FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 19

FIRE MAGAZINE YEAR IN REVIEW 2024

THE FIRE OF 2024 SETTLES: LEAVING A FOUNDATION FOR WHAT'S TO COME

INTRODUCTION

"Success is a journey, not a destination. The doing is often more important than the outcome"

- Arthur Ashe

As we draw to the end of another fantastic year in FIRE, we are pleased to publish the final FIRE Magazine for 2024, our 'Year in Review' edition. Inside Issue 19, our authors tackle a variety of topics that have been prominent this year, including reducing the odds of fraud in online gambling, misfeasant trading, and case updates. This issue also features a Women in FIRE supplement, where we feature a series of *60 Seconds With* interviews alongside further insightful content, all curated by just some of our incredible Women in FIRE.

We extend our deepest gratitude to all Corporate Partners and contributors whose expertise and commitment have been instrumental in shaping all the issues for 2024. Your valuable insights and knowledge sharing have enriched the pages of the FIRE magazine. We look forward to bringing you more in 2025.

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

Amelia Gittins
Strategic Partnership Executive
020 3059 9797
email Amelia

CONTRIBUTORS

Syedur Rahman, **Rahman Ravelli**
Adam Garside, **Control Risks**
Georgia Ranaldo, **Control Risks**
Lena Raballand, **Control Risks**
Nichola Brookes, **Ogier**
Romauld Johnson, **Ogier**
Gemma Bellfield, **Ogier**
Corey Byrne, **Ogier**
Joshua Folkard, **Twenty Essex**
Vantage Intelligence
Andres Galinanes, **Grant Thornton**
Michael Cooper, **Grant Thornton**
Lucas Moore, **Payne Hicks Beach**
Victor Lui, **Payne Hicks Beach**
Marie Smale, **PCB Byrne**
Steven Haynes, **Greyhawk**
Baruch Baigel, **Asserson Law Offices**
Wilson Leung, **Serle Court**
Emma Quin, **Serle Court**
Jack Nithavrianakis, **Alaco**
Michael Walker, **Kingsley Napley**
Charlotte Dorman, **Kingsley Napley**
Hannes Arnold, **Gasser Partner**
Olga Bischof, **PCB Byrne**
Aileen McErlean, **Gatehouse Chambers**
Sumru Akter, **Omni Bridgeway**
Claudine Morgan, **Charles Russell Speechlys**
Mary Barrett, **Charles Russell Speechlys**
Rebecca Wilson, **Pinsent Masons**
Bill Geiringer, **Pinsent Masons**
Seohyung Kim, **4 New Square Chambers**
Amr Bajamal, **NHB Legal**
Tami Davis, **Collyer Bristow**

CONTENTS

Women in FIRE

Women in FIRE Supplement

TRACING LOST CRYPTOCURRENCY TO AN EXCHANGE IS POSSIBLE IF PROPERLY EVIDENCED

Authored by: Syedur Rahman (Partner) - Rahman Ravelli

In the first ruling under English law on the treatment and status of cryptocurrency after a full trial, the High Court held that the claimant had failed to evidence that his stolen USD Tether had ended up in the specific wallet held by the cryptocurrency exchange.

The case gives valuable comment on the extent to which claimants must evidence the complicated movement of their cryptocurrency as it passes through the blockchain via various transactions.

Key Takeaways

- Cryptocurrency is property. USD Tether (USDT) stablecoins are 'property' for the purposes of English law and thus gives rise to the opportunity of freezing injunctions, proprietary claims in insolvency and constructive trust claims.
- The identity of USDT can be preserved despite mixing, and can be evidenced. In principle, there should be an option to follow the USDT through a mixed fund.
- This case failed on a lack of evidence to link the assets to a specific wallet. The evidence must clearly track the specific unit of Tether as it moves from wallet to wallet.

The Alleged Fraud

Fabrizio D'Aloia (Mr D'Aloia) was tricked by 'Persons Unknown' into transferring USDT cryptocurrency worth around £2.5 million away from his wallet, into wallets of a sham entity. The fraudsters later accessed the USDT through crypto exchanges including Bitkub Online Co Ltd (Bitkub).

Mr D'Aloia pursued other crypto exchanges in separate proceedings. However, his claim against Aux Cayes Fintech was struck out (D'Aloia v Persons Unknown Category A & Ors [2024] EWHC 895 (Ch)) and his claim against Binance Holdings was settled.

There were no allegations of fraud levelled against any of the exchanges.

In these proceedings, Mr D'Aloia claimed that Bitkub had been unjustly enriched by the receipt of 46,291 of his Tether coins, and / or that Bitkub held Mr D'Aloia's USDT as constructive trustee.

Recovering The Assets – What Has To Be Proven

Given Mr D'Aloia's USDT (among other cryptocurrency) had long been dissipated by the bad actor(s), his case was that some of his assets could be traced to money withdrawn by the alleged scammer.

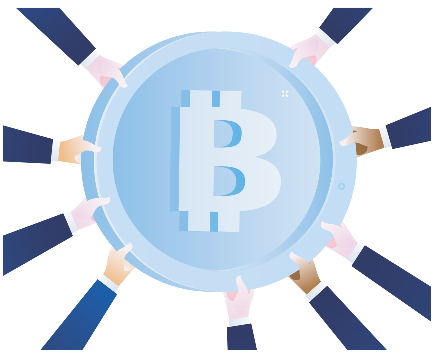
Crucial to the case was being able to pinpoint 'identifiable cryptocurrency' within the USDT that was transferred to the 82e6 Wallet held with Bitkub. Mr D'Aloia had to 'bridge the gap' between the 1dDA Wallet into which he paid his

USDT and the 82e6 Wallet, from which it left the blockchain and re-entered the traditional banking system.

This exercise was complicated. The cryptocurrency went through a series of 14 'hops' on the blockchain. It was then swept into the Bitkub hot wallet.

Chain-hopping complicates the tracing process because cryptocurrencies are swapped from one token to another.

When crypto-assets are swept into a 'hot wallet' they go into a central unsegregated pool address. Hundreds of transactions an hour pass through the central pool and so it was said that any attempt to trace the Tether swept into the pool would be close to impossible.



Tracing Crypto Assets Through Mixed Funds

Judge Farnhill considered that USDT is 'a persistent thing' because it maintains a distinct identity, even in a mixture. Notably, Tether's White Paper states it is capable of creating and destroying USDT, it is able to track each individual token and the transactional history of USDT is publicly audited. This was accepted by the Judge at trial.

Looking at the evidence, Judge Farnhill considered that the identity of the USDT was preserved despite mixing and could be evidenced. It could therefore be followed, including through different wallets used in various hops, even where those wallets contained or subsequently received USDT from other sources.

The judge concluded that at law USDT could have been followed but Mr D'Aloia's USDT in this case was not successfully followed as a matter of fact.

Lack Of Evidence

The issue in this case was a practical one. There was no evidence before the Court, from Tether Ltd or any other source, that would allow the 'following' exercise to be undertaken.

Even if tracing had been possible in principle, the judge found that Mr D'Aloia had not demonstrated that his funds could be traced to the 82e6 wallet as a matter of fact.

Mr D'Aloia failed to show on the balance of probabilities that any of his USDT ever arrived at the 82e6 wallet. In light of that, Mr D'Aloia had no claim against Bitkub because it did not receive anything from him. Bitkub held no funds as a constructive trustee for Mr D'Aloia.

Shortcomings In The Expert Evidence

Evidence was adduced from a blockchain tracing experts, but it was not clear from the evidence how and where D'Aloia's assets had been moved.

Mr D'Aloia could not show how part of the missing stablecoin was offloaded through a range of cryptocurrency exchanges after it had mixed with money from other sources.

This case highlights how lawyers and experts need in depth knowledge of the way blockchain technology works, and how movements of funds can be evidenced practically. When funds are mixed, the crypto-assets can still be followed, but this needs to be dealt with meticulously and clearly in the expert evidence.

Read the full judgment here: Fabrizio D'Aloia v Persons Unknown Category A & Ors [2024] EWHC 2342 (Ch)

Legal Articles - Archive | Rahman Ravelli - Page 5 of 156

This article was first published on www.rahmanravelli.co.uk

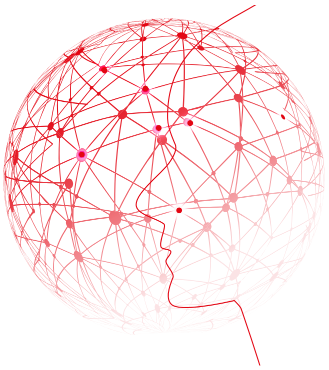
RAIDERS OF THE LOST FUNDS

INVESTIGATIONS IN HIGHER RISK JURISDICTIONS

Authored by: Adam Garside (Director), Georgia Ranaldo (Associate Director) and Lena Raballand (Consultant) - Control Risks

Investigating fraud, bribery and corruption in higher risk jurisdictions requires a unique skills set coupled with ready access to a trusted local network.

When allegations concern countries with an elevated Corruption Perception Index (CPI) or a higher security risk, there are practical considerations to be worked through and they shouldn't be rushed. This is to ensure the safety of all involved alongside achieving the objectives of the investigation.



Initial Intelligence Gathering And Planning

The starting point of any successful investigation is understanding the information landscape. Each country and case presents a unique political, cultural, linguistic, legal, and economic environment. Navigating that environment requires a map constructed from knowledge and experience in order to gather initial intelligence and plan effectively.

Alongside local legal support, forensic accountants, technology support and business intelligence, the investigation team will need to seek specialist advice on security risks and expert advice on the state of local and national politics.

Typical Considerations Required In Higher Risk Jurisdictions

With the groundwork laid, the investigation team has a number of considerations at the outset. For example, the decision of on-site vs. remote work in light of potential security threats, forming a strict need-to-know list to counter potential information leakage and the likely need to gather corporate and ultimate beneficial owner (UBO) information in offshore financial centres (OFCs).

Addressing Risks Of Intimidation Or Violence

Where there exists a significant risk of intimidation or violence, consultation with security experts and obtaining a security risk assessment is imperative to determine the appropriateness of an on-site investigation. If considered necessary, on-site investigations may require a physical security detail to enable safe passage to and from the on-site location.

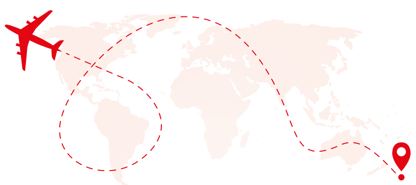
The investigator will need to consider not only the safety of the team, but also whistleblowers and witnesses. Whistleblowers and witnesses will be fearful of intimidation, retribution or physical harm and their safeguarding must be the priority. The investigator should arrange safe, off-site locations in which to conduct any detailed discussions or interviews. There is also a risk of confidentiality breaches where a whistleblower or witness can be intimidated into sharing details of the investigation. Therefore, appropriate protocols should be in place that ensure that person is offered appropriate working alternatives during the investigation and is able to communicate easily with the investigator and appropriate HR lead in the organisation.

In the event that a security assessment deems an on-site visit too risky, evidence collection, analysis and relevant interviews can be handled remotely, with certain limitations.

Avoiding Information Leakage And Obtaining Accurate Books And Records

Books and records in offices and sites located in higher risk jurisdictions do not typically meet best practices of document retention and digitalisation. For example, a lack of data validation protocols can result in digital records not being properly authenticated, increasing the risk of relying on inaccurate or tampered data during the investigation. Therefore, ensuring potentially critical evidence is not contaminated or deleted due to an information leak or tip-off is fundamental at every stage of the investigation. To mitigate this risk, developing a strict need-to-know list and a set of communication protocols for the investigation is vital.

Requests for email data and legal holds should be made to local IT via general counsel. Due to the potential for relationships between the IT team and the subject/s of investigation, requests should be framed as routine, internal reviews and contained inside larger, randomised samples to avoid raising suspicion. For example, where two employees are subjects of an investigation, requests for email data might be requested alongside ten peripheral employees. This masking technique will help to conceal the purpose of the request to the information-holder. The additional data set can be collected, but not processed by investigators, who will then focus on processing and reviewing data related to the target custodians.



Obtaining Company Records And Ubo Information In Higher Risk Countries And OFCs

Investigations in higher risk countries inevitably identify illicit funds exiting the country via transactions with shell entities set up in OFCs, supported through the use of proxies. Investigators can deploy a combination of open source intelligence and searches on proprietary databases to identify links between subject of an investigation, the shell entity and the proxy. In some cases, this information is also available through third-party sources such as trade databases which may have scanned bills of lading with names and addresses included.

Investigators will generally encounter difficulty in accessing accurate corporate records in higher-risk countries. For example, basic corporate information in an OFC typically requires attendance at the local registry, achieved by leveraging the investigator's local networks. Another risk is the request for facilitation payments to speed up administrative processes, such as providing corporate records.

The "middleman" syndrome is persistent in many markets and organisations may run the risk of paying potentially illegal facilitation payments (under the UK Bribery Act) where the local network used is not tried and tested.

A proxy is often used as the director or corporate officer of a shell entity in an OFC to provide a veil to the ultimate beneficial owner (UBO). To determine whether the UBO and subject of the investigation are the same person or connected entities, human source intelligence can be deployed to gather intelligence on links between the subject of the investigation and the proxy in place at the shell entity. This intelligence can then be used to search and review documents, books and records in order to identify supporting evidence that confirms the links.

Conclusions

Conducting investigations in countries with high levels of perceived corruption and security risks is undoubtedly complex. Success depends on meticulous planning and deploying an investigation team that can quickly adapt its approach when circumstances change. On top of strong investigative credentials, the investigation team will also require access to appropriate security consulting and trusted local intelligence networks in higher-risk countries.

A year of uncertainty and volatility, trade wars and political violence

www.controlrisks.com/riskmap

Charting a world of uncertainty and volatility, RiskMap 2025 outlines the main risks to international businesses in the coming year.

Control Risks' Top risks for business in 2025 are:

- **Uncertain States of America**
- **Red Line Geopolitics**
- **Global Trade War**
- **Rising Political Violence**
- **Digital Concentration Risk**

The re-election of Donald Trump as President of the United States is truly momentous, but Control Risks' analysts argue that many of the risks associated with the US's changing global role and investment landscape are baked in regardless of who occupies the White House. What Trump's victory does is layer on more uncertainty and risk potency in the year ahead.

Beyond the US, but heavily influenced by what the Trump administration will and will not do, the red lines of global flashpoints will drive risks to business. Companies will have to be ready for rapid changes in regional and global stability.

US trade policy, Chinese trade policy and industrial policy across the world will all drive the risk of escalation in a global trade war in 2025. The coming year will establish national security as the guiding principle of international trade and investment.

The spectre of political violence makes a return to Risk Map for 2025 as jihadists regroup, the far right resurges, and lone wolves radicalise. Four global factors will contribute to political violence in 2025: geopolitical rivalry, political polarisation, online radicalisation and emerging technologies.

Alongside these risks, businesses must also address the risks presented by over centralised technological ecosystems. Concentrating services and among a few major providers escalates the threat of systemic risks and global disruptions in the volatile and uncertain world of 2025.

> **"The economic and geopolitical arena is now a fully contested space where nation states, global companies and indeed criminal networks compete for advantage. This is not a world without opportunity, far from it. The skills of resilience, anticipation and flexibility remain the differentiators between success or a lack of it."**
>
> - *Nick Allan, Control Risks' CEO*

The RiskMap 2025 Top Risks to business

Uncertain States of America

Many of the risks presented by the US, as a destination for investors and because of its waning global power, are locked in regardless of who is in the White House. The Trump presidency layers on uncertainty. Domestically, the US is still rich with opportunity, but polarised politics and structural political dysfunction pose questions about long-term stability. Constitutional and institutional resilience have weakened, and neither Republicans nor Democrats intend to bring unsustainable budget deficits under control. Globally, the US's ability to drive the agenda and enforce rules is diminishing. A world without an obvious hegemon will be more fluid, flexible, and volatile.

Red Line Geopolitics

The red lines of global flashpoints will drive geopolitical risks to business in 2025. From the war between Russia and Ukraine to the Middle East and the South China Sea, repeated transgressions and muted responses are desensitising risk awareness and incentivising escalation. Actors are taking more frequent risks calibrated to be just short of major escalation, but without knowing for sure where red lines lie. Companies will need to know which red lines to watch. These could be military actions, draconian sanctions or something less obvious. Be ready for rapid changes in regional and global stability and an upending of supply chains.

Global Trade War

Escalating trade warfare is a top risk in 2025. Advanced and developing economies will resort to industrial policy and protective trade tools, while China continues to focus on manufacturing power, driving exports in contentious sectors. The US and EU are already raising their defences while China is poised to retaliate with its own tariffs, sanctions or export controls. A new phase of tit-for-tat restrictions will dent domestic and global growth prospects. Smaller economies, fearing "China shocks" will undercut hard-fought industrialisation strategies will also step up restrictions, albeit more quietly. Businesses will be further squeezed between these competing policies and punitive measures, complicating supply chain and market access outlooks.

Rising Political Violence

As jihadists regroup, the far right resurges, and lone wolves radicalise, 2025 will see a rise in political violence. Societies increasingly expect – and even encourage – using violence to gain power and settle scores. Even when it's not directed against companies, political violence negatively impacts the business landscape. Four global factors will contribute to political violence in 2025: geopolitical rivalry, political polarisation, online radicalisation and emerging technologies. The global threat from Islamist extremist groups is likely to increase in 2025, along with state sponsored attacks, right wing violence and lone attacks fuelled by new radicalisation pathways. Companies should prepare for more diverse and less predictable threats.

Digital Concentration Risk

The concentration of risk in centralised technological ecosystems in a worsening threat landscape will be a top risk for organisations in 2025. If the 2024 CrowdStrike downtime resulted in an estimated $5.2 billion loss, a deliberate attack in 2025 would be catastrophic. Concentrating services and capabilities - from infrastructure to generative AI- among a few major providers escalates the threat of systemic risks and global disruptions. Alongside this, the proliferation of connected and autonomous devices in critical infrastructure and consumer products will create new vulnerabilities for disruptive cyberattacks. The traditional model of operational control is rapidly becoming obsolete, replaced by a pressing need for adaptability, innovation, and resilience in the face of relentless disruption.

For more information on how the top risks will impact legal and compliance professionals in 2025, click here.

keidan harrison
disputes and insolvency lawyers

Undisputedly different

Our FIRE service

Fraud and Asset Recovery Services

- Non-performing loan and asset recovery
- Contentious insolvency and restructuring
- Fraud in shareholder, LLP and partnership disputes
- Investment frauds
- Fraud in arbitration and arbitration enforcement
- Domestic and international judgment and arbitration award enforcement
- Fraud investigations
- Pursuit of third parties responsible for fraud losses
- Interim remedies

keidan harrison
disputes and insolvency lawyers

44 Southampton Buildings
Holborn
London WC2A 1AP
Tel: +44 (0)203 733 8808
enquiries@keidanharrison.com

www.keidanharrison.com

Proud to be community partners

FIRE

Keidan Harrison offers a specialist and comprehensive FIRE service.

We act for international and UK businesses, high-net-worth individuals (HNWI) and insolvency practitioners. Our approach is partner-led and highly personalised, ensuring our clients' needs are met every step of the way. Our partners have been trusted by clients for many years to assist them on substantial and often challenging cases. They have a reputation for their entrepreneurial, dynamic and commercial approach, as well as their technical expertise.

The legal directories describe us as **innovative first class tacticians** who are determined to find the **right strategic solution**.

Our expertise in civil fraud matters is rooted in a depth of expertise across insolvency and commercial disputes which feature fraud or with fraud at their heart. Our broad experience enables us to develop strategic solutions, when bringing or defending complex claims involving allegations of fraud, which include asset recovery within or outside of insolvency proceedings.

Marc Keidan
Partner
Tel: +44 (0)208 1427 735
mkeidan@keidanharrison.com

Luke Tucker Harrison
Partner & Solicitor Advocate
Tel: +44 (0)208 1427 734
lharrison@keidanharrison.com

Dipti Hunter
Partner
Tel: +44 (0)208 1427 742
dhunter@keidanharrison.com

CRYPTO ASSET TRACING TOOLS

FOR OFFSHORE INSOLVENCY PRACTITIONERS

Authored by: Nicholas Brookes (Partner), Romauld Johnson (Associate), Gemma Bellfield (Partner) and Corey Byrne (Senior Associate) - Ogier

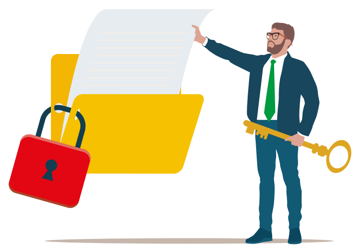
In many of the recent insolvencies of digital asset companies, liquidators have been appointed over companies in which digital assets have been fraudulently transferred from wallets controlled by the insolvent company into other unidentified wallets in foreign jurisdictions.

Given the anonymity of crypto assets, this causes difficulties for insolvency practitioners in identifying the third parties who received funds and the location of the digital wallets.

So what are the tools and legal remedies available to insolvency practitioners seeking to trace and recover misappropriated crypto assets?

Tracing The Assets

Historically, English courts were hesitant to order foreign third parties to disclose information in all but the most exceptional cases. By contrast, the Cayman and BVI courts have historically been more willing to grant such orders against foreign companies. For instance, both the BVI and Cayman courts allow service outside of the jurisdiction for claims involving interim relief in the absence of substantive proceedings. Ultimately, the court will ask itself whether the relief should be granted in the interests of justice.



Norwich Pharmacal And Bankers Trust Orders

A Norwich Pharmacal order is a court order for disclosure of documents or information against a third party (which has been innocently mixed up in wrongdoing) which assist in bringing legal proceedings against the wrongdoers.

Similarly, a Bankers Trust order is a court order against a bank or financial institution to disclose the state of, and documents relating to, the account of a customer who was, on the face of it, guilty of fraud, to allow the applicant to trace the misappropriated assets.

There is a significant degree of overlap between these orders and in many cases involving digital assets, applicants have sought both forms of relief with the courts finding that the respondent crypto exchanges are required to give disclosure to the claimant.

The Information Sought

In the recent cases involving disclosure orders, claimants have sought information which allows them to identify the holders of the wallets to which the misappropriated digital assets are transferred, including relevant "know your customer" and anti-money laundering information relating to the wrongdoers collected by the exchange, the balances of cryptocurrency held in the wallets and details of transactions involving the wallets.

This gives rise to confidentiality issues under the terms and conditions of the exchange, particularly where those terms and conditions purport to protect the confidentiality of customers.

In the English case of LMN v Bitflyer Holdings Inc, the defendant exchanges appeared at the application for disclosure orders, objected to the breadth of the information requests and sought to engage constructively to narrow the scope of information provided. Depending on the location of the exchange in question, specific jurisdictional laws on confidentiality may also need to be considered.

Securing The Assets

Seeking relief against "persons unknown" Where assets have been misappropriated from insolvent digital asset companies, those holding the assets and even the jurisdictions in which they reside are often not readily identifiable.

A number of cases have recognised the possibility for the court to grant relief against "persons unknown". The critical requirement is that the description used by the claimant in the writ or originating process must be sufficiently certain in order to identify both those who are included and those who are excluded.

For instance, in a recent case the relevant persons unknown were named as follows: "persons unknown who demanded Bitcoin on 10th and 11th October 2019".

This relief may also be used where, as is common, it is not clear which corporate vehicle operates the exchange and ought therefore to be the target of the order.

An immediate issue that arises where the defendants cannot be identified is how the originating documents are to be served on them, particularly since it is usually unclear what jurisdiction they are in.

Unless authoritative evidence exists suggesting the persons unknown are within the jurisdiction of the court, the claimant must follow the relevant procedure for service out of the jurisdiction.

Recognising the issues with identifying holders of cryptocurrency, the courts in recent cases have also been willing to grant alternative service including service by email and, as was the approach taken by the BVI court in AQF v XIO et al - service by non-fungible token through a form of airdrop into the relevant wallet address which would embed the service documents in the blockchain.

Proprietary Injunctions

When property is obtained by fraud, in order to secure the misappropriated digital assets a liquidator may seek a proprietary injunction or worldwide freezing order against both the fraudster and the exchange which holds the relevant wallet (if any).

Applicants for injunctions must show that the balance of convenience is in favour of the plaintiff (i.e. that the inconvenience to the defendant is outweighed by the inconvenience to the plaintiff) and a risk of dissipation.

Subject to demonstrating an arguable case that the crypto assets are their property, this would generally be straightforward for plaintiffs to show in cases involving cryptoassets, given that they often involve claims of fraud and given the ease with which cryptoassets may be transferred anonymously across jurisdictions at the click of a button.

Delivery Up

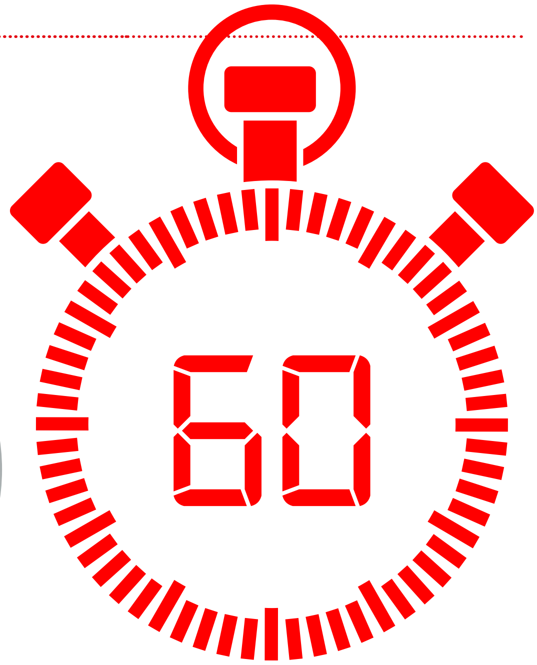
Given the principle that stolen funds are held on trust by the wrongdoer for the victim, once the misappropriated crypto assets are identified and judgment is obtained, a claimant may seek an order for delivery up.

Offshore liquidators may also avail themselves of their statutory powers to demand third parties deliver up property belonging to the company to achieve similar results. In the recent decision of in Law v Persons Unknown, the English court showed its flexibility by ordering that the cryptoassets be converted into fiat currency and delivered up to the jurisdiction to be paid into the court funds office.

A Clear Trend

Laws surrounding digital assets are still in their infancy. However, there is a clear trend in creditors, insolvency practitioners and courts across the common law world successfully using traditional legal remedies and solutions to resolve insolvency, asset tracing and recovery issues arising in respect of non-traditional crypto assets.

60-SECONDS WITH:



JOSHUA FOLKARD BARRISTER TWENTY ESSEX

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

A: I would spend them with my daughter, who is just about to turn one. Watching her grow and learn has been amazing.

Q: What do you see as the most rewarding thing about your job?

A: Advancing my clients' cases in a legally clear and convincing way, which they couldn't necessarily do themselves.

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

A: As a pupil, I helped defend a solicitor client who was alleged to have produced an (extremely negligent) deed and taken £20,000 cash under a table and stashed it in a shoebox in his attic. The client's defence was that someone else must have impersonated him. We noticed that the deed had come from a DIY precedents book, which used different fonts in different editions. I was dispatched to the British Library to call up previous editions from the stacks, to see whether we could show that the edition with the font used was published after the alleged meeting. We missed by one month, but our defence succeeded at trial. I can also confirm that 1,000 £20 notes fit (comfortably) into a shoebox!

Q: What is one work related goal you would like to achieve in the next five years?

A: I would like to appear in the Supreme Court.

Q: What has been the most significant trend in your practice this year?

A: I have been doing more oral advocacy on led cases, in addition to the advocacy I have always done in my sole instructions. The recent practice notes and amendments to specialist court guides have made a real difference to advocacy opportunities for senior-juniors in higher-value cases, and I am grateful for the trust placed in me by my leaders and solicitors.

Q: What book do you think everyone should read, and why?

A: George Eliot's/Mary Ann Evans' *The Mill on the Floss* - it's just brilliant (and Mr Tulliver's parable has twice restrained me from personally issuing claims against service providers …)

Q: Dead or alive, which famous person would you most like to have dinner with, and why?

A: Shauna Coxsey - I am a keen boulderer and would love to ask her more about the evolution of the sport; plus she seems a lot of fun!

Q: What is the best film of all time?

A: My favourite film is Satyajit Ray's *Apur Sansar*. When I went to New Delhi to sit as a Tribunal Secretary, I was put in touch with the lead actress by a client I had defended - definitely the best fringe benefit I've ever received.

Q: What legacy would you hope to leave behind?

A: I learnt a huge amount from my tutors, pupil supervisors and mentors. I now teach private international law at University College London and have had my own pupils. I hope that one day my students, pupils and juniors will pass any inspiration and advice they found useful on to their own.

Q: Where has been your favorite holiday destination and why?

A: My partner and I are lucky enough to have hiked in several beautiful places, but I think my favourite was the Ustyurt Plateau, in Southwest Kazakhstan. On clear nights there the Milky Way filled the whole sky.

Q: What is the best life lesson you have learned?

A: Career progression is not a zero-sum game. You are very likely to meet your peers again in different roles - they will remember if you helped them.

Q: If you could travel back to the beginning of the year, what advice would you give yourself?

A: Beware the nursery bugs: they come for everyone!

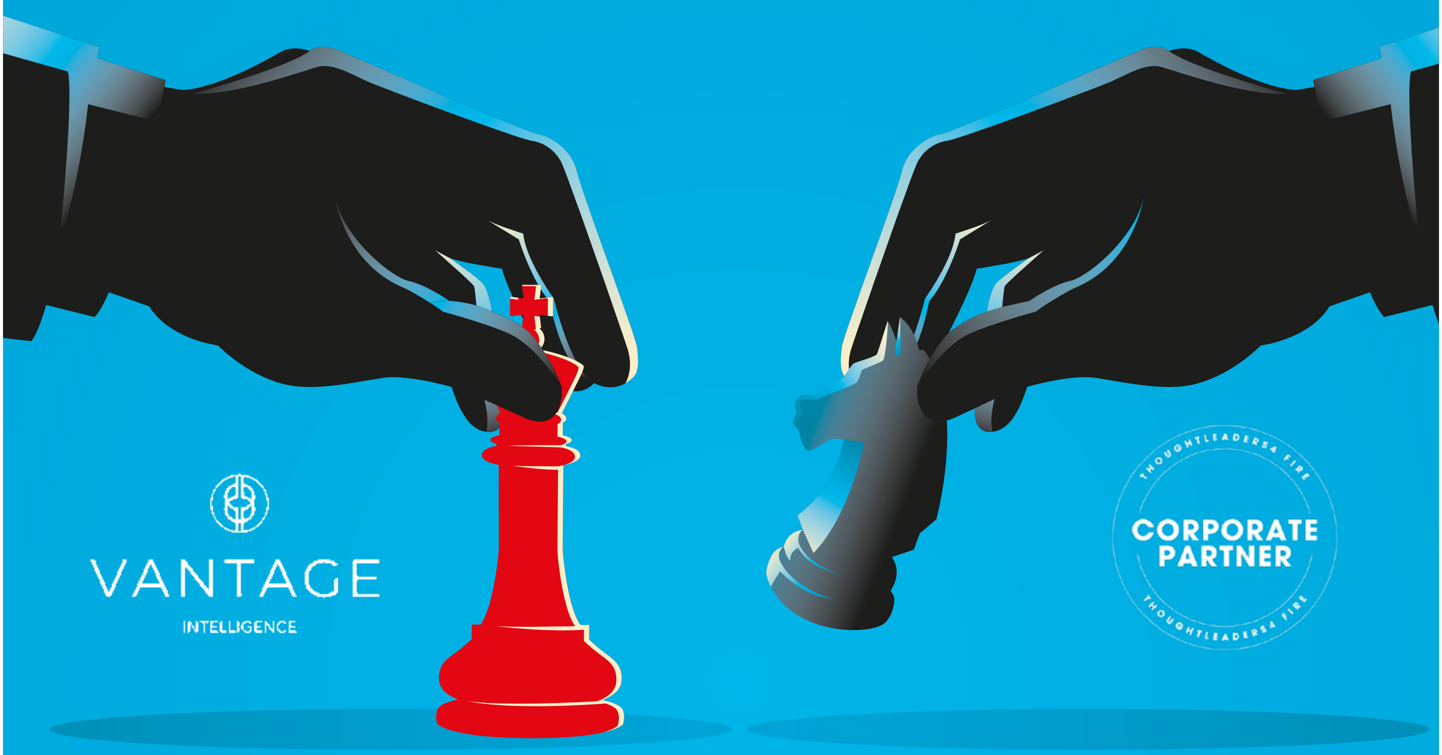
FIRE

FIRE Starters Global Summit: Dublin

26th - 28th February 2025 | Conrad Hotel, Dublin, Ireland

This Next Gen event brings together the rising stars of Asset Recovery, Fraud & Insolvency to forge networks, discuss experiences and build their own personal brand, at an affordable price

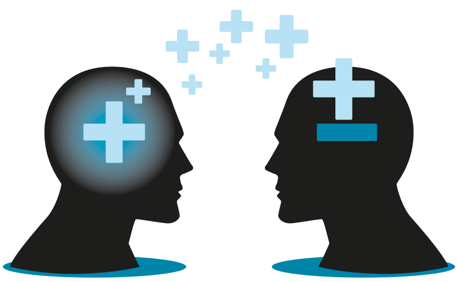
STRATEGIC INTELLIGENCE AND INFLUENCE



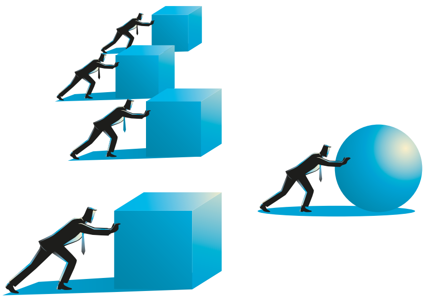
DRIVING INVESTOR OUTCOMES IN INVESTOR-STATE DISPUTES AND AWARD ENFORCEMENTS

Authored by: Vantage Intelligence

Politics and intelligence have long been intertwined, as evidenced throughout history from the era of Sun-Tzu, the legendary Chinese military strategist and author of The Art of War, to Cold War spy games and election campaigns. Although traditionally employed at a state level, there is increasing demand for corporate intelligence services that combine political consulting and public-influence services with more traditional service offerings such as asset tracing, litigation support and geopolitical risk assessment.



Areas in which a combination of bespoke intelligence and influence services can have significant impact range from standard asset tracing to sovereign debt advisory or the discreet gathering of information about the thought processes of regulators or policymakers regarding a specific company or industry. Political candidates and decision-makers can also benefit from private intelligence and influence capabilities by leveraging information from a composite of open, proprietary and human sources.



The combination of intelligence-gathering, political consulting and influence operations may be particularly relevant in investor-state disputes and enforcement of arbitral awards, especially because a sovereign's response to an award against it can be significantly impacted by its domestic political dynamics.

While an investor will naturally be interested in the speedy resolution of the dispute, a sovereign is likely to prolong arbitral and enforcement proceedings. Prolonging the dispute may be in the sovereign's interest to avoid similar claims by other investors, to generally protect state assets that could be seized as a result of an award, or, based on domestic considerations, to push the political and financial complexities of resolving the dispute onto future political or bureaucratic leaders.

Combined intelligence gathering and influence measures not only speed up arbitration proceedings but also prevent the deterioration of relations between the investor and the state by helping to set the conditions that could allow the sovereign to settle. Tailored iInfluence measures can be particularly impactful in the event of a sovereign's efforts to delay award enforcement because such measures apply public pressure on the sovereign.

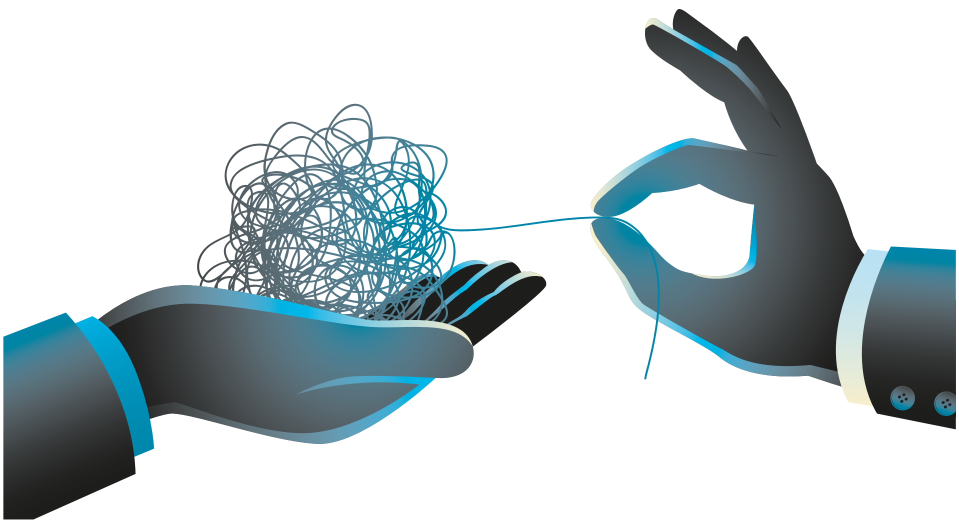
Therefore, to increase the chances of successful enforcement or settlement, holders of awards and their advisors should aim to work along multiple case-critical axes.

First, tracing a state's assets for the eventual enforcement of an award should be complemented by a comprehensive analysis of the legal framework, political system and key decision-makers that guide and influence the state's actions at the relevant time.

Second, intelligence or strategic advisors should simultaneously aim to engage human sources, such as former policymakers, to assess the interests and objectives of the respondent sovereign's government - information that can be vital to investors and their legal representatives in crafting a resolution strategy.

Third, measures can start to be applied in the crafting of public influence campaigns in order to apply pressure on a sovereign to pursue settlement options, which avoids further reputational and/or economic damages that could result from protracted litigation.

This three-pronged approach ultimately allows the client a considerable degree of flexibility in choosing the right course of action and adapting the best strategies to achieve resolution.



Insolvency and asset recovery

We are the market leading Insolvency and asset recovery practice as recognised regularly by Who's Who Legal. We are continuously developing and evolving our practice to respond to the needs of global demand for our services.

We focus on understanding the unique situation of each case and work with you to devise and implement asset recovery solutions. The cases we deal with will often have elements of fraud, regulatory breaches or international angles.

Global asset recovery using cross-border insolvency powers

We have the largest asset recovery practice in the UK and our team focuses on maximising the recoveries of assets for creditors and the victims of fraud.

We adopt innovative strategies incorporating the powers we have as insolvency practitioners and receivers. We recognise the importance of acting at short notice and have experience of handling all types of cases.

Our services

- Asset tracing and global asset recovery
- Contentious Estates/Trusts and Family Disputes
- Offshore investigations and insolvency
- Corporate Intelligence
- Personal insolvency
- Acting as receiver or administrator over deceased estates
- Enforcing matrimonial awards
- Taking director appointments
- Funding enforcement of judgements and awards
- Innovative funding solutions – We have expertise and knowledge of different funding options across multiple jurisdictions including our own fund
- Restructuring
- Digital Forensics
- Damage/loss assessment in fraud cases - Valuation and economic experts
- Crypto/digital fraud recovery

Visit grantthornton.co.uk to find out more, or contact one of our insolvency and asset recovery partners:

Kevin Hellard
Practice Leader
T +44 (0)20 7865 2478
E kevin.hellard@uk.gt.com

Amaechi Nsofor
Partner
T +44 (0)20 7865 2388
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
T +44 (0)20 7728 2426
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

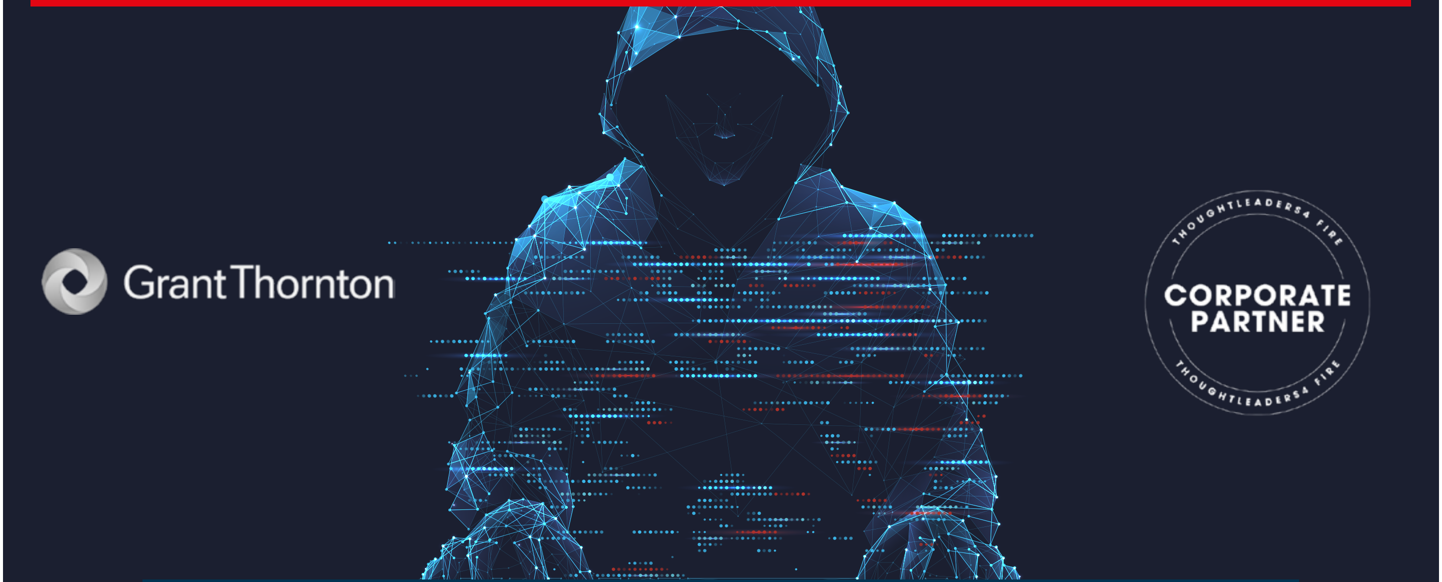
Prashan Patel
Partner
T +44 (0)20 7865 2328
E prashan.p.patel@uk.gt.com

John Skelton
Partner
T +44 (0)20 7728 2039
E John.G.Skelton@uk.gt.com

Robert Starkins
Partner
T +44 (0)20 7728 2132
E Robert.N.Starkins@uk.gt.com

Grant Thornton

BET ON PREVENTION



REDUCING THE ODDS OF FRAUD WITHIN ONLINE GAMBLING

Authored by: Andres Galinanes (Associate Director) and Michael Cooper (Manager) - Grant Thornton

The rise of online fraud has been significant, with scams like identity theft and phishing being used to prey on unsuspecting individuals to steal their money.

Fraud now accounts for nearly 40% of all crimes in England and Wales, with four-out-of-five reported cases involving cyber-enabled attacks.[1]

Driven by the ease of smartphone apps, round-the-clock access to global betting and gaming, the gambling sector has seen rapid expansion. In Great Britain alone, the online gambling yield grew by 12% year-on-year, reaching £1.46 billion in Q2 2024.[2] This growth makes the online gambling industry particularly vulnerable to fraud.

While operators have prioritised preventing money laundering and promoting responsible gambling, often guided by the UK Government and the Gambling Commission of Great Britain, fraud risk should not be overlooked. Fraud often paves the way for money laundering and can impact both operators and customers resulting in financial loss, reputational damage, legal complications, declining user numbers and strained resources.

The positive news is that many of the processes and controls already in place to combat money laundering and encourage responsible gambling can be adapted to detect and prevent fraud as well.

This article offers practical advice for online gambling operators and their advisers seeking to identify and address fraud risk.

Playing Against The Odds – The Challenge Of Identifying Fraud

The key element for all successful frauds is that it remains undetected while being committed. To achieve this aim fraudsters often manipulate systems, cheat at games and exploit loopholes, making fraud challenging to detect. Fraud is multifaceted posing challenges across an operator's business, from external fraud exploiting weaknesses in customer onboarding and monitoring controls to internal fraud conducted by employees or agents.

Below are common types of fraud in the online gambling sector:

1. **Card Not Present Fraud:** Fraudsters use stolen card details to deposit and withdraw funds. Since a physical card isn't required, the details are often obtained through identity theft.
2. **Multiple Account Fraud:** Also known as bonus abuse, fraudsters create multiple accounts to exploit welcome bonuses and promotional offers provided by the gambling operator.

1 https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/fraud-and-economic-crime

2 https://www.gamblingcommission.gov.uk/statistics-and-research/publication/market-overview-operator-data-to-june-2024-published-july-2024

3. **Player Collusion:** Fraudsters manipulate peer-to-peer games, such as online poker, by working together to influence the outcome in their favour, defrauding other legitimate players.
4. **Hacking And Account Takeover:** Fraudsters gain unauthorised access to customer accounts, using them to place bets, often as part of a broader money laundering scheme.
5. **Betting Fraud:** This occurs when individuals place bets using insider information. Betting fraud may also involve bribery and corruption, where collusion influences the outcome of a sporting event or specific incidents within it.
6. **Money Laundering:** Fraudsters may use the gambling sector to deposit illicit funds, placing low-risk bets before withdrawing money to make it appear as legitimate winnings.
7. **Internal Fraud To Benefit The Employee:** Employees and/or agents may use internal access to steal customer details or manipulate odds to commit fraud.
8. **Internal Fraud To Benefit The Operator:** Employees and/or agents may enable or commit fraud to benefit the operator, such as manipulating systems or information to artificially boost the operator's performance.

Hedging Your Bets - Measures To Prevent Fraud

The dynamic and complex nature of fraud requires continuous innovation in detection and prevention strategies to protect the interests of both legitimate players and operators. The critical first step in identifying and mitigating fraud risk is conducting a fraud risk assessment. This assessment maps out the inherent fraud risks an operator faces, using both quantitative and qualitative data to generate an inherent risk score. The effectiveness of existing controls is evaluated against these inherent risks to determine the residual risk.

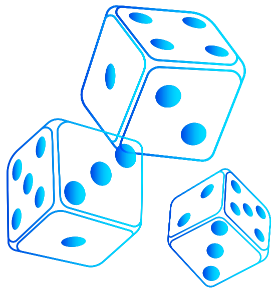
In the UK, registered gambling operators are required to conduct anti-money laundering risk assessments, and the fraud risk assessment can be integrated into the broader financial crime-related risk assessment. A fraud risk assessment should be a dynamic and ongoing process, updated when there are significant changes, such as the introduction of new products or emerging threats and in any event on a regular, such as annual, basis.

To stay ahead of evolving fraud tactics, risk assessments should incorporate trends or themes identified through the operator's own experience and collaboration with law enforcement and industry peers. The risk assessment should incorporate the impact of changing legislation, such as the "failure to prevent" offence expected to come into force in 2025, which will hold large organisations accountable if they fail to implement reasonable anti-fraud measures when fraud is committed by employees or agents for the benefit of the company.

One of the key controls in fraud prevention is customer due diligence, which is already a core element of anti-money laundering and responsible gambling procedures. However, with rapid advancements in artificial intelligence such as deepfakes, online gambling operators may struggle to keep up with the evolving tactics of fraudsters. Combining customer due diligence with real-time monitoring and investigation of customer behaviour is therefore essential for detecting fraud as it happens.

Gambling operators should ensure they can monitor customers to identify potential indicators of fraudulent activity, such as:

- An unusual number of chargeback requests
- Multiple changes to an account in one session
- Repeated login attempts on a single account
- Large transfers of reward points
- A high volume of password reset requests
- Unusual changes in browser usage, IP address, country or use of a VPN
- Address changes
- Multiple customers using the same IP or device
- Large or irregular purchases
- Use of virtual machines



Don't Roll The Dice On Fraud Risk – Final Thoughts

To effectively combat fraud, operators must treat fraud detection and prevention as a key component of their financial crime prevention framework. Operators should assess their fraud risks and apply corresponding controls to address and manage those risks. As fraud typologies develop it is crucial for an operator to regularly review their controls and check their effectiveness, to ensure they operate as designed.

Lastly, it is vital that the industry proactively engages in discussions on fraud. Operators must collaborate and share knowledge on fraud trends and emerging threats. Fraud is becoming more sophisticated, the sharing of information is going to be critical for how an operator develops an effective anti-fraud strategy, driven at industry level.

Andres Galinanes is an Associate Director and Michael Cooper is a Manager in Grant Thornton UK LLP's Financial Crime team, part of Forensic and Investigation Services.

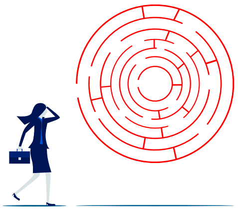
FREEZING ORDERS AND THE RISK OF DISSIPATION

KEY TAKEAWAYS FROM CANADA INC

Authored by: Rebecca Wilson (Associate) and Bill Geiringer (Senior Associate) - Pinsent Masons

Introduction

A recent English High Court ruling in Canada Inc v Sovereign Finance Holdings Ltd & Ors[1] serves as a timely reminder of the factors that the court will consider when analysing whether there is a real risk of dissipation of assets, in the context of a freezing order application.



Background

Canada Inc (the "Claimant") had obtained a judgment debt[2] against a number of parties for their failure to pay amounts owed under a settlement agreement. When the Claimant became aware that a property related to the judgment debtors was in the process of being sold, it applied for a worldwide freezing order against the Respondents. The interim freezing order was granted until the return date hearing.

Prior to the return date hearing, the Claimant discovered that the sale of a property believed to be indirectly owned by the Respondents had not been instigated by the Respondents, rather by a bank who had provided a mortgage. The court therefore considered whether the real risk of dissipation requirement was still engaged for maintaining the freezing order.

Freezing Order Test

An applicant for a freezing order must prove the following elements:

(i) There is a good arguable case on the merits. The merits threshold was recently clarified by the Court of Appeal to mean that it must meet the threshold of there being a 'serious issue to be tried', as required by other interim injunction applications[3];

(ii) There is a real risk of dissipation of assets;

(iii) There are assets caught by the order and they are within the jurisdiction of the court; and

(iv) That it is just and convenient to make the order sought.

In Canada Inc, Mr Paul Stanley KC (sitting as a Deputy High Court Judge) considered the factors relevant to prove a real risk of dissipation of assets.

Relevant Factors

In approaching this question, the court reiterated that the burden lies on the applicant for a freezing order to establish the risk. The judge explained that the court will assess the risk of dissipation by considering all relevant

1 [2024] EWHC 2170 (Comm) ("Canada Inc")

2 For the sum of £3.46 million plus interest and various costs.

3 Dos Santos v Unitel S.A. [2024] EWCA Civ 1109

factors and the cumulative impact of the factors taken together. A single factor may be relevant but not determinative on its own, such as the following:

(1) The presence of sophisticated tax structures such as trusts, and offshore companies, are relevant as they can point to ease of dissipation. However, given that there are legitimate reasons for such structures (such as tax planning) they cannot be regarded as "inherently suspicious or indicative of an intention to dissipate".[4]

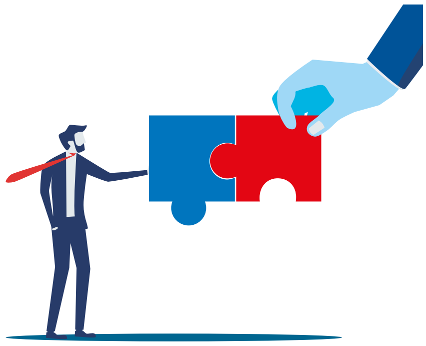
(2) A past of proven dishonesty by a respondent could be relevant but will not necessarily be determinative to establish a future risk of dissipation. Unfocused allegations of dishonesty will be less helpful to the applicant than if they can point to a respondent conducting themselves dishonestly with respect to acts akin to dissipation.

(3) The judge cautioned that the court will be careful to draw inferences from the non-payment of a judgment debt without the presence of more specific factors. The "mere fact" of a judgment debt remaining unpaid is relatively commonplace and is a feature in many post-judgment cases.[5]

(4) A respondent's failure to comply with a court order to provide asset disclosure is relevant in demonstrating a respondent's unwillingness to comply with court orders. However, the court should be careful to not draw inferences from this conduct alone, as with general allegations of dishonesty.

(5) Depending on the nature of the questions, adverse inferences may be drawn from a respondent's failure to provide answers to legitimate questions in appropriate circumstances.

The judge considered that the factors set out above should not be considered as "watertight legal categories" but rather a framework that the court could utilise to organise an analysis of the circumstances of a particular case.[6] To evidence a real risk of dissipation, an applicant will need to evidence that factors such as those set out above, taken as a whole, go to evidence that a respondent has the (a) means and opportunity; and (b) motive and propensity to dissipate the assets in question.



The Decision

(a) Means And Opportunity: the fact that the Respondents had the ability to manage sophisticated international financial structures demonstrated that the Respondents had the means and opportunity to dissipate their assets. This factor on its own would not be enough to establish that there was a real risk of this.

(b) Motive And Propensity: The Respondents' conduct in this case showed that they had the motive and intention to make enforcement difficult. The Respondents had shown a pattern of "attempts to evade clear liabilities".[7] Particular significance was attached to the Respondents' conduct in their dealings with the court. They had sought adjournments and refused to pay subsequent associated costs orders evidencing a willingness to be "cavalier".[8] In this case, this conduct went beyond a debtor's legitimate resistance to pay its debts. Significant weight was also attached to the Respondents' refusal to provide any disclosure at all of their assets, as required by the interim freezing order.

The judge concluded there was evidence of a real risk that the Respondents would seek to dissipate their assets to avoid satisfying the judgment. The freezing order was continued.

Key Takeaways

This decision emphasises that the court will take into account a respondent's entire conduct and the cumulative impact of all the relevant factors when analysing risk of dissipation.

Courts are prepared to draw negative inferences from non-compliance with disclosure obligations. However, the judge pointed out that although it is a relevant factor, "care would be required before inferring a risk of dissipation merely from that factor" alone.[9]

The 'risk' of dissipation is an inherently forward-looking concept. Even where a defendant has undertaken behaviour that may indicate a risk in the past, it cannot be regarded as an indispensable element of proof of risk. Those applying for freezing orders must ensure they can demonstrate a real risk that assets will be dissipated in the future.

What is likely to be most telling is any evidence which points to an actual plan or propensity to dissipate. For example, placing an asset on the market will be crucial to identifying the real risk of dissipation. For this reason, it is imperative that applicants have set out detailed and cogent evidence regarding the risk. Forensic accountancy and corporate intelligence services can be crucial to identifying and building this bank of evidence to show risk of dissipation.

4 See Canada Inc [26]
5 See Canada Inc [28]
6 See Canada Inc [32]
7 See Canada Inc [39]
8 See Canada Inc [42]
9 See Canada Inc [30]

BRITISH NEOBANKS HAVE A FRAUD PROBLEM

HERE'S HOW TO FIX IT

Authored by: Steven Haynes (Director) - Greyhawk

In October 2024, UK regulators overhauled the rules under which British banks should reimburse the victims of fraud. There were three key changes:

- Reimbursement is now mandatory, replacing a voluntary code.
- Victims should be reimbursed for their losses up to a cap of £85,000.
- The burden of reimbursement should be shared by the victim's bank (from which money was paid) and the "receiving bank".

The new rules apply to Authorised Push Payment ("APP") fraud. These are swindles in which the victim is tricked into making a payment for a transaction they believe to be genuine, but which in reality is a scam.

APP fraud remains a blight in the UK: in 2023, criminals made £460m this way.[1]

APP frauds come in different forms. Victims may pay for goods (cars, tech, holidays, and concert tickets) which never materialise. They make investments (in gold, wine, crypto and land) which don't exist. Others are tricked by online romance scams. Some pay what they believe to be genuine invoices from suppliers they know, but whose email systems have been compromised. Law firms, makers and receivers of large payments, are a prized target.

The new rules are welcome, up to a point.

The voluntary code was described as a "lottery" by consumer groups, with good reason. Victims received reimbursement not on the facts of their case, but on the identity of their bank. TSB and Nationwide reimbursed over 80 per cent of their customers' losses. Monzo, Danske Bank and AIB each returned less than 20 per cent.[2] The new rules will bring some consistency.

The £85,000 cap is generous and will adequately cover most victims. Consumer groups had pushed for a cap at £415,000; the push-back from banks was stronger.

They argued that such a high cap would lead customers to be reckless and incentivise fraudsters to collude in staged scams, where both purported victim and scammer were on the same side.

The third change warrants the most scrutiny. Under the old system, banks could be forgiven for feeling torn. On the one hand, they want to show

1 Source: UK Finance Limited, a trade body

2 Source: Payment Systems Regulator

compassion to elderly and other vulnerable customers who are targeted by often sophisticated criminals. On the other, they might have justifiably felt miffed at having to refund credulous customers who fell for ruses that were obviously too good to be true. The latter sentiment may have hardened in July 2023 when the Supreme Court ruled in the Philipp case, contrary to long-held assumptions, that banks did not have a duty to protect their customers from making misguided payments, even when the bank suspected the customer was being defrauded.[3]

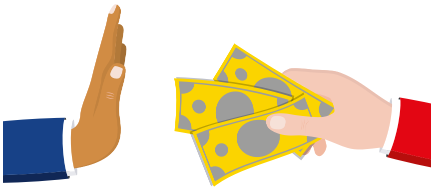
But the new regulation that sending and receiving banks are equally liable for reimbursement is a fudge. Regulators have missed an opportunity to stop punishing banks for doing what their customers instruct them to do - and start properly penalising banks who make this fraud too easy.

For just as the sending bank is sometimes referred to as "victim's bank", the receiving bank should be better known as the "fraudster's bank".

Crunching APP data for 2023 collected by the Payment Systems Regulator ("PSR"), which introduced the new rules, supports this view.

The data (see table below) shows a striking disparity between banks in the proportion of fraudulent payments that they receive. Further, a clear correlation between certain types of bank and APP fraud emerges.

The PSR found that for every £1m paid into accounts at Skrill, an e-Money firm, £18,550 was the proceeds of an APP fraud. That compares with just £408 at TSB, the "worst" performing traditional bank. Put another way, Skrill handles 45 times as much stolen money as TSB, taking their different sizes into account. It is over 100 times more than HSBC and Lloyds, 200 times more than Barclays and 300 times more than NatWest.



After Skrill, the next worst performers are Zempler Bank (founded in 2005 and known as Cashplus Bank until this year), PayrNet, and PrePay Technologies (both e-Money firms). Revolut, Starling and Monzo do a bit better, but all the challengers receive higher levels of fraud-tainted money than traditional banks.

Following the Phillip case, victims' lawyers have turned their attention to bringing claims against receiving banks. But they have struggled. The claims have deployed various arguments, including those related to a "retrieval duty", "unjust enrichment" and "dishonest assistance". None has yet to land a knock-out blow.

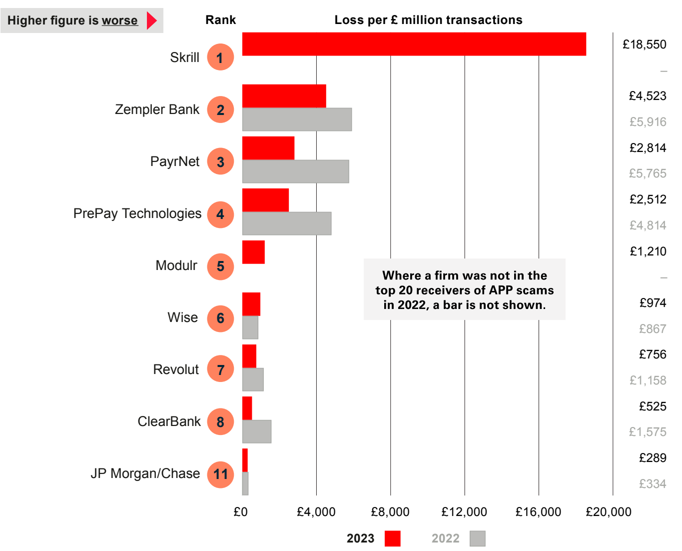
The apparent challenges of redress through the Courts makes effective regulation even more important. The Financial Conduct Authority knows there is a problem. Following a 2022 review, the regulator said:

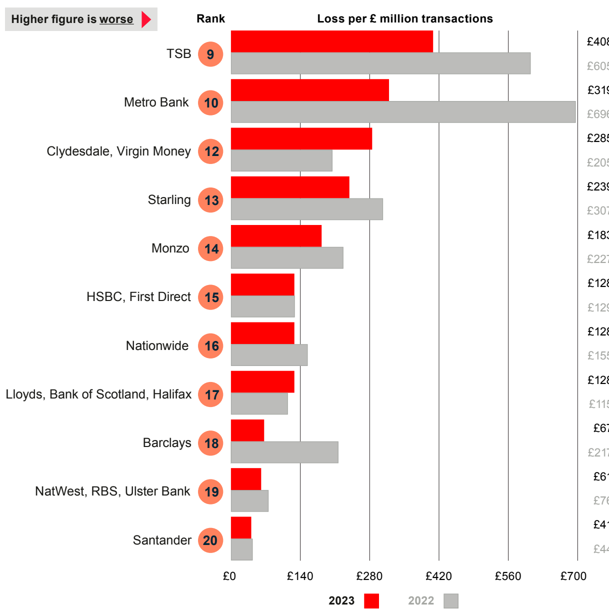
"Challenger banks are an important part of the UK's retail banking offering. However, there cannot be a trade-off between quick and easy account opening and robust financial crime controls. Challenger banks should consider the findings of this review and continue enhancing their own financial crime systems to prevent harm."

In 2024, it stopped DZing Finance, another payment fintech, from taking on any new customers, having found that nearly 1 in 5 payments it received were linked to APP fraud.

In summary, the data are clear: too many challenger banks, e-Money firms and recently formed payment service providers are opening accounts for too many fraudsters. The most effective step in curbing APP fraud is to make these receiving banks liable for 100 per cent of the compensation due to victims.

This article was first published on www.greyhawk-uk.com

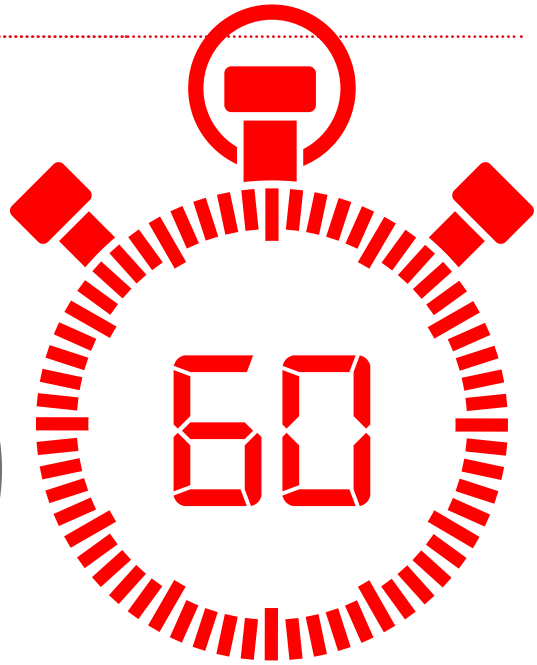




3 Philipp v Barclays Bank UK plc [2023] UKSC 25

60-SECONDS WITH:

HANNES ARNOLD SENIOR PARTNER GASSER PARTNER



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

A Travelling the world, getting to know new cultures and people.

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

A Finding solutions for difficult situations and in best case, untie the Gordian knot.

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

A Recovering legendary pieces of art on behalf of a client in a Freeport assisted by international art experts.

Q What is one work related goal you would like to achieve in the next five years?

A Continue to provide a value driven working environment despite the massive growth of our company.

Q What has been the most significant trend in your practice this year?

A War of the talents.

Q What book do you think everyone should read, and why?

A *The Alchemist*. I learned that your focus determines your reality.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Niki Lauda, in my view the first sportsman who used his fame to drive his business and overcome incredible obstacles.

Q What is the best film of all time?

A *True Romance.*

Q What legacy would you hope to leave behind?

A Happy family.

Q Where has been your favorite holiday destination and why?

A Morocco, because of its impressive culture and history.

Q What is the best life lesson you have learned?

A Never give up.

Q What piece of advice would you give to your younger self?

A Once again, never give up.


serle court
“Serle Court offers a variety of skill sets that others can’t provide, and houses some of the biggest names at the Bar”
SERLE 6 COURT
Civil Fraud
Commercial Litigation
Company
Insolvency
International and Offshore
Partnership and LLP
Private Client Trusts and Probate
Property
Arbitration
Mediation
&chancery commercial
in Serle Court
+44 (0)20 7242 6105
clerks@serlecourt.co.uk
www.serlecourt.co.uk

DIRECTORS' LIABILITY TO THIRD PARTIES

serle court

CORPORATE PARTNER

THE SUPREME COURT'S JUDGMENT IN LIFESTYLE EQUITIES V AHMED

Authored by: Wilson Leung (Barrister) - Serle Court

This article examines the UK Supreme Court's decision in Lifestyle Equities v Ahmed [2024] UKSC 17, where the Court considered company directors' accessory liability for torts committed by their companies. Rejecting the existence of any special rules for directors, the Court affirmed that ordinary principles of tort liability were applicable, such that directors could incur accessory liability if they procured or participated in a common design with the company to commit a tort. However, the Supreme Court limited such liability by requiring directors to have knowledge of the "essential facts" rendering the act wrongful. This article ends by posing the question of whether too wide a net has now been cast over directors.

Introduction

When a company commits a tort and thereby causes harm to a third party, can the third party sue the company's directors for procuring or assisting in the company's wrongdoing? In practice this can be a vital question. The third party might have difficulty in obtaining recourse against the company (e.g. if the company is insolvent) and thus need to target the directors for compensation. It might also be easier for the third party to achieve a settlement if it is able to sue – and thereby put pressure on – the company's directors.

This question was the subject of weighty consideration in the UK Supreme Court's judgment in Lifestyle Equities v Ahmed [2024] UKSC 17, where Lord Leggatt JSC (giving the only judgment) clarified the principles underpinning directors' accessory liability.

Background

Lifestyle Equities v Ahmed arose from claims of trademark infringement brought by Lifestyle (the owner of the 'Beverly Hills Polo Club' trademarks) against several companies that had allegedly infringed those trademarks. Additionally, Lifestyle sued the directors of those companies (the Ahmeds). Lifestyle alleged that the Ahmeds were liable for their companies' wrongful actions and sought an account of profits against them.

At first instance, the High Court[1] found that the Ahmeds were jointly and severally liable with the companies for the acts of trademark infringement (which are torts), because they had authorised, procured, or engaged in a common design with the companies to do the acts. The judge held that the Ahmeds were liable to account for any profits which they had personally made from the infringements (though rejected Lifestyle's claim that the Ahmeds were liable to account for the companies' profits). This was upheld by the Court of Appeal.[2]

However, the Supreme Court allowed the Ahmeds' appeal, holding that they were not jointly liable with the companies.

No Special Exceptions for Company Directors

In reaching that conclusion, the Supreme Court[3] began by rejecting several arguments advanced by the Ahmeds.

The Ahmeds argued that, where directors have acted properly in performance of their duties to the company, then their acts are treated in law as the company's acts, and consequently they will not be held personally liable for the company's tortious acts.

However, this argument was rejected by Lord Leggatt, who emphasised that the ordinary principles of tortious liability – including accessory liability – were applicable to directors and they did not benefit from any special exception:

"I do not accept that there is any general principle of English law – whether of company law, the law of agency or the law of tort – which exempts a director, acting in that capacity, from ordinary principles of tort liability."[4]

Lord Leggatt observed that the Ahmeds' argument rested on a non sequitur which he termed the "dis-attribution fallacy". This was the notion that when a director acts in such a way that his action is attributed to his company, that act becomes the company's act and not his personal act. However, this line of thought was fallacious:

"It does not follow that, because an act done by a director or other individual is treated as the company's act for which the company can be held liable, the director is immunised from liability."[5]

The Ahmeds pointed out that, although a director could be held personally liable for procuring his company's breach of contract with a third party, it was well-established (under the "Said v Butt rule"[6]) that the director would not be liable if he had acted bona fide and within the scope of his authority. The Ahmeds argued that the same exception should apply where a director procured his company to commit a tort, and had acted bona fide within the scope of his authority. However, this contention was rejected by Lord Leggatt, who held that the "Said v Butt rule" was confined to procurement of breach of contract, and did not extend to procurement of tortious acts.[7]

Accessory Liability

Thus, to assess whether a director is liable for his companies' tortious acts, the court would apply the ordinary principles of accessory liability. Under such principles, a director could be liable in two separate ways. First, he could be liable for 'procuring' the company to commit the tortious act.[8] This would be the case if he procured, authorised, induced, or incited the company to commit the act. Second, he could be liable for participating in a 'common design' with the company to commit the tort, in which he had given his assistance.[9]

1 [2020] EWHC 688 (Ch)
2 [2021] EWCA Civ 675
3 [2024] UKSC 17
4 [33]
5 [35]
6 Said v Butt [1920] 2 KB 497, 506
7 [47], [54]-[57]
8 [76], [106]
9 [117]

Knowledge Requirement for Accessory Liability

However, the Ahmeds succeeded on the appeal because of the Supreme Court's view of the knowledge requirement for accessory liability in tort.

The lower courts had held that, for a tort of strict liability such as trademark infringement (for which the infringer can be liable even if it had no knowledge that it was violating a trademark), an accessory can likewise be held jointly liable even if he had no such knowledge.

Lord Leggatt held that this was incorrect: for an accessory to be liable, the accessory must have sufficient knowledge of the facts which make the primary infringer's act a wrongful one. This was the case even if the tort itself was one of strict liability. Lord Leggatt explained:

> ***"…to be liable as an accessory for procuring a tort, a person must know the essential facts which make the act done wrongful, even if the tort is one of strict liability."***[10]

This knowledge requirement was applicable to both variations of accessory liability, i.e. 'procurement' and 'common design'.

The trial judge had made no findings that the Ahmeds knew or should have known that there was a likelihood of confusion between Lifestyle's trademarks and the companies' products. Nor had the judge found that the Ahmeds knew that the reputation of Lifestyle's trademarks would be adversely affected by the companies' use of similar logos. In the circumstances, Lord Leggatt held that Lifestyle's claim against the Ahmeds failed, because the Ahmeds were not proved to have the requisite knowledge for accessory liability.[11]

Conclusion

Lifestyle Equities casts – or recognises the existence of – a wide net over directors in terms of their potential accessory liability for procuring or assisting their companies to commit tortious acts. Lord Leggatt's judgment highlights that there are no special rules or exceptions for directors in this area, and that the court would simply apply the ordinary principles of tort liability (and, in particular, principles of accessory liability).

However, Lifestyle Equities is unlikely to be the last word on this topic. For one, the knowledge requirement – i.e. that the accessory must know the "essential facts" which make the act wrongful – will need to be explored and refined in subsequent cases. Further, it is debatable whether Lifestyle Equities has cast too wide a net over company directors, such that directors could be inhibited from making robust commercial decisions that would otherwise be in their companies' best interests due to fear of incurring personal liability.[12] It is not inconceivable that the matter could be revisited by the Supreme Court in the not-too-distant future.

10 [131]; see also [108], [137]
11 [138]-[141]
12 cf PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd [2018] SGCA 17, [68] (in relation to procurement of breach of contract); MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441, [47]-[49].

ATTACHING UK REAL ESTATE

IN THE CONTEXT OF SOVEREIGN ARBITRATION ENFORCEMENT

Authored by: Jack Nithavrianakis (Associate) - Alaco

In the thankless task that can be monetising awards against sovereigns, attaching real estate in the UK has become somewhat of a holy grail in the enforcement team's arsenal. A combination of a legal system friendly towards creditors and an unusual level of available disclosure makes real estate a prime asset class and the UK an ideal jurisdiction. For a successful attachment, however, creditors must consider several potential hurdles, including questions surrounding beneficial ownership and the nature of the property's non-diplomatic usage.

At the outset, the question of ownership is usually fairly cut and dry. Once you wrap your head around the rather antiquated system of freehold and leasehold titles, the UK Land Registry offers plenty of information as to who owns a property, the date and price of the purchase, and even specifics regarding any charges associated with the property. In the context of state-owned properties, sovereigns strategically employ the question of beneficial ownership as a defence mechanism to prevent creditors from attachment.

In its attempt to satisfy a multibillion-dollar award against the National Iranian Oil Company (NIOC), Crescent Gas Corporation (Crescent) sought to seize NIOC House, a prime piece of London real estate worth approximately £100 million. When it started its enforcement efforts in the UK in July 2022, NIOC was listed at the property's owner, and had been since 1975. However, upon placing an interim charging order on the property in November 2022, Crescent was informed that the ownership of the property had in fact been transferred to the Retirement Saving and Welfare Fund of Oil Industry Workers – NIOC's pension fund – in August 2022.

Crescent claimed in an application to the English courts that NIOC had made the ownership transfer in an attempt to avoid paying the creditor. NIOC, on the other hand, argued that its pension fund had been its owner

since 1975, and that the company had been "amin," a role used in Iranian law which does not involve ownership, but acts almost like a trustee. Specifically relying on filings published by the land registry and held in various archives, Crescent successfully argued that NIOC had been NIOC House's de facto owner since 1975, and that the "amin" agreement did not apply to the property.

The English courts granted Crescent permission to enforce its award, considering that the creditor was successful in being able to demonstrate to that the transfer was not only made in "circumstances of great expedition" – i.e., as a matter of great urgency – but also that the transaction was significantly undervalued.

The judge therefore concluded that the changing of its listed ownership was done to protect NIOC House from NIOC's creditors.

State-owned real estate portfolios more broadly often include residential properties, cultural and language centres, and, particularly in the case of its state-owned entities, commercial real estate. When it comes to enforcement proceedings, creditors must demonstrate what the properties are used for, requiring them to successfully disprove the argument of sovereign immunity. Sovereigns routinely use the argument that residential properties under their ownership are used by diplomats or individuals affiliated with its embassy, thus falling under the bracket of sovereign immunity.

For example in 2023, General Dynamics UK Ltd (General Dynamics) sought to satisfy its £16 million ICC award against the State of Libya by placing an interim charging order on a high-value London property.

Previously belonging to the son of the former Libyan leader Muammar Gaddafi, Libya took ownership of the property in 2012. Libya initially opposed the interim order, arguing that a diplomat had been residing in the property since April 2023, thus entitling it to diplomatic immunity. Libya withdrew its argument after General Dynamics' lawyers provided surveillance evidence to refute the claims of a diplomat residing there.

Identifying the occupants of a property in the UK can these days be done online. There are a multitude of platforms and databases which aggregate data from a combination of sources, including phone directories, the electoral register, and credit data, which offer insights into individuals affiliated with a specific address.

As outlined in both examples, the volume of information obtainable online in the UK makes it one of the most popular jurisdictions for enforcement against sovereigns. With real estate generally considered a top commodity in the UK, identifying the property portfolio of the relevant debtor state must be a priority in any enforcement campaign.

FIRE International: Vilamoura

20th - 22nd May 2025 | Anantara Hotel, Vilamoura, Portugal

The flagship International Asset Recovery event in the fraud & insolvency practitioner's calendar

APP FRAUD

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

CORPORATE PARTNER

REASONS TO BE NERVOUS FOR THE RECIPIENT BANK?

Authored by: Michael Walker (Associate) - Kingsley Napley

Inventive Claims and Ballooning Fraud

Authorised Push Payment fraud ("APP Fraud") is prolific; according to UK Finance, cases of it rose by 12% last year to reach a whopping 232,429 cases, with total losses of just under £460 million.

Unless the victim has realised exceptionally quickly that they have just suffered from APP Fraud and the relevant payment service provider ("PSP") equally acts promptly, the fraudster is likely to have already moved the funds on, washing it through layers of accounts to make recovery as difficult as possible.

Given the extent to which APP Fraud is ballooning across the UK, it is no surprise that 2024 saw the Courts of England and Wales wrestling with claims brought by APP Fraud victims against receiving PSPs. Two of the inventive arguments deployed by APP Fraud victims in particular managed to survive the summary judgment applications they faced; claims in unjust enrichment and claims in what is now known as the 'Retrieval Duty'.

Unjust Enrichment

Taking each of the four elements of unjust enrichment in turn:

Was The Claimant Enriched?

In Terna Energy Trading doo v Revolut Ltd the High Court dealt with a reverse summary judgment (and alternatively strike out) application, regarding an unjust enrichment claim in the context of an APP Fraud. After a detailed analysis of the relevant authorities, it stated (at paragraph 71) that:

"the answer on the authorities must be that the applicant has indeed been "enriched", in the special, technical sense in which the question is formulated".

It noted (at paragraph 69) that a PSP following receipt of a payment as a result of an APP Fraud "has more beneficially owned assets after the payment than it had before. Moreover, [it] can properly profit from holding the money in several ways, including keeping any interest paid".

Was That Enrichment At The Claimant's Expense?

As the Supreme Court at paragraph 46 of Investment Trust Companies v HMRC made clear, this element will be made out when "the defendant has received a benefit from the claimant, and the claimant has incurred a loss through the provision of that benefit".

This includes the APP Fraud scenario, where at the Claimant's request, an agent bank has transferred its principal's funds to another bank.

In applying the ITC principles in the context of APP Fraud, Terna Energy concluded that such transfers from a Claimant to a recipient bank are "a classic case of agency" (paragraph 90) and as such, constitute enrichment at the Claimant's expense.

In 2022, the High Court in Tecnimont Arabia Limited v National Westminster Bank Plc came to a very different conclusion; holding that it was not possible for standard international bank transfers to result in the enrichment of a receiving PSP at the expense of a Claimant. The decision in Terna Energy addresses Tecnimont directly, broadly concluding that Tecnimont had incorrectly applied the ITC decision to circumstances involving APP Fraud and had incorrectly adopted an overly technical view of international bank transfers such as to make finding any enrichment impossible.

Was That Enrichment Unjust?

In Tecnimont, which itself was a standard APP Fraud scenario, the Court found that any enrichment in that case ought to be considered unjust (paragraph 159), given a material mistake was made on the part of the Claimant and the Claimant did not unreasonably run the risk that they were acting on a mistake. The Court came to this conclusion even though parts of the fraud in Tecnimont were "amateurish and inept" (paragraph 156).

Are Any Defences Available?

Recipient banks are likely to rely upon a change of position defence with the Courts being asked to consider whether It would be unconscionable to allow such a defence.

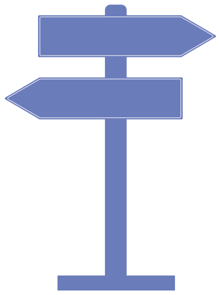
This is likely to be highly fact dependent. For instance, were a receiving bank to not have done all it reasonably ought to have, in accordance with its regulatory framework (in terms of KYC or its anti-money-laundering obligations), a court could conclude that it would be unjust to allow a defence of change of position.

The Retrieval Duty

Another reason receiving PSPs may be feeling nervous is the fact that there have been two recent instances of a novel breach of duty argument surviving a summary judgment application; the argument contends that a duty exists between an APP Fraud victim and a receiving PSP, despite the lack of any relevant contractual relationship.

In the Supreme Court judgment in Philipp v Barclays Bank UK PLC and subsequently in 2024 in the High Court decision of CCP Graduate School Ltd v National Westminster Bank PLC & Anor, the Court refused to summarily dismiss arguments that a duty can be triggered between a receiving PSP and a victim of an APP Fraud when the former receives notice of the fraud from the latter (the "Retrieval Duty").

While proponents of a Retrieval Duty can feel confident it could survive a summary judgment application, how it will fare when exposed to a full hearing is far from certain – the arguments around the Retrieval Duty are still to benefit from a positive decision either way. However, before any full hearing is come to, Terna Energy faces a date with the Court of Appeal, with permission to appeal already granted.



New and Old Regulatory Routes to Compensation

All of the fascinating, emerging potential avenues against receiving banks aside, there has been another significant development: the mandatory reimbursement scheme.

This scheme, which came into effect in October 2024, allows all eligible APP Fraud victims to apply for reimbursement from the sending PSP. It remains to be seen how the PSPs will interpret the exceptions of the victim acting fraudulently or with gross negligence. The reimbursement is capped at £85,000.

It shouldn't be forgotten however that complaints to the Financial Ombudsman Service ("FOS") remain open to APP Fraud victims. The highest cap on compensation for a successful FOS complaint is £430,000.

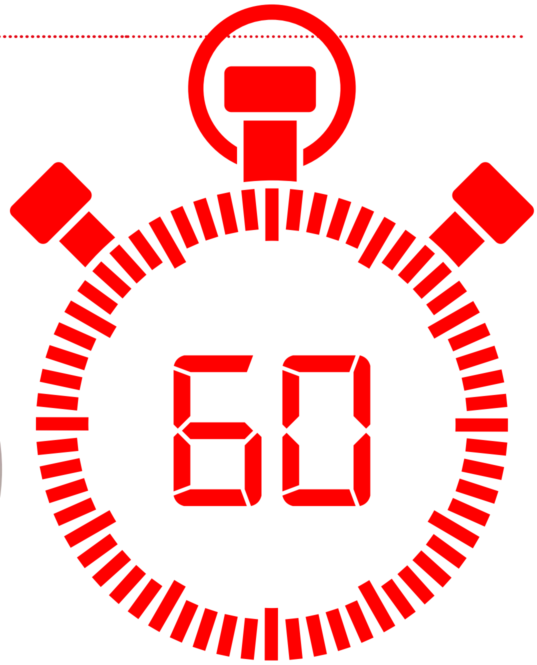
Conclusion

For the vast majority of APP Fraud victims, the mandatory reimbursement cap will be more than sufficient.

However, where it is not, and where there are apparent failures by PSPs involved, a FOS complaint remains a very strong option. For the cases involving extremely high losses, litigation against the receiving bank remains open to the victim.

Until the Courts conclusively decide whether APP Fraud victims' claims in unjust enrichment and the Retrieval Duty are viable, there remain several reasons for receiving banks to be nervous.

60-SECONDS WITH:



BARUCH BAIGEL
PARTNER
ASSERSON

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

A I would share my time between reading/writing about ancient legal history and composing music.

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

A Working ones way through a maze of complex and brain-stimulating legal issues and the daily collaboration with colleagues and clients.

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

A I was driven by my client's driver to a mystery location in Paris to proof a mystery witness. Closest I ever came to James Bond.

Q **What is one work related goal you would like to achieve in the next five years?**

A To do more oral advocacy both in court and before arbitral tribunals.

Q **What has been the most significant trend in your practice this year?**

A We are seeing an increase of fraud related cases arising out of family breakdowns, often at the level of second generation recipients of wealth created by the first generation.

Q **What book do you think everyone should read, and why?**

A The Bible has something for everyone – poetry and prose, law and strategy, history and politics, ethics and philosophy – the world's best-selling book for a reason.

Q **What is the best film of all time?**

A *My Cousin Vinny*, although I only allow my trainees to watch it after they have qualified.

Q **Where has been your favorite holiday destination and why?**

A The Dead Sea (Israel) – a holiday resort par excellence on the coast of one of the natural wonders of the world, surrounded by ancient history, hikes and stunning vistas of the desert and all this just a couple of hours' drive from my home.

Q **What is the best life lesson you have learned?**

A "If I am not for myself, who will be for me? If I am only for myself, what type of person am I? If not now, when?" 1st Century rabbinic idiom.

ACCOUNT OF PROFITS AGAINST ACCESSORIES

Authored by: Lucas Moore (Partner) and Victor Lui (Associate) - Payne Hicks Beach

What is the scope of the remedy of an account of profits against accessories to wrongdoing that a claimant victim can recover? In this article, Lucas Moore (Partner) and Victor Lui (Associate) examine the recent cases of Lifestyle Equities CV v Ahmed[1] and Hotel Portfolio II UK Ltd v Ruhan.[2]

Account Of Profits

The remedy of an account of profits is discretionary and personal in nature, requiring the wrongdoer to give up their profits made as a consequence of their breach. The measure is the defendant's gain as opposed to the claimant's loss.

This remedy is not generally available for breach of contract or in tort. Damages in contract are usually intended to place a claimant in the position they would have been in had the contract been performed. Damages in tort typically aim to place a claimant in the position they would have been in had the tort not been committed, albeit an account of profits is an established remedy in the infringement of intellectual property rights.

In contrast, an account of profits is a well-established remedy in equitable wrongs such as breach of fiduciary duty or breach of confidence. Where a fiduciary has taken property or exploits an opportunity belonging to the principal, the fiduciary is liable for any unauthorised profits made, held on constructive trust for the principal. The principal is required to elect between an account of profits and equitable compensation, and cannot claim both.[3] It may be favourable to claim an account of profits where: (1) they are evidentially easier to quantify than the loss suffered; (2) the principal may wish to trace into any substitutes; or (3) the principal may wish to gain priority over other creditors of the fiduciary.

However, in the case of accessories, can the law require them to repay profits that were made by the primary wrongdoer, or only the profits that they themselves made? The answer is decidedly the latter in view of recent legal developments.

Accessory Liability

At Common Law

The scope of accessories' liability in tort was clarified in the Supreme Court decision of Lifestyle Equities CV v Ahmed, a case involving the statutory tort of trademark infringement. Lord Leggatt JSC explained that there are two distinct possibilities: (1) where a person knowingly procures another to commit an actionable wrong, they will be jointly liable with that other person for the wrong committed; (2) where a person gives another person more than trivial assistance to commit a tort, pursuant to a common design between the parties, then they will also be jointly

1 [2024] 2 WLR 1297, [2024] UKSC 17

2 [2024] 2 All ER 903, [2023] EWCA Civ 1120

3 Tang Man Sit (decd) v Capacious Investments Ltd [1996] AC 514, 521A-C (Lord Nicholls)

liable. In either case, the accessory must have knowledge of the essential features of the tort to be liable (even where the tort is one of strict liability).[4]

The court further held that the only profits which an accessory could be ordered to account are those which they have made, because the remedy operates to require that defendant to disgorge a gain derived from the wrong, rather than to pay a penalty or a fine.[5]

On the facts of Lifestyle, the claimants sued two companies and their directors for infringement of registered trademarks and passing off, in their having deployed infringing signs in the sale of clothing and footwear. One of the defendant companies, HS, subsequently went into administration. The claimants elected to claim an account of profits against the wrongdoing directors.

The Supreme Court held that the directors had not themselves infringed the claimants' trademarks,[6] nor should they be liable as accessories because there was no finding at trial that they had the requisite knowledge for the infringements committed by HS.[7] The court further held that the following did not constitute profits which should be accounted for: (1) a loan advanced by HS to a director, which was not argued to be a disguised dividend; (2) the salaries paid to the directors, which were not alleged to be beyond their fair market value.[8]

In Equity

Hotel was a case concerning dishonest assistance of a breach of fiduciary duty. The Court of Appeal similarly held that, while such an assistant is jointly and severally liable with the fiduciary for the principal's loss, the assistant can only be liable to account for their own profits and not for those of the fiduciary.[9]

The facts involved a company HPII which owned a hotel portfolio and was directed by Mr R. HPII entered into an agreement to sell the portfolio at market value to a company CM that was owned by Mr S, who was in fact Mr R's nominee. Mr R had not disclosed his involvement in CM. Subsequently, CM sold the hotels for a profit and made further investments. After HPII entered liquidation, the liquidator brought proceedings against Mr R for breach of fiduciary duty for the original sale of the hotels, and Mr S for dishonestly assisting the misapplication of those profits. At HPII's election, the trial judge ordered Mr R to account for the profits realised for the sales by CM and Mr S to pay equitable compensation in an equivalent amount.

On appeal, the court held that Mr S was not so liable for two reasons: (1) the original sale was inextricably connected to the profits said to be misapplied, such that HPII suffered no loss;[10] (2) it was inconsistent for the claimants to elect for an account of profits as against the fiduciary (Mr R) but seek equitable compensation against the dishonest assistant (Mr S).[11] HPII was granted permission to appeal to the Supreme Court,[12] so the interplay between these remedies awaits further consideration.

Uncharted Territory

Underlying Rationale?

Lord Leggatt JSC referred to two possible rationales of why an account of profits is ordered: (1) deterrence – a defendant should not be allowed to keep profits made dishonestly by knowingly infringing another's rights, so the remedy should remove any such incentive; (2) purposive – intellectual property rights exist to encourage and reward creativity and innovation, and this purpose is promoted by allocating profits made from exploiting the right to the owner. He viewed the second rationale as more cogent but left open whether the first was a viable justification.[13]

The second rationale would, however, appear to support the availability in principle of an account of profits by way of remedy for a wider array of torts than is countenanced by the present state of the law. It may be said that denying a defendant's profits made from property torts (e.g. conversion, trespass) may promote the owner's peaceful enjoyment of their property; or that disgorging profits made from economic torts (e.g. procuring a breach of contract, conspiracy) would better protect legitimate economic interests. Different public policies may be in play for each type of tort, so it would be necessary to examine individually whether the remedy is justified.

Scope Of The Account?

While the court's discretion as to whether to grant an account of profits has to be exercised in accordance with clear principles,[14] it may be preferable that the law allows wider considerations to accommodate the justice of each case.

With respect to Lord Leggatt JSC's ruling, even where an accessory employee receives a fair salary from a company that manufactures infringing goods, it should still be possible to argue that the employee's salary was an effective gain when the infringement has contributed to the company's liquidity or solvency. Instead of categorically rejecting salary as a form of profits, this could have been left as an evidentiary matter for the claimant to prove.[15]

To seek advice on commercial litigation, please contact Lucas Moore or Victor Lui, or alternatively, telephone on 020 7465 4300.

4 Lifestyle, [120], [131]-[137]
5 Lifestyle, [158]-[161]
6 Lifestyle, [33]
7 Lifestyle, [143], [181]
8 Lifestyle, [170]-[173], [182]
9 Hotel, [43]-[45], [60]
10 Hotel, [63]-[69]
11 Hotel, [70]-[72]
12 On 31 January 2024: https://www.supremecourt.uk/pta/permission-to-appeal-2024-01.html
13 Lifestyle, [152]-[155]
14 Lifestyle, [145]
15 C.f. Lifestyle, [173]-[174]

A ROSE BY ANY OTHER NAME

‘A GOOD ARGUABLE CASE’ IN ISABEL DOS SANTOS V UNITEL [2024] EWCA CIV 1109

Authored by: Seohyung Kim (Barrister) - 4 New Square Chambers

Isabel dos Santos v Unitel and a serious issue to be tried: the Court of Appeal gives freezing orders the Broad Idea treatment

In a judgment handed down on 30 September 2024, the Court of Appeal has restated and clarified the law on freezing injunctions: Isabel dos Santos v Unitel [2024] EWCA Civ 1109. The relevant test for obtaining a freezing injunction is now the same as the test for interim injunctions generally: the question is whether there is a serious issue to be tried.

This is a surprising result not least because the focus of the appeal was on whether the merits test for a freezing injunction was (or was not) the same as the test used in the context of jurisdictional challenges. The submissions (and the bulk of Flaux LJ’s judgment) concerned whether the test for obtaining a freezing order is for the applicant to show there is *“a good arguable case”[1] (the classic statement of the test as held in The Niedersachsen [1983] 2 Lloyd’s Rep 600)* or that the applicant has “the better of the argument”,[2] as considered and refined by the Supreme Court in Brownlie v Four Seasons [2017] UKSC 80 and the Court of Appeal in Kaefer Aislamientos v AMS Drilling [2019] EWCA Civ 10 in the context of jurisdiction cases. A divergence in practice at the first instance level had arisen as to which test to apply: two High Court decisions[3] used the “better of the argument”

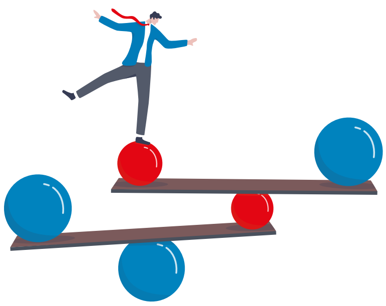
---

1 It was held that a good arguable case is one that “more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success”.

2 Giving judgment for the Supreme Court, Lord Sumption held that a claimant had to show it had the “better of the argument”, which is to say that: “(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.”

3 Harrington & Charles Trading Co. Ltd. v Mehta [2022] EWHC 2960 (Ch)

test in deciding whether a freezing order should be made, but in a more recent High Court decision,[4] Butcher J held that those decisions were wrong.[5] The Court of Appeal in Unitel agreed with Butcher J: in the context of a freezing order, a "good arguable case" is the correct test.



But it is apparent from the Unitel judgment that there was no real focus on whether the test of "good arguable case" should be treated the same as "serious issue to be tried" before the (first) hearing. While the Court invited submissions from counsel on the distinction between a "good arguable case" and "serious issued to be tried" between the first and second hearings, those written submissions were confined to what the Commonwealth authorities said about the merits threshold for granting a freezing order: see paragraphs 106- 107 of the Judgment. It is unclear therefore whether the distinction between a "good arguable case" and "serious issue to be tried" was one which needed to be decided as part of the appeal, or whether it would have had any impact on the outcome for either party. Strictly speaking, the Court's comments in this regard are therefore obiter, although it is expected that High Court practice will adopt this test going forward.

Furthermore, it had been considered that "a good arguable case" required something more than "serious issue to be tried".[6] In Holyoake v Candy [2016] EWHC 970 (Ch); [2018] Ch 297, Nugee J (as he then was) considered that the latter test would filter out only the frivolous or vexatious case such that it was too lenient for freezing orders.[7] It appears to have been thought that because notification orders were at least as invasive as freezing orders and were therefore more invasive than other interim injunctions, a higher threshold was required.[8] This contrasts with the Court of Appeal's conclusion that the distinction between freezing orders and other interim remedies are no longer justifiable.

Nevertheless, it is unlikely that using the "serious issue to be tried" test is likely to open the floodgates for obtaining freezing injunctions. This is not least because whether an applicant has a good arguable case has become increasingly synonymous with whether the claim has a real prospect of success, and it cannot be realistically suggested that the test for summary judgment is somehow less stringent than what has been understood by "a good arguable case" (if different at all). Furthermore, the other constituent elements of the test for obtaining a freezing order – that there is a real risk of dissipation and that it is only granted at the court's discretion – will continue act as important controls. The equivalence between "a serious issue to be tried" with "real prospect of success" may in fact mean that a claimant who does not manage to convince the court that there is "a serious issue to be tried" has essentially failed to clear the threshold for summary judgment. Greater care needs to be taken therefore to the claimant's preparation and presentation of its claim before a freezing order application.

More importantly, what the Court of Appeal judgment in Unitel achieves is an extension of the restatement of the jurisdictional footing for freezing orders set out in Broad Idea.[9]

Historically, freezing injunctions against a prospective defendant (i.e. Mareva injunctions) or a non-party (Chabra orders) as well as interim injunctions (from the American Cyanamid case) have been developed incrementally by English courts faced at each juncture, with a specific set of facts and submissions. While freezing orders have been described as one of the law's "nuclear weapons",[10] they are no longer inherently more invasive and in fact are just as necessary as other interim injunctions are to protecting a substantive right or interest before a final judgment on the merits. That these historically disparate but substantively similar forms of interim relief are brought under the same umbrella of "a serious issue to be tried" is a helpful clarification indeed.

There remain other areas of interim remedies in a fraud practitioner's toolkit that require such reassessment. For example, there is currently a jurisdictional restriction on Norwich Pharmacal orders such that a party wishing to obtain information in England for use in foreign proceedings is forced to resort to the letters of request regime under the Evidence (Proceedings in Other Jurisdictions) Act 1975.[11] It remains to be seen whether the courts will grasp the nettle and restate the juridical basis and powers for interim orders more broadly.

---

4 Magomedov v TPG [2023] EWHC 3134

5 This was because i) a higher degree of certainty in jurisdiction challenges was justified where the issue of whether a jurisdictional gateway was met would not be revisited at trial; ii) imposing a higher burden on the claimant, who in a typical fraud case would struggle to meet the higher threshold, would be inimical to the protection freezing orders are meant to provide; and iii) imposing a higher burden would lead to the court having to adjudicate 'mini-trials' at an interlocutory stage.

6 Holyoake v Candy [2016] EWHC 970 (Ch); [2018] Ch 297, per Nugee J, as he then was

7 A notification injunction is a variant of a conventional freezing injuction requiring a defendant to notify a claimant of any intended dealing or disposal of the defendant's assets.

8 There appears to be continuity between this thread of thought and the misapplied maxim "the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged", which despite the House of Lord's exhortations to put it to rest, continues to spring back to life in dishonesty cases: Gorbachev v Guriev [2024] EWHC 2174 (Comm) at paragraph 8 is a recent example.

9 Broad Idea v Convoy Collateral [2021] UKPC 24

10 Despite it being described as such, the enforcement of worldwide freezing orders issued by the English Court remains defanged by UK's departure from the Brussels Regulation and Lugano Convention. The recent ratification of the Hague Judgments Convention 2019 is a welcome step in the right direction, but interim measures have been carved out of the definition of judgments enforceable under the convention such that pre-judgment freezing orders remain dependent on the patchwork of domestic laws for their enforcement, with all the attendant costs and loss of speed that taking such steps entail.

11 Green v CT Group [2023] EWHC 3168 (Comm)

We are the International Fraud Group

IFG

The International Fraud Group ("IFG") is a network of international lawyers who are experts in Asset Recovery and Fraud Investigation.

We have members spanning over 56 jurisdictions and we cover the globe.

In 1994 a Bank that Mishcon de Reya were working for in the international recovery space expressed a need to access like minded and similarly skilled lawyers across the globe to help them when their and their client's assets had gone astray. The IFG was born in response to that need.

The ethos of the IFG is based on responsiveness, know how and commerciality.

In the Asset Recovery & Fraud Investigation space there is no time to lose when a problem is discovered. Sometimes injunctions are needed on an immediate basis. IFG's members know that every second is valuable when chasing crooks and understand that responsiveness is critical.

There is a huge difference between knowledge and know how. It is the practical application of the law to get a result that the client wants which is at the very core of the IFG.

Knowing what to do and how to do it is not enough. What lawyers in this space need to understand is that clients want and are right to insist on a return on their investment. The costs that a client incurs in an Asset Recovery scenario and/or Fraud Investigation represent an investment. IFG Members know that to justify their existence they must produce a return on that investment in terms of funds or assets recovered.

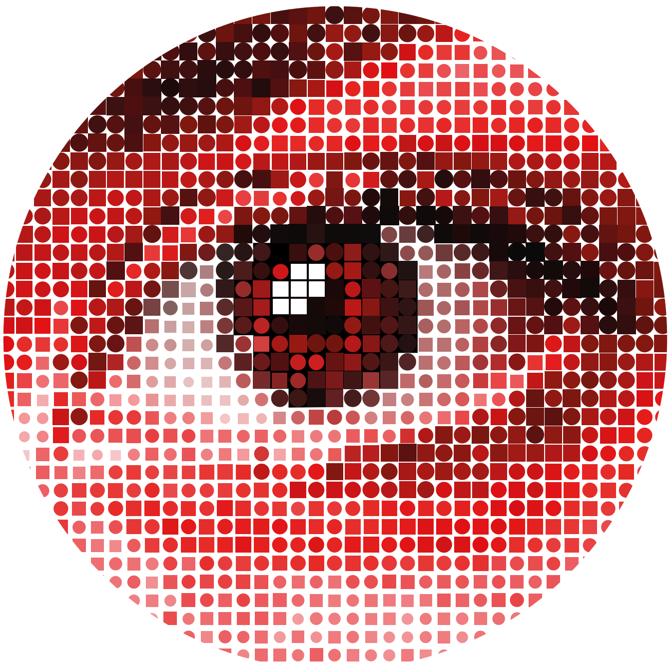
The IFG also has in-depth expertise in the following sectors which are represented by 5 sub-groups namely Crypto Currency, White Collar Crime & Investigations, Arbitration, Shipping and Insolvency.

Contact:

Gary Miller
Partner, Mishcon de Reya LLP
T +44 20 3321 6294
E gary.miller@mishcon.com

Our sponsors

- CENTRAL
- Grant Thornton
- Mann & Associates PAC, Chartered Accountants of Singapore, a Network Firm of KRyS Global
- Queen Mary University of London
- Traffik Analysis Hub
- STOP THE TRAFFIK



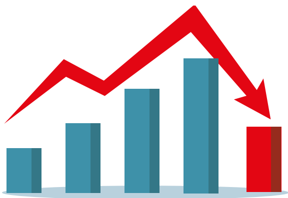
We freeze.
We seize.
We recover.

UAE BANKRUPTCY

ON THE HUNT FOR DIRECTORS

Authored by: Amr Bajamal (Partner) - NHB Legal

Bankruptcy regimes are essentially a legal framework that generally aims at either restructuring troubled corporate entities with view to allowing them to re-enter the market or ensuring their demise in an orderly manner. A central feature of this framework consists of tools that enable recovery for unpaid creditors through measures that combine the administration and possible disposal of the insolvent debtor's assets.



All of this sounds well and straightforward so long as the insolvent debtor has assets to be administered or disposed of. In practice, in the UAE, except for large conglomerates, most of bankruptcy trustees end up with little assets to administer. This can either be due to the entities designed to be assetless from day one or assets having been removed from the company during the years leading up to the bankruptcy.

In such situations, recovery for creditors becomes a far fetched target and often leads to creditors abandoning the bankruptcy process itself to avoid incurring further costs. What we learned in practice is that to get paid a creditor really needs to catch a director or a shareholder.

But How Do You Do That With That With Most Entities Being Limited Liability Companies?

The simple answer for creditors is not to lose hope so easily due to the simple fact that an insolvent debtor operated as a limited liability company. Due to reasons attributable to historical background and market practices, in the UAE there are many avenues that can be explored to get a shareholder or a director to pay up your debt.

The historical reasons mainly relate to the fact that many small to medium sized businesses did not take the entire issue of proper bookkeeping and financial reporting seriously until the introduction of the most recent legislative changes, namely:

(a) The UAE Federal Commercial Companies Law of 2021;

(b) The UAE Federal Law on Taxation of Corporations & Businesses of 2022.

Prior to the introduction of these legislations, whilst many companies practiced bookkeeping, many shareholders and directors did not really pay much attention to basic concepts that govern issues such as, distribution of dividends, related party transactions, disposal of company assets, shareholders' current accounts and director's renumeration. Because many businesses in the UAE are owned by entrepreneurs and families, the internal accounting practices in many companies were relaxed. This may not have necessarily been because of shareholders or directors acting in bad faith, but rather for the lack of a need to enforce the accounting practices expected under the legislative frameworks. Usually, business owners are focused on growing their businesses. If there are multiple unrelated shareholders then the need for strict accounting and governance rules is more pressing. However, if the company has a single owner or is owned by family members, such need does not seem so obvious until, sometimes, it might be too late.

Under the UAE Bankruptcy Law, the main legal provision which every creditor in the UAE must be aware of is Article 246 (1) of the UAE Bankruptcy Law which provides:

1. If a company is declared bankrupt, the Bankruptcy Court may, upon the request of the trustee, the Unit, where the debtor is supervised by the regulatory authority, or any of the creditors, oblige the members of the Board of Directors, the managers, any person responsible for the actual management of the company or those in charge of the liquidation, in respect of the liquidation procedures executed outside the framework of this Law, to pay an amount proportional to the mistake attributed to the person concerned. The amount shall be used to repay the company's debts if it is proven that any of them committed any of the following acts during the two years preceding the company's cessation of payment:

   (a) Using commercial methods, whose risks are not thoughtfully studied, such as disposing of goods at prices lower than their market value in order to obtain amounts with the intention of avoiding bankruptcy proceedings or delaying their initiation;

   (b) Entering into transactions with third parties to dispose of assets without compensation or in exchange for insufficient compensation and without a confirmed or proportionate benefit to the company's assets;

   (c) Paying the debts of any creditor with the intention of causing damage to other creditors;

   (d) If it becomes clear after the company's bankruptcy that its assets are insufficient to pay at least 20% of its debts, as long as it is proven that they failed to manage the company in a way that led to the deterioration of its financial condition.

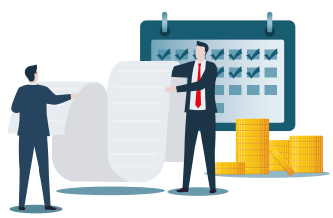
Whilst paragraphs (a) to (c) of Article 246 (1) of the UAE Bankruptcy Law cover classic conduct which is punishable under most bankruptcy regimes, paragraph (d) provides an interesting opening for creditors. The trigger event in this sub-section does not require the creditor to establish that the director (s) committed any of the acts mentioned in the previous paragraph. It is a standalone ground that is engaged if:

- The company's assets are not sufficient to pay 20% of its debts; and
- The director (s) are found to have managed the company is a way that led to the deterioration of its financial position.

If these conditions are satisfied then the court will have to engage in another assessment to ascertain the extent of loss caused to the company by way of the director (s) mis-management, so as to arrive at a figure of compensation to be awarded against the director (s).

Given that many of the directors in small to mid size businesses are often the shareholders or ultimate beneficial owners, creditors may benefit from this legal provision to apply pressure against the director (s) either to secure an award for compensation or reach a satisfactory settlement.

Outside the UAE Bankruptcy Law, tort action still provide an effective tool for creditors if the conditions of the abovementioned Article 246 cannot be met. In general the UAE Civil Transactions Law provides for the ability to seek compensation for any tort or "harmful" act. Article 282 of the UAE Civil Transactions Law operates on a strict liability basis in the sense that a victim of a harmful act is only required to establish the defendant's responsibility for the underlying act together to a chain of causation to the loss.



In many cases, during the bankruptcy proceedings, bankruptcy trustees request financial statements of the debtor for a number of years dating back to 5 or more years. Because of serious sanctions, including criminal offences, directors or former directors often tend to comply with these requests for financial statements.

These statements sometimes reveal a host of irregularities in relation to:

- The failure to record the debt in question as an outstanding amount in the company's books due to misconceived understandings of legal and accounting principles;
- Distributions of dividends further to questionable accounting practices;
- Drastic changes in the levels of revenue of the company on a year to year basis;
- Unjustified directors' renumerations.

If any such irregularities become evident then it can form the basis to pursue a tort claim against the director (s) outside of the bankruptcy regime.

In order to achieve an advantageous position, under both routes, creditors must be diligent in their analysis of financial data disclosed to the bankruptcy trustee as well as think outside the box. This often requires building a team of both legal and financial professionals with enough experience in contentious insolvency matters.

Women in FIRE

Women in FIRE connects women in litigation or whose practice encompasses or touches upon Fraud, Contentious Insolvency, Asset Recovery and International Enforcement.

This initiative brings together female practitioners and allies of all backgrounds and experiences in one room to discuss current challenges and share knowledge. It is all about continuous connection and forging strong networks that elevate women in the industry. Scan the QR code to find out more.

Upcoming Events

FIRE Starters Global Summit: Dublin

'Women in FIRE' After-Party Drinks Reception - 27 February 2025

FIRE International: Vilamoura

Women in FIRE Dinner - 20 May 2025

To get involved please contact:

Danushka De Alwis

Founder/Director

T: +44 (0) 20 3580 5891
E: danushka@thoughtleaders4.com

"MISFEASANT TRADING"?

DIRECTORS DUTIES AFTER THE BHS DECISIONS

Authored by: Aileen McErlean (Barrister) - Gatehouse Chambers

Introduction

In March 2015, BHS was sold for to Retail Acquisition Limited for the princely sum of just £1. Dominic Chappell (a thrice bankrupt former racing driver with no experience in retail) and his fellow directors took the helm of the struggling group. A little over a year later, in April 2016, BHS collapsed into administration and later insolvent liquidation by which point the net deficiency was a staggering £1.3 billion).

Unsurprisingly, the Joint Liquidators brought actions against the directors for wrongful trading (pursuant to s.214 of the Insolvency Act 1986) and misfeasance under s.212 (including breach of the duty to consider the interests of creditors, the "Creditor Duty").

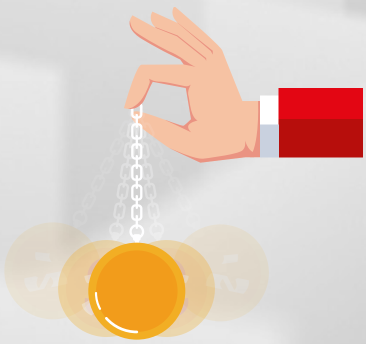
In two controversial judgments: Wright v Chappell & ors [2024] EWHC 1417 and [2024] EWHC 2166 ("the BHS cases"), Mr Justice Leech held that the directors were liable not just for wrongful trading (for which they were liable for -variously- £6m or £21m) but also for breach of the Creditor Duty from an earlier date. As a result of the breach of the Creditor Duty (which the judge termed "the misfeasant trading"), the directors were held liable for the net increase in the deficiency of the company's assets ("the IND") from the date of breach in the sum of £110 million – the same amount that they would have been liable for had they been liable for wrongful trading from that date.

The BHS cases raise a number of issues:

i. Have the lines between wrongful trading and breach of the creditor duty been impermissibly blurred?

ii. Is "misfeasant trading" a new cause of action?

iii. Is the outcome incompatible with fostering a "rescue culture"?



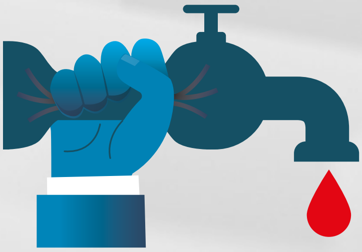
Blurred Lines

The Creditor Duty was considered by the Supreme Court in BTI 2014 LLC v Sequana SA [2022] UKSC 25 ("Sequana"). In Sequana, consensus amongst the Justices was that the Creditor Duty is triggered where a company was 'bordering' on a formal insolvency process or that a process was 'probable' or that entering into a particular transaction would make it so.

However, opinions diverged as to what weight was to be given to the interests of creditors. Competing analyses included 'a duty not to materially harm creditor interests' or 'to be satisfied that the creditors would be no worse off than if company immediately put into liquidation or administration' (Lady Arden); a duty to give the creditors interests 'appropriate weight' as against the interests of shareholders (Lord Reed) and, in certain (unspecified) circumstances, act in the interests of the creditors (Lords Briggs and Hodge).

However, there was broad consensus that the interests of creditors did not (usually) become predominant until insolvent liquidation or administration was 'inevitable'.

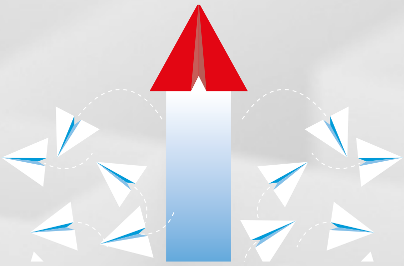
The exceptions (in the view of Lady Arden and Lord Hodge) arise where: (i) a formal insolvency process is more probable than not and (ii) the only prospect of avoiding insolvency was engaging in a risky transaction which would put the company's remaining assets at risk (i.e. an insolvency deepening activity). In those circumstances, requiring directors to give primacy to creditors' interests was 'a necessary constraint on directors' and plugged a 'lacuna' in the law prior to the point of section 214 being engaged.



Section 214 is engaged when a notional director knew or ought to have known that insolvent administration was 'inevitable'. Once that threshold is met, a director is under an active duty to take every step to minimise loss to creditors.

In Sequana, Lord Reed compared the Creditor Duty and Wrongful Trading. He noted the following differences: (i) the Creditor Duty applies at an earlier point in time that s.214; (ii) there is no knowledge requirement for the Creditor Duty to be engaged (unlike wrongful trading); (iii) the duty under s.214 is more onerous in that it requires the director to demonstrate taking objective steps to minimise loss whereas the Creditor Duty is discharged if the director acts in good faith; and (iv) different loss principles applied (equitable compensation vs. contribution to IND in the case of wrongful trading). Lord Reed concluded that breach of the Creditor Duty and Wrongful Trading do not yield the same result.

The BHS cases show that the distinction may be more difficult to draw in practice. In BHS, having found that the directors were liable for wrongful trading from 26th August 2015, the Judge considered whether the Creditor Duty was breached at an earlier point. He held that by 23 June 2015 (before entry into the ACE II facility), the directors knew it was probable that BHS would enter a formal process. The directors were therefore obliged to consider creditors' interests before entering into the ACE II transaction but did not do so.



Had the directors considered the interests of creditors in good faith and still entered into the ACE II facility they might have escaped the consequences of breach (because an honest but misguided view will suffice provided that an intelligent person in that position could have held it). However, where no consideration is given to creditor interests, the question is what would the notional director have done?

The Judge held that a notional director would have not entered into the ACE II facility because it was an onerous transaction which put the last of the property assets at risk and all of the risk was carried by the creditors (i.e. it was the type of insolvency deepening activity referred to by Lord Hodge and Lady Arden).

In terms of loss, the Judge had to consider what would have happened if BHS had not entered into ACE II? On the facts of the case, he found the BHS group would have been placed into a formal insolvency process almost immediately. As a consequence, applying the principles of equitable compensation, the directors were liable for the IND from that point.

Much of the controversy surrounding the case is that, on this occasion, the loss for breach of the Creditor Duty is the same as if the directors had been liable for wrongful trading. That outcome might be a surprise to Lord Reed but is not inconsistent with Lord Hodge or Lady Arden who were concerned about protecting creditors from the risks associated with "insolvency deepening behaviour".

Is "Misfeasant Trading" A New Cause Of Action?

Much has been made of the use by Mr Justice Leech of the phrases "misfeasant trading" and "trading misfeasance". However, looking at the underlying mechanics of the decision, there is scant support for a new duty to avoid "misfeasant trading". The BHS cases are best viewed as an application of the Creditor Duty and a salutary reminder of the potential consequences of breach.

Rescue Culture

There are concerns that BHS will discourage directors from making good faith attempts at corporate rescue for fear of incurring personal liability. That is possible but perhaps unlikely. The notion that defaulting directors may face significant financial liability for their conduct is not new – the Creditor Duty has been with us for some time. What is more likely (or to be hoped for) is that BHS will encourage directors to obtain advice from insolvency professionals at an earlier stage.

KEY DEVELOPMENTS FROM RECENT FREEZING ORDER CASES

Authored by: Charlotte Dormon (Associate) - Kingsley Napley

In the last 12 months, several judgments have tested and considered multiple core legal principles that govern freezing injunctions. This article highlights some of the key cases and lessons that practitioners should bear in mind when instructed on freezing injunctions.

Dos Santos v Unitel SA [2024] EWCA Civ 1109 – September 2024

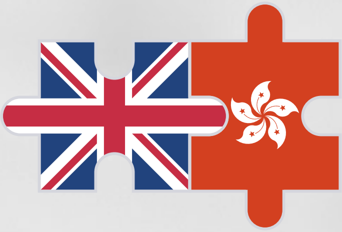
The Court of Appeal decision in Dos Santos v Unitel SA [2024] is the current authority to resolve previous uncertainty on the correct test of 'good arguable case' in WFO applications.

The parties were advancing different positions on what the correct test was for 'good arguable case' in the context of a freezing order application. In this judgment, Popplewell LJ described that the correct test is:

'One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success'.

At [96], Popplewell LJ confirmed that recent decisions applying the three-limbed jurisdictional gateway test "were wrong to do so".

The judgment also confirms that, in respect of continuation applications, costs will be awarded to the successful party and not be carried over as costs in the eventual action. Respondents will need to consider the potential immediate cost consequences of contesting a continuation application.



Mex Group Worldwide Ltd v Ford and Ors [2024] EWCA Civ 959 – August 2024

The Court of Appeal upheld a decision to set aside a freezing injunction sought in England and Wales - pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 ("CJJA") - where the underlying claim was the subject of Scottish proceedings.

Scotland, for the purposes of the claimant's application under s.25 CJJA, was treated as being a separate state despite being a country within the United Kingdom. Applications for interim relief under s.25 CJJA are not automatically granted, and the court has to ask itself whether it is expedient to make such an order in England and Wales if there is no connection to the jurisdiction other than that which is established through this section.

The Court of Appeal determined that there was no substantial nexus between England and the defendant, who was based in Hong Kong and had no assets in this jurisdiction. As such, it was regarded as inexpedient to continue the freezing order.

Never Say 'Never'

Males LJ noted that, even in the absence of a territorial connection to the English court, one could "never say 'never'" to interim relief being granted under this section in that circumstance, thereby retaining the court's discretion to grant interim relief under s.25 CJJA 1982.

Full And Frank (But Streamlined)

The court found that the injunction could also be discharged on grounds of material non-disclosures. The judge made a point as to how parties should approach challenging material non-disclosures: highlighting their best points, particularly in circumstances where there are a significant number of factual points, legal points, or documents that were allegedly absent.

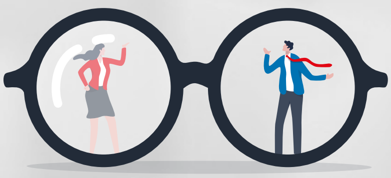
While the court acknowledged that there would always be a balance to the approach (and that sometimes several non-disclosures taken together would amass to a material failing), it is helpful to assist the court pragmatically by separating key non-disclosure points from minor ones, such that the court does not have to spend time separating "the wheat from the chaff". To do otherwise may risk the court refusing to consider complaints on this point at all.

LAX SA v JBC SA [2024] EWHC 2042 (Comm) – August 2024

An inherent price of obtaining an injunction is the cross-undertaking that applicants are required to give, and which the court may order the applicant to fortify.

In this case, the applicant was unable to evidence that it could meet the cross-undertaking in damages or fortify the undertaking in the conventional way (by paying money into the court or issuing a bank guarantee). This was said to be due to a combination of having no assets in the jurisdiction, insufficient liquidity of assets, and a recent and ongoing financial restructuring of the company.

Foxton J considered that requiring the applicant to provide its own asset disclosure would "ameliorate" the applicant's inability to identify any of its assets in this jurisdiction. By providing worldwide asset disclosure as an alternative for fortifying the cross-undertaking, the English court found a new way to address deficiencies in an applicants' ongoing obligation to meet cross-undertakings associated with a freezing order.



If the applicant did not provide the asset disclosure under the terms set out, then the freezing order would be discharged automatically. The respondent also retained the option to pursue fortification at a later date, should circumstances change.

If an applicant lacks assets in the jurisdiction (and to reduce the risk of later fortification applications), they could consider approaching banks to obtain a bank guarantee facility before or at the time of making an application. Such security would be satisfactory to the English Court, relatively cheap to obtain, and avoids the risk of an asset disclosure order. For a respondent, providing an intelligent estimate of their loss is important for the purpose of fortification and increases likelihood of success. In the alternative, transparency into the applicant's assets permit the respondent to locate assets that they may later need to enforce against for damages.

Conclusion

Various legal principles in freezing order cases have been scrutinised by the court in 2024.

The granting and maintenance of a freezing injunction depends on the applicant complying with the duties assumed on seeking a freezing injunction, and the balance of convenience will continue to be addressed by the court for the life of an order. As has been seen this year, the court can impose non-traditional ways to tackle a perceived imbalance. The balance, fortification, and fair presentation of the evidence comprise the protective guard rails at the ex parte stage, and are essential to uphold given the draconian nature of freezing orders.

60-SECONDS WITH:

SUMRU AKTER
SENIOR LEGAL COUNSEL
OMNI BRIDGEWAY

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

A If I no longer had to work, I would spend my time working towards improving the health and development of children living in underprivileged communities. I feel that even the smallest impact on a child's development, be it in the form of financial support or an interesting role model, can lead to significant differences in their life.

Q In your opinion, what are the biggest challenges faced in the enforcement and asset recovery space right now?

A The current geopolitical climate is playing a significant role in shaping international disputes, including enforcement and asset recovery. Armed conflicts, severing diplomatic ties and broken economic relationships are leading to challenges which impact all stakeholders involved in disputes. To name a few examples from the enforcement and asset recovery space, service to Russian parties have become more complicated due to weakening diplomatic ties following the war. Key witnesses and counsel are facing difficulties in obtaining visas to attend hearings due to restrictions in immigration policies in various countries.

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

A Enforcing against a sports club – we identified that the club would have earnings based on their performance in an ongoing tournament. This meant that for a while my work calendar looked like a fixture while I studied various group combinations and prayed for wins!

Q What is one work related goal you would like to achieve in the next five years?

A Having relocated in the last year to Omni Bridgeway's Dubai office, I have an opportunity to expand my knowledge around enforcement and asset recovery practices in the Middle East. Case law is evolving at great speed and towards an arbitration-and-enforcement friendly direction. I think the regional conventions in the Middle East that facilitate judicial cooperation and enforcement of judgments offer interesting tools that could help parties resolve disputes more quickly and efficiently. My goal is to further understand those tools and utilise them better for our clients and investors.

Q What has been the most significant trend in your practice this year?

A Dispute funding became common practice among large corporates – indicating a shift from the misconception that dispute funding is for impecunious creditors only. Large corporates without a need for external finance approach specialised funders to monetise their claims, reduce and control cost and access enforcement expertise while removing expenses from their P&L.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Perhaps not a surprise for someone from Turkey to say… I would love to have dinner with Atatürk, the founder of the Republic of Turkey. Turkey owes its foundations to the vision he had for a modern state that carries the attributes of the East and the West together. His vision, particularly in education, is the core factor in turning Turkey into a modern state and is still praised by experts today.

Q What would you say are the biggest asset recovery trends in the Middle East?

A DIFC Court rendered several decisions where it dealt with certain issues for the first time and decided in ways which showed its willingness to assist parties in international litigation. The Court recently confirmed in SKAT v FFA Private Bank that it was willing to use its power to grant Norwich Pharmacal and Bankers Trust relief in support of foreign proceedings, diverging from the approach of English courts. Similarly, in Muhallam v Muhaf, the Court decided to declare a partial award containing interim measures enforceable. Both cases showcase the DIFC Court's inclination to use its powers in ways that assist litigants in pursuing their claims efficiently.

Q Where has been your favorite holiday destination and why?

A The Algarve region in Portugal – beautiful coastal views, friendly people and delicious food and wine!

Q In the years you have been at Omni Bridgeway, how have client services evolved and what solutions do you provide to clients?

A Omni Bridgeway's offering evolves continuously to provide innovative financing solutions that address the needs of different cases and clients while ensuring strong returns for our investors. For example, we are engaging with financial institutions more than ever to assist in the recovery of their non-performing loans (NPLs). Last year we structured a bespoke deal to acquire an NPL portfolio from a bank in the MENA region – it was first of its kind in the country and required creative solutions. Regardless of the structure, by partnering with Omni Bridgeway the client has access to both our capital and expertise –to outsource the remedial work on time-consuming matters while putting an end to (legal) expenditure on these matters. The ability and desire to keep innovating is one of the most compelling aspects of working at Omni Bridgeway.

INJUNCTIONS TO REMOVE DIRECTORS FROM OFFICE IN S994 PETITIONS

Authored by: Claudine Morgan (Legal Director) - Charles Russell Speechlys

In the recent decision of Garofalo v Crisp [2024] EWHC 1737 (Ch), the High Court has continued an ex parte injunction to remove a company director (and CEO) from his position at a luxury perfume group, due to a high degree of assurance that he had caused the group to continue to trade with Russia in breach of sanctions. The decision demonstrates the Court's powers to grant interim relief in an unfair prejudice application and sheds light on how the Court can, and indeed will, intervene when directors of companies breach sanctions.

Background

The Petitioner (Mr Garofalo) and the First Respondent (Mr Crisp), both shareholders and directors of a group of companies (the Companies) involved in the sale of perfume, entered into an agreement (the Agreement) on 4 January 2016 which set out their business relationship. This agreement required the parties to exercise reasonable endeavours to promote the success of the business and gave Mr Crisp free rein in managing the business.

Following Russia's invasion of Ukraine, from April 2022, the trade of luxury perfumes was prohibited under the Russia (Sanctions) (EU Exit) Regulations 2019 reg.46B (the Regulations). Both Mr Garofalo and Mr Crisp agreed that the Companies would cease any trade with Russia. However, in 2023, after Mr Garofalo's suspicions were aroused that the Companies were still trading with Russia, he instructed a private investigator.

The findings were staggering - allegedly without the knowledge or consent of Mr Garofalo, Mr Crisp had caused the Companies to continue trading with Russia, therefore breaching the Regulations.

The investigations revealed that Mr Crisp had made statements about the Companies' Russian market doing well and that he had blatantly ignored 'government edicts' not to trade there. Furthermore, whilst Russian sales had previously been recorded in their own category, management accounts were now found to have recorded Russian sales in the 'rest of the world' category.

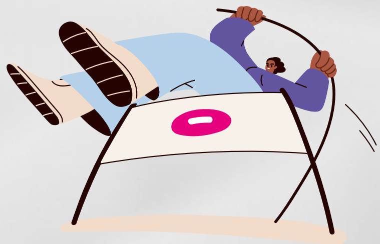
These findings resulted in Mr Garofalo issuing an unfair prejudice petition against Mr Crisp under section 994 of the Companies Act 2006 (s.994) and applying without notice for an ex parte injunction for Mr Crisp's removal as a director from the Companies and the installation of new directors.

The injunction (the Order), along with numerous ancillary orders, was granted on 9 October 2023. On 5 July 2024, Mr Justice Freedman held that the Order would only be continued if the high degree of assurance test was satisfied and if the balance of convenience fell in favour of this continuation. He concluded that it was appropriate to continue the Order and that it should remain in force until trial or earlier order and would not be discharged. The tests and the decision are discussed in further detail below.

Decision

Threshold Test

Mr Justice Freedman determined that the Court could remove Mr Crisp as director and replace him with new directors by way of interim relief in support of an unfair prejudice petition. The relevant test is usually whether there is a serious issue to be tried and, if so, whether it is just and convenient to grant an order. However, in this case it was appropriate to apply an enhanced threshold. This was due to two reasons. Firstly, the Order was exceptional (essentially, changing the status quo of the day-to-day management of the Companies); and secondly, the Order was analogous to a mandatory order, which courts are more cautious about granting due to carrying a greater risk of injustice if incorrectly made.



The Court applied the enhanced, 'high degree of assurance' test, namely that Mr Garofalo would succeed at trial. In applying this test, Mr Justice Freedman found there was a high degree of assurance that: there had been unfair conduct within the meaning of s.994; that Mr Crisp knowingly breached the Regulations; Mr Crisp's conduct breached his fiduciary and statutory duties, and the Agreement; and that prejudice was caused to the Companies as a result.

Mr Justice Freedman held that it was an exceptional case, requiring a change in management at the interim stage.

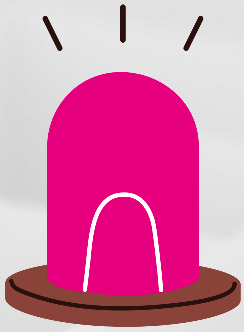
This was due to: the gravity of the breach of the Regulations; the reputational consequences for the Companies unless Mr Crisp was removed as director; the strong prima facie evidence of Mr Crisp's concealment of trading; and, a high degree of assurance that a trial or a cross-examination of Mr Crisp would lead the Court to reject the case that there had been no deliberate breach of Regulations on Mr Crisp's part.

Balance of Convenience

The Court held that the balance of convenience lay in favour of continuing the Order, since in the unusual circumstances the Order was necessary and was not more than was absolutely necessary to preserve the goodwill of the Companies.

The Court confirmed that, if reinstated as director, Mr Crisp would pose an 'existential threat' to the Companies, so an award of damages would not compensate Mr Garofalo, and there was a greater risk of injustice if there was no injunction.

The Companies' successful operation under the newly-appointed management team was also taken into consideration, as well as the fact that it made no commercial sense at this stage to reverse what had been done and to abandon the parties to their own devices.



Conclusion

There is no suggestion that this relief will become ordinarily available to petitioners. The facts in this case were remarkable. Nevertheless, the decision represents a groundbreaking development in the nature of injunctive relief that the court is prepared to grant to protect the rights of minority shareholders in s.994 petitions. The court not only changed the constitution of the board by way of interim relief to remove and install Mr Garofalo's management team as directors, it did so on a without notice application. The effect of this was that Mr Crisp, who had a contractual entitlement to act as sole executive director, was removed from office without even having the opportunity to address the court.

The decision serves to enforce the ongoing trend seen in injunctive relief as a whole that the court will do what is necessary on the facts of the case.

LIABILITY FOR COSTS ON DISCONTINUATION

WHEN MAY THE COURT DEVIATE FROM THE 'USUAL ORDER'?

Authored by: Claudine Morgan (Legal Director) and Mary Barrett (Associate) - Charles Russell Speechlys

There are many different reasons for discontinuance of a claim. Generally speaking, regardless of the reason, the defendant is entitled to recover its costs up to the date of discontinuation. This fundamental entitlement is provided for in Civil Procedure Rule 38.6(1):

"Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."

This is consistent with CPR 44.2(2), with the general rule being that the unsuccessful party will be ordered to pay the costs of the successful party. Common sense certainly dictates that the defendant should not have to bear the burden of costs for a claim which has ultimately been deemed, not worth pursuing (for whatever reason) against it. But akin to CPR 44.2, the Court may make a different order. So when will the usual rule be disapplied and/or deviated from?

A claimant who wishes to avoid an order for costs under CPR 38.6 may apply to the court for its discretion to be exercised. Generally however, the claimant must show some form of unreasonable conduct on the part of the defendant which provides a good reason for departing from the usual rule. What amounts to unreasonable conduct? In Brookes, the Court of Appeal provided guidance in the form of 6 key principles which should be considered for the disapplication of CPR 38.6:

1. The starting presumption is that the defendant should recover its costs and the burden is on the claimant to show a good reason for departing from that presumption;
2. The fact that the claimant would or might have succeeded at trial is not itself a sufficient reason for departing from the presumption;
3. On the contrary, if it is plain that the claimant would not have succeeded in its claim, that is even more of a reason for the usual rule being maintained;
4. Allied to (2) is the fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons, and not a lack of confidence in the merits of the claim, is not enough to displace the presumption;

Whilst the first four principles set down by Brookes dictate 'what will not be considered', the final two principles set the scene for 'what will be considered' to disapply the usual rule:

The claimant will usually need to show a change of circumstances to which it has not contributed to or caused;

And such change in circumstance is only likely to suffice where it has been brought about by unreasonable conduct on the part of the defendant.

Breaking this down, the real questions are how high is this hurdle and what is considered unreasonable conduct? The first health warning is, be prepared to have all and any pre and post action correspondence poured over by the claimant (and the court) in considering and determining this.

What Amounts To A Change Of Circumstances?

Nelson's Yard provides an example of where the court did 'order otherwise' and deviated from the usual rule. Here, the determination of a surveyor, which revealed there were no issues with the excavations (meaning the claimant received the answer they wanted and their land was protected), amounted to a change in circumstances, and more specifically, a change in circumstances whereby the claimant's claim became redundant. On the application of Brookes, it was determined that this change in circumstance (the surveyor making a determination) was brought about by the defendant's failure to respond (at all) to pre-action correspondence and / or to give access to its land for the surveyor to make a determination.

In Hewson v Wells, where the claimant had issued a part 8 claim seeking a declaration that it had beneficial interest in property and sought a copy of deed, the eventual presentation of the deed by the defendant created a change in circumstance, and as in Nelson's Yard, this essentially rendered the claimant's claim redundant.

Similarly, in Benjamin v Benjamin disclosure was sought from trustees prior to proceedings being issued, no response received, proceedings were issued and following disclosure of documents, they were discontinued. Again, the handing over of fundamental documents amounted to a change in circumstances and this was brought about by defendant's failure to provide those prior to issue of proceedings.

What Amounts To Unreasonable Behaviour?

Seeking to untie the tethered principles of five and six in Brookes is clearly a challenge and they must be considered together. In Nelson's Yard, the defendant's failure to engage (at all) in pre action correspondence was largely considered unreasonable. Similarly, the failure to engage in pre-action correspondence in Hewson v Wells, and the failures in Hewson v Wells and Benjamin v Benjamin to disclose material documents was considered sufficient to depart from the normal rule.

Clearly, whilst there are pitfalls for a defendant to avoid, the ultimate burden lies with the claimant to show a reason to depart from the usual rule and this is a high hurdle to leap. Lord Justice Moore-Bick succinctly expressed the underlying rationale for CPR 38.6 and the fundamental presumption on the basis that: "…a claimant who commences proceedings takes upon himself the risk of the litigation."

Lord Justice Moore-Bick went further than this to say that even in

"cases in which it can be said that the defendant has brought the litigation on himself", even "that is unlikely to justify a departure from the rule if the claimant discontinues in circumstances which amount to a failure of the claim".

This has been cited without criticism by the Court of Appeal in four subsequent cases and remains authoritative.

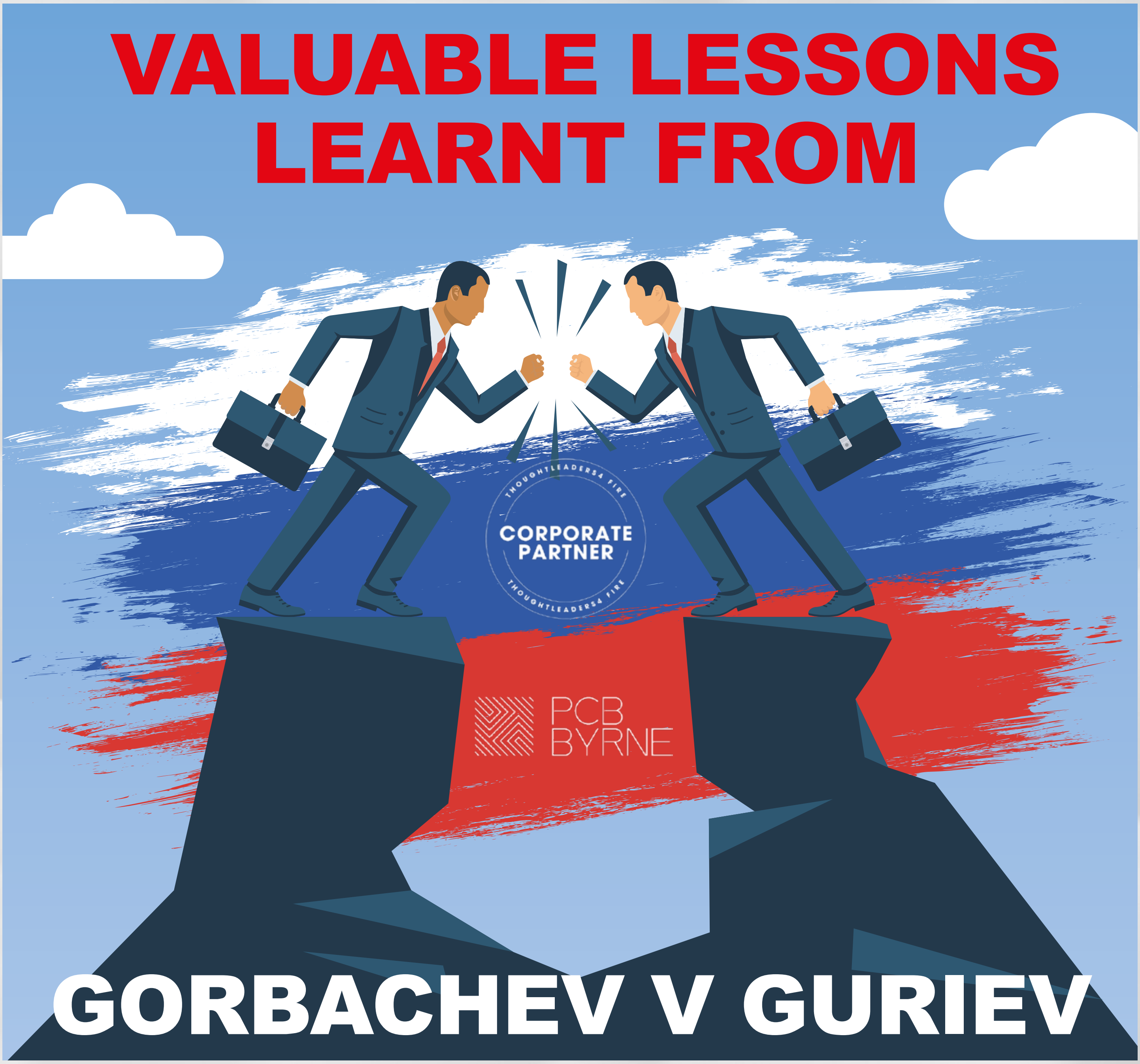
One further point of contention which has arisen in the judicial (dis)application of CPR 38.6 is whether a refusal by a defendant to agree to a standstill for the purposes of limitation is sufficient to amount to unreasonable conduct. In GREP London Portfolio it was said that the fact a defendant refuses to agree a standstill agreement is irrelevant and indeed, it is a defendant's entitlement to refuse to agree to something which seeks to circumvent the underlying statutory provisions on limitation.

In summary, parties must be mindful that whilst the underlying presumption remains that the defendant will succeed in getting costs on discontinuation, there is certainly scope for the court to 'order otherwise'. If an application is made, the dirty laundry of pre-action correspondence will inevitably be aired and parties should be prepared for criticism on conduct. An aggressive approach or tone can look very different with hindsight. That said, the decisions of the court to date, suggest that a differentiation will be made between conduct which can be critiqued in hindsight and conduct which was blatantly unreasonable.

Points To Consider Remain

- Engagement in pre-action correspondence and the brevity of any early response to a letter before action may be considered;
- Refusals to meet other parties either pre or post action, if lacking in explanation and/or reason may be considered;
- The burden is ultimately on the claimant to show it has a legally recognisable claim but there is merit to the defendant stating its case / defence at an early stage and/or highlighting failures and inadequacies of the claimant's claim.

VALUABLE LESSONS LEARNT FROM GORBACHEV V GURIEV

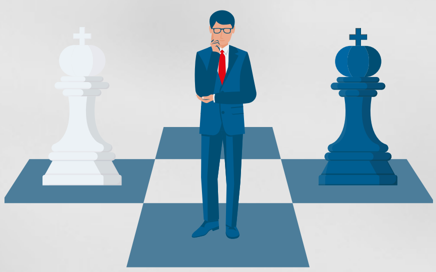


Authored by: Marie Smale (Associate) and Olga Bischof (Partner) - PCB Byrne

2024 was the year of the long-awaited trial in Gorbachev v Guriev ([2024] EWHC 2174 (Comm)), one of The Lawyer Top 20 Cases. The outcome was a decisive win for Mr Guriev. What was the case about, what factors drove the case to trial, and what can be done to redress the balance for defendants facing such unmeritorious claims?

What Was It About?

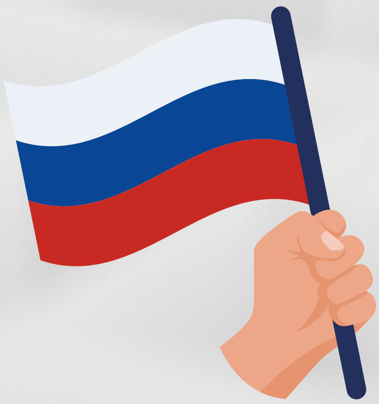
The case centred on a dispute between two Russian businessmen about interests in PJSC PhosAgro, a billion-dollar global fertiliser company acquired in Russia in the post-Soviet era and listed on the Moscow and London Stock Exchange.



Mr Gorbachev's claim, valued at some US$2 billion, asserted a 24.75% interest in Mr Guriev's share in PhosAgro. The bases of such entitlement were the oral declarations allegedly made by Mr Guriev, while visiting England, and in various locations including a sauna, a pub, the Ritz Hotel or the Wolseley restaurant, and possibly on the street while the two businessmen may or may not have shared a pint while sat on the curb. Mr Gorbachev asserted that those declarations, to which only he and Mr Guriev were parties, created an express oral trust governed by English law or alternatively a common interest constructive trust or a proprietary estoppel. The nature of Mr Gorbachev's claim required the Court to undertake a detailed factual investigation into events concerning the sprawling PhosAgro empire in Russia occurring as long ago as 1989.

The six-week trial was the culmination of a bitterly fought and decade-long battle between old friends, involving multiple parallel proceedings in Cyprus, including private criminal prosecutions which were ultimately dismissed.

Interestingly, the case also involved, for the first time, a High Court Judge (His Honour Judge Pelling KC) appointing himself as special examiner in the United Arab Emirates for the purpose of hearing Mr Guriev's evidence in person for a week in the DIFC. This was crucial in determining the veracity of the alleged oral declarations, on which only the two men could give any direct evidence.



What Was The Historical Backdrop?

This was a case decided entirely on its facts. The backdrop was 30 years of tumultuous Russian history beginning with the collapse of the Soviet Union, the dismemberment of its industrial assets, and the privatisation of those assets ushering in a new era of Russian capitalism. The rise of PhosAgro, beginning in the early 1990s, is opaque. What is clear is that Mr Guriev and the well-known exiled Russian businessman Mikhail Khodorkovsky were instrumental in setting up the building blocks for PhosAgro's emergence as one of the world's leading phosphate-based fertiliser producers.

Mr Guriev and Mr Gorbachev were acquaintances from their days at the youth wing of the Soviet Union's Communist Party. Mr Guriev enabled Mr Gorbachev's rise in PhosAgro to reach, at its pinnacle, a high-ranking role at the PhosAgro trade association. They became friends, holidaying together and at one stage they were neighbours. In 2003, a politically motivated investigation threatened the PhosAgro empire and resulted in Mr Gorbachev fleeing Russia and seeking political asylum in the UK. Throughout the years of Mr Gorbachev's exile, Mr Guriev maintained his friend, and his friend's family, in the lifestyle to which they had become accustomed.

What Did The Court Decide?

Mr Gorbachev's claim was dismissed in its entirety with the judge finding that there were "simply too many unexplained and unexplainable inconsistencies and inherent implausibilities about what the claimant has alleged over time to enable any other conclusion to be reached".

Mr Gorbachev's credibility as a witness was a central factor to be considered, not only because the evidential onus of proof rested with him as the Claimant, but also due to his case being entirely dependent on his uncorroborated factual evidence.

The Judge rejected Mr Gorbachev's evidence "as untruthful in part" and "consciously exaggerated in other parts". While giving evidence, Mr Gorbachev abandoned key elements of his pleaded case. The Judge's ultimate assessment of Mr Gorbachev's credibility as a witness was that

"his evidence must be treated with caution save where it is admitted, is corroborated or is against his interest".

Accordingly, Mr Gorbachev failed to prove any of the oral declarations on which his claim was premised.

Analysis

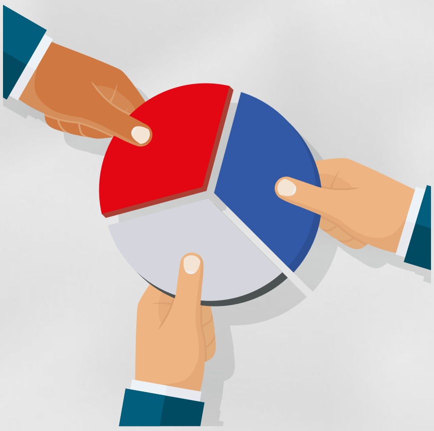
The nature of this case was such that:

1. There was no documentation or other corroborative material supporting of Mr Gorbachev's claim;
2. The outcome was heavily dependent on an assessment of the credibility of the parties' oral testimony; and
3. Much of the other voluminous evidence presented at trial was tangential.

These factors cannot be unique to this case. They must also feature in other cases involving, for example, oral declarations of trust, promissory estoppel, and oral contracts. How may the credibility of a key witness's oral testimony be tested other than at trial? Are defendants in these types of cases bound to, at vast expense, defend them all the way to trial? What if such defendants do not have the means to defend such a case to trial? The problem is compounded where claims are financed by third-party funders, as was the case here. Amounts owed to funders, which can often be eye-watering, can often become barriers to any kind of settlement even remotely commensurate with the actual merits of a claim, causing claimants to become entrenched in hopeless litigation.

What Can Be Done To Redress The Balance In Cases Such As This One?

Summary judgment is not an option where the Court would effectively be required to carry out a "mini-trial" and hear oral evidence from witnesses. Furthermore, Courts generally exercise caution in dealing with summary judgment where there are allegations of dishonesty or fraudulent conduct (which were features of this case). The strike-out procedure is unsuitable where there is a serious issue of fact that can only be properly determined by hearing oral evidence. Forms of alternative dispute resolution which might in exceptional circumstances resemble a "mini-trial", such as Early Neutral Evaluation or determination by an executive tribunal, are consensual and private (which presents obvious barriers for certain disputes) and crucially, they are non-binding unless the parties specifically request a binding determination be made. The Shorter Trials Scheme is not suitable for cases involving allegations of fraud or dishonesty.



In this case, Mr Gorbachev was impecunious and was financing his claim with the assistance of various funders. Thus, to offset the injustice of Mr Guriev defending these proceedings with no real prospect of recovering his costs even if successful, to joining the funders to the proceedings was one of the focuses of this litigation.

By putting the funders on risk in this case, the expectation was that they would reassess the merits of the claim at key junctures. They clearly had not, and they ought to have done so.

The identity of the funders was fiercely guarded by Mr Gorbachev. Several applications were made seeking the funders' identity throughout the proceedings and whilst these resulted in some of the identities being disclosed by Mr Gorbachev prior to the trial, the full picture did not emerge until after the consequentials hearing. Having successfully defended the case, Mr Guriev sought and obtained further disclosure in relation to Mr Gorbachev's funders, beyond their mere identity and extending to documentation evidencing terms of funding, paving the way for a pursuit of the funders under section 51 of the Senior Courts Act 1981.

In addition, Mr Guriev also sought to recover his costs on the indemnity basis. He was successful in that regard. The Judge found that this claim was one that was outside the norm, describing Mr Gorbachev's approach to the litigation, including his rejection of several offers in the tens of millions of pounds, as "entirely unreal, unreasonable and almost irrational".

The ultimate outcome, including an indemnity costs order, is a clear message to claimants and funders – pursuing an unmeritorious claim involving allegations of fraud and dishonesty to the bitter end will not go unpunished.

60-SECONDS WITH:

EMMA QUIN
DEPUTY PRACTICE DIRECTOR
SERLE COURT

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

A It would be a mix of travelling the world, spending quality time with family and friends and volunteering.

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

A Knowing you've made a positive difference and helped others. Whether that might be helping a client find the right barrister for a case or helping our barristers or practice management team achieve their objectives, it's hugely rewarding.

Q What book do you think everyone should read, and why?

A *Wide Sargasso Sea* by Jean Rhys. It's a prequel to Jane Eyre and gives the first Mrs Rochester a voice and identity. It will forever change the way you read Jane Eyre.

Q What legacy would you hope to leave behind?

A That it's important to be kind and understanding. You never know what someone else may be going through.

Q Do you have any hidden talents?

A Upcycling. My garage is full of items that I should probably get rid of but am convinced I can upcycle.

Q What's the most important quote you've heard that you have adapted to your personal or professional life.

A "Sometimes you will never know the value of a moment until it becomes a memory." It reminds us to enjoy the present, cherish time with people that we take for granted will always be there and realise that even bad moments can be key moments that ultimately can change things for the better.

Q Is there anything you want to do/achieve that you haven't already?

A So many things but two that spring to mind are learning to play the piano and running the London Marathon.

Q What piece of advice would you give to your younger self?

A Don't compare yourself to others. Everyone is different and that's a good thing.

Q Where has been your favorite holiday destination and why?

A Any of the Greek islands – beautiful scenery and beaches, amazing food and so much history and culture. There is something for everyone.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Louis Theroux. He has interviewed and met such a wide range of celebrities and non-celebrities that I think he would have some good dinner party stories.

Q What's your go to relaxing activities to destress after a long day at work?

A Any form of exercise really helps clear my mind and feel more positive after a stressful day. However if I'm feeling less energetic then reading a good book or a bit of online retail therapy.

Q What's your New Year's Resolution?

A To see more of the world.

SPOILER ALERT: WRONGFUL TRADING AND TRADING MISFEASANCE IN HBO'S 'THE BEAR'

Authored by: Tami Davis (Associate) - Collyer Bristow

Critically acclaimed tv show 'The Bear' is full of drama, tension, and dark humour. Unsurprisingly, it has remained one of the most popular series of the year.

And yet, as a keen Woman in FIRE, as I watched each episode with eager anticipation, I couldn't help but wonder – in light of the recent BHS judgment, if 'The Bear' was a limited company incorporated in England, what would have happened?

Liquidation

It wouldn't be surprising if the Bear was pronounced insolvent and a liquidator appointed. Throughout the show, Carmy has a habit of spending beyond the company's means and all signs point to the Bear being unable to pay its debts as they fall due. There are frequent scenes of various characters arguing over money and scrambling around to pay their suppliers; the restaurant can't even afford to buy napkins.

Many companies facing insolvency are bound to have a long list of creditors and for the Bear, Cisero (also known as 'Uncle Jimmy') comes to mind. In season 1, we find out Cicero loaned $300,000 to Carmy's brother, Michael, and then in Season 2, he loans an additional $500,000 which Carmy agrees to secure against the restaurant's premises. Whilst HBO did not televise the legal negotiations, let's presume the second loan was properly secured and Cicero obtained a fixed charge registered at Companies House. This will place Cicero above the list of unsecured creditors all hoping to be paid out of the liquidation.

However, Cicero's chance of recovery would depend on the company's distributable funds. Even if Carmy disclosed the cash found in the chopped tomato tins, it's unlikely the company has enough assets to pay him in full.

But what are Cicero's prospects of recovery if the liquidator commences proceedings against Carmy?

Claim Against Carmy For Wrongful Trading And Trading Misfeasance

In view of the landmark BHS judgment, Carmy may find himself defending claims for wrongful trading and/or trading misfeasance.

In Season 1, the Bear struggled to break even let alone make a profit – a liquidator may well argue that the restaurant should have ceased trading rather than incur further liabilities in season 2 (including renovating the entire restaurant). The BHS case clarified the minimum knowledge threshold, namely that it would need to be shown that Carmy "knew or ought to have known that insolvency was probable".

The greater the risk of insolvency, the greater the consideration or priority which must be given to the interest of the company's creditors (the "Knowledge Condition").

In addition, as director of The Bear, Carmy would need to comply with his duties pursuant to the Companies Act 2006. If the Bear is bordering on insolvency, this includes the notorious "Creditor Duty" – to consider or act in the best interests of the company's creditors (s172 CA 2006). Failure to do so could result in Carmy being held liable for trading misfeasance.

Whilst an excellent chef, it's not hard to identify Carmy's potential breaches of the Creditor's Duty. A recurring theme throughout all three seasons of The Bear is Carmy's lack of commercial awareness.

He avoids financial tasks like the plague and his bookkeeping skills leave a lot to be desired. This often creates situations where Carmy or another character are left frantically trying to put out fires (figuratively and literally). One such example is when Carmy's 'cousin' Richie gets arrested and Carmy uses the restaurant's (diminishing) funds to bail him out of jail.

For both claims, the liquidator would propose dates by which Carmy had satisfied the Knowledge Condition – this could be as early as Carmy's first day on the job when he could only afford 25 pounds of meat (instead of the 250 pounds the restaurant needed).

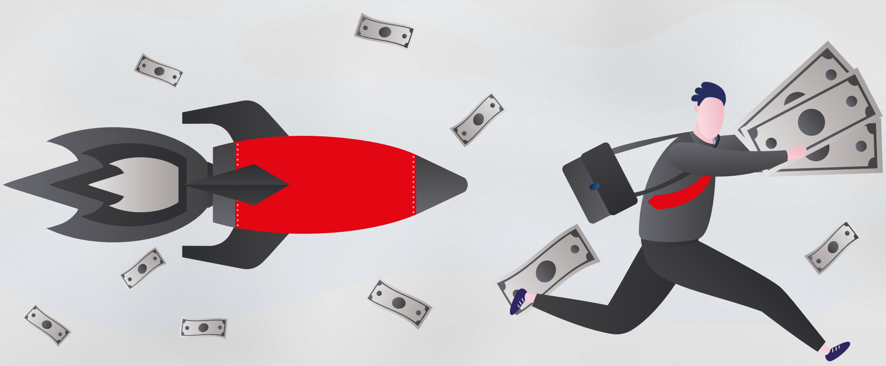
Did Carmy, after this date, actively and in good faith consider the interests of the Bear's creditors? He would face the burden of having to demonstrate that he took "every step" to minimise their creditors' potential losses when deciding to continue trading instead of putting the restaurant into liquidation or administration. Intention is not sufficient – Carmy's actions would need to prove so.

The Court would measure Carmy's decisions against the minimum objective standard of a reasonably diligent person having the general knowledge, skill and experience reasonably expected of a person carrying out Carmy's directorship. Although, in BHS, one of the respondents was a corporate finance professional so was held to a higher standard. Whilst Carmy does not have a corporate background, a reasonably diligent person could see that the Bear was financially destitute. Indeed, Carmy's failure to properly monitor and manage the restaurant's finances would likely be heavily relied upon in evidence. As with the respondents in BHS, Carmy may be found liable for "insolvency deepening" activities – namely for failing to file for insolvency when it would have been in the creditors' best interests to do so. Instead, Carmy decided to continue trading despite learning of Michael's serious mismanagement and rising tax debts (not to mention the attempted insurance fraud).

Carmy would need to gather evidence to show he took every step to minimise loss to the Bear's creditors. It doesn't help that Carmy did not even seek the advice of an insolvency practitioner, albeit, as highlighted in BHS, directors cannot seek to absolve their liability by relying on professional advice.

As for quantum – this could be a hefty claim for damages. The liquidator would look to recover the Bear's net deficiency between the date on which the Knowledge Condition was first satisfied and the date when the Bear entered insolvent liquidation or administration. This would be regarded as to the period during which Carmy should have taken steps to minimise losses to creditors and not, as he did, incur further liabilities by renovating the entire restaurant without funds to do so.

Whilst Carmy hopefully won't find himself on the receiving end of a 533-page judgment, he has definitely landed himself into some hot water.



Our FIRE Corporate Partners:

Grant Thornton
HFW
MBK.LAW SWISS LITIGATORS
Radcliffe Chambers
ALACO
Charles Russell Speechlys
GREYHAWK
IWIRC connecting women worldwide
Ogier
PCB BYRNE
KINGSLEY NAPLEY WHEN IT MATTERS MOST
PAYNE HICKS BEACH
IFG
FEMALE FRAUD FORUM
3VB Three Verulam Buildings Barristers
COLLAS·CRILL
GASSER PARTNER ATTORNEYS AT LAW
keidan harrison disputes and insolvency lawyers
Control Risks
GATEHOUSE CHAMBERS
TWENTY ESSEX
MAITLAND
Pinsent Masons
serle court
COOKE, YOUNG & KEIDAN COMMERCIAL DISPUTES LAWYERS
OMNI BRIDGEWAY
DUBLIN INTERNATIONAL DISPUTES WEEK
VANTAGE INTELLIGENCE
RAHMAN RAVELLI
ASSERSON
TDN Tech Disputes Network
dga

ThoughtLeaders4 FIRE

Meet ThoughtLeaders4

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

Amelia Gittins
Strategic Partnership
Executive
020 3059 9797
email Amelia