set aside a judgment. Both Lord Kerr and Lord Sumption, giving the leading judgments, held that there was no such requirement.[5] In particular, Lord Kerr considered that

"the idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice".[6]

There was no issue before the Court about what constitutes fresh evidence for the purpose of this cause of action. This was because the relevant evidence of forgery was obtained after the trial. For this reason, Lord Kerr's statement of the test assumed that "no allegation of fraud had been raised at trial".7

However, Lord Kerr and Lord Sumption both expressed views (by way of obiter dicta) about the result that would pertain if the fraud was raised at the original trial. Lord Kerr's provisional view was the Court would have a discretion as to whether to proceed in such circumstances; whereas Lord Sumption considered that the position would remain the same. If the fraud was unsuccessfully raised at the original trial, and new evidence was later deployed that decisively established it, his provisional view was that the cause of action would lie

"irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material".[8]

It was not until the recent case of Finzi v Jamaican Redevelopment Foundation [9] that this lingering question of whether and in what circumstances it may be an abuse of process to seek to set aside a judgment for fraud based on evidence that was known at the time of trial was decisively resolved.

In Finzi, the claimant had unsuccessfully sought to set aside certain Jamaican court judgments and consequential settlements on the basis that they had been procured by fraud. The judge dismissed that claim as an abuse of process for the reason that the claimant had all the information on which he was relying to substantiate his fraud claim at the time that he concluded the critical final settlement agreement. The Jamaican Court of Appeal was similarly unpersuaded, refusing permission to appeal. Despite granting leave to appeal, the Privy Council likewise advised that the claimant's appeal be dismissed. In doing so, the Board of the Privy Council took the opportunity to consider the correctness of the dicta in Takhar (in particular, Lord Sumption's provisional views set out above, which had since been endorsed by the Court of Appeal).[10]

5 See in particular, para. 54 (Lord Kerr) and para. 63 (Lord Sumption).
6 Para. 52.
7 Para. 54.
8 Para. 55 (Lord Kerr) and para. 66 (Lord Sumption).
9 [2023] UKPC 29; [2024] 1 WLR 541.
10 See Park v CNH Industrial Capital Europe Ltd (trading as CNH Capital) [2021] EWCA Civ 1766; [2022] 1 WLR 860.

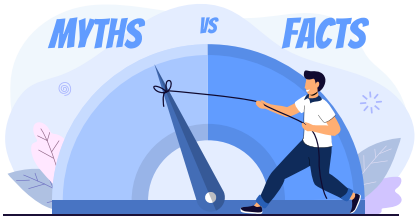
In general terms, the Board criticised the Court of Appeal's reliance on Lord Sumption's statements in Takhar and the tendency of advocates generally to place undue weight on obiter dicta:

"all too often advocates treat the analysis of cases as if it were simply an exercise in looking at the language used by judges, forgetting that it is not particular verbal formulations that make the common law but the principles on which the actual decisions in cases are based." [11]

In the case of Takhar, as the Board pointed out, neither Lord Sumption nor the other members of the Supreme Court had applied their minds to the question of whether it is an abuse of process to set aside a judgment for fraud relying solely on evidence that the claimant had at its disposal when judgment was given.[12]

Like the leading judgments in Takhar, the Board recognised that "fraud is not excused by negligent failure to expose it".[13]

But, in contrast to Lord Sumption, the Board emphasised the strong public interest in achieving finality in litigation and the possibility of vexatious allegations of fraud in this context.[14] Allegations of fraud were "not to be regarded as some kind of open sesame"for a new round of litigation."[15]



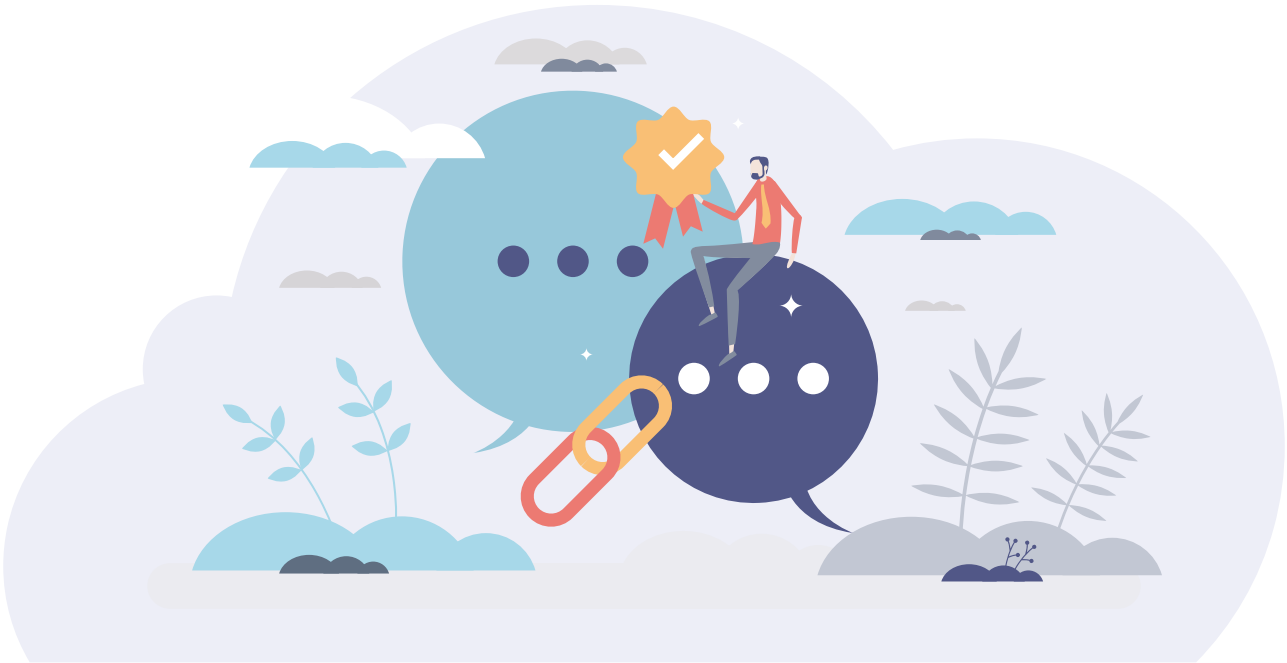
Ultimately, the Board did not conclude that a party's prior knowledge of matters on which it later relied to impugn a judgment or settlement would bar an action. Instead, where a claimant relies on evidence not adduced at trial to prove fraud, it must prove (i) that the evidence is new, in that it has been obtained since judgment, or (ii) if it is not new, the matters on which the claimant relies to explain why the evidence was not originally deployed. Insofar as the second category is concerned, the Board indicated that a claim will likely be an abuse of process if the claimant cannot show a "good reason" why it was prevented or significantly impeded from using the relevant evidence at trial. Further, the Board observed that the strength of the fraud claim (i.e., conspicuous strength or conspicuous weakness) may be a factor in the Court's assessment. [16]

Although it is not strictly binding on the English courts, the Board's decision provides helpful guidance as to the circumstances in which a domestic judgment or settlement agreement can be set aside on grounds of fraud and confirms the enduring relevance of the doctrine of abuse of process. As one High Court decision has observed, since 2019, the Supreme Court's judgment in Takhar has been

"regularly invoked in circumstances where it has no proper application". [17]

After the Board's decision in Finzi, prospective claimants should think twice about whether they have a proper basis to impugn a judgment for fraud, particularly where the evidence was available before judgment.

11 Finzi v Jamaican Redevelopment Foundation [2023] UKPC 29; [2024] 1 WLR 541, para. 60.
12 Paras 61-62.
13 Para. 67.
14 See paras 65 and 67-69 in particular.
15 Para. 76.
16 Paras 72-73.
17 El Haddad v Al Rostamani [2024] EWHC 448 (Ch), para. 108.



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TRACING ASSETS IN THE CRYPTO-VERSE:

CHALLENGES ON THE HORIZON FOR THE IRISH COURTS

Authored by: Elaine White (Partner) and James McDermott (Senior Associate) - Ogier

Despite a spate of scandals and frauds in the industry, mainstream adoption of cryptocurrency continues apace. As a result, courts and regulators are increasingly required to show significant agility to deal with issues presented by crypto-assets.

As victims of fraud (and liquidators acting on behalf of creditors) seek to recover crypto-assets, courts across the common law world have continued to adapt and repurpose well known private law investigative and asset tracing tools to assist claimants pursue their assets.

With a number of major crypto firms and exchanges continuing to establish and/or bolster their presences in Dublin, the Irish courts can expect to grapple with these issues before long.

In this piece, we review some of the indication of the approach the Irish courts are likely to take when dealing with misappropriated crypto assets.

Cryptocurrency As Property

In 2019 the UK Jurisdiction Taskforce (UKJT) contended with the question of whether crypto-assets could be property, noting that the "fundamental proprietary relationship is ownership: the owner of a thing is, broadly, entitled to control and enjoy it to the exclusion of anyone else".

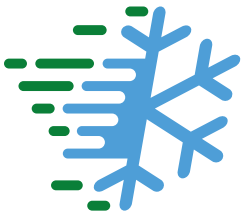
If crypto-assets were property, then the owner would have proprietary right against the whole world and not a right in action against a service provider or other counterparty. Ultimately, the UKJT concluded that crypto-assets have all of the indicia of property, noting however that a private key is not in itself to be treated as property because it is information.

This position was given judicial support by the English High Court in AA v Persons Unknown [2019] EWHC 3556 (Comm), which found that cryptocurrency satisfies the following criteria:

1. It is definable
2. It is identifiable by third parties
3. It is capable in their assumption by third parties
4. It has some degree of permanence

That approach has been extremely influential and cryptocurrency has subsequently been recognised as property in other common law jurisdictions including the United States, Singapore, New Zealand, Cayman, BVI, Hong Kong, and Canada.

In Ireland we have not yet had explicit recognition by the courts of cryptocurrency as a form of property, but a number of judgments show a willingness to make orders more commonly used in the context of traditional property related applications, which are considered below.



Freezing Orders

The Irish High Court's readiness to

grant freezing orders in respect of assets including crypto-assets, as well as disclosure orders in respect of cryptocurrencies, gives some comfort that the Irish Courts will not deviate greatly from the approach of the UK.

In a 2022 case, the Irish Commercial Court granted judgment in default of appearance against two defendants in a dispute relating to an alleged fraud perpetrated on a Russian company (Trafalgar Developments Ltd, Instantania Holdings Ltd, Kamara Ltd and Bairiki Incorporated v Dmitry Mazepin, OJSC United Chemical Company Uralchem, & Ors [2022] IEHC 167).

As the Court had reason to fear the defendants taking steps to dissipate their assets in order to frustrate judgment in the event of a successful claim, the Court granted a worldwide Mareva-type injunction, preventing the defendants from reducing their assets below the sum of US$78,769,219.84.

Importantly, the Court extended the disclosure of assets to include the defendants' crypto-assets:

An order requiring each of [the defendants] to disclose on affidavit or equivalent document all bank accounts (and/or wallets in respect of any cryptocurrency) worldwide in which these defendants have a direct or indirect legal or beneficial interest.

It is clear from the decision to grant these freezing and disclosure orders that the Irish Courts are willing to include crypto-assets within the domain of these reliefs.

This approach is consistent with that of the courts of England and Wales, which have also granted similar reliefs. In doing so, they expressly recognised cryptocurrencies as property.

Norwich Pharmacal Orders

As a go-to jurisdiction for global tech firms, against whom Norwich Pharmacal Orders provide an avenue to identify anonymous wrongdoers, the Irish courts regularly hear applications for Norwich Pharmacal relief.

This relief has been used to good effect in Ireland in relation to crypto in recent years and we recently had confirmation from the Courts of its exact parameters. In late 2023, the Irish High Court confirmed that because of the strict requirements for pleading fraud, Norwich Pharmacal relief must allow an applicant obtain information which goes beyond the identity of the alleged wrongdoer, such as the dates of the payments and the amounts. This expanded relief should be a vital tool in countering crypto-fraud.

In Williams v Coinbase Europe Ltd (High Court Record No. 2021/3478P), the Irish High Court granted an application by a US businessman, Titus Williams, as part of efforts to trace approximately $1.8 million (€1.5 million) in Bitcoin, which was stolen from his cryptocurrency wallet following a hack in February 2021. The Court required Coinbase to disclose to the Plaintiff within five days all information in its possession that would identify or assist in identifying the unknown parties who owned or had access to the relevant accounts, including IP addresses, email addresses, login details and other contact information.

In Stanbury v Coinbase Europe Ltd (High Court Record No. 2022/714P), a similar application was granted to Mr. Stanbury against Coinbase, when he claimed that 41.96 Bitcoin was stolen from his digital wallet in August 2013, due to a hack of his user account on a now defunct Japanese Bitcoin exchange.

In the context of increasing regulatory oversight, particularly with the Markets in Crypto-Assets Regulation (MiCAR) on the horizon, the level of KYC documentation held by these exchanges may make them a necessary target for disclosure in efforts to counter fraud.

Alternative Service

In June 2022, the High Court of England and Wales in the case of D'Aloia v. (1) Persons Unknown (2) Binance Holdings Limited & Others granted an application for service of court proceedings by way of the transfer of a non-fungible token ("NFT") recorded to a blockchain. This was subsequently followed by courts in other common law jurisdictions (see, for example, AQF v (1) XIO (2) VQF, (3) CGN BVIHCCOM 2023/0239 in the BVI Commercial Court).

In Jones v Persons Unknown [2022] EWHC 2543 (Comm), the English Court went further, acknowledging that the speed at which crypto assets can be dissipated could render traditional service redundant. In that case, even though the location and identity of the crypto-exchange was known, the service processes in the Seychelles were acknowledged as being "too slow", and substituted service on the exchange via email and NFT was considered appropriate. The English Court also stated that

"no traditional means of service are likely to be effective in relation to the [fraudsters]" and "this [was] an exceptional case".

In Trafalgar Developments Ltd (above), the Irish Court granted an order for substituted service against the defendants, noting that substantial procedural delays typically arise in respect of service by way of the Russian designated authority under the Hague Service Convention. The Court permitted the Russian defendants to be served "through a combination of post, e-mail, fax and messages to social media accounts".

Although the defendants had also been ordered to disclose on affidavit details of all wallets in respect of any cryptocurrency they held, service by way of NFT was not considered.

Ireland was a relatively early adopter of service by social media: in 2012, permission was given by the High Court in the case of Daly v Lynch (Unreported) 28 March 2012 allowing service of legal documents via Facebook. In September 2014, the High Court made an order to allow a liquidator to serve an uncontactable person by way of LinkedIn, having been satisfied that the liquidators could not contact the respondent in person, by email, fax or postal address.

It remains to be seen if the Irish High Court will adapt to NFT service, which in the case of anonymous fraudsters may well be the most effective route. While the English Court in Jones (above) commented that it was an "an exceptional case", that seems questionable given the modus operandi of crypto-thieves is to cloak their identity and move the assets into jurisdictions in which enforcement is more difficult. Deeming service by NFT to be effective gives a small advantage to the claimant in having their judgment recognised and enforced in the relevant jurisdiction.

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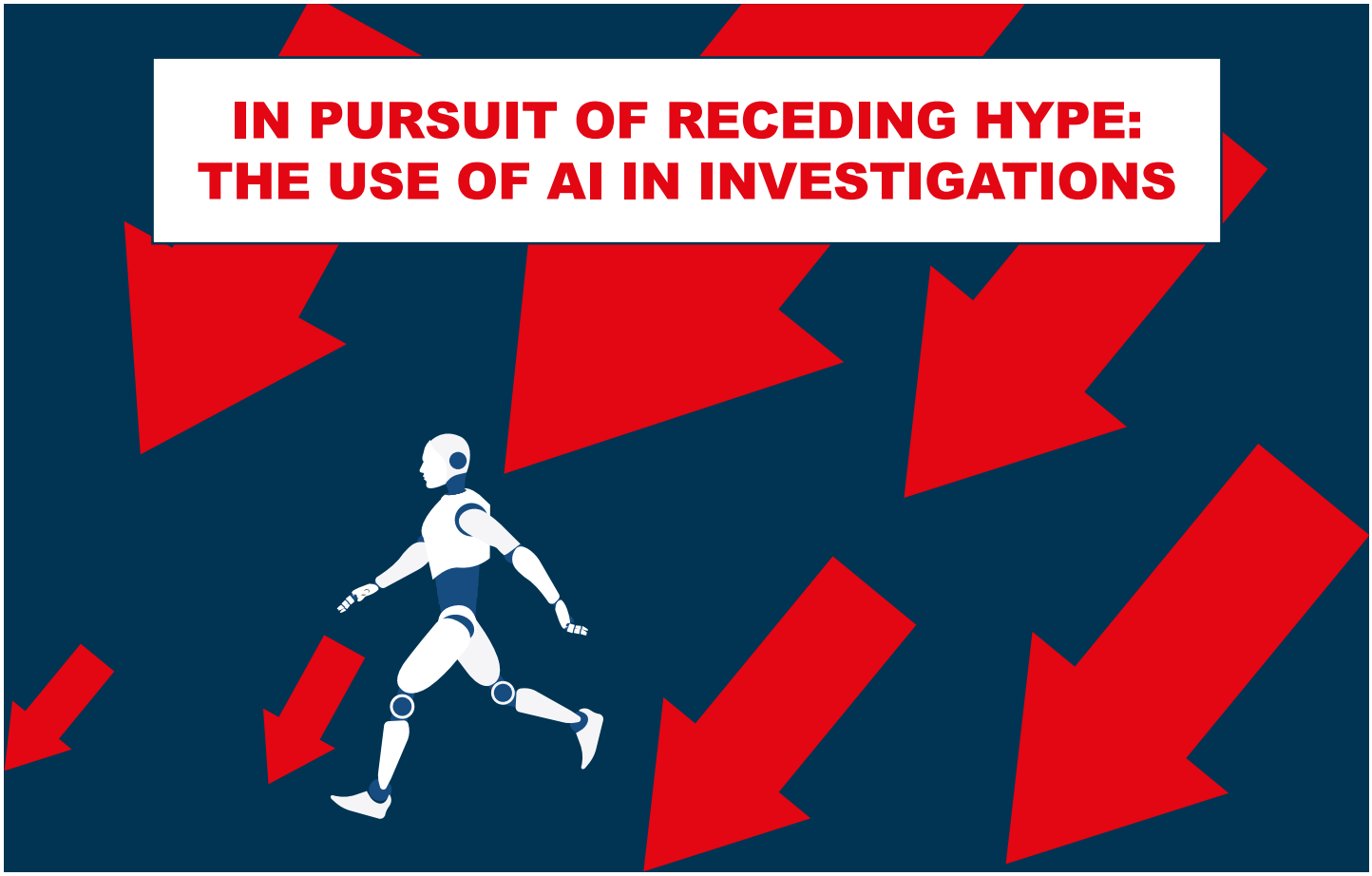
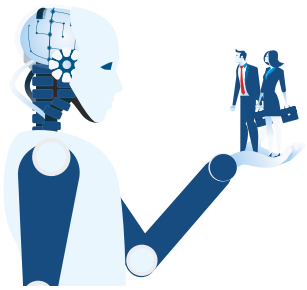
IN PURSUIT OF RECEDING HYPE: THE USE OF AI IN INVESTIGATIONS



Authored by: Arseny Barkovskiy (Head of Cyber and Field Operations) - Vantage Intelligence

In Pursuit of Receding Hype: The Use of AI in Investigations

In late 2023 the world experienced peak AI hype, with much discussion ranging from the potential benefits of this technology to safety concerns and calls for its immediate regulation and even suspension of all associated research. As is often the case, the hype largely subsided while the technology continues to rapidly develop and is being quietly integrated into various aspects of our daily lives.



AI, AGI, LLM

At the outset, we must touch on a little terminology. Despite the best efforts of Machine Learning (ML) professionals and industry experts to clarify the distinction between ML and Artificial Intelligence (AI), the term “AI” has been increasingly misused, particularly in relation to Large Language Models (LLMs) such as ChatGPT.

While LLMs are undeniably impressive, they are not, strictly speaking, true AI. However, the hype surrounding these models has led to a widespread misappropriation of the term, much to the chagrin of ML experts. The tide of public perception was too strong to turn back, and ML professionals came to accept that the term “AI” has taken on a life of its own, even if it doesn’t quite align with its technical definition.

So a new term, “Artificial General Intelligence” (AGI), has emerged as a way to refer to the original vision of sentient AI, with AI commonly referring to the narrower, more specific applications of ML that we see today.

Your AI Is Too Hot!

It is important to realise that commercial LLMs such as OpenAI ChatGPT and Anthropic Claude3 are designed for maximum mass appeal. They are trained to be attractive and pleasant to use for an average consumer with a mix of friendliness, creativity, humour and safety. The aim of this is increased user base, which in turn fires the engines of the AI operators’ business models.

However, this is a critical problem when LLMs are employed for forensic tasks, such as analysis of financial statements or digital forensic data. Increased creativity means AI is more likely to “hallucinate” (generate false information) or to draw exaggerated conclusions.

LLM operators usually provide the ability to reduce the "temperature" of the models, to generate more accurate and factual responses at the cost of creativity and expressiveness, which is something forensic users of AI must experiment with to achieve perfect results.

Your AI Is Too Safe!

Safety is a huge topic in the development of AI. In simple terms, although AI knows how to make explosives it cannot be allowed to teach this knowledge to the user. The highly controversial issue of AI political correctness is another component of this conversation. Excessive safety has been a major issue in our use of AI, for example, commercial models refused to translate a public court judgement because it featured a summary description of a fraud. In other cases, AIs would refuse to translate public corporate filings because they "contain personal information".

There is nothing a user can do to "turn down" the safety at the present time, and we envisage that in the future we will see the emergence of "less-safe" models which would be available to enterprise users after a substantial KYC process.

The good news is that there is a growing ecosystem of less restrictive "open source" models which advanced users can run on their own infrastructure, and recently Elon Musk open-sourced his "Grok" LLM, lauding its' relative absence of safety and political bias.

To conclude, at present an enterprise seriously considering AI tools for investigations or forensics must be prepared to run their own LLMs for use cases where commercial offerings refuse to work.

Let's Put Things In Context

LLMs are trained on vast amounts of data, allowing them to recognize patterns and relationships between words and phrases, and this is what passes for their built-in "knowledge". However, this knowledge is not accessed like a database and is not completely reliable, leading to infamous "hallucinations".

Moreover, a forensically minded user has to know the provenance of the information provided, which is unknowable in the case of AI responses. However, LLMs are exceptionally capable of accurately recalling and analysing information provided to them by the user, which is stored in a place referred to as "context".

In simple terms, training data forms AI's slightly fuzzy long-term memory and "context" is the short term memory. An impatient reader might say

"That's great, so we just need to put the things we want AI to analyse in the 'context' and we get accurate results"?

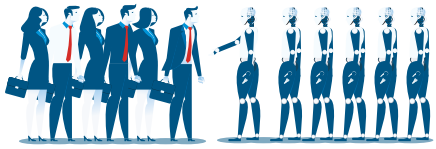
Well, yes, but sadly the context is currently rather small - but is growing as technology is advancing.

For example, ChatGPT4 has a context size of 8,000 "tokens", which is approximately 13-14 pages of text. However, some of that context is taken up by system instructions hard-wired by OpenAI, some is taken up by user instruction and the answer of the model also has to fit inside the context.

This leaves 10 or fewer pages for the actual data you want the LLM to look at, which really isn't very much. There are various clever techniques to allow the models to work on large documents, but all of them lead to a loss of accuracy and data integrity. For example, one method splits a large document into chunks, has AI summarise each and then do a "summary of summaries".

This is acceptable for a casual user but absolutely inappropriate for forensic investigative use case as much of the detail and nuance is lost.

In practice, context size limit is a huge, principal limitation of LLMs. The good news is that it is growing. ChatGPT4 Turbo Preview boasts a context of 128,000 tokens, and the recently released Anthropic Claude3 models have a context size of 200,000 tokens. These larger context sizes are a game-changer in terms of the ability of newer models to work with forensic accuracy on most documents.



The Future

At the peak of AI hype, we often saw claims that "AI will replace people". Given the current limitations of the technology this is inaccurate, however it is already true to state "people who use AI will replace those who do not". Correctly built and tuned AI-enabled tools are accurate, reliable and are a huge productivity multiplier. Vantage has been an early adopter of AI and we work hard to integrate the latest state-of-the-art models into our investigative toolkit, which we use for a wide range of technical, research and analytical tasks. This means our team can move fast while retaining the factual forensic accuracy we pride ourselves on.

*No LLMs were harmed in the making of this article

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PARTNER

Founding Committee Member, Disputes nextgen community

Mob: +44 (0)7879 018 014
Email: natalie.todd@cyklaw.com

CV here

A HIDDEN GEM?

THE 'SUFFICIENT CONNECTION WITH THE JURISDICTION' TEST UNDER S.423 OF THE INSOLVENCY ACT 1986 IN THE LIGHT OF SUPPIPAT V NARONGDEJ [2023] EWHC 1988 (COMM).

Authored by: Tim Penny KC (Barrister) and Daniel Petrides (Barrister) - Wilberforce Chambers

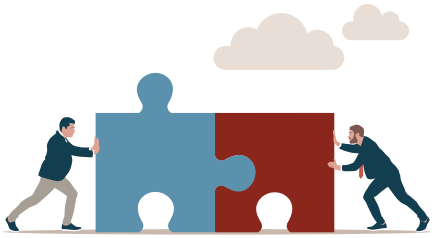
Introduction

Hidden within the mammoth 1593 paragraph judgment of Calver J in Suppipat v Narongdej [2023] EWHC 1988 (Comm) ("the Judgment") lies an important analysis – albeit obiter – of how the court should approach the issue of whether a claimant has satisfied, the 'sufficient connection with the jurisdiction' test for the purposes of a claim under s.423 of the Insolvency Act 1986 ("s.423").

By way of reminder, s.423 gives the court a far-reaching power to make such order as it sees fit to restore the position if a person has entered into a transaction, either for no value or not for money's worth, for the purpose of putting assets beyond the reach of or otherwise prejudicing their creditors. Far from being confined to the insolvency context, s.423 is an increasingly important tool in all forms of civil litigation, even reaching the Family Division in the high-profile divorce case of Akhmedova v Akhmedov [2021] EWHC 545 (Fam).

In Suppipat, the claimant and his companies brought proceedings against 17 defendants, only one of whom was resident in England and Wales, (i) claiming damages under Thai (alternatively, Singaporean or Chinese) law, against a number of the defendants for fraudulent misrepresentation in relation to the sale and purchase of shares in a Thai wind-farm company ("the SPA"), and (ii) in relation to the allegedly unlawful post-SPA asset-stripping of the corporate purchasers of the shares, claiming (a) damages under Thai (alternatively, Chinese) law, and/or (b) financial orders reversing transactions to defraud creditors under s.423.

Following a 20-week trial in the Commercial Court in 2022 and 2023 in respect of the foreign law claims (which the court held fell to be determined under Thai law), by its Judgment the Court (i) dismissed the claims under Thai law for fraudulent misrepresentation, but (ii) awarded the claimants damages under Thai law in respect of a 'cheating against creditors' claim involving the unlawful asset-stripping of the purchasers under the SPA.



However, of most significance for this article, between [1326] and [1350] of the Judgment, the Judge also dismissed all of the claimants' claims under s.423, holding that the claimant had not satisfied the threshold requirement of proving a 'sufficient connection with the jurisdiction'.

This was the case even though, during the pre-trial interim skirmishing, the claimant had persuaded the court that there was a serious issue to be tried that it would be able to satisfy the 'sufficient connection' issue at trial by reason of the existence of its other sufficiently connected claims in the same proceedings (see Suppipat v Narongdej [2020] EWHC 3191 (Comm), Butcher J, at [71-77]).

In case it is thought that this obiter part of the judgment was really of no consequence because the claimant in Suppipat succeeded under its foreign law claims, think again. The logical consequence of the Judgment on this issue is that, if the claimant had failed in its Thai law claims (for example, on limitation grounds), s.423 would not have ridden to the claimant's rescue – even if the s.423 claim had otherwise been well-founded – by reason of their failure to overcome this threshold test. It would also seem to follow that the approach adopted by the court at the interim stage (and other cases which have adopted similar approaches) may be ripe for reconsideration.

In this article, we analyse these issues, which we suggest ought to be of great interest to those lawyers who practise in the area of cross-border fraud claims. In such claims there are often tenuous links (at best) to the jurisdiction in which the claimant seeks to bring the proceedings, which jurisdiction is often chosen more for the availability of draconian interim injunctive relief such as WFOs and Search Orders and/or for the high reputation of its judicial system, than for any real connection with the parties or dispute. Whilst the general trend in recent years has been for the courts to adopt a more expansive approach towards granting cross-border relief, the approach to s.423 in Suppipat sounds an intriguing note of judicial caution.

The 'Sufficient Connection' Test

On its face, s.423 is of unlimited territorial scope, so the threshold "sufficient connection" test is a critical safeguard against the exorbitant exercise of the power.

The leading case is Re Paramount Airways (No. 2) [1993] Ch 223. That was decided in the context of s.238 of the 1986 Act, which applies only to English-registered companies but also provides for orders to be made against "any person" in order to reverse transactions at an undervalue. The Court held that the words "any person" in s.238 (and a number of other sections of the Insolvency Act 1986, including s.423,) bear their literal and natural meaning and permit orders against a foreigner resident abroad. (Although, contrast Re Akkurate Ltd [2020] EWHC 1433 (Ch) in which the Chancellor, following the decision of the Court of Appeal in Re Tucker [1990] Ch 148 and overruling several contrary High Court authorities, held that the phrase "any person" in s.236 does not give that provision extra-territorial effect).

However, Sir Donald Nicholls V-C provided an important gloss on this broad starting point at 239–240, in a passage warranting full quotation:

"The court's discretion: a sufficient connection with England

This conclusion is not so unsatisfactory as it might appear at first sight. The matter does not rest there. Parliament is to be taken to have intended that the difficulties such a wide ambit may create will be sufficiently overcome by two safeguards built into the statutory scheme. The first lies in the discretion the court has under the sections as to the order it will make … The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would by itself be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country, either at the time of the transaction or when proceedings were initiated, will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank, carrying on business here, but all the dealings in question may have taken place at an overseas branch.

Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections."

In Erste Group Bank AG v JSC 'VMZ Red October' [2015] 1 CLC 706 at [116],

the Court of Appeal[1] re-emphasised, citing Paramount Airways, that for the court to exercise its jurisdiction under s.423 extra-territorially, the court must be satisfied that, in respect of the relief sought, the defendant (our emphasis) is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element.

Paramount Airways was also approved by the Supreme Court in Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1, at [110] (Lord Sumption) and [213]-[214] (Lord Toulson and Lord Hodge), and the sufficient connection test was held to be equally applicable in the context of s.213 of the Insolvency Act 1986.

In Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd [2018] 1 WLR 4847 the Court of Appeal again endorsed the Paramount Airways sufficient connection test. Lewison LJ stated at [30] that:

"The effect of the legislation, therefore, is that it confers on the court power to make orders against persons or property outside England and Wales, subject to the court being satisfied that there is a close enough connection with England and Wales."

At [54] Lewison LJ reiterated the point that the sufficient connection must be 'between the defendant and England and Wales', and at [55] he emphasised that:

"The breadth of the potential scope of section 423 makes it all the more important that in a case with a foreign element the court is scrupulous to ensure that the safeguards are rigorously applied."

Having re-entrenched those principles, the Lewison LJ at [58] held that the first instance judge's failure to advert to the factors identified by Sir Donald Nicholls V-C in Paramount Airways vitiated his judgment. At [59] it was further held that there was not even a serious issue to be tried that there existed a sufficient connection between the claim and England and Wales. Importantly, the fact that there was a separate damages claim against the transferor that would be litigated in any event in England and Wales under a settlement agreement governed by English law, was not enough to establish a connection; the s.423 claim had "its own factual and juridical basis"

(see [55] and [59]).

Finally, and most recently, both Paramount Airways and Orexim were cited with approval by the Privy Council in AWH Fund Ltd (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Ltd [2019] UKPC 37, again noting at [40-41] and [55] the importance of a sufficient connection between the jurisdiction and the defendant.

Thus, as the appellate authorities stand, the overarching question is whether, in respect of the relief sought against the defendant on the s.423 claim, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. The focus is on the s.423 claim against the defendant, not other claims against the defendant, still less other claims against other defendants or the proceedings more broadly.

Suppipat

In Suppipat, with the exception of one defendant domiciled in the jurisdiction, the court was dealing with defendants who had no connection at all with the jurisdiction: they were foreign nationals, and it was not alleged that they had ever resided or carried on any business in, or otherwise had any connection with England and Wales; the s.423 claim did not concern property that was or ever had been in England and Wales; no relevant dealings were alleged to have taken place in England and Wales; the relevant transfer for the purposes of the asset-stripping claims took place in Thailand between Thai nationals or Thai companies pursuant to contracts governed by Thai law.

Thus, Suppipat was not a case concerned with an attempt by defendants to frustrate a judgment of an English court or an English-seated arbitral tribunal (by contrast with the Commercial Court decisions in Dornoch Ltd v Westminster International BV [2009] 2 CLC 226 (Tomlinson J), considered by Lewison LJ in Orexim at [60], and Integral Petroleum SA v Petrogat FZA [2021] EWHC 1365 (Comm) at [30] (Calver J), where the English court held that the sufficient connection test was satisfied).

It was in these circumstances that the defendants in Suppipat submitted to the English court that it should not play the role of international policeman. In essence, the defendants submitted that if the claimants' Thai law asset stripping damages claims succeeded, there was no need for the English Court to make a concurrent order under s.423, whereas if the claimants' Thai law claims should fail, it would not be appropriate for the English court to step in to improve the claimants' position, by exercising a discretion under an English statutory provision (despite having no other connection with the jurisdiction) to grant a remedy that would not be available under the governing law of the transaction or in the jurisdiction with which the transaction was overwhelmingly connected.

For their part, the claimant relied upon the fact that the s.423 claim was 'inextricably connected' to the Thai law asset-stripping claims already before the English court, involving the identical factual basis, and submitted that it would be perverse for the court to decide the Thai law claims, over which

1 Gloster LJ giving the judgment of the Court, the other members of which were Aikens and Briggs LJJ.

it did have jurisdiction, and not to decide the s.423 claims. The claimants relied upon the judgment of Evans-Lombe J in Jyske Bank (Gibraltar) Ltd v Spjeldnaes [2000] BCC 16, in which s.423 relief was granted against a defendant whose only connection with the jurisdiction was as a defendant to other claims in the jurisdiction, and where none of the Paramount Airways considerations and factors were present. The claimants also relied upon the judgment of Flaux J (as he then was) in Fortress Value v Blue Skye at [116-118], where the court held that even in the absence of any of the factors identified in Paramount Airways, the court might have jurisdiction to make an order under s.423.

In Suppipat, the Judge rejected the claimants' submissions for the following reasons:

The starting point is Paramount Airways, and the requirement that the defendant is sufficiently connected with the jurisdiction to make it just and proper for the English court to make an order against him despite the foreign element: [1345].

None of the factors identified in Paramount and Orexim as indicating a sufficient connection were present in the case before the Judge: [1346].

The Judge doubted the correctness of the pre-Orexim authorities which suggested that, in a given case, the claimant might be able to establish the existence of a sufficient connection to the jurisdiction in the absence of any of the specific factors identified in Paramount and Orexim; at least, in such circumstances it would only be in 'an exceptional case' that sufficient connection could be established: [1347(1)].

The Judge distinguished the previous authorities in which s.423 orders were made despite the absence of any of the Paramount factors. Thus, (i) Dornoch was a case where the impugned transaction could be viewed as an attempt to frustrate an award of the English court arising out of a dispute before the English court; (ii) Fortress Value was a case where the claimant had established a good arguable case that English law would be the applicable law at trial, and (iii) Jyske Bank was a case where, if the English court declined relief, the victim would suffer delay and increased costs in issuing fresh proceedings in Ireland, and the court was giving the victim an effective remedy – the Judge might also have distinguished Jyske Bank on the ground that it was an application made post-judgment, where the main judgment had been handed down by the English court in favour of the victim.

Perhaps most significantly for future cases, at [1348] the Judge accepted the defendants' submission that, had the claimants failed to establish their Thai law claims in relation to the alleged cheating against creditors claims (i.e., the asset-stripping), it would not be appropriate for the English court to step in and give the claimant a remedy under English law by way of relief under s.423, particularly in the absence of any connecting factors and where the claims were already the subject of criminal proceedings in Thailand. Effectively, the Judge held that the claimants' arguments were 'bootstraps' arguments.

Consequences For Future Claims

We respectfully suggest that, in the light of the Judgment, it might legitimately be argued that some of the earlier judgments of the Courts, particularly in relation to the question of whether at an interim stage a claim under s.423 should be permitted to go to trial, have adopted an overly liberal approach to the 'sufficient connection' test. In particular, it is arguable that they have erred in finding that the mere existence of litigation in this jurisdiction between the parties related to the s.423 claim is itself a connecting factor: see for example, Butcher J in Suppipat [2020] EWHC 3191 (Comm) and Cockerill J in Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 2458 (Comm), neither of which were referred to in the Judgment.

In Avonwick, Cockerill J candidly accepted at [55] that "what might be termed the preponderance of the standard factors [i.e. those identified in Paramount] do point away"

from there being a sufficient connection. But she continued at [55]-[56] "I do need to consider any other relevant factors together with them. Where there is litigation in this jurisdiction between the same parties, which litigation is related to the section 423 claim, that is of itself in my judgment a factor." Therefore, she held at [66]

Overall, I conclude that there is sufficient material for me to say that there is a real prospect of establishing that, despite the relative lack of indications within the initial or standard factors, there is a sufficiently close connection to make the exercise of the discretion appropriate and that it would therefore be appropriate, subject to forum conveniens, to grant permission to serve out. Those factors are the ones that I have been through, the link in the existence of the litigation itself, the links in relation to English law, the case in relation to motivation and the factual overlap of issue."

In similar terms, at the interim stage in Suppipat, Butcher J (having quoted from Avonwick and other earlier decisions) held as follows at [74] – [75]:

…I recognise that what Cockerill J called the "initial or standard" factors do not indicate a significant connexion with England. However, in this case, the Tenth Defendant will be involved in this litigation in any event, irrespective of the claim under s. 423….

The decision in Jyske Bank indicates that the involvement of the relevant defendant in litigation here, even in the absence of other "initial or standard" connecting factors can, in an appropriate case, mean that there is a

sufficient connexion…In paragraph [56] of her judgment in Avonwick Cockerill J stated that the existence of litigation in this jurisdiction between the same parties and which is related to the s. 423 claim is itself a connecting factor. I agree with that. It is true that it is likely to be a weightier factor if the impugned transaction is said to have been designed to thwart proceedings here, as was the case in Dornoch , but I do not consider that it can have no weight in other circumstances. How much weight it has will depend on the circumstances of the case."

Whilst it is correct that Paramount did not purport to lay down an exhaustive list of factors, whether the existence of other claims in England can ever be a relevant factor is open to question, both in light of the facts and reasoning in Orexim, and in light of the rejection of a 'bootstraps' argument in the Judgment. After all, s.423 is not, properly considered, an alternative form of personal or proprietary claim; it is a form of statutory class-action remedy (albeit increasingly invoked by and exercised in favour of a single creditor) to which different jurisprudential considerations may apply.

In the context of interim injunctive relief the courts have sometimes taken an expansive view of its jurisdiction in order to combat international wrongdoing and assist foreign courts. For example, in Haiti v Duvalier (No. 2) [1990] 1 Q.B. 202 (CA) a Mareva injunction was granted in support of proceedings in France in circumstances where the sole connection with England was the fact that the respondent had used English solicitors to hold property abroad. But the facts of that case were extreme, and it was described by Lawrence (later Lord) Collins in an LQR article as going to

"the very edge of what is permissible".

In contrast, where final substantive relief is sought, the English courts have generally been more circumspect about the circumstances in which it is appropriate to assume jurisdiction: see e.g. Vedanata Resources Plc v Lungowe [2019] UKSC 20 at [66] – [87].

This reticence to grant exorbitant final relief may explain the differences between Jyske Bank and Suppipat. In Jyske Bank it was clear that there was an equivalent to s.423 in Irish Law, and that the consequence of refusing jurisdiction would simply have been to require parallel proceedings to be issued in Ireland at additional cost and expense in order to obtain the remedy. Evans-Lombe J held that in those circumstances it was 'convenient' to grant the relief in England. In contrast, in Suppipat the s.423 claim was an attempt to obtain a remedy which was not otherwise available under Thai Law.

There are also practical considerations which may have to be considered on another occasion. If it were the case that the sufficient connection test could be satisfied by the mere fact that the relevant defendant will by the end of the trial have participated in related claims, any s.423 defendant would in practice be required to take the sufficient connection point at the jurisdiction stage or on a strike-out/ summary judgment application (in each case to be determined on a real prospect of success basis) or risk being presented with a fait accompli. As matters presently stand, defendants would be well-advised to make such an application at the earliest opportunity.

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BOILER-PLATE CONSTITUTIONS RARELY FIT FOR PURPOSE IN FINANCIAL FAILURE

Authored by: Paul Muscutt (Partner) and Cathryn Williams (Partner) - Crowell & Moring

The latest insolvency statistics for England & Wales show a record number of companies entered an insolvency process in 2023. Faced with the perfect storm of current economic challenges, exacerbated by the ongoing situations in Ukraine, Gaza and the Suez Canal, an unexpected rise in inflation and slow decreases in interest rates, it is not anticipated that the economy will improve in the short term to limit insolvencies. And that's excluding Brexit-related problems.

It is not only commercial businesses that are affected by current economic conditions — many charitable institutions are also feeling a significant pinch, exemplified by the recent closure of the House of St Barnabas in Soho, a members' club and charity devoted to raising funds to help the homeless. The charity stated that the pandemic had significantly eroded its reserves, and a recent ceiling collapse, coupled with vastly increased energy costs, rendered the continuing work of the charity unsustainable.

The problem for charities is that their running costs are often funded by grants from local authorities and donations from the general public. Given that many local authorities in England & Wales are experiencing their own financial difficulties (seven at the time of writing — Northamptonshire, Slough, Croydon, Thurrock, Woking, Birmingham City and Nottingham City — having issued notices in the last five years under section 114 of the Local Government Finance Act 1988, meaning that they have no funds to meet spending commitments), charities previously reliant on such funding are hitting the buffers.

Deficient Finance Documents

In straitened economic times, donations to charities fall away, and charities without reserves are left with a significant hole in their funding. Consequently, the House of St Barnabas is not the only charity victim of the current economic climate. A number of charitable institutions have been forced to close and seek advice on how to wind down their activities, and the options for such entities vary depending on the nature of the legal entity by which the charity operates. Many charities (such as the House

of St Barnabas) are set up as limited companies and are thus subject to the provisions of the insolvency legislation applicable to the administration and winding-up of commercial companies registered in England & Wales. However, a number of charities are not established as limited companies, which can cause difficulties if the charity becomes insolvent.

Further complications can arise for lenders to charities, especially where the legal entity status of the charity has not been properly considered by the lender at the point of lending. Lenders' standard finance documents will rarely contain sufficient provisions suitable for an unincorporated charity. Where enforcement action is required by lenders (leaving aside the reputational risk of enforcing against a charity), deficient finance documents can be fatal to the lenders' recovery prospects and early advice should be sought prior to enforcement.

Reduction In Children Enrolling

A further threat to charities may arise in relation to the proposals by the Labour Party to charge VAT on private school fees. Many private schools are registered charities and, while Sir Keir Starmer says that he isn't trying to abolish private schools, merely to stop exempting from tax a means of education that is generally reserved for the rich, if VAT is applied to school fees at 20%, there is a real risk of pupils will vacate the private education sector and leave some schools facing closure and/or insolvency.

The education sector is already facing significant challenges from many directions. An example of this is the recent failure of a pre-school that was a registered unincorporated charity. The pre-school's income dropped as a result of a reduction in children enrolling, their reserves had been decimated by the failure to apply for furlough payments for staff during the pandemic and a rodent infestation had required a prolonged period of closure. All of these factors meant they were unable to continue operations. Several staff employed by the pre-school were made redundant and one of the issues faced by the charity trustees was how they could ensure that the staff would receive redundancy payments, given that there were insufficient funds within the charity to meet them.

The fact that the pre-school was an unincorporated registered charity had a number of implications.

While it was clearly insolvent, as a registered unincorporated charity, it could not be wound-up under the provisions of the Insolvency Act 1986 — it could only be wound-up by the provisions of its constitution.

Trustees Pursued Personally

As the charity could not enter liquidation, the employees could not apply to the Redundancy Payments Service (RPS) to meet the redundancy payments due. They would need to get an award from an employment tribunal first.

The charity could apply to the RPS for financial assistance to meet the redundancy payments, but the guidance provides that if such payments are made, it will create a debt to the RPS which may take enforcement action if the debt is not repaid. In the absence of repayment, there was a risk the trustees of the charity could be pursued personally to recover that debt, notwithstanding that the trustees of the charity acted as such on a voluntary, unpaid basis.

This position seems unfair, given that if the charity were a limited company and able to enter liquidation, the directors of that insolvent company would not have been personally liable to repay the RPS. It therefore seems anomalous for the trustees of a charity to be held personally liable for the redundancy payments simply because the charity did not have the benefit of incorporation.

As a final housekeeping point, following the closure of a charity, the Charity Commissioners must be notified so that the charity can be removed from the register, and the trustees must arrange for its accounting books and records to be kept for at least three years (for an incorporated charity) or at least six years (for an unincorporated charity).

When a charity is set up, the last thing being considered is what is to happen if it fails, and whether one operating structure is better than another in the event failure occurs. A charity's constitution will regularly be based on templates that contain boiler-plate provisions rarely fit for purpose in an insolvency scenario, or they will contain no provisions dealing with winding-up and closure at all.

In the pre-school in question, the constitution of the pre-school provided that the charity could be wound-up by a resolution of the trustees passed at an extraordinary general meeting, but no guidance was otherwise given, except that any surplus assets should be transferred to another charity with similar objects. This left the charity trustees needing advice on the process and how to limit their exposure, which was provided on a pro bono basis. While the constitution provided for an indemnity in favour of the trustees for any liabilities they may incur, the indemnity was no comfort to the trustees given that the pre-school had insufficient assets to meet any claims under the indemnity.

If a charity runs out of money and comes to you for advice, the moral of the story is that it may not be as straightforward to wind-up the charity as you expect.

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THE MAGIC OF FREEZING INJUNCTIONS AGAINST THIRD PARTIES

Authored by: Tom Wright (Counsel) – Collas Crill

One can't help but pity the plaintiff with an ironclad claim against a defendant with apparently no assets to their name - and thus none to freeze - to ensure a surefire favorable judgment can be met.

One also pities (even more so) the plaintiff who already holds such a judgment against such a defendant, but can find no means of monetising it. The sympathy only increases when you acknowledge the practice of using offshore jurisdictions to safeguard assets via the use of companies, trusts and nominees.

However, thanks to judicial ingenuity instigated by the courts of England and Wales and developed by the courts of the Cayman Islands (and other offshore jurisdictions) in their efforts to address the issues through the adoption of the Chabra injunction, plaintiffs have the means of freezing assets held in the name of a party against whom it has no claim (a non-cause of action defendant – the "NCAD"), on the basis that those assets are, in truth, the assets of the defendant (the cause of action defendant – the "CAD").

That adoption and development of the Chabra injunction has included legislative amendments in the Cayman

Islands, as a result of which it is possible in Cayman to obtain a Chabra injunction against an NCAD where the injunction sought is in aid of foreign proceedings, and even when the NCAD is outside the jurisdiction.

What Do I Need To Show To Obtain A Chabra Injunction?

1. "Good Reason To Suppose"

To expand the test in full, one must demonstrate that there is a good reason to suppose that the targeted NCAD asset could be available to satisfy a judgment made against the CAD. This test is in turn divided into two limbs which make it necessary to satisfy the Court:

- The CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or

- That there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD." - Algosaibi v Saad Investments Co Ltd [2011 (1) CILR 178], applied recently in the BVI case of Parles AS & Daniel Perner v Winsley Finance Limited (BVIHCM2022/0123, 29 March 2023).

One must establish a case "which is more than barely capable of serious argument, but yet not necessarily one which the judge believes to have a better than 50% chance of success." - PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov [2013] EWHC 422 (Comm).

2. Real Risk Of Dissipation

So often the highest hurdle for those seeking freezing relief, one must establish that there is an objective risk of unjustified dissipation of the asset, such that, if the relief is not granted, there is a real risk that the plaintiff's judgment will go unsatisfied.

There must also be solid evidence of a current risk; it cannot merely be inferred.

However, the plaintiff can point to certain factors which may be regarded as relevant to the establishment of a real risk of dissipation. Those factors are too numerous for each to be included in this article, but they include (and the first one is especially pertinent in the context of seeking relief in the Cayman Islands):

- The use of offshore structures – this may be relevant but will not by itself be determinative, given the general acceptance that international business can legitimately be conducted through offshore vehicles. That said, if combined with a good arguable case of fraud, a "web of offshore companies" may be taken into account - VTB Capital plc v Nutritek International Corp and others [2012] 2 BCLC 437.

- Allegations of dishonesty – these may be a relevant consideration, but only where there is a good arguable case of dishonesty and that dishonesty is at the heart of the risk of dissipation.

- A lack of commercial probity – for example, a repeated and deliberate failure to pay invoices and court orders, despite being able to do so if it so chose.

- Conduct in legal proceedings – for example, failure to comply with Court orders, choosing not to cooperate with the Court or Court-appointed officers, misleading the Court.

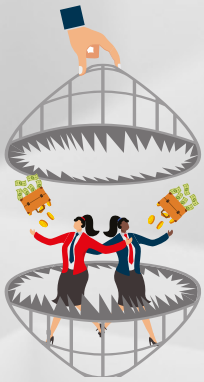
3. "Just And Convenient"

If satisfied that the two previous limbs of the test have been satisfied, the Court will then look at the position in the round and take account of where the balance of justice lies. At this stage, it will also remind itself that the Chabra jurisdiction "is exceptional and to be exercised with caution" New York Laser Clinic Ltd v Naturastudios Ltd and others [2020] EWHC 560 (QB).

The Court will question whether it would be just to impose an injunction, or better

to maintain the status quo. It will take into account whether, for example, the injunction would be especially prejudicial to either the CAD or NCAD.

Here, the Court may also consider whether any delay on the part of the plaintiff in seeking the injunction is such that it should be factored into the "just and convenient"(enlarged) question. Undue delay on the part of the plaintiff may also weaken an assertion of a real risk of dissipation.



What Type Of Assets Can Be Caught?

Assets of which the CAD is the ultimate beneficial owner - for example, assets held by the NCAD as nominee or trustee for the CAD - are the most likely to be caught.

If beneficial ownership cannot be established, a sufficient degree of control may suffice but the crucial consideration remains whether the asset in question would be amenable to the execution of a judgment obtained against the CAD. If a route can be shown to the Court by which the NCAD's assets could become amenable to execution, then that may suffice.

The Court will "broadly evaluate" whether there is reason to suppose that the assets might be reachable; no case by case analysis is required - Alnajjar and another v DX9 Property Ltd (a company incorporated under the laws of the British Virgin Islands) and another company [2022] EWHC 926 (Ch).

For example, in Motorola Solutions, Inc and another company v Hytera Communications Corp Ltd and other companies [2020] EWHC 980 (Comm), the English Court found that there was no evidence that a NCAD subsidiary of the CAD held assets as nominee or trustee. Nevertheless, it held that assets held by that subsidiary were amenable to execution, because there was a complete chain comprising 100% shareholdings between the CAD and the NCAD.

Similarly, in PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov [2013] EWHC 422 (Comm) the assets of a company in which the NCADs held interests, and whose major shareholder was a company owned and controlled by the CAD, were deemed amenable to execution.

Monies held on the CAD's client account by an NCAD law firm to cover the CAD's fees and disbursements have also been deemed amenable because the CAD was entitled to the money when transferred to the law firm or because it would be in her power to seek the return of it and the court would have power to order her to do so - Phoenix Group Foundation v Cochrane and another [2017] EWHC 418 (Comm).

Recent Developments

In March 2024, in HRH Princess Deema v Gibbs and Elysium Yacht Ltd (unreported, 7 March 2024) Justice Doyle of the Grand Court of the Cayman Islands granted a freezing order in respect of the Cayman assets of a CAD, including his 100% shareholding in a Cayman registered company, Elysium Yacht Ltd. An ex tempore judgment reveals that the Chabra jurisdiction was considered as part of His Lordship's deliberations.

The decision underscores the willingness of the Cayman Court to avail itself of the jurisdiction to grant injunctive relief, in appropriate circumstances, to ensure that orders of foreign courts are not prevented from being satisfied by dint of the fact that assets are held offshore.

In 2023, in the aforementioned Parles AS case, the BVI Court held that Chabra relief was available in support of foreign insolvency proceedings, with an unsecured creditor being permitted in exceptional circumstances to apply for the relief, rather than the liquidator or provisional liquidator, who would be the more customary applicant.

For more information on Chabra injunctions, please get in touch with Insolvency and Corporate Disputes team, who will be happy to assist you.

60-SECONDS WITH:

ANNALISA SHIBLI
COUNSEL
COLLAS CRILL

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I would do all the things with my children that I do not regularly get to do because I'm working (school drop-offs, pickups, afterschool activities). I'd also have daily three-hour gym sessions while the kids are at school!

Q **What do you see as the most important thing about your job?**

A The ability to look outside the box for solutions to my client's problems.

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

A Technology and digital assets impacting what fraud cases look like, how they are managed and how assets are recovered.

Q **What motivates you most about your work?**

A Overcoming challenges; I'd get bored if it was too easy.

Q **What skill do you wish you would have learned earlier in your career?**

A I cannot think of any skill that I would have wanted to learn earlier. Lessons relevant to my practice – maybe – but I think my skillset developed appropriately based on how my career has evolved.

Q **If you could make an office rule that everyone had to follow, what would it be?**

A Don't steal the forks!

Q **If you could do someone else's job for a day, who would it be and what is the job?**

A Philip Rosenthal from Somebody Feed Phil. In each episode, Phil travels to cities around the world with friends and family to taste the local cuisine and experience the culture at each stop on his journey.

Q **What song would you have as the theme tune for your life?**

A *I Can See Clearly Now* by Jimmy Cliff

Q **What cause are you most passionate about?**

A Supporting law students and junior lawyers

Q **What is something people may not know about you?**

A I'm addicted to French Fries.

Q **What does the perfect weekend look like?**

A Sleeping in on a (rainy!) Saturday morning, waking up to freshly made pancakes and spending the rest of the day reading on the couch with a cup of tea. Church on Sunday morning followed by lunch on the waterfront with my family and an afternoon nap.

Q **Dead or alive, which three people would you most like to have a dinner party with, and why?**

A Jesus – because I have a lot of questions

Barack Obama – because I think he's awesome

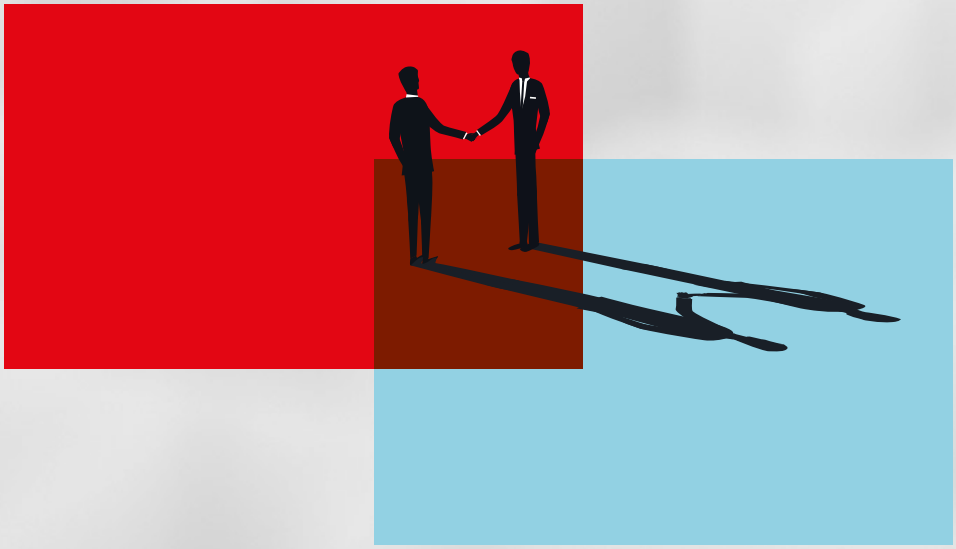
My husband, David Shibli Jr – because I'd want to share the experience with him.

UNLOCKING THE SECRETS OF ENFORCEMENT AND ASSET RECOVERY IN THE CAYMAN ISLANDS

Authored by: Jennifer Colegate (Partner) - Collas Crill

There are likely to be very few claimants who would argue with the proposition that the real value in bringing proceedings is in the judgment obtained actually being satisfied. Delinquent, or worse - fraudulent - counterparties against whom a creditor has a judgment are rarely willing to disgorge ill-gotten gains or pay over damages duly payable as a result of their prior default or wrongful conduct.

Accordingly, a successful litigation strategy should encompass not only how to win before the tribunal, but the steps likely to be required to secure and recover assets once the claimant has a judgment in hand. A key driver of this strategy will be a consideration of the nature of assets which a judgment debtor has, and where those assets are located.



Enforcement Or Asset Recovery?

The terms “enforcement” and “asset recovery” are often used in the same breath, but what do we actually mean by each of those terms? For the purpose of this article, we use the term “enforcement” to refer to process of a creditor taking civil action to collect the value of a judgment against the defendant. In contrast, an “asset-recovery” exercise may be employed in support of the enforcement of a judgment debt, but more broadly refers to the tracing and seizing of assets that have been misappropriated or dissipated.

There are a number of challenges to a successful asset-recovery exercise, including where the assets are located and how easily the legal system permits enforcement of judgments; whether assets have been transferred into the names of third parties; and the nature of the asset in question. In this article we take a look at the ways in which assets can be identified in the Cayman Islands, and what steps may be taken to protect and preserve such assets be they

tangible or intangible.[1]

Identifying Assets For Execution

In the Cayman Islands there are broadly three avenues by which a claimant looking to ascertain the existence of assets against which a judgment may be executed, namely:

- Ownership registers which may be searched irrespective of the status of any litigation against the defendant;
- Interim applications before the Grand Court seeking to freeze, preserve and take possession of assets of the defendant; and
- Powers exercisable by a liquidator (where the judgment debtor is a corporate entity)[2]

The use of liquidation as a means of seeking redress for an unsatisfied judgment, would normally be a means of last resort. Taking the steps of placing a corporate debtor into liquidation in order to obtain payment of an unsatisfied judgment changes from a private enforcement action to a collective-process outside the control and direction of the judgment creditor. Notwithstanding, there are circumstances in which appointing a liquidator with wide ranging powers to investigate the assets of the debtor and take action on the international stage is a proportionate step.

Public Registries

Contrary to the perception that the Cayman Islands is a secretive jurisdiction, there are a number of registries which provide useful starting points when developing an enforcement strategy.

From these registries it is possible to identify if the defendant (or related parties who may be acting on the instructions of the defendant):

- Is a current director of a company incorporated and registered in the Cayman Islands, whether that company is a domestic or exempted company.
- Is a current shareholder of a domestic company.
- Owns real estate in the Cayman Islands, whether that property is subject to a mortgage and the identity of the mortgagee.
- Owns an aircraft registered with the Cayman Islands Civil Aviation Authority.

Data obtained from these registers may disclose real assets that can be executed against, or point to additional lines of enquiry by identifying third parties who may hold relevant information regarding the defendant's financial interests. Where the facts point to further steps being required in Cayman, the claimant will need to seek assistance from the Grand Court, as discussed below.

Most recently enforcement and recovery proceedings have required the consideration of how digital assets can be traced and executed against. The blockchain technology on which these assets are held and transferred makes digital assets more readily traceable than traditional assets. However, the users are identified only through their digital addresses which are long strings of letters and numbers. The task then becomes identifying the name behind the address. Through digital forensics and data analytics it is possible to unmask the parties to transactions on the blockchain, but doing so requires the right software and professional expertise.

Freezing And Preserving Assets In Cayman

A claimant who has been able to point to assets in the name of or held for the benefit of a defendant can seek to freeze all assets of the defendant. The purpose of a freezing order is to preserve the practical value of any judgement that has been or may be obtained. Freezing orders are frequently supported by disclosure orders which require the defendant to disclose the whereabouts of all assets in which they hold a legal or beneficial interest. This ancillary order supports the effectiveness of the freezing order and can be an invaluable tool in the enforcement and asset recovery strategy deployed by a claimant.

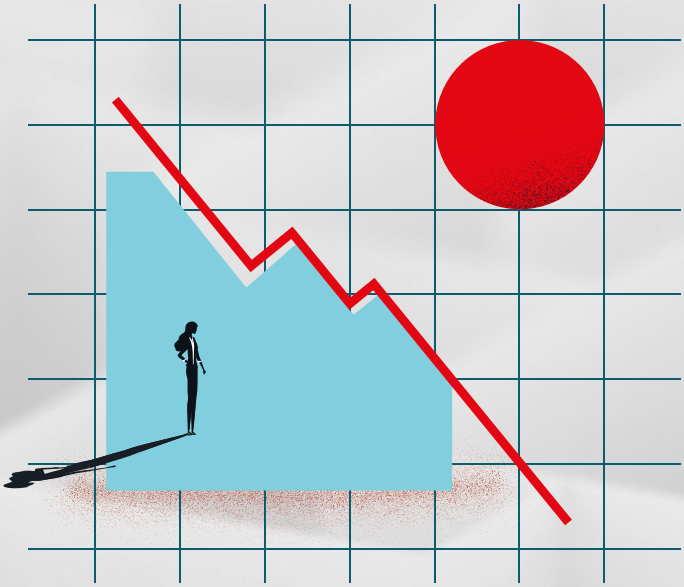
Where the claimant seeking to recover assets held by or for the benefit of a defendant are has a legal of equitable claim to those assets a proprietary injunction may be obtained to stop those assets from being dissipated.

While there are subtle differences in the legal criteria which need to be met by an applicant, both forms of injunction can be obtained on a domestic or worldwide basis, and sought before or after judgment. The extent to which a freezing order stated to have worldwide application is effective depends on the jurisdictions in which the defendant is found to have assets that may be enforced against. Accordingly, a claimant looking to secure assets in various jurisdictions will also need to consider whether any / all of those jurisdictions would give effect to a worldwide freezing order.

A common feature of these injunctions, which cater to a number of circumstances, is that the relief is sought on an ex parte basis, such that the defendant may have little or no notice of the application until served with the resulting order.

1 The scope of this article is limited to providing an overview of the civil remedies available to a judgment creditor / prospective claimant and does not address the regulatory or criminal law penalties which may be relevant.

2 This article does not extend to a consideration of the personal bankruptcy regime which applies in the Cayman Islands.



In addition to injunctions against the defendant, where a claimant has been able to identify assets that are held by a third party who is not otherwise involved in the dispute, for the benefit of a defendant by a third party (e.g. note or share custodian), a third party of Chabra injunction may be applied for (page 39).

Receivers

A claimant may apply to the Grand Court for the appointment of a receiver to the assets of a defendant, or a prospective defendant. The appointment of a receiver is a flexible tool and may apply to the entirety of a company's assets, or be appointed for the purpose of realising and dealing with specific assets. Notably, the debt underpinning the receiver's appointment is not confined to domestic debts and a foreign creditor may seek the appointment of a receiver to enforce its debt.

While a receiver may be sought as a standalone application, it is often sought in addition to a freezing order to further ensure that the defendant is not able to dissipate its assets and thereby render the judgment in favour of the claimant valueless.

Debt Enforcement Proceedings

Injunctive relief and the appointment of a receiver are draconian measures that are costly both in respect of the professional fees required to prepared the application, and the need for the claimant to provide an undertaking in damages which may be called on to be fortified.

Where a claimant has a simple debt claim to be enforced, the Cayman legal regime offers a variety of effective debt recovery actions which are generally less costly than seeking injunctive relief, including:

- Garnishee (third party debt) orders. It is an essential requirement that the debt be due and payable for a defined amount rather than subject to a calculation.
- Appointment of a bailiff to seize and sell the debtor's assets to the value of the debt and costs of the proceedings and enforcement.
- Charging orders and orders for sale, which applies to interests in land, securities, funds paid into Court and interests arising under trust.

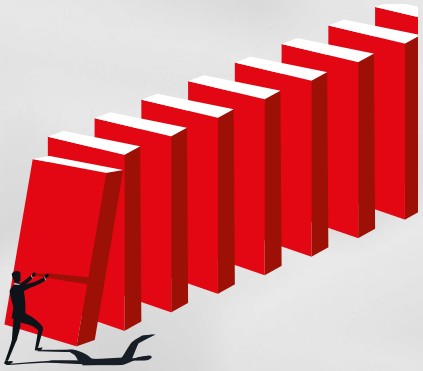
Whether a debt recovery action is viable will depend on the claimant first identifying a viable target asset. This requires both the application of legal principles, along with forensic asset recovery skills of suitably qualified professionals.

Gathering Evidence

Given the status of the Cayman Islands as an international financial centre, the Grand Court regularly deals with cross-border enforcement actions and asset recovery actions where assets or funds have been misappropriated. Frequently, those assets may be transferred via or with the knowledge of a third party, who may by innocent of any wrongdoing and yet a valuable source of information in locating the whereabouts of assets of a defendant.

A Norwich pharmacal order may be sought against such third parties before or after the claimant has obtained judgment. This form of relief is intended to provide the claimant / judgement creditor with information held by a third party that can be used in proceedings against the defendant. The scope of information which can be ordered from a third party will be carefully scrutinised by the Court so as to prevent fishing expeditions, and the court will look to balance the competing interests of the claimant and the third party. However, these applications can fill in many evidential gaps which would otherwise prevent the claimant from taking proceedings against a wrongdoer.

If the claimant is seeking to trace or recover assets a banker trust order may be obtained. These orders may be granted against banks and other third party organisations, providing specific criteria are met. One of those criterion is that there is a real prospect that the information disclosed pursuant to the order will lead to the location of or preservation of assets.



Liquidation

Stepping outside the realm of private enforcement and asset recovery options, a claimant may seek the winding up of a company. The liquidation of a company may be sought on the basis that the company is insolvent, or for the reason that it is just and equitable that the company be wound up.

The basis invoked will be driven by the facts of the case, and the objectives of the petitioner, be it simple debt recovery

where the claimant has an unsatisfied and undisputed debt due under a judgment;

or to remove the company's management and conduct an investigation into the affairs and dealings of the company.

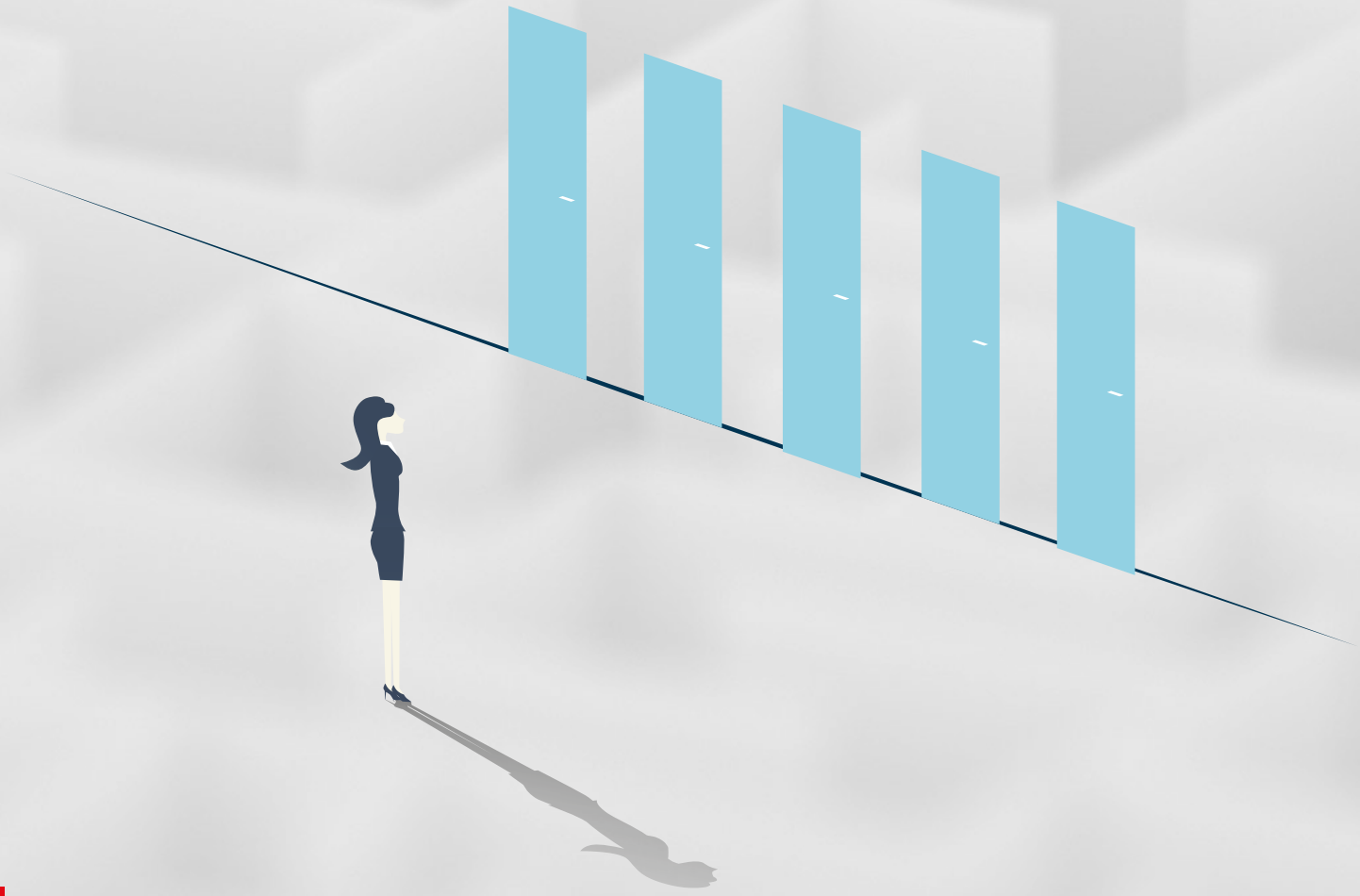
While the principal function of liquidators appointed by the Grand Court is to collect in the assets of the company, and distribute them to those entitled, it is well recognised that the necessary element of the liquidator's role is to investigate the affairs and dealings of the company. In support of that function the Companies Act (as revised) gives the liquidator wide ranging information gathering powers, including the power to compel relevant persons to attend for written or oral examination on matters under investigation; and the ability to compel any person holding property or documents of the company to deliver those up to the liquidator.

From the perspective of a claimant / judgment creditor, appointing a liquidator requires the claimant to give up taking unilateral action to obtain satisfaction of the outstanding debt from the company. Instead, the claimant will, subject to any security interest (including a charging order obtained prior to the liquidation) rank pai passu with the general creditors of the company. In each case it will be a cost/benefit analysis for a claimant as to whether it is preferable to continue to take independent enforcement steps in a bid to recover on a judgment for its own benefit, or to shift the cost and responsibility to the liquidation process which may yield a lower net return and potentially at a lower cost.

Conclusion

Evaluating the enforcement options and ability to execute against assets early on is likely to result in an efficient and effective litigation strategy. The Cayman Islands' legal system offers a range of measures by which a claimant may identify and preserve assets to be applied in satisfaction of judgment against a defendant, which have extra-territorial reach, subject to the question of recognition of those orders.

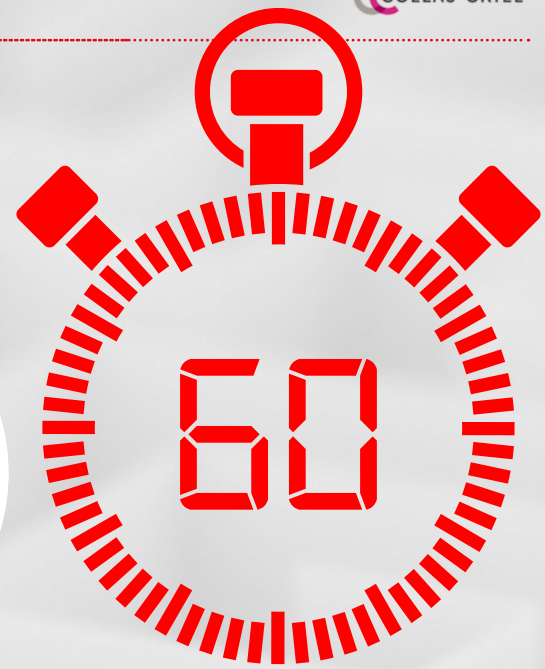
From a practical perspective, and with the exception of liquidation, the asset identification and asset preservation measurers that are available in the Cayman Islands can be used independently or in combination without one another. How these measures are deployed is best determined through coordinated efforts with advice from legal counsel in all relevant jurisdictions and experienced asset recovery professionals.



COLLAS·CRILL

60-SECONDS WITH:

DAVE MARSHALL
SENIOR ASSOCIATE
COLLAS CRILL



Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I think I'd struggle not to be involved in the law in some form even if I didn't need to work. I could certainly see myself lecturing for a few days a week if I weren't in private practice. Apart from that, I'd be spending some time lounging on a beach in Barbados!

Q **What do you see as the most important thing about your job?**

A I think what's most important is being able to skilfully navigate clients through their legal challenges and trying to get the best possible outcome for them.

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

A It's difficult to identify the most significant trend when you have a pretty broad commercial practice, but what has been very noticeable is that we haven't seen the avalanche of insolvency matters that we had anticipated would come about as a result of the pandemic. There seems to be a slightly greater trend towards restructurings rather than liquidations.

Q **What motivates you most about your work?**

A I think the intellectual challenge and stimulation that comes with an insolvency and corporate disputes practice is most interesting.

Q **What skill do you wish you would have learned earlier in your career?**

A I find it rather difficult to pinpoint any one particular skill that I wish I learned earlier, as I think that we are all works in progress as we continue to progress in our respective careers.

Q **If you could do someone else's job for a day, who would it be and what is the job?**

A I've always found aviation to be absolutely fascinating so I wouldn't mind being a pilot for a large airline for a day.

Q **What cause are you most passionate about?**

A For me, my family's welfare is of utmost importance. I can't say that there is anything that I'm more passionate about than that.

Q **What is something people may not know about you?**

A I'm a huge cricket fan so in an ideal world (if my skills had matched my enthusiasm!) I'd have been a professional cricketer rather than a lawyer.

Q **What does the perfect weekend look like?**

A I love cricket and ultimately people are what make life most fulfilling, so the perfect weekend for me is spent with close friends or family, enjoying a riveting cricket match.

Q **Dead or alive, which three people would you most like to have a dinner party with, and why?**

A a) Barack Obama – I'd love to pick his brains about his personal and political development and eventual rise to become America's first Black president.

b) Sir Vivian Richards – huge cricket fan (as you might have gathered by now) and he is one of the best to ever play the game.

c)Lord Denning – that might be quite an interesting chat about the law.

PARTNERSHIP ASSET OR NOT? EXEMPTED LIMITED PARTNERSHIPS AND DERIVATIVE CLAIMS

Authored by: Sarah Tresman (Barrister) - Twenty Essex

Section 33 of the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act")[1] sets out the general rule to the effect that, "ordinarily, actions for and on behalf of an ELP [exempted limited partnership] must by statute be brought by the general partner of that ELP" and "a claim belonging to a limited partnership must be brought by the GP [general partner] acting for and on behalf of the ELP".[2] Exceptionally, however, a derivative action may be brought in respect of an ELP if a GP has,

"without cause, failed or refused to institute proceedings".[3]

The test of "without cause" is not to be equated with the "special circumstances" test that applies – for example – in the trusts context (although, "consideration of whether there are special circumstances is likely in most cases to be of considerable assistance in determining whether the decision is 'without cause'").[4]

Section 33 is, as a matter of statutory interpretation, strictly concerned with when, and in what circumstances, a limited partner ("LP") may sue or be sued in its capacity as a partner in an ELP.[5] That said, the section has no application to direct claims that may be brought by an LP in respect of its own cause of action such as it may have as against (and for example) a GP.[6] As such, before an LP may bring a claim derivatively for and on behalf of an ELP in which it is a partner, the ELP must itself have a claim in respect of which it may be said to have suffered loss.[7]

It is in this context that the significance of an ELP's lack of corporate legal personality recently arose for consideration. In the Kuwait Ports case,[8] the issue was whether the ELP, as "an entity [that] does not exist at

1 Unless otherwise stated, all references to sections of legislation are to sections of the ELP Act.
2 Both submissions were accepted by the Cayman Islands Court of Appeal ("CICA") in Kuwait Ports Authority v Port Link GP Ltd (Unreported, 20 January 2023) ("Kuwait Ports (CA)") at [21].
3 Section 33(3).
4 Kuwait Ports (CA) at [98].
5 The section does not operate as a rule prohibiting an ELP from suing or being sued in its own name: Country Garden (Hong Kong) Development Company Ltd and Five Others v Formation Group (Cayman) Fund I L.P. [2022] 1 CILR 594.
6 Kuwait Ports (CA) at [21].
7 Kuwait Ports (CA) at [141].
8 In Kuwait Ports Authority v Port Link GP Ltd [2022] 1 CILR 12 ("Kuwait Ports"), upheld in Kuwait Ports (CA).

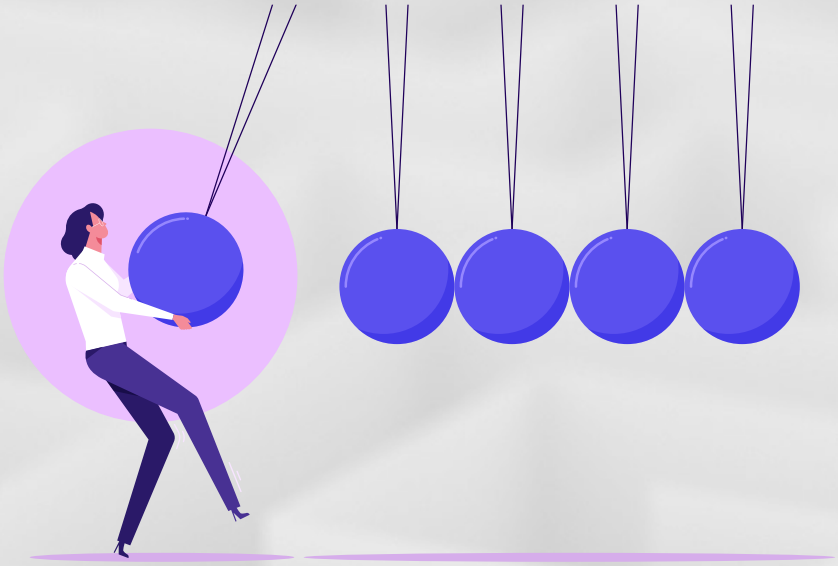
law",[9] could incur loss.[10]

The judge at first instance thought not, holding that,

"where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners".[11]

This finding was not appealed but the CICA stressed that it was, "not to be taken as agreeing that this is correct".[12] The CICA referred first to the statutory trust arising pursuant to s.16(1), under which the "GP of an ELP holds its [i.e., the ELP's] assets on trust for all the limited partners".[13] In the case of a trust, a trustee's breach of trust may cause a loss to the trust fund,[14] and a beneficiary of a subsisting trust may bring a claim to recover that loss.[15] The remedy is for an order to "restore to the trust what ought to have been there".[16] The CICA said the same approach and remedy was equally applicable in the case of the statutory trust created pursuant to s.16(1), concluding that "in proceedings against the GP, a limited partner can recover for loss suffered by the breach of the statutory trust but that the remedy would be the restoration of the ELP's fund thus compensating the direct losses suffered by all the constituent limited partners".[17]

Secondly, the CICA referred to the principle that a successor trustee may bring a claim against a former trustee



for breach of trust and for restoration of the trust fund.[18] "Thus", the CICA concluded, "even though like an ELP, a trust is not a separate legal entity, it can properly be said that the trust as well as a beneficiary has a claim against a trustee for breach of trust"

(emphasis added).[19] By analogy, the CICA appeared to consider that an ELP could have a claim against a GP.

In a trust context, whether a derivative action is possible appears to depend on whether the cause of action can be considered trust property.[20] If it cannot, a beneficiary has no ability to bring a claim derivatively on behalf of the trust.[21] If, as the CICA said in the Kuwait Ports case, it is, "strongly arguable that the position is the same in relation to an ELP",

then it is submitted that precisely the same question must be posed under s.33(3), namely: is the claim which the LP seeks to bring properly to be considered as being partnership property? Only if that question is answered in the affirmative will it become necessary to consider the "without cause" test. Whether a,

"particular chose in action is or is not a trust asset involves no contest involving high principles and great authorities but rather an examination of the particular facts of the particular case",[22]

including examination of what, if any, is the connection between the cause of action and the administration of the trust and the nature and extent of any such connection.[23] In this context, it may be necessary to differentiate between claims against third parties and claims against the incumbent (defaulting) trustee.

Claims of the former type can quite clearly constitute trust property. For example, when a contract is made by the trustee in the course of the administration of the trust, and for the purpose of the trust,[24] the benefit of the contract will itself be trust property with the result that any right of action thereunder will also constitute trust property.[25] By parity of reasoning, an

9 Kuwait Ports at [63].
10 Kuwait Ports (CA) at [142].
11 Kuwait Ports at [63].
12 Kuwait Ports (CA) at [145].
13 Kuwait Ports (CA) at [56].
14 Lewin on Trusts (20th Ed., 2023) ("Lewin"), at [41-002].
15 Lewin, at [41-010] and [41-071].
16 Kuwait Ports (CA) at [57] citing Target Holdings Limited v Redferns [1996] AC 421. And see Lewin, at [41-010].
17 Kuwait Ports (CA) at [59].
18 Lewin, at [41-080].
19 Kuwait Ports (CA) at [145].
20 Lewin, at [47-007] referring to claims against third party advisers to the trustee. See also Bayley v SG Associates [2014] EWHC 782 (Ch) at [47]. This article assumes the position is the same when the putative claim is against a defaulting trustee.
21 Bradstock Trustee Services Ltd v Nabarro Nathanson [1995] 1 W.L.R. 1405 at page 1411F
22 HR v. JAPT [1997] Pens. L.R. 99 at [78].
23 Young v Murphy [1996] 1 VR 279 at page 317.
24 Importantly, not all contracts made by trustees, are necessarily made by them in the course of the administration. A contract may be made for private purposes as opposed to being made in the management of the trust estate: Young v Murphy at page 291.
25 Young v Murphy at page 317. Bayley v SG Associates [2014] EWHC 782 (Ch); [2014] W.T.L.R. 1315 at [51]. See also Royal Brunei Airlines v Tan [1995] 2 AC 378, at page 391F.

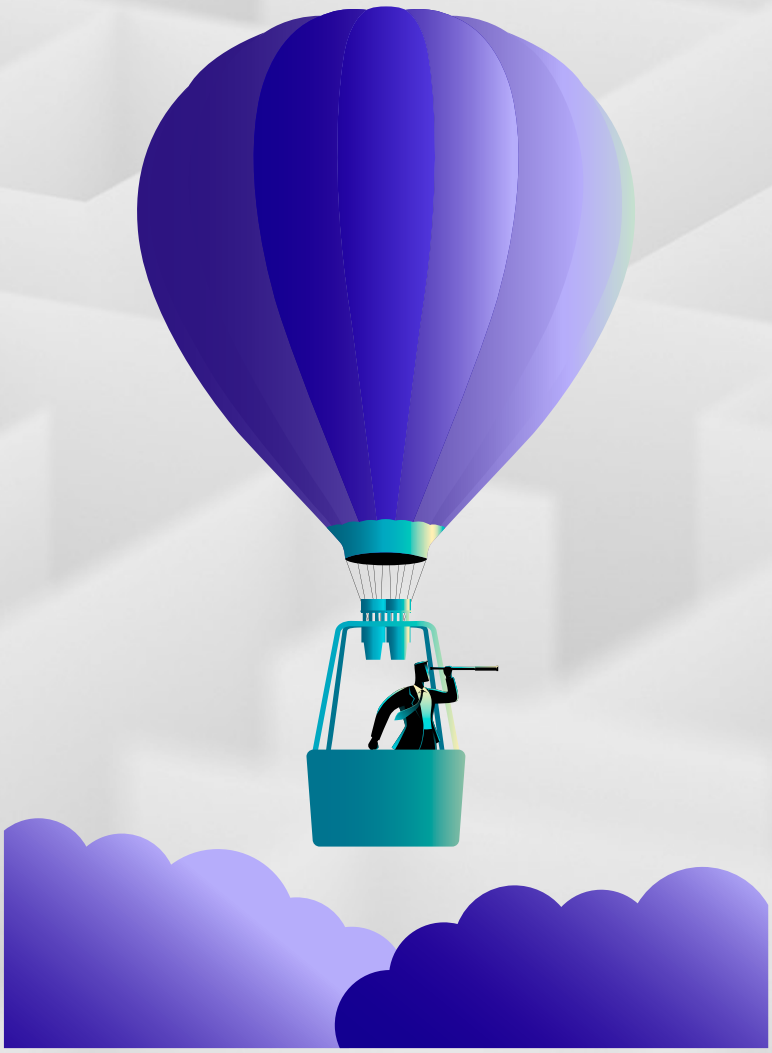
ELP's claim against a manager under a management agreement entered into by the GP on behalf of the ELP under s.14(2),[26] appears clearly to be partnership property (in the English case of Henderson PFI Secondary Fund II LLP v. Henderson Equity Partners (GP) Ltd. [2013] QB 93 there was no dispute that the claim against the manager under the management deed was a partnership asset, "owned jointly by the partners" [26]).

The position as regards claims in the latter category (i.e., against a trustee), is less clear. In the Henderson case, the judge held that the partnership had no claim against the GP.[27] It was that finding which the CICA gave emphasis to in the Kuwait Ports case.[28] Drawing an analogy with a trust, the CICA thought that the trust's claim for breach of trust could, "be considered as an asset of the trust",[29] emphasising the fact that any sums recovered would be held upon the terms of the trust.[30] Arguably, however, that conflates the recoveries made from a cause of action, with the cause of action itself, which distinction was drawn in Bradstock Trustee Services Ltd v Nabarro Nathanson [1995] 1 W.L.R. 1405 at page 1411F-G as follows:

"Where the action sounds in tort there can be no question of the trustees constituting themselves as trustees of a chose in action right from the moment that they first consulted the solicitors. As I see it the claim cannot be regarded as part of the trust property, though doubtless any damages which may be recovered would be".

Trustees no doubt have the right to commence an action against co-trustees or former trustees (as well as strangers) for loss caused by a breach of trust,[31] but it is not clear that that cause of action constitutes trust property or that an analogous cause of action by a GP against a defaulting GP would constitute partnership property. If such a cause of action is not partnership property, that would explain why any attempt to bring such a claim derivatively would fail, not just as a matter of discretion (on the basis that any breach of duty by the GP is enforceable by the LPs, as was the case in the Kuwait Ports case)[32] but in limine, as a matter of jurisdiction.

Thankfully, what seems clearer is that the bringing of a derivative claim by an LP will not result in the loss of limited liability, assuming the reference to sub-section (2) of s.33 in s.20(2)(h) is the drafting legacy it appears to be.[33]



26 Which section provides that, "[a]ll letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner (or any agent or delegate of the general partner) on behalf of the exempted limited partnership" (emphasis added).
27 Henderson at [28].
28 Kuwait Ports (CA) at [144].
29 Kuwait Ports (CA) at [145].
30 Kuwait Ports (CA) at [145].
31 Young v Murphy at page 282. Lewin, at [41-071].
32 Kuwait Ports (CA) at [149]-[151].
33 As originally enacted, the statutory test for a derivative action was found in s.13(2). By the Exempted Limited Partnership (Amendment) Law, 2009 s.7(3) of the Law (which section provided that a limited partner would not take part in the "conduct of the business" of the ELP within the meaning of s.7 by the conduct stipulated in s.7(3)(a)-(f)) was expanded to expressly include the taking of any action required or permitted by the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought pursuant to s.13(2) of the statute. That right is now enshrined in s.33(3) of the ELP Act.

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Paul Barford
Founder/
Managing Director
020 7101 4155
email Paul

Chris Leese
Founder/Chief
Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder/Chief
Operating Officer
020 7101 4191
email Danushka

Maddi Briggs
Strategic Partnership
Senior Manager
07825 557739
email Maddi

Yelda Ismail
Senior Marketing
Manager
020 3398 8551
email Yelda

Amelia Gittins
Strategic Partnership
Executive
020 3059 9797
email Amelia