FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 18

FIRE CONTENTIOUS INSOLVENCY EDITION 2024

REIGNITING YOUR POST SUMMER FLAME

INTRODUCTION

'Set your life on fire. Seek those who fan your flames.'

- Rumi

We are well and truly back from the summer break, so with that we are delighted to present **Issue 18 of FIRE Magazine**, our 'Contentious Insolvency' edition for 2024. Alongside a series of 60 seconds With interviews spotlighting some of our FIRE partners, we hear from a number of authors discussing what is going on in their jurisdiction, from the UK to Germany, Japan and more. Our contributors provide a number of relevant updates including the recent BHS case Wright v Chappell [2024] EWHC 1417 (Ch), and other topics discussing insolvency, litigation funding agreements, enforcement and more. This issue also features a FIRE Side Chat with James Pirie of Grant Thornton (Channel Islands) and Amita Chohan of Locke Lord.

Thank you to our partners, contributors and members for their support, we look forward to staying in touch as we delve into a busy Q4 for all FIRE practitioners.

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

Gary Miller, **IFG**
Gemma Kaplan, **Pinsent Masons**
Stephen Cope, **Pinsent Masons**
Jade Nachoom, **Pinsent Masons**
Ellie Boreham, **Keidan Harrison**
Lucas Moore, **Payne Hicks Beach**
Victor Lui, **Payne Hicks Beach**
Francesca Sargent, **Payne Hicks Beach**
Daniel Burgess, **Blackstone Chambers**
James Hyne, **Charles Russell Speechlys**
Nicola Jackson, **Charles Russell Speechlys**
Nick Hughes, **Kingsley Napley**
James Birkett, **Dentons Global Advisors**
Vantage Intelligence
Phillip Patterson, **Gatehouse Chambers**
Antonia Argyrou, **N.Pirilides & Associates**
Yana Ahlden, **PCB Byrne**
Dave Johnson, **PCB Byrne**
Wilson Leung, **Serle Court**
Max Marenbon, **Serle Court**
Nick Nicholson, **Grant Thornton**
Sarah Yale, **Grant Thornton**
James Pirie, **Grant Thornton**
Amita Chohan, **Locke Lord**
Ben Kempe, **NOERR**
Niklas Ronker, **NOERR**
Midori Yamaguchi, **Mori Hamada & Matsumoto**

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Upcoming Events

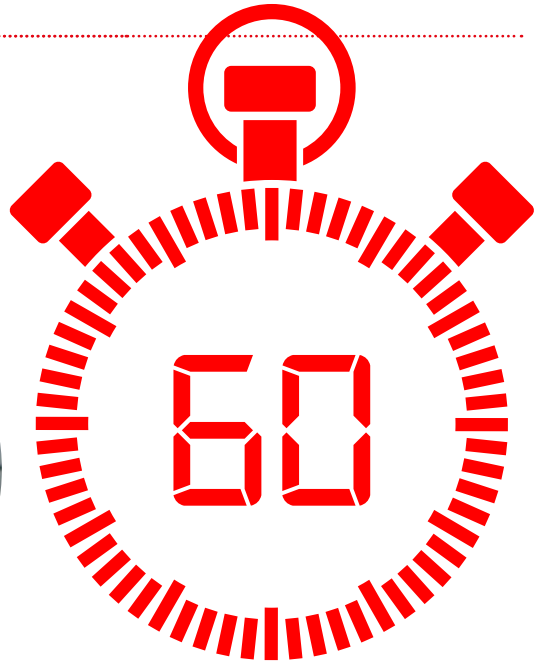
- **Contentious Trusts Next Gen Summit**
  18th - 20th September 2024 | Conrad Hotel, Dublin, Ireland
- **The International Arbitration and Enforcement Forum 2024**
  8th October 2024 | The Hallam Conference Centre, London
- **FIRE Middle East 2024**
  10th - 12th November 2024 | Shangri-La, Dubai
- **Sovereign States Disputes and Enforcement**
  29th - 30th January 2025 | Law Society, London
- **FIRE International Circle**
  4th - 5th February 2025 | Powerscourt Hotel, Ireland
- **FIRE Starters: Global Summit**
  26th - 28th February 2025 | Conrad Hotel, Dublin, Ireland
- **FIRE & ICE Circle Europe**
  10th - 11th March 2025 | Le Mirador Resort & Spa, Vevey, Switzerland
- **FIRE International: Vilamoura**
  20th - 22nd May 2025 | Anantara Hotel, Vilamoura, Portugal

To register for the events and speaking opportunities contact:

Paul Barford
Founder/Director
T: +44 (0) 20 3398 8510
E: paul@thoughtleaders4.com

60-SECONDS WITH:

GARY MILLER
FOUNDER
IFG
& PARTNER
MISHCON DE REYA



Q **As the founder of the IFG, why is it valuable to become part of this network?**

A Because it enables independent midsize firms to compete successfully on the international stage with all the magic circle firms.

Q **From your experience, how has the asset recovery landscape changed over the years?**

A It has changed beyond recognition. In 1989 when I returned it didn't really exist as an independent practice area. It now does and its expanding every year.

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

A The most rewarding thing about my job as Chairman is meeting so many multi talented lawyers, investigators and other practitioners from so many different jurisdictions.

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

A Working with a firm in Jamaica to get a Search Order there and being allowed to participate in its execution.

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

A I would like to see the IFG grow into major locations in North Asia, Africa and Latin America.

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

A I think it's the realisation by arbitration lawyers that they have been missing a trick by not getting asset freezing and evidence preservation orders prior to starting an arbitration.

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

A *The Seven Habits of Highly Effective People* by Steven Covey because it is a road map to changing and understanding human behaviour.

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

A Dr. Henry Kissinger because he was involved in so many international political intrigues and influenced the course of history.

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

A *Lord of the Rings*.

Q **What legacy would you hope to leave behind?**

A One that inspired anyone who had an interest in asset recovery whether lawyer, investigator, accountant or journalist to constantly push the envelope to find clever solutions to tracking down and recovering assets.

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

A Majorca for the past 15 years because it has a magical, peaceful and healing energy.

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

A Wait 24 hours before reacting to anything.

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Alan Sheeley
Partner, London
+44 (0)20 7054 2626
+44 (0)7971 871 229
alan.sheeley@pinsentmasons.com

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

Andrew Barns-Graham
Legal Director (Barrister), London
+44 (0)20 7490 9309
+44 (0)7824 461 374
andrew.barns-graham@pinsentmasons.com

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FORMER TRUSTEES IN BANKRUPTCY TO SUCCESSFULLY STRIKE OUT A BANKRUPT'S CHALLENGE OF AN ASSIGNMENT OF A RIGHT OF ACTION

Authored by: Gemma Kaplan (Partner), Stephen Cope (Associate) and Jade Nachoom (Trainee Solicitor) - Pinsent Masons

In Ackerman v Leeds[1], the former Trustees in Bankruptcy of Joseph Ackerman, who had brought an application under section 303 of the Insolvency Act 1986 to set aside a decision to enter into an assignment to settle a right to appeal a cause of action that vested in the bankruptcy estate, have successfully struck out that application.

Under section 303, a dissatisfied bankrupt individual can apply to the court to reverse or modify any act or decision of the trustee.

Mr Ackerman pursued this objective in his latest legal actions against his previous trustees in bankruptcy. The matter was heard by Deputy ICC Judge Passfield KC and was listed to determine, amongst other matters, the Trustees' and other respondents' request to strike out Mr. Ackerman's s303 application.

The Background

For more than a decade, Joseph Ackerman has been involved in heavily contested litigation with his sister-in-law, Naomi Ackerman and her son, Barry Ackerman arising out of the demerger of a group of companies known as the Ackerman Group.

In the early 1960s, Mr. Ackerman together with his brother Jack built the Ackerman Group, a large property empire. After Jack passed away in 1989, his widow Naomi inherited his share of the Group and their son Barry began working at the Group in 2001. Conflict arose between Joseph and Naomi/Barry by 2004, which ultimately led to the demerger of the Group in 2006.

1 Joseph Ackerman v Michael Thomas Leeds, Kevin Hellard, Naomi Ackerman, Barry Ackerman and Bana One Limited [2024] EWHC 1215 (Ch)

In 2011, Mr Ackerman brought proceedings against Naomi and Barry to challenge the basis and outcome of the demerger, claiming that the expert instructed to determine the basis for the demerger had allegedly acted unfairly. The expert was also a party to those proceedings. Following a nine day trial, Vos J (as he then was), dismissed this claim and ordered Mr Ackerman to pay costs and payments on account. In 2015, Mr Ackerman sought to set aside the order of Vos J, which Snowden J (as he then was) struck out.

In 2014 proceedings were commenced against Mr Ackerman by two companies of which he used to be a director, Haysport Properties Limited and Twinsectra Limited. The claim alleged breach of fiduciary duty. In 2016 the companies obtained judgment against Mr Ackerman for £9 million plus costs and interest.

Mr Ackerman was made bankrupt in September 2016 on the back of that judgment, and Michael Leeds and Kevin Hellard were appointed as his joint trustees in bankruptcy (the "Trustees") in October 2016.

Mr Ackerman's right to appeal the decision of Snowdon J vested in the Trustees following their appointment and in 2017 the Trustees (1) assigned the right to appeal the decision of Snowden J to the respondents, Naomi, Barry and Barry's company, Bana One Limited (the "Ackerman Respondents") and (2) waived, released and settled their right to seek permission to appeal against the striking out of that claim ("the Assignment").

Dissatisfied that the Trustees had made the Assignment to his opponents, Mr Ackerman issued a s.303 application in 2018 against the Trustees and the Ackerman Respondents in 2018 to set aside the Assignment and to assign the right of appeal to him so he could attempt to set aside the judgments of Snowden J and Vos J and eventually unwind the demerger himself. The application had been in a state of suspension and the Trustees in the interim vacated office and were released under s.299 of the Insolvency Act 1986.

The Trustees and the Ackerman Respondents made separate applications to strike out the s.303 application and/or for reverse summary judgement.

The S.303 Application

In considering whether to strike out the s303 application, the court considered three issues:

1. Whether Mr Ackerman Had Standing To Bring The S. 303 Application

The Trustees contended that Mr Ackerman lacked the standing required to file the s.303 application. The argument presented by the Trustees was twofold: first, that Mr Ackerman failed to demonstrate an existing or potential surplus in his bankruptcy; and second, that his objection to the Trustees' resolution to proceed with the Assignment did not pertain to an issue exclusive to bankruptcy proceedings—one in which Mr Ackerman has a direct and legitimate interest. This submission referred to the exceptional cases identified within Brake v The Cheddington Court Estate Ltd [2] and argued these particular circumstances did not fall within this category.

Mr Ackerman's responding submission claimed that he did have standing, on the basis that if he had permission to successfully appeal the Snowden J order, he would then be able to successfully set aside the judgement of Vos J, resulting in the unwinding of the demerger, which would then result him having a 50% shareholding in the Group again. All of this thereby extinguishing the Ackerman Respondent's claims and establishing a surplus in the bankruptcy estate.

However, the Judge agreed with the Trustees' submissions, stating even if Mr Ackerman's' theory was to play out as planned, it is likely there would still be a deficiency in the estate. Therefore, the Judge found that Mr Ackerman did not have standing the make the section 303 application.

2. Trustees' Release

The second issue was whether a s.303 application cannot be pursued against the Trustees as they have been released from office. The Trustees based their submission on section

2 Brake v The Cheddington Court Estate Ltd [2023] UKSC 29; [2023] 1 WLR 3035

299(5) IA 1986, stating that this provision operates to prevent a person from pursuing a s.303 application after that trustee has had his release. This was disputed by Mr Ackerman who relied on the statutory definition of "liability" in s.382(4) IA 1986 which, he claimed, would leave the door open to challenge a trustee's decision after obtaining his release.

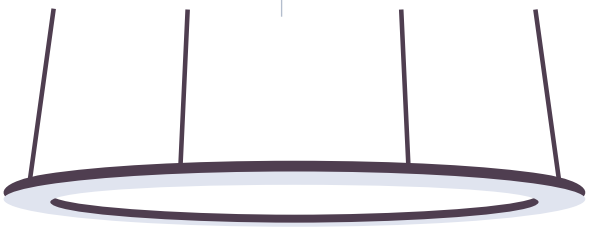
The Trustees and Respondents argued that the court should adopt a wider definition of "liability", relying on case law such as Re Borodzicz [2016], Oraki v Bramston [2015] and Birdi v Price [2018]. The Judge, however, was not persuaded and having regard to the principles summarised by the Supreme Court in R (O) v Secretary of State for the Home Department [2022], decided that court is not required to apply a wider definition, than the statutory definition, of the word "liability". It was stated to not be the intention of Parliament to prevent a person, who has a legitimate interest and seeks the reversal or modification of a perverse act or decision of a trustee just because they have been released from office.

The Judge had ruled against this issue on the above basis and also on the principle that if ruled in favour of the Trustees and Respondents, using the s299(5) interpretation as "the conclusion of the administration and end of the trustee's functions" does not cover situations and circumstances where the bankruptcy is ongoing, and a joint trustee or replacement trustee remains in office.

3. Merits

Thirdly, the argument was made that the s303 application does not have a realistic prospect of success. For this point, the Judge sided with the Trustees and the Ackerman Respondents on the basis that under a s.303 application, the court will only interfere with a trustee's decision if it can be shown that they have acted in either bad faith, fraudulently or so perversely that not trustee properly advised could have reasonably have acted.

In these circumstances, Judge Passfield believed there was no real prospect of the court concluding that the Trustees' decision to enter into the Assignment was an unreasonable one and therefore, the s.303 application disclosed no reasonable grounds for challenging the trustees' decision to enter into the Assignment and no real prospects of success.



Where Does This Leave Us?

The reasoning given by the Judge on the effect of the Trustees' release may raise concerns for trustees, both following their time in office and upon their release. Whilst given as obiter, the decision suggests trustees can be challenged for any acts or decisions made during their time administering the bankruptcy, after release, and it is uncertain as to the length of time this liability remains. In circumstances where no trustees are no longer in office, it would fall on the Official Receiver to deal with any challenges to the decisions of former trustees.

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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

60-SECONDS WITH:

ELLIE BOREHAM ASSOCIATE KEIDAN HARRISON

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

A I would spend a lot of time making my way around (and then back around) the vineyards in the South East where I live.

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

A I love being able to work with clients to understand their commercial objectives and develop strategy (which can often be creative) to ensure they are able to achieve those goals.

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

A In 2021 I acted in respect of a successful appeal of alleged breaches of planning control associated with oyster farming at Whitstable Beach. The Planning Inspector undertook a site visit of the Oyster Farm, which attracted TV cameras and protestors – and me, strutting around in my wellies!

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

A One day I would love to appear in the Supreme Court.

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

A AI continues to be the topic everyone is talking about – it will be interesting to see how the application of AI inevitably changes legal practice, with the tech potentially being used to draft and analyse documents, and even produce decisions within the court and tribunal system.

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

A *Why We Sleep* by Matthew Walker – it's a really readable book which sets out the science behind the importance of sleep (which is something we can sometimes lack in the legal profession!)

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

A Phoebe Waller-Bridge – I absolutely love her work.

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

A My film taste is notoriously bad – I love shark films, my current favourite is *Deep Blue Sea*.

Q **What legacy would you hope to leave behind?**

A My first boss told me, when I thanked her for her support, to remember the help I had received, and ensure in turn I supported the next generation within the legal profession – I hope to have kept up this legacy.

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

A Bermuda – Pink beaches and rum swizzle, what's not to love!

Q **Do you have any hidden talents?**

A I've just taken up calligraphy.

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

A Trust that you can do what scares you.

APP FRAUD

PAYNE HICKS BEACH

RECOVERY AGAINST BANKS

Authored by: Lucas Moore (Partner), Victor Lui (Associate), Francesca Sargent (Associate) - Payne Hicks Beach and Daniel Burgess (Counsel) - Blackstone Chambers

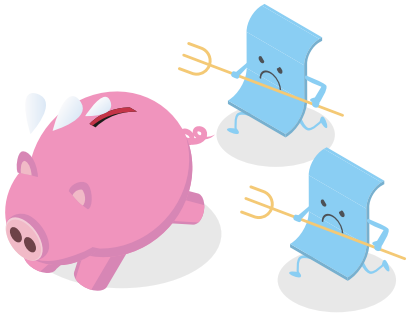
Where an individual is induced by fraud to send a payment from their bank to a bank account controlled by fraudsters, when does the law hold the banks responsible? In this article, Lucas Moore (Partner), Victor Lui and Francesca Sargent (Associates) and Daniel Burgess (Counsel, Blackstone Chambers) examine this question in view of recent case law.

What Is "Authorised Push Payment" Fraud?

According to the National Crime Agency, fraud is the most prevalent crime in the UK, the majority of which is cyber-enabled.[1] An increasingly common tactic involves fraudsters impersonating law enforcement officers or bank staff members to pressure individuals into paying them. Where the victim is deceived into authorising their bank (i.e. the "paying bank") to send a payment to the fraudsters, this is known as "authorised push payment" (APP) fraud – so-called because on its face, the payment was authorised by the victim as opposed to criminals directly stealing from the victim's account. UK Finance reported that in 2023, there were over 230,000 instances of APP frauds.[2]

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

2 https://www.ukfinance.org.uk/system/files/2024-06/UK%20Finance%20Annual%20Fraud%20report%202024.pdf



Why Go After The Banks?

It seems obvious (and just) that the victim should seek to recover their losses from the perpetrators. Legal mechanisms available to support such a claim include: (1) third party disclosure orders against the bank which received the payment (i.e. the "recipient bank") to identify the account holder and ascertain whether the funds have been transferred onwards (and if so, where); (2) freezing injunction with the objective of preserving funds for recovery.

Such exercises are, however, difficult and expensive in practice. Very often the culprits have absconded and the defrauded sums long dissipated. Alternative potential avenues of redress are the paying bank or recipient bank, whose identities are known and liquidity most likely not in doubt.

Claims Against The Paying Bank?

In the landmark decision Philipp v Barclays Bank UK plc,[3] the Supreme Court held that the bank has a fundamental duty to follow the customer's instructions. However, if there are reasonable grounds for the bank to believe that the person giving the payment instruction is attempting to defraud the customer, the bank must first make inquiries to verify that the instruction was actually authorised before executing it. Where the paying bank follows an instruction which is not authorised, it cannot debit the customer's account. The consequence is that the customer victim can sue:

1. **In debt:** as the debit was unauthorised, the amount remained to the credit of the customer at law. The bank has to restore their account to its correct balance;
2. **For damages in breach of contract and/or tort:** the bank may be in breach of its contractual mandate and/or have failed to carry out its services with reasonable care and skill.[4]

Individual Vs. Corporate Victims

It would be difficult for most individual victims to recover from the paying bank: while they may be mistaken when giving instructions, they nevertheless intended the bank to effect payment. Philipp makes clear that, if there is no independent reliable information to suggest to the bank that the instruction was not authorised, it need not be concerned with the wisdom or purpose of the customer's payment decision.[5] On those facts, Mrs Philipp, who was persuaded by a fraudster to make payments, had confirmed her instructions in person and on telephone with her bank. That did not give rise to any claim against the bank.

In contrast, where the bank customer is a company, it is at law a separate legal entity which necessarily operates through its officers. There is accordingly a real risk that the representatives giving instructions on the company's behalf to the bank may lack authority (whether actual or apparent).[6] Corporate victims could argue that the representative acted dishonestly such that the bank was placed on inquiry. This argument was successful in an earlier decision by the Hong Kong Court of Final Appeal, PT Asuransi Tugu Pratama Indonesia TBK v Citibank NA[7] (Lord Sumption NPJ giving the judgment, the reasoning of which was largely consistent with Philipp). In that case, the company victim claimed against the bank for payments made upon dishonest instructions of its two authorised signatories to themselves and other officers. The court found that the operation of the account was unauthorised, the bank was put on inquiry and its inquiries were inadequate.

Given the analysis in Philipp that the issue is essentially one of authority based on general principles of agency, the following arguments appear to be available.

3 [2023] UKSC 25: https://www.supremecourt.uk/cases/uksc-2022-0075.html
4 Philipp, [28], [30], [34]-[35], [96]-[97]
5 Philipp, [3], [30], [100], [109]-[110]
6 C.f. Philipp, [98]
7 [2023] HKCFA 3: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=150358

First, an agent acting contrary to a principal's interests (even if not extracting gain for themselves) may be sufficient to put the bank on inquiry. Support is found in Philipp, which states that an agent's authority only includes authority to act honestly in pursuit of the principal's interests.[8] Thus, where an agent was deliberate or reckless (albeit possibly honestly) in giving a payment instruction contrary to their principal's interests, the bank may be required to make reasonable inquiries before relying on that instruction.

Second, it is not necessary for the bank to be aware of the precise reason for a lack of authority before it may be liable. It would often be the case that, in giving the payment instruction, the employee has failed to comply with internal authorisation procedures of the company that are not known to the bank. However, if there are suspicious circumstances about the transaction apparent to the bank, it should nonetheless have to make reasonable inquiries.

Claims Against The Recipient Bank?

Claims against recipient banks have traditionally been difficult to pursue by reason of the absence of contractual or tortious duties towards the victim.[9] Unjust enrichment claims (on the ground that the payment was made under a mistake) were similarly challenging by reason of caselaw to the effect that a recipient bank was not enriched by the receipt of funds for an account holder (Jeremy D Stone Consultants Ltd v National Westminster Bank plc[10]) and any enrichment was not at the victim's expense (Tecnimont Arabia Ltd v National Westminster Bank plc[11]).

However, HHJ Paul Matthews rejected these arguments in the recent case of Terna Energy Trading DOO v Revolut Ltd.[12] In Terna the claimant was fraudulently induced by third parties to make a payment to the defendant "electronic money institution" (EMI) and seeks recovery in unjust enrichment.

On "enrichment" the Judge rejected the argument that, where a bank receives a payment, it is matched by an immediate balancing liability in the form of a debt owed to its customer, such that it cannot be enriched. The question of enrichment is inherently tied to the question of whether the defendant (agent) is under any liability to account to its customer (principal) for the payment (i.e. whether the defendant has any defences). Further, the defendant was the legal and beneficial owner of the incoming payment (EMIs are not relevantly different from ordinary banks). The Judge considered that Jeremy D Stone was not binding and in any event wrong in principle.[13]

On "at the claimant's expense", the Judge held that this requirement was satisfied whether viewing this as a case of agency or a series of co-ordinated transactions (applying Investment Trust Companies v HMRC[14]).

The transaction intended by the claimant was a transfer of funds from its account with its bank to the defendant. It did not make any difference how many correspondent banks were involved along the way (declining to follow Tecnimont).[15]

The Judge has granted permission to appeal, citing the obvious importance of receiving banks' liability to the industry and the need for clarity as to the legal effect of the vast numbers of transfers of funds which take place through the banking system every day,[16] with the result that the question of recourse against recipient banks may be considered at appellate level shortly.

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

8 Philipp, [72]-[74]; Tugu, [16] similarly held that a plain lack of benefit for the principal or commercial purpose on the face of the transaction and unusual aspects of the transaction may be sufficient cause for inquiry
9 Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18, [94]: https://www.jcpc.uk/cases/docs/jcpc-2020-0044-judgment.pdf
10 [2013] EWHC 208 (Ch), [242]: https://www.bailii.org/ew/cases/EWHC/Ch/2013/208.html
11 [2022] EWHC 1172 (Comm), [139]-[142]: https://www.bailii.org/ew/cases/EWHC/Comm/2022/1172.html
12 [2024] EWHC 1419 (Comm): https://www.bailii.org/ew/cases/EWHC/Comm/2024/1419.html
13 Terna, [64], [66], [69]-[71]
14 [2017] UKSC 29, [48], [61]: https://www.supremecourt.uk/cases/docs/uksc-2015-0057-judgment.pdf
15 Terna, [85], [88]-[91], [93]-[94]
16 [2024] EWHC 1524 (Comm), [16], [18]: https://www.bailii.org/ew/cases/EWHC/Comm/2024/1524.html

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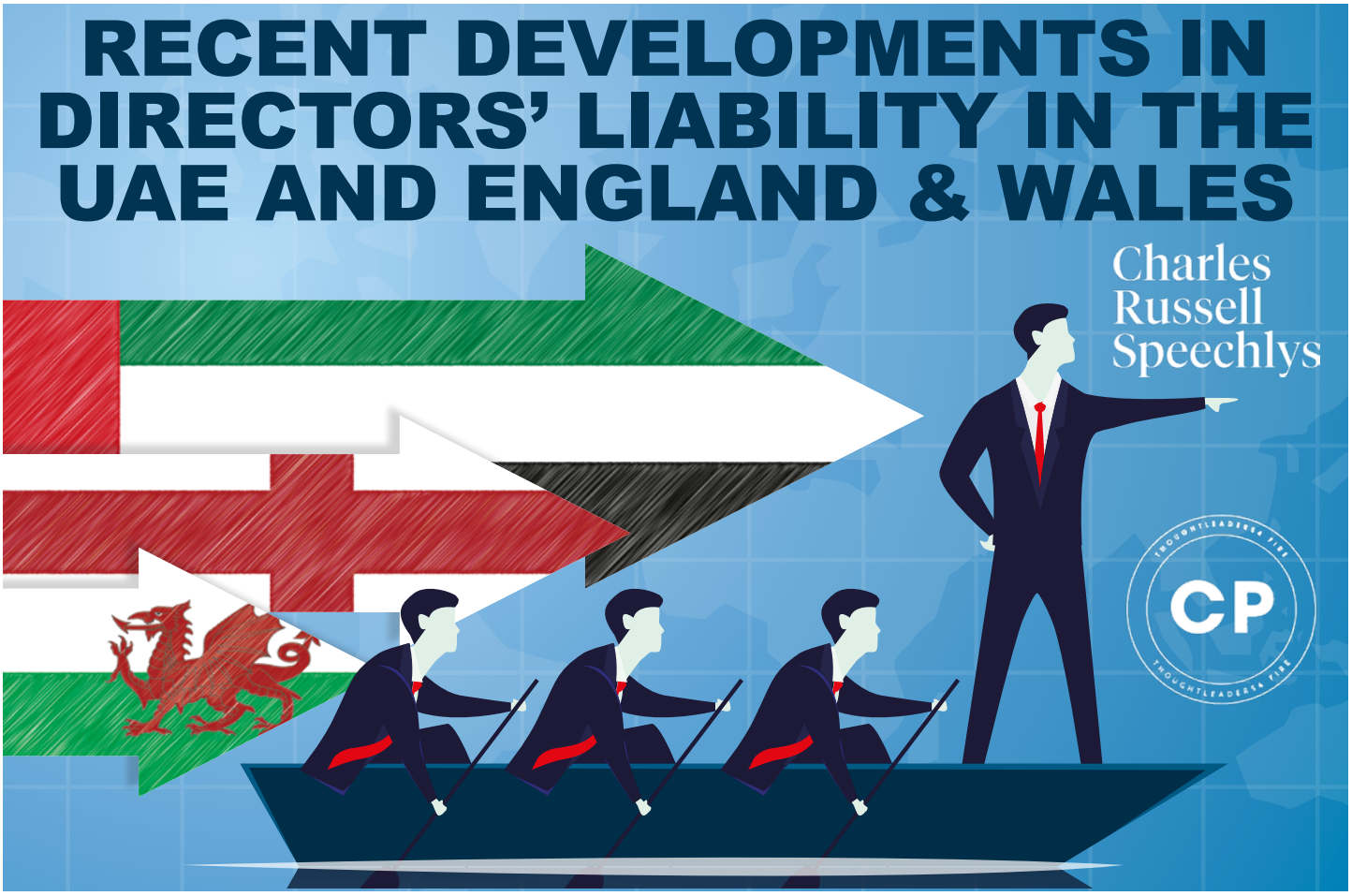
RECENT DEVELOPMENTS IN DIRECTORS' LIABILITY IN THE UAE AND ENGLAND & WALES



Authored by: James Hyne (Partner) and Nicola Jackson (Partner) - Charles Russell Speechlys

In this article, James Hyne and Nicola Jackson, Partners in Charles Russell Speechlys' Corporate Restructuring and Insolvency team, based in the UK and the UAE respectively, provide a short comparative analysis of recent developments in directors' liability in the UAE and in England & Wales.

On 1 May 2024, the UAE Federal Decree Law No. 51/2023 on Financial Reorganisation and Bankruptcy ('the New Law')[1] came into force. The New Law repealed Federal Decree-Law No. 9/2016 on Bankruptcy ('the Old Law'). The New Law operates in the 'onshore' UAE (not in the two financial free zones (the Dubai International Financial Centre and the Abu Dhabi Global Market)).

There are various provisions of the New Law which impose personal liability on directors, board members and managers including, potentially, shadow and de facto directors and managers. Liability is personal and it can be civil, or criminal, or both. Here, we set out some high level comparisons between the New Law and the current equivalent law in England and Wales.

Persons Liable

Article 246 of the New Law prescribes that if the company is adjudicated bankrupt, the Court may find, in certain circumstances,

"the members of the Board of Directors, Managers, or any person responsible for the actual management of the company, or those in charge of the liquidation [presumably, the liquidators(s) / trustee(s)][2], in the liquidation procedures carried out outside the framework of this Law, to pay an amount proportionate to the error attributed to the person concerned."

1 There is no official English translation of the New Law and accordingly, all citations use in this article are taken from the unofficial LexisNexis Middle East English translation.

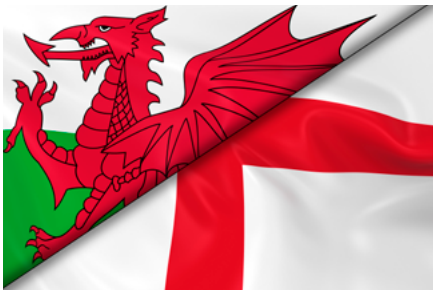
2 Author's interpretation

The circumstances in which such finding can be made are summarised as follows:[3] **(i)** using ill-considered commercial methods, such as disposing of assets at an undervalue, with the intention of avoiding or delaying bankruptcy proceedings; **(ii)** disposing of assets without or without adequate consideration; **(iii)** making preference payments with the intention to cause harm to other creditors; or **(iv)** management failure which led to the deterioration of the company's financial position in circumstances where the company's assets are not sufficient to pay at least 20% of its debts. The New Law expands the scope of the Old Law as regards persons liable to potentially include de facto and shadow directors and managers, ie "any person responsible for the actual management of the company".

In England & Wales, s.212 Insolvency Act 1986 ('IA 1986'), often shortened to the label of 'misfeasance', relates to the misapplication, retention or becoming accountable for money or property of the company, negligence, or being guilty of a breach of any fiduciary or other duty owed to the company. If there is a finding under s.212, personal liability may be imposed upon any current or past officer of the company (including shadow and de facto directors), insolvency office holders and anyone who has been concerned, or has taken part, in the promotion, formation or management of the company. Under s.214 IA 1986 (personal liability for wrongful trading) liability can be imposed upon any past or present officer of the company, including shadow and de facto directors.

Offences

There was a well-publicised case in 2021 in the onshore Dubai Courts, called the 'Marka Case', in which the current and former directors and managers of the bankrupt entity were held personally liable for the company's debts to the tune of USD120m on the basis that the assets of the company were not sufficient to pay at least 20% of its debts, without a finding of mismanagement (and in a case that the managers/directors were not party to). The Old Law was amended as a result of the decision in Marka, and the Court clarified in a further judgment in 2022 that to engage liability, the decision-makers must have contributed to the losses that rendered the company insolvent.



Similarly, In England & Wales, practitioners are still considering the advisory impact of the recent case of Wright & Ors v. Chappell & Ors (Re BHS Group Ltd in Liquidation),[4] and specifically the element of the judgment relating to misfeasant trading, where the directors were found personally liable or continuing to trade even though, at the relevant time, there was a reasonable prospect of avoiding insolvency. Interestingly, the Court also found the directors liable for a shorter period of wrongful trading later, pursuant to the higher threshold test to be found in s.214 IA 1986 whereby personal liability may be incurred by a director where they knew or ought to have reasonably concluded that there was no prospect of avoiding liquidation but continued to trade. This new and distinct legal concept of 'misfeasant trading' as set out in BHS is of acute relevance to directors, office holders, professional advisers and D&O insurers.

Back in the UAE, the New Law has now codified the position laid down in Marka, largely in Article 246, in that the person(s) held liable may be ordered:

"to pay an amount proportionate to the error attributed to the person concerned. The amount shall be used to cover the company's debts if it is proven that any of them committed any of the… acts [paraphrased at (i)-(iv) above], during the two years preceding the company's cessation of payment".

The assessment of quantum is likely to be restorative, and how quantum is to be apportioned amongst those held liable will likely be developed in case law (although noting that there is technically no binding precedent in the onshore UAE Courts). It is also worth noting (albeit beyond the scope of this short article) Title 7 of the New Law: "Crimes, Penalties and Rehabilitation", which includes penal sanction (financially punitive and/or custodial) for "Bankruptcy by Negligence" and sets out offences that can be committed by those other than directors / managers, including creditors, trustees, liquidators / trustees, auditors and employees, and Article 162 of the UAE Commercial Companies Law[5] (liability of the board of directors and the executive management).

3 Author's interpretation
4 [2024] EWHC 1417
5 UAE Federal Decree-Law No. 32/2021 on Commercial Companies

Comparatively, England & Wales has similar 'offences' and look-back periods, largely contained within the IA 1986 and its provisions as set out at s.212 (misfeasance), s.214 (wrongful trading), s.238/239 (transactions at an undervalue/preferences).

Sections 238/239 do not prima facie seek to impose liability on directors, rather the Court will seek to restore the position to what it would have been if the voidable preference or transaction had not taken place, which is often a payment from the recipient of the benefit.

However, the court has a wide discretion which, in certain circumstances, can be used to impose liability on directors, even if they are not the recipients of the benefit.

Furthermore, directors who are in breach of their fiduciary duties by enabling or failing to prevent such preferences or transactions can be made personally liable for the company's losses pursuant to s.212.

Defences

Art 246 of the New Law provides defences to an allegation of liability: "[e]very person who has proven in writing his reservations regarding the acts [paraphrased at (i)-(iv) above]… of this Article shall be exempted from liability for such acts" and the Court shall not 'issue judgment against him/her/them'[6] if

"he has taken all the precautionary measures that a normal person can take to reduce potential losses on the company's funds and creditors."

In England & Wales, defences can be found in a number of places. By s.1157 Companies Act 2006, directors may avoid liability for misfeasance under s212 (and after BHS, misfeasant trading) if they can demonstrate to the satisfaction of the Court that they have acted honestly and reasonably and that in all the circumstances ought fairly to be excused. However, s.1157 does not offer any defence to directors to the other provisions of IA 1986, should they be found personally liable for wrongful trading under s214, or in the circumstances of the case for offences under s238 or s239. There is a separate defence for wrongful trading, built in to s214(3), which has similarities to the New Law: that after the relevant time, the directors took every step with a view to minimising the potential loss to the company's creditors that they ought to have taken. There is no clear cut defence to s238 and 239, other than the court has discretion to make such order as it sees fit.

Summary

The introduction of the UAE's New Law is a welcome codification of decision-makers' duties and sends a clear message as to expectations of responsible corporate governance and personal liability for those who are in breach of their duties. Whilst England & Wales are arguably 'further down the road' in this regard, recent cases such as BHS and Sequana have demonstrated a significant level of judicial activity in this area which is likely to continue to evolve and will take some time to become settled law.

6 Author's interpretation

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THE BHS SAGA NEARS AN END WITH THE LIQUIDATORS SUCCESS AT TRIAL AGAINST THE FORMER DIRECTORS

Authored by: Nick Hughes (Partner) - Kingsley Napley

Philip Green's sale of BHS, the famous British high street brand, to Retail Acquisitions ("RAL") for £1 in 2015 must be one of the best known and analysed transactions in recent British corporate history. The widespread scepticism expressed regarding the purchase of shares in the BHS companies ("BHS") by a group led by Dominic Chappell, who had a history of personal bankruptcy, and no experience of running a similar-sized company, was justified when in 2016 BHS went into administration with the loss of 11,000 jobs and a pension deficit of circa £570million. This case concerns what happened after the sale to RAL in 2015 and Mr Green was not in the spot light.

The liquidators of BHS, Mr Wright and Mr Rowley of FRP ("the Liquidators"), have now been successful in claims against two of the former directors, Mr Henningson and Mr Chandler, for wrongful trading, individual misfeasance and trading misfeasance. They were directed to pay over £18million in respect of the wrongful trading and individual misfeasance claims. The sums payable in respect of the trading misfeasance claims will be determined at a separate hearing.

Mr Chappell, did not participate in the trial due to ill health. Claims against him were heard separately at the end of June 2024. While the judgment against him was not available at the time of writing, he was reportedly ordered to pay at least £50million, with further sums payable in respect of trading misfeasance claims to be confirmed later.

Wrongful Trading

In order for a claim for wrongful trading to succeed under section 214 of the Insolvency Act 1986 ("the Insolvency Act"), it is necessary to show that at a date before the winding up of the company, a director knew, or ought to have concluded that, there was no reasonable prospect that it would avoid insolvent liquidation or administration, unless, from that date, the director took every step to minimise the potential loss to creditors. The relevant standard expected of a director making that determination is that of a reasonably diligent person having both the general knowledge, skill and experience reasonably expected of a person carrying out the same functions, and the general knowledge, skill and experience of the directors in question. This was referred to as the "notional director" test. The starting point for assessing liability is the increase in net deficiency in the assets as a result of the company continuing to trade.

The Liquidators set out six dates by which the directors were said to have the requisite knowledge. The court concluded that notional directors carrying out Mr Chandler and Mr Henningson's roles would have had such knowledge on only the last date pleaded, 8 September 2015. The judge accepted that Chandler did not conclude on 8 September 2015 that the companies had no reasonable prospect of avoiding insolvent liquidation, but a notional director would have. By comparison the judge suspected that Mr

Henningson well understood the position given his background in corporate finance.

The court was not convinced that either director had a defence to the claim under S214(3) of the Insolvency Act, as they did not take every step with a view to minimising the potential loss to creditors.

Professional Advice

The directors relied on the fact that their lawyers and accountants did not advise them there was no real prospect of avoiding insolvent administration or liquidation. Mr Justice Leach held this was no answer to a wrongful trading claim as it was the duty of the directors themselves to decide whether there was a reasonable prospect of avoiding insolvent liquidation. While legal advice is a relevant factor, the weight attached to it depends on the instructions given to the professionals (for example assumptions made) and whether the directors carefully considered the advice. The evidence was this was not the case here and the directors were aware when assumptions upon which the advice was based were unreasonable. In respect of cashflow updates prepared by the accountants, the court found that it would have been obvious to notional directors that BHS was cashflow insolvent from 1 September 2015. It was not necessary for the accountants to spell that out.

Trading Misfeasance

Section 212 of the Insolvency Act allows liquidators to bring claims against directors for breach of duty. The Liquidators alleged that the directors breached various duties under sections 171 to 176 of the Companies Act 2006 ("the Companies Act").

The judge found in favour of the Liquidators in respect of two claims. The first involved a facility described as ACE II which was entered into on 26 June 2015 and second a facility described as Grovepoint on 8 September 2015. The ACE II facility was found to have been agreed by Mr Henningson for an improper purpose in breach of section 171(1)(b) of the Companies Act, the dominant purpose having been to obtain an arrangement fee.

The judge found the facilities were last desperate throws of the dice, insolvency-deepening activities, which were in breach of both directors' duties to promote the success of the companies by considering the interests of their creditors under section 172 of the Companies Act. Had they done so the company would have ceased trading, the result being that the directors are liable for the depletion of assets between 26 June and 8 September 2015.

In doing so the Judge held the Company was cashflow insolvent in June 2015 (the date of the ACE II transaction) and the directors had the requisite knowledge insolvency was probable to be culpable for the loss caused by the transaction notwithstanding he did not hold the directors culpable for wrongful trading from that date.

Individual Misfeasance

The Liquidators partially succeeded in misfeasance claims in relation to individual transactions which were said to breach various directors' duties.

This included a claim in respect of commission received by Mr Henningson for the ACE II facility, a payment authorised to Swiss Rock (which was controlled by Mr Chappell), an arrangement fee paid to RAL, and a property purchased in December 2015 but later sold for significantly less.

Section 1157 of the Companies Act allows the court to grant relief on terms it thinks fit, in claims for negligence, default, breach of duty or trust, if directors are found to have acted honestly and reasonably in all the circumstances. The court was not convinced that either director met this requirement and so they were not excused for their breaches of duty or wrongful trading.

The court agreed with the arguments made on behalf of the directors that liability should be several due to differing levels of responsibility and culpability.

Conclusion

The case follows Sequana in suggesting the Courts will look very closely at any transaction which causes the Company a loss if the office holders can prove insolvency was probable even if they cannot prove that at the relevant date there was no reasonable prospect of avoiding insolvent liquidation or administration. This creates an additional risk for directors who are seeking to negotiate short term finance on terms which will no doubt appear punitive to the Court, or who are looking at entering into new arrangements with shareholders or connected companies.

Secondly the case underlines the care which must be taken in obtaining and considering professional advice if a director is to rely upon it as a defence to such claims. It is not good enough to carefully frame a question for your lawyers and accountants to obtain the answer the board is looking for. To be useful they must be given the right information, asked the right questions and then the advice must be properly considered by the board.

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rpenson@maitlandchambers.com
+44 (0)20 7406 1258

Luke Irons - Deputy Senior Clerk
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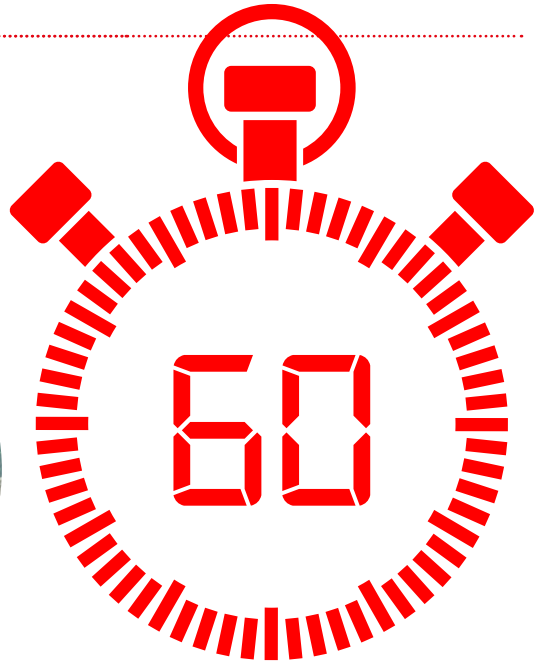

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I have three children – two of them quite young. They would account for the bulk of the time. If I found some gaps, I'd try to find a way to apply my skills to some useful purpose, perhaps in journalism or academia.

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

A I love the challenge of investigative work. It is still a thrill to provide useful answers to difficult questions, especially when the situation feels unpromising. And it is even better when you can feel that you are on the right side of things.

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

A I can't give specifics, but work with human sources is always compelling. I have spoken to some very interesting people – including senior politicians, former intelligence officers, jailed political activists and US-designated criminals – but the real excitement comes from getting specific insights and detail which would otherwise be unobtainable.

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

A We have had great success building up the intelligence practice at DGA Group over the past year. Hopefully in the next five we can really establish ourselves as a name in the sector and bed down an established team here in London.

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

A The intelligence industry seems to be going through a bit of a sea change currently, with a lot of new investment coming in and some of the old guard moving on. I am enjoying the challenge of weaving the boutique focus on quality and client service in which I grew up in the industry alongside the scale and sophistication of being a larger player.

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

A *Slaughterhouse 5*. Neither an original nor an especially interesting choice. But I love its underlying gentleness.

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

A Ho Chi Minh. We could swap notes about his time living in Crouch End. If I could resurrect a restaurant too, I'd take him to Banners.

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

A I love old movies. I try to watch *Brief Encounter* every year.

Q **What legacy would you hope to leave behind?**

A I'd be gratified if people in the industry were to remember me as someone who helped to spark enthusiasm for the work.

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

A Tobago, a couple of years ago, when we were still (just) a family of three.

Q **Do you have any hidden talents?**

A I barely have talents that aren't hidden!

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

A I wouldn't have listened anyway!

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THE RUSSIAN CASE OF CORPORATE REDOMICILIATION:

HELP OR HINDRANCE FOR THE INVESTIGATOR?

Authored by: Vantage Intelligence

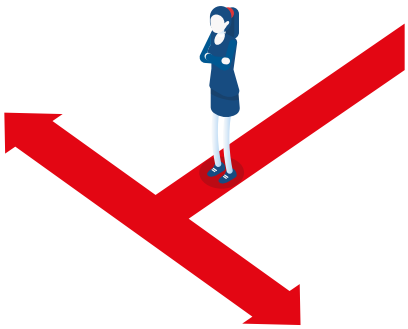
As corporate investigators, the fulcrum of our work, at least in the initial stage of investigations, is our access to and analysis of public documents. Whether an asset trace, an enhanced due diligence, or any of the myriad types of investigations requested by our clients, documentation provides the basis from which we develop investigative leads. In our line of work, the world looks very much like that described by Thomas Cromwell, one of the chief advisors to Henry VIII, in Hilary Mantel's historical fiction Wolf Hall. Burdened with an errant courtier, who is stirring up trouble for the King, Cromwell advises him that the world is not run how he thinks, with castles, with armies, with guns and ships. The world, Cromwell says, is run by documents, land deeds, bills of lading, import notices, charge documents, mortgages, loans.

Our ability to analyse the world as Cromwell saw it relies on access. If sophisticated in the management of their corporate structures, the targets of our investigations can reduce that access, registering companies in jurisdictions where the disclosure of public information is limited. In some offshore jurisdictions, the only information made available is the date of a company's incorporation and its registered agent. Others also offer the names of directors. Some, more friendly to public disclosure, offer the full gamut of shareholder information, beneficial ownership, audited accounts, annual returns and land ownership. Part of the expertise we offer to clients is piecing together snippets of information from different jurisdictions, with different levels of public access, to offer as full a picture as possible.

Access in even the most opaque jurisdictions, however, is not static; from time to time, laws change. In recent years, for example, jurisdictions across the world have introduced registers of beneficial ownership.

In Russia, for example, a recent innovation in company law, which since February 2022 has been used to safeguard against sanctions, provides both challenges and opportunities for investigators. In 2018, the Russian government established Special Administrative Regions in Kaliningrad, an exclave on the Baltic coast, and Khabarovsk, in the Russian Far East. These Special Administrative Regions gave rise to new company formations, designated as Mezhdunarodnaya Kompaniya, or international company, abbreviated as MK. The formation of MK companies – which can be registered as joint stock companies, known as MKAO, public joint stock companies, MKPAO, and limited liability companies, MKOOO – has several prerequisites. Crucially, the company formation is primarily applicable to companies already registered outside of Russia, and redomiciling requires a commitment to invest approximately RUB 50M (approximately USD 550,000) in the six months after registration.

In effect, the Kaliningrad Special Administrative Regions act as Russia's own "offshore" jurisdictions; they offer tax benefits not available to regular companies registered on the Russian "mainland". However, in the context of Russia's invasion of Ukraine in February 2022 and consequent imposition of sanctions, the Kaliningrad Special Administrative Regions are used as a safeguard for Russian beneficial owners. The MK companies are bound by the Russian legal system, where it is difficult for foreign claimants to enforce judgements against Russian counterparts.



For investigators, the establishment of the Kaliningrad Special Administrative Regions and MK companies offers some contradictory opportunities and challenges. On the one hand, the redomiciling of foreign companies to Special Administrative Regions can add another level of obfuscation, rendering access to company documentation more restricted. MK companies can apply to the Russian government to conceal their ownership from the public. They can also request to be released from their obligations to publish corporate documentation.

To give an example of the impact of these measures on the work of investigators, let us consider a limited liability company, which was previously registered in Cyprus and then redomiciled to a Special Administrative Region as an MKOOO. When the company was registered in Cyprus, investigators had access to a wealth of public information. Companies registered in Cyprus publish the names of shareholders, the company's shareholder history, its directors, secretaries and detailed annual accounts, which often show subsidiaries, loans from related parties and group transactions. With this information, the investigator can piece together the beginnings of the corporate structure of the company and other companies in the same group. After redomiciling to a Special Administrative Region, however, and filing a request to hide the company's shareholders, the investigator is no longer able to verify the ownership of the company directly. Annual accounts, a valuable repository of information in Cyprus, are not available, and the opportunity to generate leads based on subsidiary companies and related parties is curtailed.

Conversely, Special Administrative Regions can, in some circumstances, offer more information than was previously available before redomiciling. In our experience of investigating MK companies in recent years, we find that, more often than not, beneficial owners have not requested to obscure shareholder information and, in some cases, even publish annual accounts. Let us take the example of a company, previously registered in Switzerland, which was redomiciled to a Special Administrative Region as an MKOOO. Switzerland is renowned for its robust privacy measures; no information is made available regarding the shareholders or beneficial owners of a company and annual accounts and company filings are not publicly available. However, after redomiciling to a Special Administrative Region, the investigator now has access to the name of the company's shareholders and, as in many cases, annual accounts, detailing subsidiaries and related parties.

In this example, what was previously obscured is now publicly available.

With the introduction of Russian Special Administrative Regions, the investigative game of whack-a-mole continues. We persevere with our work of piecing together information from different jurisdictions, in some cases challenged by MK companies and in some cases aided by them. Access shifts, documents are made public or removed from public view, and the investigator adapts.

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TOO IMPORTANT TO FAIL?

THE FUTURE OF SPECIAL ADMINISTRATION REGIMES

Authored by: Phillip Patterson (Barrister) - Gatehouse Chambers

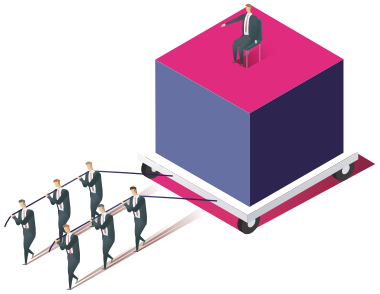
What Is Special Administration?

The Insolvency Act 1986, as amended on many occasions in the years since, provides a range of different insolvency procedures when companies and individuals encounter financial difficulty. To the extent that those procedures share common features, the primacy of the interests of creditors of the insolvent entity is surely one.

Some companies, whether by virtue of their size, the interconnectivity of the business they operate in the wider economy or the public significance of the goods or services that their business provides, are too important to fail. When such a company encounters financial difficulties, a focus solely on the interests of creditors has the potential to cause major political and economic consequences for the country as a whole.

When the then conceptual administration process was described by Kenneth Cork in his landmark report, one role identified was its use to pursue issues of national interest arising out of corporate failures. Despite that, neither as enacted nor as subsequently amended, does the Insolvency Act 1986 make provision for administration to perform such a function. Instead, a parallel concept of 'special administration' came to exist outside the boundaries of the Insolvency Act 1986.

No single statute creates or codifies the concept of special administration. Instead, a variety of statutes and statutory instruments have been introduced creating alternative insolvency procedures, typically described as 'special administration' for companies operating within certain industries. Special administrations currently exist in industries as diverse as healthcare, utilities, insurance and social housing.



Existing Special Administration Regimes?

Perhaps the best-known and most widely used special administration regime is the one applicable to investment banks, introduced under powers contained in the Banking Act 2009 in light of the challenges experienced by those seeking to recover client monies from Lehman Brothers International (Europe) Limited. The litigation addressing those challenges reached the Supreme Court and cruelly exposed the shortcomings of the FSA's CASS 7 regulatory framework. The investment bank special administration regime, contained in the Investment Bank Special Administration Regulations 2011 (SI 2011/245), as amended in 2017, has provided the framework for dealing with the insolvencies of (among others) MF Global Limited, SVS Securities Plc and Strand Capital Ltd.

It is, however, far from being the only special administration regime (or "SAR") to be used in recent years. The SAR for FE and Sixth Form Colleges, contained in the Technical and Further Education Act 2017 has been used for the insolvencies of Hadlow College and West Kent and Ashford College.

Following the widely-reported issues in the water industry, including but not limited to Thames Water, the water industry special administration (known as "WISAR") was substantially overhauled in March 2024. These changes drew upon the experience of the Bulb Energy special administration under the equivalent SAR for energy companies under the Energy Act 2004.

Calls have grown for Thames Water to be placed into special administration in the months since and this appears to be a significant matter in the in-tray of the new Government.

Further Special Administrations Planned And Implemented

The trend appears to be for the number of special administration regimes to continue to grow. Following the collapse of Monarch Airlines in October 2017, an Airline Insolvency Review in 2019 recommended the introduction of a SAR for the airline industry. This was included in the Queen's Speech of October 2019 and recommended again by the Transport Select Committee in April 2022. As yet, no such SAR exists, however, this appears to be the product of inadequate parliamentary capacity rather that a change of policy direction.

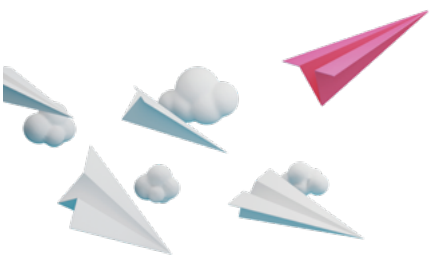
In 2021, a new SAR was introduced for the payment system and electronic money institution industry and, in July 2023, a new SAR was introduced for the nuclear industry.

Overall, there seems increasingly to be a consensus that special administration regimes have a significant role to play in the wider insolvency landscape.

Room For Improvement?

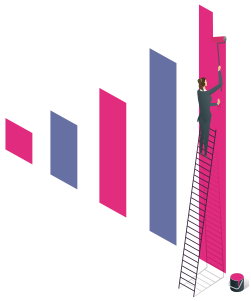
Despite the increasing popularity of SARs, precious few overarching principles can be discerned from the various regimes. Some SARs, for example the investment bank SAR, are comprehensively codified in a single statute or statutory instrument. Others, such as the WISAR amend the provisions of Schedule B1 to the Insolvency Act 1986 to tailor them to the specific requirements of a water company.

Most SARs apply only to circumstances in which the relevant entity is insolvent. However, for water companies, a parallel SAR is set up for companies whose performance falls sufficiently far below acceptable standards.



A further difference concerns whether the SAR represents the exclusive procedure applicable to that company. A winding up order cannot be made against a water company. However, if a petition is presented against such a company, the Court may order that it be placed in special administration. By contrast, there is no prohibition on an investment bank being placed into liquidation or "normal" administration. Before such an order may be made, however, 14 days' notice must be given to the bodies granted standing to seek a special administration order. The expectation is that those bodies would seek to exercise that power upon being given such notice rather than to permit the "normal" insolvency procedure to commence.

Finally, each SAR has its own bespoke purpose or purposes of the special administration. In the case of an investment bank, the bespoke purpose emphasises the return of client money to its beneficial owner. Others emphasise the continuation of service provision to customers both in the long term, via transfer of the business to another entity, and in the short term by obligations imposed upon the special administrator.



These various differences, alongside the difficulty in drawing principles from authorities taken from other SARs, has led some to suggest that a single codified general special administration regime could be produced, leaving scope for industry specific provisions or amendments to be read into that code. Whilst such an ambition may be laudable, the scale of the task should not be underestimated. There is considerable scope for such a project to provide a yet further layer of complexity to an area already beset with complexities.

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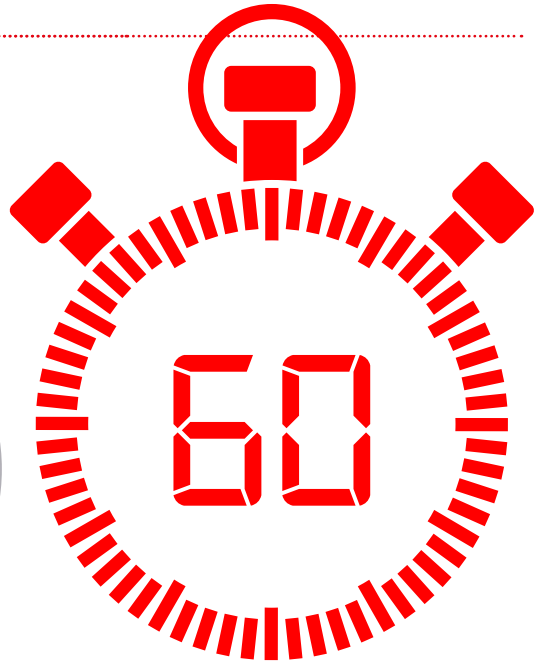

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A My weekdays would definitely include running by the sea during sunrise time, followed by some iced coffee, ceramic workshops and many road trips around the island with my Labrador, Manos.

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

A That feeling of satisfaction when I see my clients smiling proudly after a successful cross-examination or after achieving a positive outcome for their problems.

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

A Issuing an ex-parte interim injunction during the first days of lockdown in March 2020, wearing a facemask and hygiene gloves, spraying my files and pens with antiseptic spray in the Courtroom!

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

A Build an even stronger professional network outside Cyprus and meeting colleagues who aim to leave their mark in the legal profession.

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

A The recent introduction of new Civil Procedures Rules in Cyprus which provide for new – and very interesting - mechanisms and tools to be used by Cypriot legal practitioners, such as the issue of free-standing injunctions.

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

A *The Kite Runner* by Khaled Hosseini, a beautiful book which offers valuable life lessons about redemption, courage, forgiveness, friendship and love. Highly recommended to everyone!

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

A Frida Kahlo, as one of the most inspiring female figures that admire for her views and art work. I would be very curious to find out the reason behind her numerous (over 50) self-portraits!

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

A *Forrest Gump*; feels like being on a roller coaster of emotions, especially reminding you about the simple things in life that actually matter and how an innocent soul may impact so many other people's lives.

Q **What legacy would you hope to leave behind?**

A I would like to be remembered as the person who fearlessly and bravely chased her dreams and passions.

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

A Wadi Rum, Jordan. Living at the dessert was a once in a lifetime experience and I would never be able to get over the unique beauty of such a surreal landscape!

Q **Do you have any hidden talents?**

A During my free time I am drawing and painting and I am currently working on a collection with fashionable elderly ladies and men together with their pets (cats, dogs, parrots or even chickens), using pen markers and acrylic.

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

A "Stress less, always listen to your instinct, and never be scared stepping outside your comfort zone!"


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PERMISSION FOR COUNTERCLAIM AGAINST A CLAIMANT IN ADMINISTRATION

Authored by: Yana Ahlden (Associate) and Dave Johnson (Senior Associate) - PCB Byrne

Introduction

In CargoLogicAir Ltd (in administration) v WWTAI Airopco 1 Bermuda Ltd [2024] EWHC 508 (Comm), Paul Stanley KC (sitting as a Deputy High Court Judge) considered a cross-claim which had been brought without the consent of the Administrators or the permission of the Court.

The decision is of interest of officeholders, as it clarifies the extent to which an ostensibly defensive counter-claim can be brought without first meeting the summary judgment threshold which would be applied when permission is considered.

Statutory Framework

The claim concerned the statutory moratorium under paragraph 43(6) of Schedule B1 to the Insolvency Act 1986, pursuant to which:

"No legal process (including legal proceedings .. may be instituted or continued against [a company in administration] or property of the company except (a) with the consent of the administrator, or (b) with the permission of the court".

Whilst this wording may suggest that all claims are subject to the moratorium, it does not apply to defensive steps, which allows certain counter-claims to be brought without permission (Mortgage Debenture Ltd v Chapman [2016] EWCA Civ 103).

Procedural And Factual Background

The case concerned a Boeing 747 which was leased by the claimant company ("CLA") from the defendant ("WWTAI").

Whilst the lease was due to run until April 2027, however WWTAI purported to terminated it in February 2022, following the imposition of a flight ban on Russian-owned or controlled aircraft. WWTAI subsequently took possession of and sold the aircraft. CLA considered that WWTAI was not entitled to terminate the lease and that its conduct amounted to a repudiatory breach.

In May 2022, CLA sued WWTAI for wrongful termination, seeking the return of its security deposit and damages for being deprived of the opportunity to restructure its business following the imposition of sanctions. That claim was stalled due to sanctions, with CLA then entering administration in November 2022.

In September 2023, WWTAI served its defence, together with a counterclaim seeking damages for loss of rental payments and the return of documents relating to the aircraft; it did not obtain the permission of the Administrators nor the Court before doing so.

Was Permission Required?

The first key issue was whether WWTAI was required to obtain permission before advancing the counterclaim.

WWTAI submitted that permission was not required, on the basis that the counterclaim was defensive and therefore outside the ambit of the statutory moratorium; reliance was placed on Mortgage Debenture v Chapman, in which David Richards LJ held that: "as a matter of basic fairness … defendants to proceedings where the claimant is a company in administration should be able to defend themselves without restriction … It is established that essentially defensive steps are not within the statutory moratorium"

However, this raises the question of what amounts to an essentially defensive step. On this point, David Richards LJ in continued to state: "If a counterclaim is pleaded solely to raise a defence by way of set off, it is a defensive measure and no permission of the court is required. If, on the other hand, the counterclaim seeks a net payment from the claimant to the defendant, it does constitute a legal proceeding against the company for which the permission of the court is required"

In the present case, whist the counterclaim did not explicitly seek damages in excess of CLA's claim, they were not limited to the value of that claim. The Deputy Judge therefore concluded that the counterclaim:

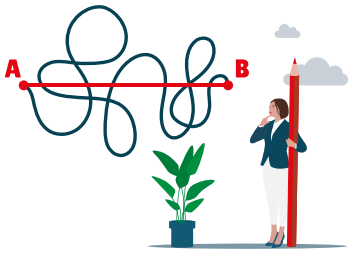
"cannot credibly be said to have solely a defensive purpose, or to be incapable of having any offensive effect" and that permission ought to have been sought".

Should Permission Be Given Retrospectively?

It was common ground that the Court can give permission retrospectively (Bank of Ireland v Colliers International UK Plc [2012] EWHC 2942 (Ch), [2013] Ch 422).

Turning to the question of whether permission should be granted, the Deputy Judge noted that the purpose of the moratorium was to allow the collective interests of creditors to be balanced against those of individual creditors. Four principles were identified as being relevant to that exercise:

- Where there is doubt as to the existence of value of a creditors' rights, it may be in both the interests of both that individual creditor and the general body of creditors for the rights to be definitively determined.
- The Court attaches great significance to proprietary rights, so the balance is more likely to lay in favour of lifting the moratorium if the creditor's claim is proprietary.
- If a counterclaim is partly defensive, and arises from the same facts of the claim, this will weigh heavily in favour of permission being granted. In those circumstances, there is obvious sense in the Court deciding all matters concerning the facts before it, and avoiding matters being part-decided by the Court, with the remainder being left to be adjudicated on by the administrator.
- The Court may grant permission on terms, for example by providing that any money judgment granted against the company cannot be enforced by execution.



With those principles in mind, the Deputy Judge concluded that:

- Permission should be granted for the claim for delivery up of the aircraft documents.
- Permission should also granted for the damages claim, subject to the following conditions: (i) WWTAI would not seek to enforce any money judgment in the counter-claim without the Court's permission, and (ii) WWTAI was to provide further information relevant to the quantum of the claim (which CLA had submitted was previously lacking).

Comment

This decision illustrates the practical approach which the Court will take when dealing with the moratorium.

On the one hand, if a creditor wishes to bring claims which are not strictly defensive, permission will be required. This ensures that exception for defensive counterclaims is not abused, and incentivises defendants only to advance claims which are properly arguable apt the be dealt with in the existing proceedings.

However, it is also clear that the Court will not allow administrators to use the moratorium for an unfair tactical advantage. For example, if counterclaims are connected to the same underlying facts as the claim, permission will generally be granted - as the Deputy Judge put it, there would be: "something fundamentally questionable about a company making claims arising from a set of events but refusing to permit the target of its action to assert cross-claims arising from the very same facts". However, that does not prohibit administrators from seeking better particulars of the counterclaim before permission is granted (as CLA did in this case).

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INSOLVENCY PROCEEDINGS VS PARTIES' AGREEMENT ON FORUM

THE PRIVY COUNCIL'S JUDGMENT IN SIAN V HALIMEDA

serle court

Authored by: Wilson Leung (Barrister) - Serle Court

This article examines the Privy Council's judgment in Sian Participation Corp v Halimeda International Ltd [2024] UKPC 16, where the court addressed the interplay between insolvency proceedings and forum selection clauses (i.e. arbitration clauses and exclusive jurisdiction clauses). The Privy Court held that, even if the underlying contract contains a forum selection clause, the debtor must demonstrate a genuine and substantial dispute on the debt before the court would stay the insolvency proceedings in favour of arbitration or the foreign court. In doing so, the Privy Council overturned the previous leading authority in England. This article also poses the question of whether the Privy Council's analysis represents a triumph of form over substance.

Arbitration Clauses, Exclusive Jurisdiction Clauses, And Insolvency: A Clash Of Public Policies

When faced with a winding up or bankruptcy petition, it is common for a putative debtor to resist the petition on the basis that the debt is disputed on substantial grounds. But what happens when the underlying contract contains an arbitration clause or an exclusive jurisdiction clause ("EJC")? Would the court stay the insolvency proceedings in favour of the parties' agreed forum (i.e. arbitration or a foreign court)? Or would the court still require the debtor to demonstrate that the dispute is based on sufficiently substantial grounds?

In recent years, the courts in numerous jurisdictions have grappled with this conundrum. Evidently, the courts have not found it easy to arrive at a solution, because there have been a profusion of conflicting decisions both within particular jurisdictions and between different jurisdictions.

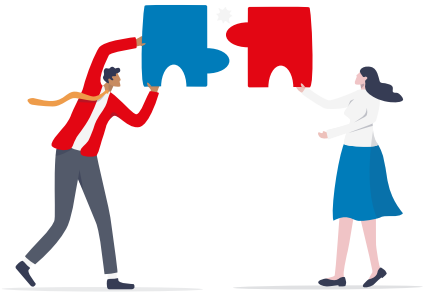
A key reason why the courts have struggled with this quandary is that it embodies a conflict between two important areas of public policy. On the one hand, the courts have long sought to give effect to party autonomy: the freedom for parties to agree how their disputes should be resolved (e.g. by arbitration or the courts of a particular country). On the other hand, there is a different public policy underpinning insolvency law: an aspiration for a system whereby an insolvent debtor can be efficiently placed into an insolvency process, through which its assets can be divided fairly among its creditors.

In Sian Participation Corp v Halimeda International Ltd [2024] UKPC 16, the Privy Council gave an authoritative answer, at least from the perspective of BVI and English law.

Sian V Halimeda: Background

The respondent (Halimeda) had advanced a loan to the appellant (Sian, a BVI company) under a facility agreement. The facility agreement included an arbitration clause which provided that "any claim, dispute or difference of whatever nature arising under, out of or in connection with" it would be referred to arbitration in London.

Sian did not repay the loan. Halimeda applied to the BVI court for the appointment of a liquidator over Sian (the equivalent of a winding up petition in England). However, Sian disputed the debt on the basis that it had a cross-claim against Halimeda (based on an alleged corporate raid aimed against Sian).



The BVI courts, at first instance and on appeal, held that Sian had failed to demonstrate a genuine and substantial dispute regarding the debt. The BVI courts also decided (following previous BVI authority[1]) that the existence of the arbitration clause did not automatically prevent Halimeda from commencing insolvency proceedings. Instead, Sian had to demonstrate that the debt was genuinely disputed on substantial grounds before the court would stay or dismiss the liquidation application in favour of arbitration.

Sian appealed to the Privy Council. Sian did not challenge the BVI courts' holding that the debt was not genuinely disputed on substantial grounds. However, Sian argued that, as a matter of law, the BVI courts should have dismissed or stayed the liquidation application in favour of arbitration, without requiring Sian to first demonstrate a genuine and substantial dispute.

Privy Council's Decision

The Privy Council (with Lord Briggs and Lord Hamblen giving the opinion) rejected Sian's appeal. It agreed with the BVI courts that a debtor had to demonstrate that the debt was genuinely disputed on substantial grounds before the court would give effect to an arbitration clause or EJC by staying or dismissing the liquidation application.[2] In doing so, it decided that the English Court of Appeal's decision in Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2014] EWCA Civ 1575 should no longer be followed, whether in the BVI or in England.[3]

Overturning Salford Estates

In Salford Estates, it was held that, where a creditor petitions to wind up a company on the basis of a debt but the underlying contract contains an arbitration clause, the court would, as a matter of discretion, generally dismiss or stay the petition in favour of arbitration. This was consistent with the policy underlying the Arbitration Act 1996, which was to enable parties to make binding agreements on the forum in which their disputes would be resolved. If a debtor were required to demonstrate a genuine and substantial dispute, that would oblige the court to undertake a "summary judgment type analysis", which would run contrary to that policy.[4]

The Privy Council held that Salford Estates was wrong. It observed that a winding up petition does not seek to resolve whether the debtor owes the petition debt to the creditor; does not result in a judgment for that debt; and is not analogous to a summary judgment application. Therefore, the presentation of such petition does not violate the

1 Jinpeng Group Ltd v Peak Hotels and Resorts Ltd BVIHCMAP2014/0025 (8 December 2015)
2 [5], [85], [99]
3 The Privy Council at [125] made a 'Willers v Joyce' direction, with the effect that its decision represented English law (as well as BVI law)
4 Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2014] EWCA Civ 1575, [39]-[41]

parties' agreement to have their disputes resolved by an arbitral tribunal or a foreign court. Applying to wind up the debtor company is simply not something that the petitioner has agreed to refrain from doing.[5]

The Privy Council dismissed a concern expressed in Salford Estates[6] that, if debtors were (despite any arbitration agreement) required to demonstrate substantial grounds for disputing the debt, that would encourage creditors to bypass the arbitration agreement by presenting a winding up petition, thereby putting pressure on the debtor to pay up. The Privy Council's answer was that the risk of abusive petitions could be met by ordering indemnity costs, which is a familiar tool used by the courts to deter creditors from using insolvency proceedings to collect disputed debt.[7]

Form Over Substance?

It could be argued that the Privy Council's decision represents a triumph of form over substance. Even if technically the nature of a winding petition is distinct from that of a summary judgment application, in substance they are closely related. In winding up proceedings, the court examines whether the debtor has raised a dispute on substantial grounds. In a summary judgment application, the court considers whether the defendant has any real prospect of defending the claim. In both contexts, the arguments advanced by counsel, and the substantive analysis conducted by the court, are likely to be similar.

Arguably, it is also artificial for the Privy Council to base its decision on the premise that a winding up petition does not seek to 'resolve' anything about the debt. Where a petitioner seeks a winding up order, he is for practical purposes asking the court to rule that the debtor has no substantial grounds to dispute the debt (at least to the threshold sum for a winding up petition).

It is instructive to compare the Privy Council's approach with those of the Hong Kong[8] and Singapore[9] apex courts. Those jurisdictions have essentially followed Salford Estates; in their view, where parties have included a forum selection clause in their contract, their intention is that the (domestic) court should not be engaged in deciding whether one party has raised a viable dispute on the debt; instead, that is a matter for the parties' chosen forum. It can be argued that the Hong Kong and Singapore courts' approach accords more with the practical experience of practitioners than the Privy Council's decision in Sian.

Lessons For Drafting

Intriguingly, the Privy Council commented that its analysis was applicable to a generally worded arbitration agreement or EJC, and that

"different considerations would arise" if the arbitration clause or EJC "was framed in terms" which covered insolvency proceedings.[10]

Thus, the Privy Council recognised (unfortunately, without elaboration) that it was possible to draft an arbitration clause or EJC which would incline the court to stay or dismiss a winding up petition without examining whether there was a genuine and substantial dispute on the debt.

The lesson is that if parties intend for all their disputes to be decided in the chosen forum and do not intend that the other party would be able to present a winding up petition against them for any alleged indebtedness, they should make express stipulation in their contract.

5 Sian, [82], [88]-[96]
6 Salford Estates, [40]
7 Sian, [82], [97].
8 Re Lam Kwok Hung Guy (2023) 26 HKCFAR 119. See also Re Simplicity & Vogue Retailing (HK) Co Ltd [2024] 2 HKLRD 1064 (CA) and Re Shandong Chenming Paper Holdings Ltd [2024] 2 HKLRD 1040 (CA)
9 AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2020] 1 SLR 1158
10 [99], [127]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CRIMINAL OR CIVIL ACTION

Authored by: Nick Nicholson (Partner) and Sarah Yale (Associate Director) - Grant Thornton

The Proceeds of Crime Act 2002 (POCA) is the primary legislation in England and Wales to recover the profit made from criminal activities. There are highly effective provisions within POCA to allow for Court-appointed Receivers to manage and realise the assets of the offender. However, cross-border asset recovery attempts by POCA Receivers are not without issue and here we consider whether concurrent insolvency appointments might assist maximising recoveries.

Published figures estimate the annual cost of fraud to the UK at £2.3 billion[1] and that fraud is now the most experienced crime, accounting for 40% of all crime reported[2].

While that figure is calculated, the true scale is unknown as it remains grossly underreported by victims, be it individuals or organisations.

While English criminal legislation allows law enforcement to achieve both recoveries for victims and perpetrators of fraud prosecuted, budget realities inevitably lead to issues with prioritisation. By their very nature, enforcing agencies' main objectives are focused on protecting the public and securing a conviction; recovery of ill-gotten gains can become a time-consuming afterthought.

For those fraud cases (or indeed any other applicable crime type) where POCA action is an appropriate add-on, assets can be dealt with by way of management (§48) and enforcement (§50) receivership appointments. Such appointments grant a Receiver, appointed by the Court, autonomy to manage and realise the assets of a defendant with the ultimate goal of, post-conviction, stripping a convicted criminal of the financial benefit of their crime. These Receivership appointments are instantly recognised in the UK (as are the restraint and confiscation orders from which the appointments arise), and there are no issues, beyond perhaps seeking the Court's direction and determining a third party's interest, with realising UK-based assets. When assets are based outside of the jurisdiction, however, enforcement can become challenging.

Overseas Recoveries

There is no automatic recognition of criminal orders or receivership appointments between the UK and other nations. Mutual Legal Assistance

1 UK fraud makes massive leap to £2.3bn | ICAEW

2 Fraud - National Crime Agency

(MLA) is the mechanism for prosecuting authorities to seek assistance, with bilateral treaties for criminal matters existing in 41 nations[3].

If going down the MLA route, it may be possible when formally seeking assistance to include a request for recognition of the POCA Receivership appointment. There are foreign jurisdictions where legal treaties and agreements with the UK allow the Receiver to carry out their functions in the foreign jurisdiction. Fundamentally, however, how a nation actions a request is dependent on their local laws, which may lead to assets realised by local representatives and/or monies retained within that jurisdiction – thus the role of the Receiver can often become redundant, and the proceeds of crime lost from the UK economy.

A pragmatic approach by a Receiver is to act on behalf of the criminal by way of Power of Attorney, if drawn up in a way that would be accepted in the receiving jurisdiction. For this to be successful, there needs to be some level of cooperation from the individual or they need to be within the jurisdiction (on occasion convictions and receivership orders are obtained in the absence of a defendant who may have fled the jurisdiction) to allow them to be compelled by the Court to sign the necessary documents.

Without a defendant taking steps themselves to realise their overseas assets, POCA recovery options are limited. An alternative option is to make an insolvency appointment to deal with overseas assets.

Benefits Of Insolvency

Whether the assets are held personally or via a corporate vehicle, there is likely to be a way to commence an insolvency process against the owner of the asset. Unfortunately, a confiscation order alone is not enough as it is not a provable debt. Most fraudsters will fall short elsewhere, leaving behind a debt or two or perhaps an unaccounted-for tax liability that does not match their lavish lifestyle[4].

As a matter of law, the assets of a bankrupt individual automatically vest in the Trustee on the making of a bankruptcy order. This can include the proceeds of criminal acts of the bankrupt. However, with property subject to a restraint order excluded from the vesting[5], often it can be a race to the assets. If there is no restraint order, or no appointed POCA Receiver, there is nothing to prevent the Trustee from dealing with the fraudsters' assets; a confiscation order alone will not prevent assets falling into an insolvency estate. Assuming there is a restraint order, if certain assets (overseas assets, for example) are excluded or indeed removed by agreement, a Trustee has the ability to seek recognition and deal with that asset in the bankruptcy process. While vesting does not happen in a corporate scenario, the same principles apply.

Recognition of bankruptcy orders has become more burdensome since Brexit, there is still a well-trodden route to recognition of insolvency appointments in EU countries and among those signed up to the UNCITRAL Model Law on Cross-Border Insolvency (currently 60 nations). Any recoveries made in the foreign jurisdiction will be brought into the insolvency estate.

Insolvency appointments also come with the benefit of bringing in personam claims, which do not feature within the POCA regime. This can include actions against associates, negligent advisers, co-conspirators or unwinding historic transactions leading to a recovery into the estate which is arguably necessary when dealing with a larger (and potentially growing) pool of general creditors rather than solely the unpaid confiscation order.

A criticism that could be envisaged from law enforcement is that an insolvency will dilute the return to victims, either as a result of the appointment holder's fees or by an increase in creditors. Any criticism detracts from the fact that the insolvency practitioner and law enforcement are on the same side, the asset pool can be extended, and the purpose of any parallel insolvency proceedings is in line with the ethos of POCA – to deprive the criminals of their assets and to maximise the return to their victims.

Nick Nicholson is a Partner in Grant Thornton UK LLP's Insolvency and asset recovery practice leading the firm's POCA team.

Sarah Yale is an Associate Director in Grant Thornton UK LLP's Insolvency and asset recovery practice.

3 Post Brexit, the position regarding POCA assistance in the EU is governed by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and northern Ireland, of the other part (the TCA),2 which was implemented into domestic law by the European Union (Future Relationship Act 2020). Since 1 January 2021,3 the TCA provides the legal basis for any requests for cooperation in confiscation matters between the UK and Member States of the EU.

4 Proceeds of Crime Act 2002 Part 6

5 §306A of the Insolvency Act 1986

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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
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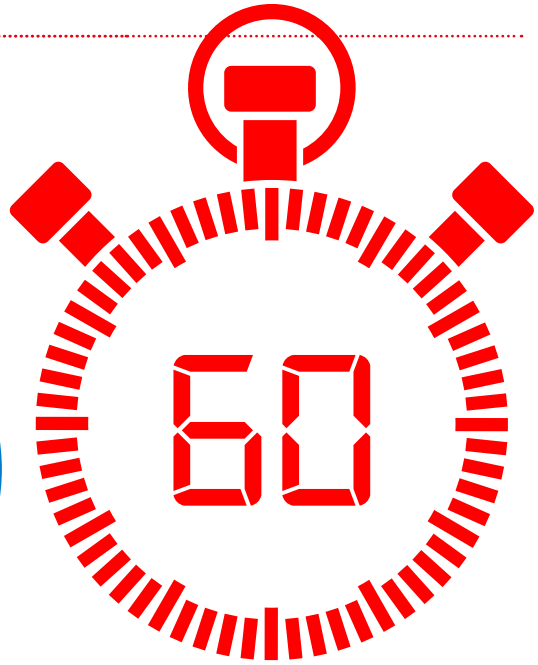


Q **Imagine you no longer have to work. How would you spend your weekdays?**

A Mornings translating classical literature and doing pro bono cases. Afternoons looking after our baby daughter.

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

A The feeling of satisfaction that comes from being part of a team that has just achieved a great result for the client, and even more so if our legal arguments were adopted by the Court and have set a precedent for similar cases.

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

A The strangest was certainly our Law Commission field trip to a retirement village near Portsmouth. The most exciting was probably seeing the inner workings of the US justice system, including the Supreme Court, on an exchange visit for judicial assistants.

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

A I would love to continue to grow my practice in the Middle East and be involved in the fast-paced development of DIFC and ADGM case law.

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

A Minority shareholders are finding more innovative ways to preserve and recover value taken out of the company by the majority.

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

A *The Histories of Herodotus* for its charming narrative, wisdom about human nature, and insight into ancient cultures that differ from our own.

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

A The Notorious B.I.G., the greatest rapper of all time.

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

A That's an impossible question, but *North by Northwest*, *In the Mood For Love* and *Lord of The Rings: The Two Towers* definitely feature high on my list.

Q **What legacy would you hope to leave behind?**

A I like to think I'm a bit young to be considering my legacy – ask me again in a decade or two!

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

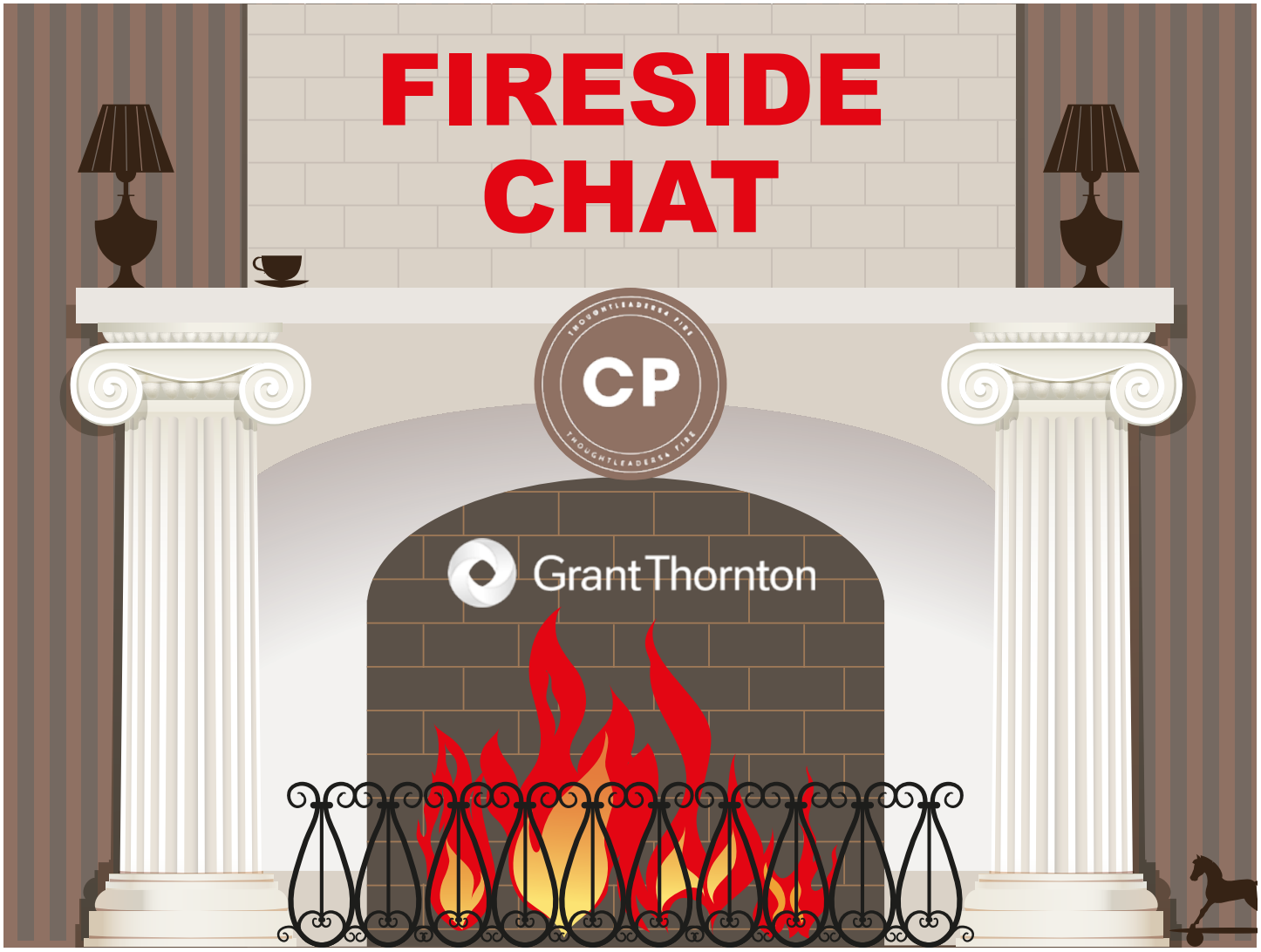
A The Loire region of France catered perfectly to both my inner ten-year-old's love of castles, and my more grown-up interests in wine, history and the great outdoors.

Q **Do you have any hidden talents?**

A I'm surprisingly good at supergluing – lots of practice from breaking things.

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

A I know it's hard in your carefree early twenties, but try to focus on who, and what, will matter to you in the long term.



Authored by: James Pirie (Director) - Grant Thornton and Amita Chohan (Barrister) - Locke Lord

James! What Do You Love Most About Your Job?

James: That's an easy one – the variety! Being an IP in a well-established offshore jurisdiction is anything but repetitive. The work ranges from complex cross-border restructurings and insolvencies, to winding up insolvent local trading companies, regulated entities and our only professional rugby team! Add to that forensic and expert witness assignments in both the private and public sectors, I think I'd struggle to find the same variety elsewhere. You?

Amita: The unpredictability! Litigation can be quite fast paced and there can be all sorts of interesting (often unprecedented) procedural fights going on at the same time - stepping into the unknown and finding solutions is where I thrive. I especially love insolvency work as it involves dealing with a situation as it is happening and the investigatory work makes me feel like a detective! Also, there are so many interesting personalities in the insolvency community which makes the industry such a fun world to be involved in!

Who Inspires You, Amita?

Amita: This one is easy for me - my parents. They have always instilled in me the importance of respecting people, always having the hunger to learn, working hard, finding every reason to have a smile on my face, being myself and bringing people together. I carry that into my work life too and always try to cultivate a similar culture for my colleagues and clients. You?

James: Great question – from a personal perspective I'd have to say my father, for all the reasons you list and for influencing my work ethic! From a professional perspective, I have always had a certain level of respect for Sir Richard Branson, partly for his disrupter approach (I am somewhat more reserved) but more so for prioritising culture – it is so important and without our people in our line of work, where would we be?

What Would The Title Of Your Autobiography Be, James?

James: I have been asked this once before, and I am still struggling to think of something that would compel someone to pick it up. Having taken a

longer and somewhat more interesting route than most to get to accountancy, something like **'The winding road'** or '**You are where you are for a reason'** seem appropriate. You?

Amita: I guess **'Don't throw in the towel'**. In my career and more generally in life, I don't give up and I take my commitments quite seriously. I like to see things through to the end. There's always a story to tell afterwards! Also, I love boxing so this title is apt.

James, Tell Me About A Key Development For Ips This Year In Jersey.

James: Jersey finds itself in somewhat of a lull between two significant developments in the insolvency regime. Alongside the introduction of a statutory demand process and residency requirements for liquidators, 2022 saw the introduction of a new Creditors' Winding Up regime which provided creditors with the ability to apply to Court for an independent liquidator to be appointed over a company. This process is now becoming more widely used with regular applications to Court being seen.

Roll on 2024, and a consultation process will shortly be commenced by government regarding the introduction of an Administration process. Jersey currently has no formal business rescue regime, so it will be interesting to see the outcome of the consultation later this year together with the timeline for any legislation changes.

What About Any Key Developments Or Cases In England In Insolvency Litigation?

Amita: You've probably heard about the BHS Group saga since it went into administration, James. This summer, the English High Court decided the joint liquidators' claims against 3 company directors for wrongful trading and misfeasance.

Interestingly, the case established the first "misfeasance trading" action against former directors. The court awarded c.£13m against 2 of the directors – this is the largest award since the Insolvency Act 1986 was introduced. Not only did the court set new legal precedent for directors' duties in the UK but went on to warn boards of directors about adherence to their duties, revealed the court's appetite to scrutinise documents produced by boards and made it clear that simply instructing professional advisors (e.g. lawyers) without documenting decisions or taking their advice is not enough to relieve directors of liability. That judgment is worth a read!

Amita, If You Were On A Desert Island And Only Allowed To Bring 3 Things, What Would They Be And Why?

Amita: Is there any room for negotiation? If not (and if I can't bring my family and our puppy Roman), I'd bring: a boxing bag stand (I love boxing and kickboxing), an mp3 player (I love to dance) and a comfy pillow (comfort is everything).

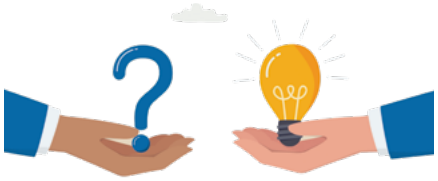
James: Excluding the obvious choices of family and pets, I'd have to say my golf clubs (I could entertain myself for hours provided I have enough balls, and spend some quality time working on my game), running shoes (to stay active, although laps of a desert island could get a little dull!) and a good book (who wouldn't take one?).

James, Tell Me One Thing You Love About Jersey?

James: I grew up in Jersey, and there was a time (teenage years) when all I wanted was to get off 'the rock'. Now though, as an adult and parent with a professional career, I'd say it's tough to find somewhere better – it ticks so many boxes (no long commutes, the beach life etc.) but one thing I love is the balance Jersey allows between a high quality work and family life!

What Do You Love About London, Amita?

Amita: I grew up in the countryside so London never ceases to surprise me. As you walk around, you will always stumble upon the most unique spots, restaurants and scenes. I'm a foodie and I love fashion so London ticks those boxes! I previously worked (and lived) in Jersey and often miss the beautiful beaches, homely feel of the island, great people culture and all the seafood!



What Advice Would You Give To Aspiring Lawyers, Amita?

Amita: Choose your own pathway into the profession by researching the career in your own way so that you gain new and interesting experiences along the way. Eg. if you want to become a lawyer and one of your personal passions is sports, instead of looking for work experience at a law firm, why not try and seek out internships at a sports team or regulator? Be unorthodox! Your journey will shape you into the lawyer you become so make it your own.

Do You Have Any Advice For Aspiring Ips?

James: We have all been given more advice than we know what to do with throughout our careers (take every opportunity; say yes, and work out how later!), but I have always found that no matter the situation, trusting your gut instinct serves you well.

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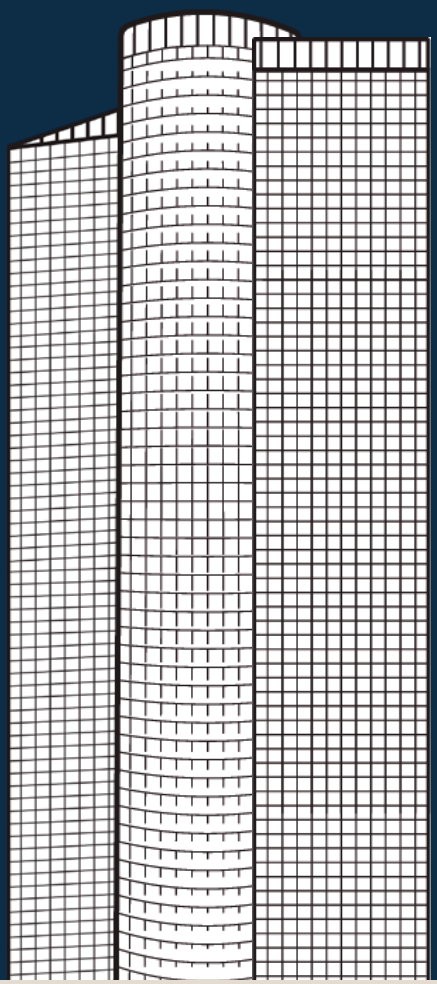

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baruch.baigel@asserson.co.uk

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Partner
yisrael.hiller@asserson.co.uk

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

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

Michael Abel
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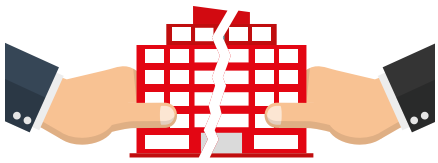
OVERVIEW OVER GERMAN INSOLVENCY PROCEEDINGS

Authored by: Ben Kempe (Partner) and Niklas Rönker (Research Associate) - NOERR

This text provides a general overview of the main features and principles of German insolvency law for businesses, but it is not intended to cover all aspects and details of this topic. German law distinguishes between liquidation and insolvency proceedings. Liquidation proceedings are conducted on a voluntary basis by the shareholders without the involvement of a court. They require that there are no grounds for insolvency and are regulated by the law applicable to the respective legal form of the company (e.g. Act on Limited Liability Companies - GmbHG). If there is a ground for insolvency, insolvency proceedings must be conducted in the courts. Unlike in other jurisdictions, German insolvency law does not differentiate between types of proceedings, so the aim can be either the reorganisation or the liquidation of the debtor/their business. Additionally, preinsolvency reorganisation proceedings have recently been introduced under a separate statute (StaRUG), but these proceedings are not the subject of this text.

I. Initiation Of Insolvency Proceedings

Insolvency proceedings can be initiated by either the debtor (Sec 13 German Insolvency Code - InsO) or a creditor (Sec 14 InsO) by filing a petition with the competent insolvency court. If the debtor is a corporation with limited liability of its shareholders, the directors have a statutory obligation to file the petition without undue delay, i.e. at least within 3 to 6 weeks after a ground for insolvency arises (Sec 15a InsO).



II. Procedure

Upon filing, the court examines the petition´s admissibility, the grounds for insolvency and whether there appear to be sufficient funds to cover the costs of the proceedings.

In general, insolvency can be established on the grounds of (i) illiquidity (Sec 17 InsO), which is the case if the debtor is unable to meet at least 90 % of their due payment obligations within a time period of 3 weeks, and (ii) if the debtor is a legal entity, overindebtedness (Sec 19 InsO), which is the case if the debtor´s liabilities exceed their assets (balance sheet test) and does not have a positive goingconcern prognosis (Fortführungsprognose) for at least 12 months. If the debtor files the petition, imminent illiquidity (Sec 18 InsO) is also a ground for insolvency, meaning the debtor is likely to become insolvent in the near future.

The courts engage experts for examination of the grounds for insolvency and whether there appear to be sufficient funds to cover the costs of the proceedings. If the debtor has an ongoing business, often the court will appoint this expert as provisional insolvency administrator to protect the debtor's assets and oversee their business (Sec 21 InsO).

If the expert opinion confirms the grounds for insolvency, the court orders the opening of the insolvency proceedings. It appoints a "final" insolvency administrator (Sec 56 InsO) and publishes the order (Sec 30 InsO) on a central website[1].

The usual time period between filing of the petition and opening of insolvency proceedings is a few months.

The debtor maintains ownership of their assets but no longer has the right to freely dispose of and manage them (Secs 80, 35 InsO). The debtor cannot make valid transfers of those assets (Sec 81 InsO) and obligations cannot be fulfilled by performance to the debtor (Sec 82 InsO). Court proceedings that relate to the insolvency estate are automatically interrupted upon the opening of insolvency proceedings (Sec 240 of the German Code of Cicil Procedure, ZPO).

III. The Creditors´ Rights And Roles

In principle, all unsecured creditors whose claims came into existence prior to opening of insolvency proceedings have equal rights: They may file their claims with the insolvency administrator (Sec 174 InsO). If their claim is acknowledged, it shall be included into the schedule of claims. The creditors shall receive the socalled insolvency dividend (a percentage of the amount of their claims), which is usually paid out at the end of the proceedings (Secs 175 et seqq. InsO).

However, ownership and other rights in rem (including collaterals) give rise to rights of segregation or separate satisfaction for the respective creditor (Secs 47 et seqq. InsO). Depending on the nature of the right, this leads either to the handover of the asset to the creditor or to a privileged satisfaction of the creditor from the proceeds of the realisation of the asset.

Further creditors´ rights are primarily exercised through the creditors´ meeting (Sec 74 InsO). The creditors' meeting decides on important measures in the proceedings (e.g. sale of the debtor's business). It is comparable to the shareholders meeting outside of insolvency proceedings. Voting rights in the meeting correspond to the amount of the claim the respective creditor holds.

A creditors´ committee with fewer members than the creditor's meeting (usually 3 to 11) may be established (Sec 67 InsO) and is mandatory in larger and more complex insolvency proceedings (Sec 22a InsO). The committee assists and supervises the insolvency administrator and is involved in significant decisions (Secs 67-70 InsO).

IV. Claw-Back Actions

Claw-back actions of the insolvency administrator (Secs 129-147 InsO) play an important role in German insolvency proceedings. They allow the insolvency administrator to challenge and reverse transactions made by the debtor prior to the opening of insolvency proceedings. Claw-back periods cover up to ten years prior to the petition for insolvency proceedings. These transactions can include payments to specific creditors, fraudulent transfers, or under-valued disposals of assets.

V. Purpose Of Insolvency Proceedings – Liquidation Or Restructuring Of Debtor

Insolvency proceedings are open-ended, meaning that the purpose can either be liquidation or restructuring of the debtor/ their business. As there is only one type of procedure, the purpose does not have to be determined at the outset but can change during the course of the proceedings (e.g. transition from restructuring to liquidation). Measures for restructuring can be the transfer of the business as a whole or significant parts of it to another person/legal entity (reorganisation by way of transfer) or restructuring of the legal entity by way of an insolvency plan which usually includes a "haircut" of claims. Such a plan can be submitted by the debtor or the insolvency administrator (Sec 218 InsO).

The insolvency plan may include various interventions into stakeholder rights, including a debt-to-equity swap. An insolvency plan needs approval by a majority of creditors and confirmation by the insolvency court (Secs 244 – 246a, 248 InsO). Dissenting creditors/ stakeholders may be overruled under specific conditions.

VI. Self-Administration

The German InsO allows for self-administration by the debtor. In this case, the proceedings, in principle, follow the same rules as ordinary proceedings. However, the court does not ap-point an insolvency administrator. Accordingly, most of the tasks and rights that would otherwise be exercised by an insolvency administrator are assumed by the debtor themselves. Nevertheless, the court appoints a custodian who supervises the debtor and executes certain rights under the InsO (in particular claw-back rights).

The court only allow self-administration upon application by the debtor and if there is sufficient ground to believe that there will be no detrimental effect on the position of the creditors.

1 https://neu.insolvenzbekanntmachungen.de/ap/

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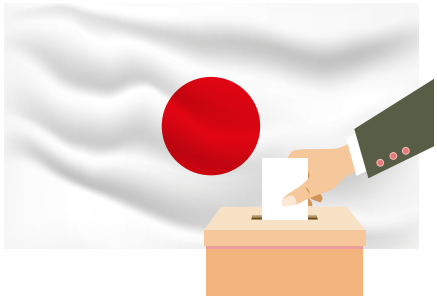
TRANSFORMING JAPANESE INSOLVENCY LAW

A BOLD REFORM INITIATIVE

Authored by: Midori Yamaguchi (Senior Associate) - Mori Hamada & Matsumoto

In Japan, three major upcoming insolvency law reforms under consideration by the government (see sections 1 and 2), or that have already passed as the relevant bill (see sections 2 and 3), are waiting to take effect. Any of the three reforms would present significant advantages to insolvency practice.



1. Majority Voting System In A New Hybrid Workout

In this country, it is becoming more common to opt for out-of-court workouts as a debt restructuring tool instead of relying on in-court proceedings such as the civil rehabilitation procedure. There are several forms of rule-based out-of-court workouts in which participants must follow particular rules, guidelines or laws while independent specialists supervise the restructuring. All of them limit the participating creditors, whose rights are modified in the process, mainly to financial institutions such as banks, whose aim is to standardise the workout process and help facilitate the negotiations between distressed debtors and their financial institution creditors. In other words, these workouts function as preliminary insolvency proceedings for debtors that can maintain their cash liquidity to continue their businesses by requesting standstill and debt restructuring only from the banks without suspending payments to other trade creditors.

Even though rule-based out-of-court workouts are common restructuring tools nowadays in Japan, they require the unanimous approval of all participating creditors in order to make a restructuring plan binding. In 2022, the Japanese government revealed that it is considering the adoption of new pre-insolvency workout legislation. Under the new regulations, a restructuring plan will be legally binding if it receives a certain percentage more than a majority of the creditors' approval and court confirmation, such as that prescribed under the Scheme of Arrangement in the UK and StaRUG in Germany.

In a recent significant case in 2022, Marelli Holdings Co. Ltd. attempted restructuring through Turnaround ADR, which is one form of rule-based out-of-court workout. Its restructuring plan was ultimately rejected by 5% of the participant creditors, forcing the debtor to enter judicial rehabilitation proceedings. Afterwards, the restructuring was completed swiftly by "cramming down" the minority lenders through a simplified rehabilitation process. However, this delayed the restructuring, damaged the debtor's reputation, and caused considerable difficulty in getting the creditors to understand the transition from the workout to the in-court process. Accordingly, majority voting in pre-insolvency restructuring is now being taken into account in the upcoming legislation, following a protracted discussion by academics and practitioners.

The new legislation must ease some of the concerns arising from a majority vote. For instance, dissenting creditors should be well-protected with due process under the regulations in view of property rights. The voting process must also be structured equitably and consistently. Amongst other things, there should be a good balance between the need for quick corporate restructuring and the fairness of the new process.

2. Reform Of Secured Transaction Law

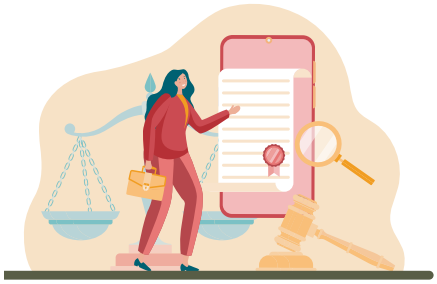
The Japanese government published the Interim Proposal on the Reform of Secured Transaction Law on 20 January 2023, with the aim of regulating security interests in secured transactions, including by means of security assignments and sales with retention of title. These transactions are commonly used to secure financing but have relied on court precedents, resulting in ambiguity. The proposal seeks to introduce clear rules, allowing multiple security interests over a single asset through multiple security assignments and providing definitions for aggregation of movables and claims. The background is that, historically in Japan, bank lending has predominantly been supported by real estate collateral and personal guarantees, limiting the financing options for small and medium-sized enterprises and start-ups. To diversify financing, the proposal allows for the use of movable property and receivables as collateral, providing clarity on security assignment rules, order of priority amongst competing security interests, their enforcement, and their treatment in insolvency proceedings.

Additionally, on 7 June 2024, the Diet passed a bill for a new collateral law with the concept of an all-assets security interest called “Business Security Interest”. This innovative approach aims to secure financing for businesses without tangible assets, such as start-ups, by leveraging the potential value of the entire business. The policy could additionally streamline financing during the restructuring phase, including the possibility of utilising DIP financing. This may enable a greater number of debtor companies to steer clear of bankruptcy by capitalising based on this approach, and encourage lenders to monitor borrowers’ businesses more closely on an ordinary basis and assess their business value by not relying on real estate or guarantees.

The proposal and the law leave several issues to be discussed, including amendments to the registration system, handling of movables and claims in insolvency proceedings, clawback provisions, and the specifics of putting Business Security Interest into effect. Overall, it represents a significant reform in Japanese secured transaction law, potentially making financing more diverse, secure and predictable.

3. Digitisation Of In-Court Insolvency Proceedings

On 6 June 2023, the Act on the Development of Laws to Promote the Utilisation of Information and Communications Technology in Civil Proceedings was enacted with amended provisions of current laws for the full-scale digitisation of civil-related procedures, including judicial insolvency proceedings. While the implementation of digitisation of civil lawsuit proceedings has already been initiated, this law will not be enforced for insolvency proceedings until June 2028 at the latest.



The filing of petitions online will be mandatory in insolvency proceedings where an attorney-at-law is retained or a trustee is appointed, and the court claim investigations and the creditors’ meetings may be held via web conference. The amendments stipulate the digitisation of court case records and enable creditors to inspect those records online. This will improve the efficiency of insolvency proceedings and contribute to the convenience of those involved.

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 Middle East 2024

Afternoon Tea & Panel Session - 10 November 2024

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

Networking Seminars Podcasts

TDN Tech Disputes Network

TDN is an inclusive group of legal and tech professionals interested in learning how to avoid, manage and win technology disputes.

Join TDN to hear about our next event.

https://disputes.tech

Our FIRE Partners:

ThoughtLeaders FIRE

Meet ThoughtLeaders

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