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FIRE *MAGAZINE*

Fraud • Insolvency • Recovery • Enforcement

ISSUE 8

The FIRE Starters Edition

BRINGING TOGETHER THE RISING STARS OF ASSET RECOVERY

INTRODUCTION

"What could be more important than equipping the next generation with the character and competence they need to become successful"

Colin Powell

We are delighted to publish this issue of the FIRE Magazine post FIRE Starters Global Summit, our first Asset Recovery event of 2022.

In this edition, we gain insight on all aspects of FIRE from our FIRE Starters community. Our authors discuss a variety of current trends and recent cases, including ESG, the COVID-19 pandemic, and Crypto-fraud. We also hear more from our community in a series of 60 second interviews, including the winner of the Future Thought Leaders Essay Competition, Caitlin Bruce.

Thank you to all of our authors for contributing towards the first issue of 2022. It is going to be a busy and exciting year for the FIRE community, and we look forward to connecting with as many of you as possible throughout 2022.

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FIRE International

FIRE International: Vilamoura

18th - 20th May 2022
Anantara Hotel, Vilamoura, Portugal

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COVID PANDEMIC:

THE PERFECT PETRI DISH FOR CULTIVATING FRAUD

Authored by: Piers Elliott and Lauren Pender - Henderson & Jones

In this article, Piers Elliott and Lauren Pender examine the reasons why the COVID-19 pandemic is likely to lead to an explosion of fraud cases.

The COVID-19 pandemic is without precedent in modern times. Its impact has spread across the globe infecting our lives for nearly two years. Almost every person in the world has had their life impacted in one way or another. As of January 2022 more than 5.5 million people had lost their lives and countries are continuing to scramble to limit the impact of the Omicron variant.

An unfortunate consequence of the pandemic is also likely to be an explosion of fraud cases. These fraud cases can be broadly split in two categories.

Career criminals

The first being career criminals who have sought to exploit the circumstances of the past few years for their own illicit benefit.

PwC have been advising the Department for Business, Energy and Industrial Strategy on bounce back loan fraud and as of October 2021 estimated that out of a total of £47bn in bounce back loans provided, approximately 7.5% - or £3.5bn - may have been fraudulent.

Criminals have also used the pandemic as a vehicle to scam members of the public. In particular, 2020 and 2021 saw a proliferation of text message scams linked to COVID-19 vaccinations. And, whilst demand for delivery services boomed during lockdown cyber criminals set out to trick citizens into scams via bogus 'missed parcel' text messages.

Victims of circumstance

The second category of fraudsters did not begin 2021 as criminals - many were successful business men and women but have fallen victim to the "fraud triangle" as a result of the circumstances of the pandemic and, in particular, the economic downturn it caused. It is this category of fraudsters that are examined in more detail below.

The Fraud Triangle

The fraud triangle is a framework commonly used to explain the reason behind an individual's decision to commit fraud. The fraud triangle outlines three limbs that contribute to increasing the risk of fraud:

(1) opportunity,
(2) pressure, and
(3) rationalization.

1. **Opportunity refers to circumstances that allow fraud to occur.**

2. **Pressure (alternatively called incentive) refers to an individual's mindset towards committing fraud.**

3. **Rationalization refers to an individual's justification for committing fraud.**

Impact of the pandemic

There are a variety of reasons why recession and economic instability lead to an increase in fraud. A key factor is the increase in pressure that companies and employees are under as a consequence of the economic downturn. For example, struggling companies may face pressure to falsify their results so as to meet financial targets or avoid breaching lending covenants.

Many businesses that were performing well prior to the pandemic have suddenly been decimated. These are not cases of floundering businesses in an inevitable slide towards insolvency following many years of poor performance. But viable and successful businesses unable to cope with the sudden and severe change in circumstances. Therefore, the temptation arises to do something desperate to counteract the issues caused by the pandemic. This also links in with the "rationalization" limb of the fraud triangle - as owners of previously successful businesses could attempt to rationalise fraudulent acts on the basis that the pandemic isn't their fault and they don't want to lose everything and so have done something desperate in the hope that the company will be able to earn its way out of difficulty and then try to undo any wrongdoing.

The final limb of the fraud triangle, opportunity, can also increase during economic instability. The rise in remote working may present new opportunities for employees to target their employer. In particular, employees working remotely may feel that they are under less scrutiny than when working in an office surrounded by colleagues and, through the use of digital signatures, may be permitted to push through processes without encountering physical constraints. Those same employees may also be under increased financial pressure personally and/or have increased strain on their mental health caused by the pandemic, both of which may cause them to make bad decisions. Further, when companies come under severe financial pressure the first departments to face cuts are those that are non revenue generative. That includes departments such as legal, compliance and internal audit; leaving companies more vulnerable to fraud. In particular, to fraudulent and/or duplicative invoices, which may go undiscovered as a result of weakened controls and reduced collaboration as a result of remote working. Companies make cut backs to try to reduce overheads but consequently create an environment which is ideal for encouraging fraud. The company has weakened its defenses intended to guard against fraud at a time when the pressures and opportunities motivating employees to commit fraud (either for themselves or on behalf of the company) are high.

Discovery of historic fraud

Economic downturn not only leads to greater instances of fraud being committed but also leads to an increase in existing or historic fraud being discovered.

As Warren Buffett famously said, "You only find out who is swimming naked when the tide goes out."

When cash flow dries up companies that have been able to hide fraud within their balance sheet may no longer be able to do so. Numerous instances of fraud were discovered following the global financial crisis in 2008 - notably the ponzi schemes of Bernie Madoff and Allen Stanford.

The economic downturn is likely to lead to a proliferation of insolvencies. The tsunami of insolvencies that has been widely predicted has yet to emerge - largely as a result of the government's various interventions - but it is inevitable. And, as insolvency practitioners are appointed they will probe insolvent companies' affairs - no doubt shedding light on further instances of fraud.

The impact on FIRE practitioners

The pandemic has been challenging and difficult for everyone and millions have lost their lives. The fraud perpetrated during the past two years will doubtless cause further suffering. So it is without any hint of triumphalism that we acknowledge the simple fact that the pandemic will undoubtedly lead to an explosion of fraud related work for investigators, insolvency practitioners, forensic accountants and lawyers. Some of that work may continue for many years to come - matters relating to the Madoff and Stanford frauds are still being litigated today.

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ESG: HOW THE LEGAL RESPONSIBILITIES OF BUSINESS ARE CHANGING

Authored by: Emma Williams - Grant Thornton

Capitalism is evolving. We've come a long way since the days when 'maximisation of shareholder value' was all that counted. Every day, it seems, the world grows increasingly aware of the environmental, social and governance (ESG) responsibilities of business. As attention to ESG grows, so the legal and regulatory requirements of business evolve, which may broaden the types of legal claims brought against businesses.

New and emerging ESG disclosure laws

The evolving views of the ESG responsibilities of business are beginning to be reflected in the legislature.

In the UK, new legislation coming into force on 6 April 2022 will require Britain's 1,300 largest businesses to disclose their climate-related risks and opportunities[1].

This follows the introduction in the UK of mandatory reporting of greenhouse gas emissions in 2013[2], modern slavery statements in 2015[3] and mandatory gender pay gap reporting[4] in 2017. In Europe, the EU's sustainable finance action plan of 2018 led to the introduction of regulation regarding sustainable finance disclosures and corporate sustainability reporting. And in the US, the SEC's climate disclosure rules are anticipated in early 2022[5].

This combines with growing calls from international investors for comparable reporting on ESG matters; the International Sustainability Standards Board (ISSB) has recently been created (announced 3 November 2021 by the IFRS[6]) to deliver a "comprehensive global baseline of sustainability-related disclosure standards".

By mandating and standardising reporting in these areas, the intention is for companies to provide greater clarity around non-financial performance and make their ESG risks and opportunities more transparent to stakeholders. Notwithstanding the legislation, many companies are choosing to make such disclosures voluntarily in response to pressures from their investors. However, ESG disclosures can create significant litigation and liability risks for companies that do not exercise appropriate care and diligence.

1 UK to enshrine mandatory climate disclosures for largest companies in law - GOV.UK (www.gov.uk)
2 For all listed UK companies - Environmental Reporting Guidelines (publishing.service.gov.uk)
3 For UK companies with a turnover of £36m or more- Publish an annual modern slavery statement - GOV.UK (www.gov.uk)
4 For all UK companies with a headcount of 250 employees or more as at their 'snapshot date'- Who needs to report their gender pay gap - GOV.UK (www.gov.uk)
5 A small but mighty change to force US corporate climate reform | Financial Times (ft.com)
6 IFRS - International Sustainability Standards Board

Greater disclosure equals greater risk

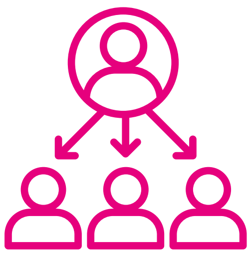
As with all statements that business make about their performance, there is a risk of misreporting. The reasons for this may vary from ineffectual record keeping through to outright fraud. While the incentives may be of a less financial nature (though may be linked to executive performance and compensation), there may be increased opportunity for fraudulent reporting in ESG. This is because the systems used to measure non-financial metrics are often less sophisticated and subject to less investment than systems elsewhere in many businesses.

ESG record keeping also lacks the double-entry book-keeping system of financial accounting, which provides a natural check and balance.

ESG litigation

In view of this, we expect ESG litigation to increase in the coming years. For example, with ESG becoming an increasingly hot topic within the investment world, investment managers may rely on the newly disclosed greenhouse gas emissions data by companies to screen them against their ESG investment criteria. Misreporting could lead to claims by investors (perhaps class-action claims) of these ESG investment criteria not being followed.

For shareholders of listed financial services companies, sections 90 and 90A of the Financial Services and Markets Act 2000 (FSMA) could be a route for greenwashing litigation. However, it is important to note that the shareholders must not only rely on the published information in making investment or disposal decisions, but also suffer a financial loss because of the untrue or misleading statement[7]. As far as we're aware, no such claims have yet gone to trial, but are expected to arise in the future.



Claims seeking to change behaviour

The legislation discussed above relates primarily to ESG disclosures, rather than business strategy. However, changes in the rights of shareholders, or in how they are used, may result in management decisions being vetoed on the basis of ESG concerns.

In the US, a recent SEC announcement will mean that companies can no longer exclude shareholder climate proposals that ask them for certain timelines and targets for their greenhouse gas emissions, "so long as the proposals afford discretion to management as to how to achieve such goals"[8]. Meanwhile, the UK is seeing increasing shareholder rebellions on environmental issues. For example, BHP Group plc saw 17% of its shareholders voting against its "climate transition action plan" in the lead-up to the COP26 summit[9].

As shareholders become more active in voting on these issues, rebellions may grow. Business leaders could in time see their proposed plans defeated on the grounds of being insufficiently long-term in view, or face disputes where business strategy conflicts with shareholders' ESG concerns.

Legal action is also being brought against businesses in relation to climate change strategy from those without shareholdings. For example, in May 2021, Royal Dutch Shell was ordered by a Dutch court to cut its carbon emissions by 45 per cent by 2030[10]. This is part of a shift away from claims for damages for past behaviour and towards changing business' future strategy[11].

Claims in respect of director's duties

The law in England and Wales already encompasses director duties in respect of ESG issues. Section 172 of the Companies Act 2006 details that directors' duties extend beyond a sole focus on maximization of profit. Instead, they have a 'duty to promote the success of the company', as follows:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (emphasis added)—

(a) the likely consequences of any decision in the **long term**,

(b) the **interests of the company's employees**,

(c) the need to **foster the company's business relationships** with suppliers, customers and others,

7 Disputes risks for FS firms: 'greenwashing' and ESG reporting obligations, Collyer Bristow, 13 October 2021 (https://collyerbristow.com/longer-reads/risks-disputes-greenwashing-esg-reporting-obligations/)

8 SEC eases path to votes on shareholder petitions at US companies | Financial Times (ft.com)

9 Investors need to dig deeper into climate conundrum | Financial Times (ft.com)

10 Lawyer who defeated Shell predicts 'avalanche' of climate cases | Financial Times (ft.com)

11 Dutch court orders Shell to accelerate emissions cuts | Financial Times (ft.com)

(d) the **impact** of the **company's operations on the community and the environment**,

(e) the desirability of the company maintaining a **reputation for high standards** of business conduct, and

(f) the need to **act fairly** as between members of the company."[12]

The explanatory notes to section 172 elaborate that this "codifies the current law and enshrines in statute what is commonly referred to as the principle of 'enlightened shareholder value'"[13].

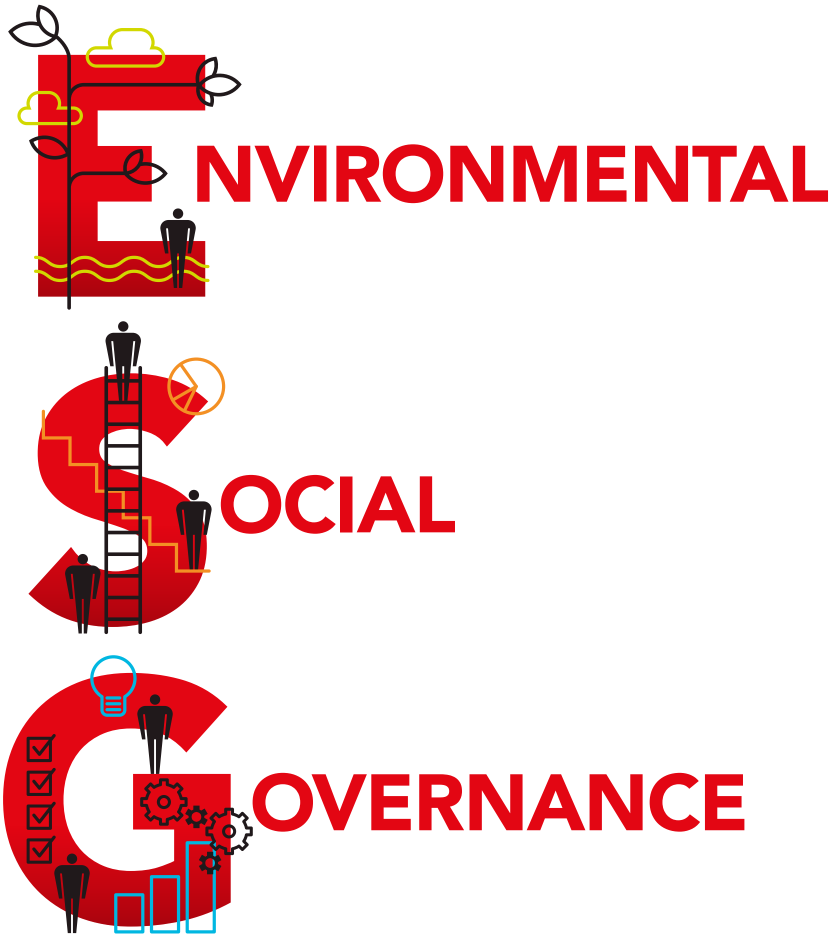
Legal commentators identify that at the very least, section 172 enables directors to make decisions based on ESG factors 'if their good faith judgment is that doing so is likely to promote the success of the company'[14] [15].

Whether this extends further to a perceived failure to perform these duties if ESG factors are not adequately considered remains to be seen, but it is expected that "the duty of care obligation for top managers will only grow"[16].

What this means for you and your clients

The legal environment is changing as our definition of corporate responsibility evolves and stakeholder attention increasingly focuses on ESG issues. While this shift may be a positive and necessary step for society as a whole, it is likely that change will come with increasing legal challenges for business as they adapt existing governance and reporting structures to a new regulatory environment.

Boards and CEOs should therefore be mindful of their oversight responsibilities and ensure that they select the most appropriate reporting metrics and evaluate and update their policies, controls and procedures. Most importantly, companies should confirm the accuracy of any ESG disclosures before they are published and investigate any ESG issues that may arise as a result of the data capture process. If they fail to do so, any misstatements may well result in litigation from stakeholders alleging misrepresentation, or even claims against the directors themselves.



12 Section 172(1)(d) of the Companies Act 2006
13 Explanatory notes to section 172 of the Companies Act 2006 at [325]-[327].
14 ESG factors: Can directors of UK Companies take them into account? (burges-salmon.com)
15 ESG goes mainstream – should directors be worried and what can they do about it? | Enyo Law LLP
16 Shell case puts spotlight on energy groups' role in climate change | Financial Times (ft.com)

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FRAUD AS AN INVESTMENT FOR POSITIVE GROWTH?

Authored by: David Hinrichsen - FRP

Now that there is light at the end of the Covid tunnel, the fallout from the eyewatering cost of the pandemic to the UK taxpayer is starting to become evident. The FIRE community especially will be closely following the government's approach to the staggering levels of fraud committed over the last two years.

The Ugly: Free money

The figures are almost incomprehensibly huge.

Of the £47bn of bounce back loans (BBLs) handed out across 1.5m individual loans, £17bn is deemed unlikely to be collected by the UK Government.

Of that sum, c£5bn is estimated to be lost in fraudulent claims, putting the level of fraud at over 10%.[1]

Similarly, £70bn of furlough cash was paid out up to November 2021[2] and HMRC estimates a provisional range for "error and fraud" in this area of 7% to 12%[3], resulting in a further loss to the taxpayer upwards of £5bn.

Compared to the levels of "shrinkage" in the retail sector, these rates of loss to crime are enough to make anyone lose their last shred of faith in humanity. Even the "honesty box" system of self-checkouts in retail stores is only estimated to result in a 4% loss rate[4], while a 2019 retail crime survey suggests that total losses in the industry from crime amount to £4.2bn or 1.1% on sales of £390bn.[5]

Are we really more than twice as likely to steal taxpayer funds in the tens of thousands of pounds than we are to walk away from a Tesco self-service till with a Pink Lady apple accidentally mistaken for its cheaper Braeburn brother?

If recent reports are anything to go by, the likely reality is a mix of some opportunistic (but still criminal) behaviour by many faced with offers of free cash in difficult circumstances as well as the concerted efforts of a handful of organised criminals.

The year to 31 March 2021 saw a c22% increase in UK company incorporations year on year with 810,000 new companies compared with only 665,000 in the year to 31 March 2020. Whilst some of those will undoubtedly be a result of the "great resignation" and a sign of well-intentioned entrepreneurship, one has to suspect that the connection to the opening of the largely unchecked BBL and furlough schemes in early 2020 was more than just coincidental.

1 https://www.nao.org.uk/wp-content/uploads/2021/12/The-Bounce-Back-Loan-Scheme-an-update.pdf

2 https://researchbriefings.files.parliament.uk/documents/CBP-9152/CBP-9152.pdf

3 https://www.gov.uk/government/publications/measuring-error-and-fraud-in-the-covid-19-schemes/measuring-error-and-fraud-in-the-covid-19-support-schemes-methodology-and-approach

4 https://money.com/shelf-checkout-encourages-shoplifting/

5 https://www.retailresearch.org/crime-costs-uk.html

The Bad: Recovery

A recent National Audit Office report suggests a minimum recovery of £6m by the National Investigation Service (NATIS) from fraudulent BBLs over the next three years.[6] Earlier this month, HMRC suggested that they had recovered £500m of "overpayments" in 2020/2021 and are expecting to recover a further £800m to £1bn between 2021 and 2023.[7] Reports such as this effectively confirm the lion's share of fraudsters' gains as lost.

As a case in point, in a recent case of two fraudsters jailed for stealing £10m of BBLs (among other things) police had only managed to recover £17,000, with most of the stolen funds sent to accounts in Germany and the Czech Republic as well as recurring favourites UAE, Singapore and Hong Kong.[8] This type of conduct, and the difficulties it brings in terms of recovery, will be familiar to FIRE practitioners. It is not inconceivable that large chunks of the great Covid fraud will have already made their way to offshore bank accounts in (in)convenient jurisdictions.

Another interesting facet to a likely overseas shift of funds is the question of whether the pursuit of wrongly paid CJRS subsidies and BBLs are effectively an attempted tax recovery by the UK.

Might the "Revenue Rule" cause havoc to attempts to secure a return for the benefit of the UK taxpayer in the same way as it did for the Danish tax authority in the Solo Capital saga earlier in 2021?

Answers on a postcard please.

The BBC reports that NATIS only has capacity to work 50 cases per year,[9] so it seems almost inevitable that any form of Government-led enforcement will result in only fractional recoveries of the vast sums handed out to fraudsters.

The Good: Fight fire with FIRE?

A pragmatic, proactive and collaborative approach between the authorities and the FIRE industry may be the best way to tackle this sickening attack on taxpayers' funds. Insolvency practitioners appointed over the remains of the vehicles used for Covid fraud and forensic accountants are going to play a key role in this area in years to come.

Efficient and joined-up teams of professionals experienced in contentious insolvency, investigations and forensic accounting are the solution to achieving effective results in going after the Covid fraudsters.

However, many cases of Covid fraud are likely to be extremely granular with BBLs averaging only c£30k per loan. Furlough fraud is also potentially fragmented across large and potentially difficult to evidence payrolls. This will clearly present huge challenges to achieve cost-effective and commercial recovery attempts by the private FIRE sector, while public bodies are likely to be overwhelmed, under resourced and pulled in different directions, having to pursue financial recoveries as well as disqualifications and other punishments. Pragmatic approaches, such as strategic collective appointments over connected entities could result in economies of scale and improve prospects of successful and cost-effective recoveries.

With funds effectively already written off, UK authorities should potentially accept that "recovery" can take many forms beyond that of a dividend cheque to the Treasury. "Recovery" by members of the FIRE community also comprises an element of deprivation and disruption to the fraudster, and a display of how we are able to make criminals' lives difficult and not allow them to walk away with ill-gotten gains, fuelling economies and industries thriving off undeserved cash.

The relevant government departments should champion the FIRE sector and encourage it to gear up for this challenge and to expand and flourish by passing linked cases and intelligence to those best placed to pursue instances of commercial misfeasance. While that may mean accepting that dividends from insolvent estates are going be extremely difficult in "single instance fraud entities", it is worth bearing in mind that fuelling a legitimate and ethically conscious industry like FIRE will result in its own dividends, not just in terms of driving a healthy sector of the economy but also by pushing a sector that will inherently instil ethical behaviour and police conduct in the UK financial market.

The spirit behind recent and proposed changes to insolvency rules and regulation seems permanently pitted against the sector and signals an inherent distrust, mostly in an act of shooting the messenger in response to public displeasure at the delivery of unwelcome news.

Working in the FIRE sector should be an aspirational goal.

Government authorities should openly support and encourage the sector in spirit and with positive action so that we can continue to attract the best and brightest new talent and remain at the forefront of the global effort to combat financial crime and misconduct.

Now for the question of how we can go after the white collared robbers who ripped off anyone from the NHS to citizens looking to travel by profiteering from things like PCR tests and PPE equipment – or is that just a sanctimonious attempt at challenging the natural workings of capitalism?

6 https://www.nao.org.uk/wp-content/uploads/2021/12/The-Bounce-Back-Loan-Scheme-an-update.pdf

7 https://www.gov.uk/government/news/hmrc-responses-to-inaccurate-claims

8 https://www.bbc.co.uk/news/business-59761294

9 https://www.bbc.co.uk/news/business-59504943

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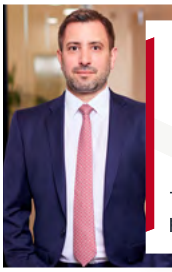

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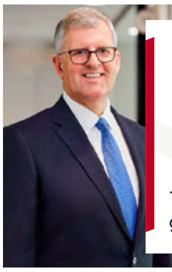

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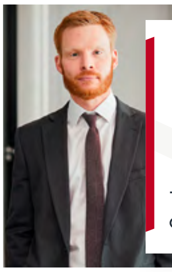

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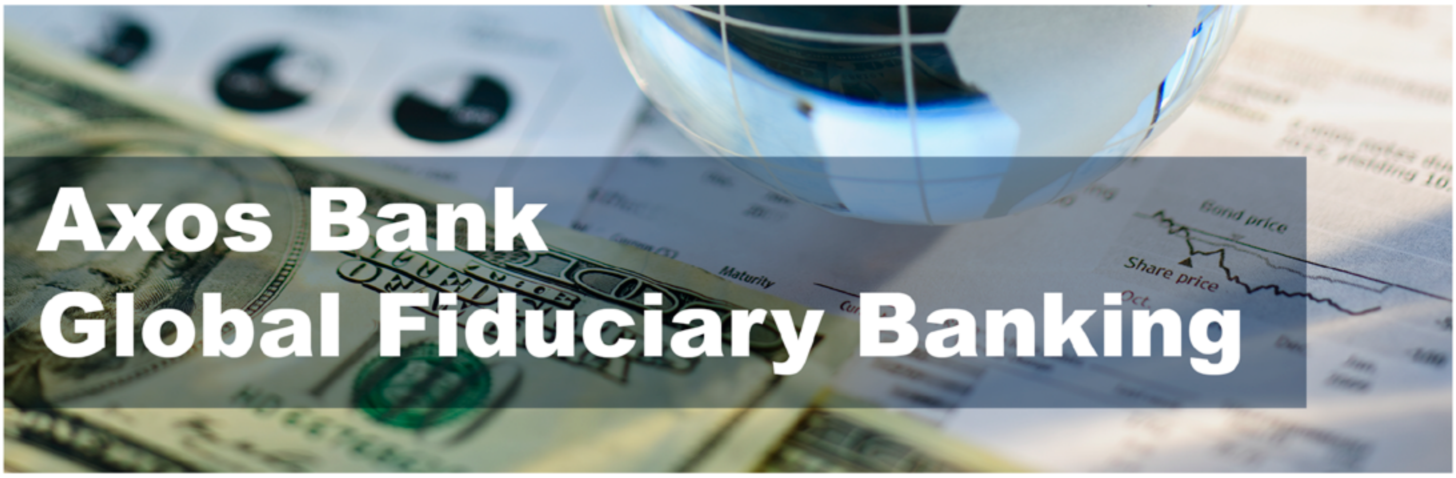

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Born digital on July 4, 2000, Axos Bank celebrates its 20th anniversary this year. Axos reinvented the banking model while growing to over $13 billion in assets in just two decades. Headquartered in San Diego, CA with commercial offices across the U.S., Axos Bank is a FDIC-insured bank and its holding company, Axos Financial, is publicly traded on the New York Stock Exchange under the symbol "AX".

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Marchand Boyd has focused his decades-long Fiduciary Banking career on fostering consultative, client-centric partnerships. Exercising deep-rooted industry knowledge, Marchand formulates market and engagement-specific deposit management solutions, empowering his clients with the specialty banking accommodations they need to successfully administer their fiduciary responsibilities. For more information, visit www.axosbank.com/gfb.

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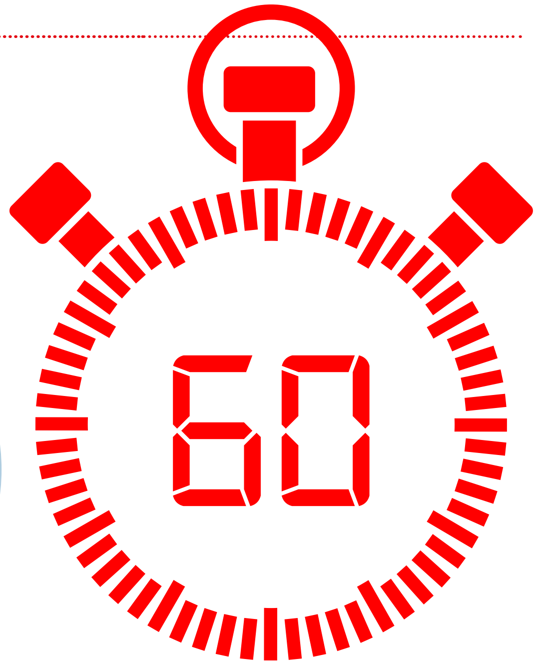
MARCUS PALLOT
PARTNER
CAREY OLSEN



Q What would you be doing if you weren't in this profession?

A Working in a couple of local construction based trading businesses that I am involved in

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

A Been called by a potential client to give advice on a routine criminal matter, who came across as a quite ordinary and normal person, to find out that he was a serial killer

Q What is the easiest/hardest aspect of your job?

A I'm tempted to say "dealing with other lawyers", but when you've invested so much of your own time and energy into a matter it's maintaining objectivity and taking emotion out of my advice that is often the hardest

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

A Use your brain: think. No one is going to spoon feed you every step of the way so switch on brain.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The post COVID fall out where legal restrictions are removed from parties commencing and taking actions including the removal on the moratorium for commencing windings up.

Q If you could learn to do anything, what would it be?

A Play the jazz mouth organ. I did try once, but was hopeless.

Q What is the one thing you could not live without?

A With my advancing years I have to confess that it is probably my glasses, which I have only relatively recently had to start wearing, as I can't really read without them these days.

Q If you could meet anyone, living or dead, who would you meet?

A Frank Sawyer. I have recently become near obsessed with fly fishing and he revolutionised its practice, against some ardent traditionalists, in the course of the 20th century. I think hearing his struggles first hand, despite his genius innovation based largely on common sense and observations, would be fascinating.

Q What songs are included on the soundtrack to your life?

A The March from Scipio (first thing I ever played on my cornet in public), ABBA's Money Money Money (my mum bought me the cassette tape as my first one), Baggy Trousers by Madness (first record I ever bought), Kadoc's Nighttrain (anthem from the most outrageous sports tour), Blues Power from Eric Clapton live (must be at speaker busting volume), Dizzee Rascal's Bonkers (having spent three weeks telling my children I didn't get it, I then saw him live with them and it was amazing).

Q What does the perfect weekend look like?

A Saturday: No children's sports functions, parties or other obligations. Nice weather and out in the boat to catch a couple of fish. Swim off the boat and then home to barbecue the fish. Movie with the family. Sunday: sneaky bacon roll followed by rugby coaching. Home for a slightly late roast before almost inevitably falling asleep on the sofa. Hopefully enough left from lunch to make leftover supper.

Q Looking forward to 2022, what are you most looking forward to?

A Taking my wife away on, I hope, at least a couple of the trips that have had to be cancelled over the last 2 years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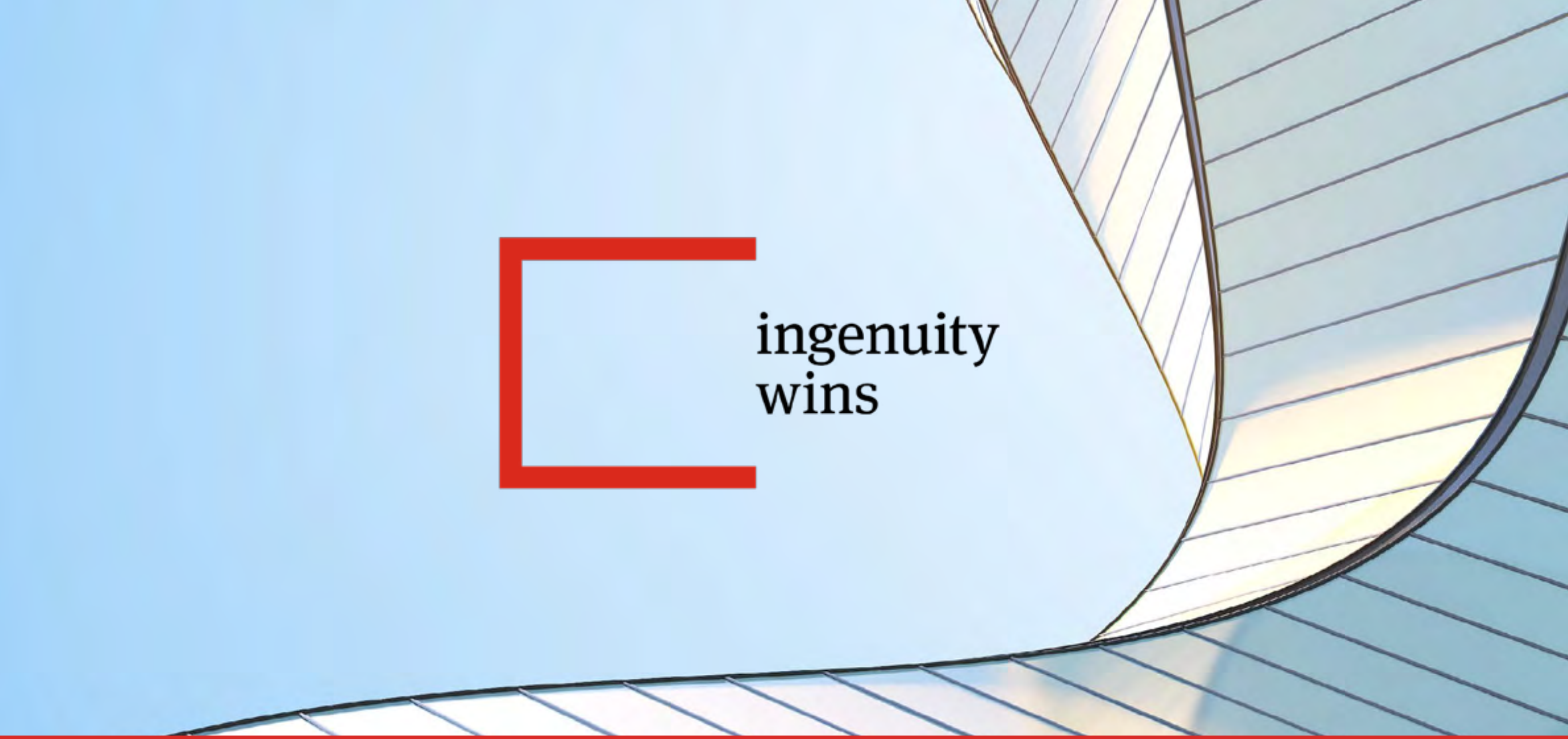
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DEFI? RUG PULLS? STABLECOINS?

WHAT DOES THE FUTURE HOLD FOR CRYPTO-RELATED FRAUD?

Authored by: Jessica Lee - Brown Rudnick

A decade ago cryptocurrency was barely known; Bitcoin was assumed by many of those that had heard anything about it to be a bit of a fad. Fast forward to 2022, with the help of celebrity endorsements and social media, cryptocurrency has been propelled into the mainstream.

Innovation and development in this space has been rapid and continues to progress at breakneck speed with thousands of different cryptocurrencies now in circulation. The technology underlying cryptocurrencies has led to the development of other cryptoassets such as NFTs and is transforming real world processes through smart contracts.

However, with every innovative digital advancement, there is an equally innovative fraudster seeking to capitalise.

For example, 2021 was the year of "rug-pulls", a scam where developers launch a cryptocurrency token on a decentralised exchange ("**DEX**"), pairing it with a genuine cryptocurrency (e.g. Ethereum) and once a significant amount of investors swap their Ethereum for the new token, scammers abandon the project and make off with investors' Ethereum. The rise of the rug pull may be attributed to a number of factors: the rising popularity of decentralised finance (or "**DeFi**") (of which DEXs are a key aspect) as an alternative to traditional finance and banking gave rug pulls an immediate audience to target; fraudulent token developers can create and list tokens on a DEX at no cost and without any audit; and social media provided an anonymous platform to quickly create the hype and momentum needed to entice investors. Chainalysis estimates that rug pulls took in more than $2.8 billion in cryptocurrency from victims in 2021.[1]

The message is clear: crypto fraud is evolving and increasing. Will that deter investment in cryptoassets? Probably not. Here are my predictions for crypto-related fraud in 2022.

More regulation is coming…

It looks like the UK will continue to take a specific and risk-based approach to regulating cryptoassets. Following the implementation of anti-money laundering registration requirements for cryptoasset exchanges and custodian wallet providers, other key areas facing regulation are consumer protection and stablecoins.

1 https://blog.chainalysis.com/reports/2021-crypto-scam-revenues/

With the rise of consumer-aimed crypto-tokens (e.g. "fan-tokens" launched by various football clubs) and the growing mainstream interest in cryptoassets, consumer protection is key on the agenda. HM Treasury recently confirmed its intention to extend the financial promotions regime to certain cryptoassets with a view to regulating their promotion to consumers and providing increased protection. The EU has also proposed a Crypto Assets (MiCA) framework seeking to strengthen consumer protection by regulating the issuance of cryptoassets.

Stablecoins are cryptocurrencies pegged to other assets such as fiat currencies like sterling or even gold and have attracted significant interest by regulators because of the potential impact they may have on monetary stability. HM Treasury published a consultation paper on proposals for a regulatory regime for stablecoins in January 2021. A discussion paper published by the Bank of England followed on 7 June 2021,[2] noting that stablecoins could be exposed to the risk of fraud and suggested that stablecoin payments should be regulated in the same way as traditional payments handled by banks.

Regulation is therefore just a matter of "when" and not "if".

…but courts will continue to play an important role

While regulation plays catch up, the English courts will continue to play a key role in combatting fraud. A line of 2021 decisions demonstrate a clear inclination by the courts to extend and apply existing legal principles to deal with disputes arising from crypto-related fraud:

1. In a firm endorsement of the UK Jurisdiction Taskforce's legal statement on cryptoassets and smart contracts, the courts have confirmed that cryptocurrency is capable of constituting property (see for example, *Fetch AI Limited & Anor v Persons Unknown & Ors*[3]).

2. Affirming the status of cryptocurrency as property, the courts have granted proprietary injunctions and worldwide freezing orders to assist the preservation and recovery of stolen cryptoassets (see: *Mr Dollar Bill Limited v Persons Unknown*[4], *Fetch AI*).

3. In a boost to the asset tracer's arsenal, the courts also granted Norwich Pharmacal ("**NPO**") and/or Bankers Trust disclosure orders against third parties (many involving popular cryptocurrency exchanges such as Binance, e.g. *Mr Dollar Bill*). However, varying approaches were taken with respect to the grant of NPOs giving rise to an ongoing debate as to how far the disclosure jurisdiction extends and whether an NPO is available in respect to parties out of the jurisdiction. The current position seems to be that Bankers Trust orders may be granted against third parties out of the jurisdiction in cases of "hot pursuit" such as fraud though the position regarding NPOs remains less clear.[5]

4. In *Wang v Darby*[6], the court for the first time considered whether cryptocurrencies could be held on trust. While it was ultimately found that no trust had arisen on the specific facts (in this case involving contracts regarding reciprocal arrangements for the sale and re-purchase of cryptocurrencies), the decision was a clear indication of the willingness of the court to apply trust law principles in respect to a proprietary claim over cryptocurrencies.

However, the courts remain cautious and acknowledge the risks associated with cryptoassets. In a very recent decision, the court refused to accept Bitcoin as security for costs in light of the high level of volatility in value which could result in the security being effectively valueless (*Tulip Trading limited v Bitcoin Association for BSV & Ors*[7]). Perhaps this is unsurprising given the extreme volatility seen in the market at the start of 2022 with Bitcoin dropping to a new 6 month low and taking the value of many other "alt coins" with it.

Comment

Innovation in the crypto space is only likely to accelerate in 2022 and with it, we can expect bad actors and evolving fraudulent schemes seeking to exploit the developing landscape. Companies, investors and consumers will increasingly look to lawyers and to the court system to navigate novel issues and disputes arising from this space and counter fraud.

As the Master of Rolls stated on the launch of the 2022 Blockchain Legal & Regulatory Guidance[8]: "every lawyer will require familiarity with the blockchain, smart legal contracts and cryptoassets."

2 https://www.bankofengland.co.uk/paper/2021/new-forms-of-digital-money
3 [2021] EWHC 2254 (Comm)
4 [2021] EWHC 2718
5 In Fetch AI, the English Court declined to grant a NPO following AB Bank Limited, Offshore Banking Unit v Abu Dhabi Commercial Bank PJSC [2016] EWHC 2082 (Comm)
6 [2021] EWHC 3054 (Comm)
7 [2022] EWHC 141
8 https://www.lawsociety.org.uk/topics/research/blockchain-legal-and-regulatory-guidance-second-edition

POSSESSION AND SALE OF A BANKRUPT'S HOME – PROCEDURAL PITFALLS

Authored by: Melania Constable and Hannah Edwards - Charles Russell Speechlys

In this article we explore the recent appeal decision of Peter Knox QC, sitting as a Deputy High Court Judge in *Re Jakir Hussain (in bankruptcy); Gostelow and another v Hussain (in bankruptcy) and others [2021] EWHC 3276 (Ch)*.

This appeal concerned the question of whether an application for an order for sale made under s.335A of the Insolvency Act 1986 ("**IA 1986**") should be made by an application notice issued under the Insolvency Rules 2016 ("**IR 2016**") or by a Part 8 Claim Form issued under the Civil Procedural Rules 1998 ("**CPR**").

The Facts

Mr Hussain was declared bankrupt on 21 November 2017, following a petition presented by HMRC. On 26 February 2018, the appellants in this action were appointed Joint Trustees in Bankruptcy of Jakir Hussain (in Bankruptcy) (the "**Trustees**").

The only substantial asset of value in Mr Hussain's bankruptcy estate was his half share in a jointly owned property. Given delays due to the Covid-19 outbreak (and the stay on possession proceedings having been extended until September 2020), the Trustees issued an application for an order for sale of the property (the "**Application**") under s.335A IA 1986 on 22 October 2020.

Notably, the Application in this case was issued by the Trustees just within the 3 year anniversary of the bankruptcy. This is relevant on the basis that s.283A IA 1986 provides that if a trustee in bankruptcy fails to take steps to realise the bankrupt's interest in the sole or principal home (including inter alia applying for an order for sale) within 3 years from the commencement of the bankruptcy, then the said property will automatically re-vest in the bankrupt. This is commonly known as the 3 year 'use it or lose it' or 'three year' rule.

Held: First Instance

At first instance, the judge dismissed the Application on the grounds that it should have been made by a Part 8 Claim Form under the CPR, rather than by an insolvency application notice issued under Rule 1.35 IR 2016. The judge held that the failure to do so meant that he had no jurisdiction to make an order for sale, or indeed an order for possession pending sale.

Counsel for the Trustees informed the judge that from her experience such applications were often brought under IR 2016, and she asked for a short adjournment to allow her to put in written submissions on the point.

But the judge refused to grant any "indulgence in cases where families are about to be thrown out in the middle of winter, in the middle of a pandemic".

The Trustees were therefore out of time to apply for an order of sale and possession on the basis that the time period under the 3 year "use or lose it" rule had passed.

The Trustees appealed this decision. The Respondents (who were litigants in person) resisted the appeal stating that it would be inhumane to evict them and their family from their home.

Held: Appeal

The High Court (on appeal) overturned the dismissal of the Application and made an order for possession and sale of the property. It was held as follows:

Form of Application

The correct application form to be used for an order for possession and sale under s.335A IA 1986 was (as the Trustees had used in this case) an insolvency application under Rule 1.35 of IR 2016.

The Court noted that s.335A was introduced by IA 1986 by way of s.25 and Schedule 3 of the Trustees of Land and Appointment of Trustees Act 1996 ("**TOLATA**"). The material part of s.335A provides:

"(1) Any application by a trustee of a bankrupt's estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy."

The material part of s.14 of TOLATA provides:

"(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order –

(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b) declaring the nature or extent of a person's interest in property subject to the trust,

as the court thinks fit…"

Section 6 TOLATA 1996 furnishes trustees of land with the powers of an absolute owner and allows trustees to obtain an order for possession and sale under s.14. However, TOLATA 1996 does not define the word 'application'.

The key question for the Court was whether IA 1986 provides that an 'application' under s.335A is to be made under the IR 2016. The Court concluded that the IA 1986 'plainly' provides that it should.

As part of the considerations for this, the Court noted it made good sense for the court's attention should be drawn at the point of issuing proceedings under s.335A that the application is made against a bankrupt, ensuring that all questions in relation to the bankruptcy can be found in one court file.

Procedural Errors

The Court held that even if the application should have been issued under the CPR, it would not have deprived the lower court of its jurisdiction to deal with the matter.

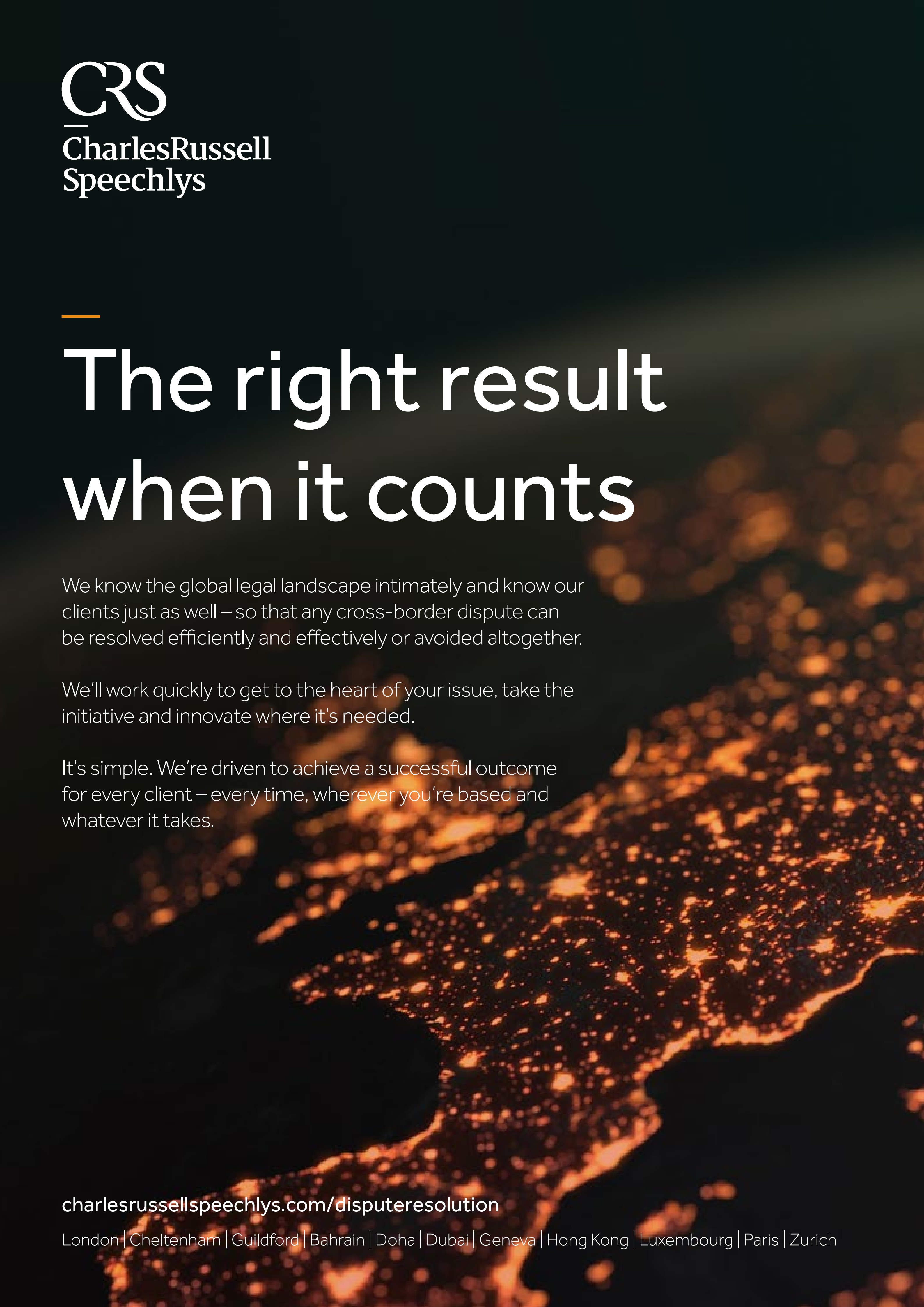
CPR 3.10 provides a power to the Court to correct 'an error of procedure such as a failure to comply with a rule or practice direction'.

No Exceptional Circumstances

As the Application was made more than a year after the bankruptcy order then the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors to outweigh all other considerations (s.335A(3) IA 1986). The Judge held that there were no exceptional circumstances in the present case and, accordingly, the interests of the bankrupt's creditors outweighed all other considerations and should not be prejudiced. It was not enough that the realisation of the spouse's beneficial interest would not produce enough to buy a comparable home in the same neighbourhood or indeed elsewhere.

The judge was, however, willing to delay possession by three months so that it would not be granted during the school term, given children of school age lived in the property.

In conclusion, this case serves as a useful statement of the need to issue s.335A applications under the IR 2016 rather than under Part 8 proceedings. Failure to do so will not necessarily be fatal, but the Court could not have been clearer in reaching its conclusions. Trustees would be well advised to bear this decision in mind when issuing applications for orders for sale.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FOREIGN LAW IN THE COMMERCIAL COURT:

A NEW APPROACH

Authored by: Richard Greenberg - Twenty Essex

The situation will be familiar to fraud practitioners. Your case has an international aspect. It raises numerous issues of foreign law. Some of those issues are clearly central to the dispute. Others less so. Strictly speaking expert evidence is required on all of the points. The scope of such evidence appears rather wide. The prospective costs are dauntingly high.

A concern starts to creep in: how are we going to keep the expert evidence exercise within sensible and proportionate bounds? The answer that may well emerge is: with difficulty.

The Commercial Court has attempted to tackle this problem. In one of the most eye-catching revisions to the Commercial Court Guide ("**CCG**") (which at the time of writing is due to be published shortly[1]), a significant change in practice (but not the law) has been announced. Instead of the normal assumption that the procedure for proving the content of foreign law will involve the exchange of expert reports, the production of a joint memorandum, and the exchange of supplemental reports, with the experts then being called to give oral evidence at trial in so far as their evidence is in dispute, the parties will now be invited to consider alternative options.

In a new section entitled "Expert evidence of foreign law", the revised CCG states (§H3.2):

"As part of their preparations for any Case Management Conference at which directions for the filing of evidence are to be given, the parties should consider the approach to invite the Court to take to the proof of foreign law where disputed issues of foreign law will or may arise for determination at trial and be ready to discuss that question with the Court."

The CCG then goes on to identify (without limitation) some of the different approaches to proving foreign law that the parties should consider (§H3.3):

Option 1 (§H3.3(a)) is to follow the traditional procedure. The Court may direct the exchange of expert reports etc and the calling of experts at trial in the usual way. The new approach encompasses the old.

Option 2 (§H3.3(b)) involves limiting the participation of the experts at trial. The Court may direct the exchange of reports etc in the usual way *"but on the basis that the experts will not give evidence at trial although their evidence is not agreed, or do so only on some of the matters covered by their reports although their evidence on other matters is also not agreed, with the advocates making submissions at trial by reference to the reports and foreign law materials filed."*

Option 3 (§H3.3(c)) places an even greater emphasis on the advocates at trial with regards to proving the content of foreign law: *"The Court can limit the expert evidence to identification*

1 This article is based on a final approved draft circulated to members of the Commercial Bar Association on 17 January 2022.

of the relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources, with the advocates making submissions at trial as to the relevant content of foreign law by reference to the sources thus identified."

- **Option 4 (§H4.4(d))**, which is the most radical of the possibilities outlined in the revised CCG, envisages dispensing with experts on foreign law altogether: *"In some cases, the Court may be prepared to take judicial notice, or accept the agreement of the parties, as to the nature and importance of sources of foreign law, and have the advocates make submissions at trial as to the relevant content of foreign law by reference to the sources thus identified, providing the source materials from their own researches."*

The clear purpose behind these revisions is to make plain that there is no longer a 'one size fits all' approach. It will be up to the parties and the Court to tailor the procedure to fit the needs of each particular case in light of the various relevant factors such as the scope, nature and importance of the issues and/or costs and efficiency considerations (see §H3.4).[2]

From now on, we will all need to consider carefully whether an expensive sledgehammer is really required to crack any particular (foreign law) nut.

It is important to emphasise that the law has not changed. The law remains that foreign law is a matter of fact that must be proved by evidence. The revised guidance concerns the more flexible manner in which such facts may now be proved in Commercial Court trials.

Consider a hypothetical example of how some of these changes might be applied in practice:

- Imagine a complex fraud trial in the Commercial Court between A and B. A and B are from Lilliput. Lilliputian law governs the substance of their dispute. The foreign law issues that arise on the pleadings concern both (i) the general principles of Lilliputian tort law (the "**General Principles**") and (ii) some more technical defences under Lilliputian law that may be applicable on the particular facts of the case (the "**Technical Defences**").
- The Commercial Court is very familiar with the General Principles. The parties have identified several English decisions on the General Principles, which are all admissible under s.4 of the Civil Evidence Act 1972 (the procedure for relying on earlier findings on foreign law: see CPR r.33.7). However, there are no previous English decisions on the Technical Defences.
- In this type of scenario, it is easy to see how a judge might be attracted to taking some kind of hybrid approach: Option 1 above for the Technical Defences; but one of Options 2 to 4 for the General Principles. The previous decisions on the General Principles mean that a lighter procedural touch is appropriate.
- If Lilliputian law was a common law system, founded on and similar to English law, the judge may be even more attracted to Options 2 to 4 in the circumstances.

Of course, it remains to be seen how these changes will be implemented in practice. In the context of hard-fought fraud litigation in particular, there may be some reluctance from parties to depart from the traditional approach. Nevertheless, alternative options will now need to be considered. These revisions to the CCG are likely to have a significant impact on the shape – and perhaps, at least to some extent, the cost – of fraud and other litigation in the Commercial Court in the coming years.

This article does not constitute, and should not be relied upon as, legal advice. The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of Twenty Essex.

2 See further Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45 at [148], which is plainly the inspiration for these revisions to the CCG. Indeed, following Brownlie, this more flexible approach to proving foreign law will not be confined to the Commercial Court but is of more general application.

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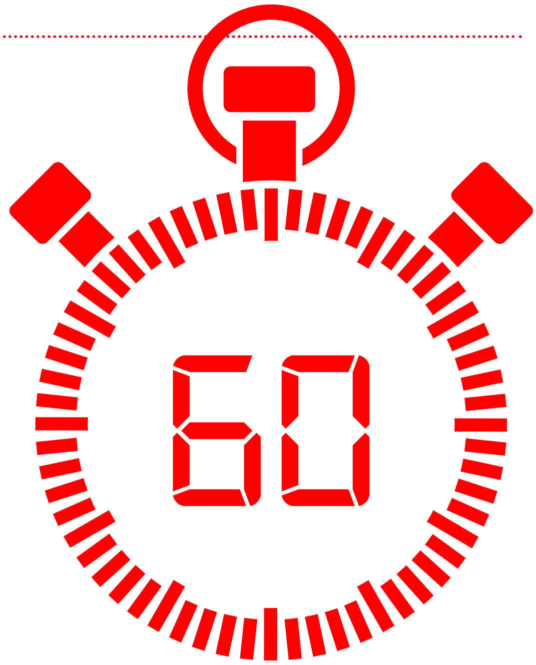

CAITLIN BRUCE
ASSOCIATE
COLLAS CRILL, JERSEY

Q What would you be doing if you weren't in this profession?

A A reunion tour with S Club 7 8.

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

A As a student intern in Johannesburg, trying to stay out of the line of sight when Oscar Pistorius was filmed demonstrating moving without his prosthetics for the Court. (I think my left side has just made the cut on YouTube.)

Q What is the easiest/hardest aspect of your job?

A Writing my to-do list, tidying my email inbox and document management – consistently the easiest tasks in my day and certainly very satisfying in a Zen garden kind of way.

The hardest aspect is learning to be a bit easier on myself for not getting it right. Although learning to manage the expectations of partners and clients in terms of capacity and ability can be difficult, managing your own expectations of yourself is sometimes even more so. It can be very tempting to want (very badly) to get it right first shot and to be very disappointed when it doesn't go that way. However, mistakes make experience and experience makes a good lawyer. Although I have not quite mastered this lesson yet, I feel glad to be at a firm that is very supportive of its juniors in this regard.

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

A Be eager and interested. I have been lucky to have worked at firms that place great stock in training and nurturing their juniors. I think that if you show an interest in the work that is going on in the department and put your hand up to get involved or try new tasks wherever you can, you cannot go wrong.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A Although it seems (fingers crossed) that the world is largely on the mend from COVID-19, as things return to a semblance of normal, the period of economic downturn is still not quite at its end. The proposed introduction of a true creditors' winding up procedure in Jersey should stand the jurisdiction in good stead to meet the needs of creditors going forward.

In addition, it may lead to some interesting work in Jersey as the concept of the 'insolvent trust' continues to develop. Collas Crill acts for one of the parties in an appeal to the Privy Council against the Court of Appeal's decision In Re Z II Trust [2019] JCA 106. The decision (which is imminent) is set to finally determine whether a trustee has priority over beneficiaries in relation to the assets of an insolvent trust.

Q If you could learn to do anything, what would it be?

A Sew.

Q What is the one thing you could not live without?

A Cheese and crackers (enjoyed with my friends and family… of course).

Q If you could meet anyone, living or dead, who would you meet?

A Emma Thompson.

Q What songs are included on the soundtrack to your life?

A Mariah Carey – Honey
ELO – Jungle

Q What does the perfect weekend look like?

A Saturday: dinner with friends.
Sunday: lie in, read, brunch, walk, nap, late lunch, read again, Sunday night movie.

Q What are you most looking forward to this year?

A Going back to South Africa (my home country) for the first time in two years – and more travel generally!

CAN CRYPTO BE HELD ON TRUST?

A LOOK AT THE RECENT DECISION OF WANG V DARBY

Authored by: Steven Bird - PCB Byrne

Introduction

In *Wang v Darby* [2021] EWHC 3054 (Comm) the High Court considered for the first time whether cryptocurrencies could be held on trust. While on the facts of the case it was held that no trust relationship arose between the parties, *Wang v Darby* will arguably be more consequential for to its possible implications in respect of Non-Fungible Tokens ("**NFTs**") as opposed to its impact on English trust law.

Facts

Wang v Darby involved a cryptocurrency deal between two individuals - Mr Wang, an experienced Australian cryptocurrency trader, and Mr Darby, a UK citizen who promoted himself as an experienced cryptocurrency operator offering Tezos "baking" services (among others).

Tezos is one of the estimated 8000 cryptocurrencies now in existence and both Mr Wang and Mr Darby acquired Tezos through its ICO in 2017. Tezos also offers a "baking" option to token holders where individual coins can be used to sign and publish new blocks in the Tezos blockchain – thereby validating transactions. Baking is similar to staking and/or mining in other cryptocurrency contexts, and like those equivalents it is incentivised by additional Tezos being received by the baker.

In July 2018, Mr Wang was eager to obtain Bitcoin and contacted Mr Darby for this reason via Telegram[1]. After extensive messaging and calls on the Telegram platform alone, the parties struck a deal. In summary, via two separate contracts Mr Wang agreed to swap 400,000 Tezos with Mr Darby in return for 30 Bitcoin, with an obligatory re-exchange after a period of two years.

In March 2019, Mr Darby allegedly deviated from the parties' agreement by transferring the 400,000 Tezos he received from the swap out of an account that was visible to Mr Wang and into a wallet on the Kraken exchange. Mr Darby also removed his social media presence around the same time and it is assumed he then traded the 400,000 Tezos. It was on this basis that Mr Wang applied for and obtained a Worldwide Freezing Order ("**WFO**") against Mr Darby.

Decision

Along with deciding whether to continue the WFO or not,[2] the court also had to determine whether a trust relationship arose between the parties in this case (as argued for by Mr Wang).

1 Telegram is an instant messaging app similar to WhatsApp.

2 Which it did at [100] – [108].

The parties followed the position of the English court in *AA v Persons Unknown*[3] and *Ion Science Limited v Persons Unknown*[4] and agreed that "*fungible and non-identifiable digital assets such as Tezos constitute property that is capable of being bought and sold as well as held on trust as a matter of English law*". As a result, the court did not determine whether cryptocurrency could be held on trust as this position was agreed between the parties. However, it did consider whether on the facts of this case a trust relationship arose.

Mr Wang asserted that the Tezos were held on trust for him by Mr Darby in one of three ways: (i) express trust; (ii) Quistclose trust; or (iii) constructive trust. Mr Darby on the other hand argued that the arrangement was essentially a sale and repurchase agreement (a "repo"). In any event, the court observed that the particular characterisation of the transaction was not entirely material. What was of consequence, however, was the underlying economic reality of the deal - which the court held was contrary to the imposition of a trust. As Houseman QC, sitting as a Deputy Judge of the Commercial Court observed at [78]:

"The fundamental problem with the existence or imposition of any kind of trust over the 400,000 Tezos is the essential economic reciprocity of the transactions, as described above. In order for Mr Wang to become entitled to the return of the 400,000 Tezos… he had to return corresponding value in (or equivalent to) Bitcoins to Mr Darby so as to reverse the swap…It is the essential economic reciprocity that precludes any trust, in my judgment."

As this is the antithesis of a simple trust situation, where a beneficiary can receive property without needing to transfer value to the trust, the Court held that a trust relationship did not arise.

Discussion

Given the facts of this case and as alluded to above, it will arguably be more consequential for its possible implications in respect of NFTs as opposed to its impact on trust law.

While NFTs are not alluded to in this case specifically, at paragraphs and [77] and [92] Houseman QC made the following observations about fungible cryptocurrency:

"It is difficult to see how a constructive trust as pleaded could arise in respect of entirely fungible and non-identifiable digital assets. There is no obvious analogy to a specifically-enforceable contract for the sale of land or some unique or sufficiently rare piece or parcel of personal property"

"It is impossible to say that Mr Darby's conditional obligation to return 400,000 Tezos after the minimum contractual period would be enforceable by decree of specific performance given the entirely fungible and non-identifiable nature of such digital currency. There is no meaningful analogy with a seller's obligation to convey title to land following exchange of contracts."

NFTs can be defined as:[5]

A unique digital certificate, registered in a blockchain, that is used to record ownership of an asset such as an artwork or collectible.

NFTs can be almost anything, and in the majority of cases they are digital in nature[6], however, they can also be linked to real world items such as artwork – which proponents argue decreases the risk of fraud in such transactions. NFTs had their breakout year in 2021 with many notable transactions occurring.[7] In 2021 it was also estimated that the size of the NFT market surpassed $40 billion.[8]

At present, the English court has not considered NFTs in any judgment. However, as is obvious, NFTs are *non-fungible* and therefore can be easily distinguished from Houseman QC's statements above. The other side of the coin of Houseman QC's analysis appears to be that it may be possible to form a trust for non-fungible digital assets – such as NFTs. Relatedly, the English courts may also determine that NFTs can benefit from proprietary remedies. It will no doubt only be a matter of time until the court has to consider such issues expressly, and when it does, *Wang v Darby* may well be influential.

3 [2019] EWHC 3556 (Comm).

4 21 December 2020, Butcher J.

5 Collins dictionary definition: https://www.collinsdictionary.com/dictionary/english/nft

6 For example, Jack Dorsey the founder of Twitter made his first tweet into an NFT.

7 For example, Beeple (artist Mike Winkelmann, who previously sold prints for $100), sold an NFT for $69 million.

8 https://www.bloomberg.com/news/articles/2022-01-06/nft-market-surpassed-40-billion-in-2021-new-estimate-shows

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CAN UNLAWFUL DIVIDENDS RECEIVED BY COMPANY DIRECTOR/SHAREHOLDERS BE LATER RECLASSIFIED AS REMUNERATION TO AVOID LIABILITY?

THE RECENT CASE OF *RE BRONIA BUCHANAN ASSOCIATES LIMITED* [2021] EWHC 2740 CONFIRMS THAT THERE CAN BE NO SUCH RETROSPECTIVE RE-CHARACTERISATION.

Authored by: Jessica Brooke - Wilberforce Chambers

In small private companies, director shareholders often draw sums from the company periodically throughout the year adopting a particular arrangement calculated to provide tax benefits. A relatively small amount of salary (generally below the threshold for income tax and National Insurance) is paid through PAYE, and, at year end, a dividend is declared, to be set-off against the indebtedness of the director arising by way of the balance of their drawings. In this way, directors benefit from the lower tax rate payable in respect of dividends as compared to salary paid via PAYE.

The courts have considered on numerous occasions whether, in the event the company's distributable reserves at year end are insufficient to declare a dividend equivalent to the director's indebtedness, the drawings can be re-characterised as salary, with the result that the director's indebtedness to the company is wiped out. These decisions have generally arisen in the context of claims issued after the company has entered liquidation by which the liquidator seeks repayment of the director's debt.

In the recent case of Bronia Buchanan, Insolvency and Companies Court Judge Burton held definitively that directors could not rewrite history, and that drawings cannot be re-characterised as salary after the event.

The facts of the case were that liquidators issued a claim against a company director seeking repayment of c.£286,000, on the basis that the director had received these sums from the company not as salary or dividends (the company having made insufficient profits to declare dividends in this amount), but as a loan, which was unpaid. The respondent director argued that, whilst she was officially paid an annual salary of £6,000 through PAYE, this was not commensurate with the services she provided to the company, often working 15 hours a day, and that all the sums she received were intended to be, and should be treated as, remuneration.

ICCJ Burton first referred to the principle that, where a director is proved to have received payments from the company, the evidential burden shifts to the director to demonstrate that they received such payments lawfully: *Re Idessa (UK) Limited* [2011] EWHC 804.

The Judge went on to find that the only way in which a director/shareholder may lawfully take out money from a company (other than being reimbursed expenditure incurred on the company's behalf) is by way of salary or dividends.

The respondent director had chosen to fix her remuneration at £6,000 to take account of PAYE and National Insurance thresholds, and at all times the respondent intended or hoped that the company would ultimately make enough profit to declare dividends which would cancel out the sums due by her to the company. Further, the company's articles provided that the company's

directors were entitled to remuneration as fixed by ordinary resolution of the shareholders, and there had been no ordinary resolution declaring the outstanding sums to be salary during the year. Unless the company resolved to increase the director's remuneration from £6,000 per annum, to the extent the director withdrew greater sums from the company, those amounts would be treated as a loan from the company to her.

ICCJ Burton observed that, if a retrospective accounting adjustment were possible, most director/shareholders would adopt such practice They would approve payment to themselves of a small salary, and take more than that amount out of the company throughout the year, in the hope of receiving sufficient dividends at year end to repay their debt. If the company made a loss, or entered liquidation, the director would change the accounts to award themselves what they thought was a fair remuneration, to the detriment of creditors.

The decision takes a stricter line to that taken in previous cases.

In *Re Jones* [2020] EWHC 1112 Mr Justice Snowden held that drawings could not be re-characterised as remuneration whenever it suited the director, but qualified this by suggesting that a re-characterisation could possibly take place if the director acknowledged that the manner in which the drawings had been disclosed to HMRC had been incorrect, with all the consequences in terms of the payment of additional tax, interest and penalties that this might entail.

In *Re Global Corporate Ltd v Hale* [2018] EWCA Civ 2618 Patten LJ suggested that, where unlawful dividends had been paid during the year, the monies could possibly be notionally repaid and then re-applied in a way which was a lawful application of the company's assets, although this formal step would need to be taken prior to the company entering liquidation.

In *Bronia Buchanan* the respondent argued that her drawings could be retrospectively re-characterised and that she would make appropriate retrospective declarations to HMRC, the arrangement referred to in Re Jones. ICCJ Burton rejected this argument, stating categorically that no such re-characterisation could occur.

She said that 'it is simply not open to a director to recreate history and the basis upon which they have historically received money from a company'.

It is well established that a director cannot overcome this position by seeking to set-off a liability to repay drawings by way a quantum meruit claim for services rendered. Unless a director's remuneration is agreed in accordance with the procedure referred to in the articles, directors have no entitlement to remuneration for work done for the company, and so cannot bring a quantum meruit claim: *Guinness plc v Saunders* [1990] BCLC 402. Further, even if a director could bring a quantum meruit claim, this claim faces the difficulty of being an unliquidated claim, which will need to be proved in the liquidation: *Global Corporate*.

GIVING EFFECT TO THE DOCTRINE OF PIERCING THE CORPORATE VEIL

Authored by: Ben Rutledge - Keidan Harrison

Introduction

Piercing the corporate veil is a doctrine which has been much discussed and debated over the years by practitioners and academics alike. It is often difficult to justify, as a matter of law, that the corporate veil should be circumvented, lifted and/or pierced. However, the law has developed in such a way that it provides remedies which have the effect of piercing the corporate veil through statutory provisions or via the common law.

This article is the first in a serious of articles which looks at the mechanisms by which in practice, the corporate veil can be pierced. Subsequent articles will examine further alternative basis upon which the corporate veil is in effect pierced. The grounds set out below are by no means exhaustive.

Executive Summary

1. The Supreme Court has previously indicated that it has doubts as to whether "*piercing the corporate veil is a coherent principle or rule of law at all*"[1] given its seemingly limited application. Rather, it is a label to describe the scenario by which a company's separate personality is disregarded much like in the scenarios discussed below.

2. It appears that there is a shift away from a true doctrine of veil piercing and a move towards an approach by which the courts are willing to expand upon other avenues and/or alternative remedies provided by statute and common law to get around the strict principles that govern company law. See for example the Marex Tort discussed below.

3. Practitioners should be aware of the statute and common law provisions which give effect to piercing the corporate veil as these are important tools for litigators and those involved in fraud and asset recovery work. Especially so in light of the pandemic with the rise in bounce back loan fraud and also the rise in the importance of Environmental, Social and Governance ("**ESG**") to investors, lenders and shareholders.

1 Para 106., Walker LJ, Prest v Petrodel Resources Limited & Others [2013] UKSC 34

Piercing the Corporate Veil

Piercing the corporate veil means disregarding the separate legal personality of a company.

The separate personality of a company refers to the doctrine that a company is treated in law as a person in its own right, capable of owning property and having rights and liabilities of its own which are distinct from those of its shareholders, as was established in *Salomon v A Salomon*[2].

There have been a number of key cases in the Court of Appeal and the Supreme Court where by the doctrine of piercing the corporate veil has been considered, including:

1. **VTB Capital v Nutritek[3];**
2. **Prest v Petrodel Resources[4];**
3. **Hurstwood Properties v Rossendale Borough Council[5].**

Broadly speaking, the courts have identified or rather sought to focus on two principles that underlie veil-piercing cases which were identified in *Prest* as:

1. The "concealment principle", which involves the interposition of a company or perhaps several companies to conceal the true nature of an arrangement; and
2. The "evasion principle", which is where a person is under an existing legal obligation or liability, or subject to an existing legal restriction, which they deliberately evade or whose enforcement they deliberately frustrate by interposing a company under their control.

However, this has been said to only "*comprise a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company*"[6].

Nonetheless, the courts of England and Wales have demonstrated and are indeed renowned for their willingness to adopt creative and imaginative approaches to resolving disputes.

Accordingly, it has become more common for the law to operate in such a way that it provides alternative remedies to that of the doctrine of piercing the corporate veil which have the same effect.

For example the remedies discussed below might be available to parties as a convenient and/or more certain alternative.

Tort of Deceit

A deceit occurs when a misrepresentation is made with the express intention of defrauding a party, subsequently causing loss to that party.

The elements of a claim in deceit are:

1. **A clear false representation of fact or law**
2. **Fraud by the maker, in the sense that they knew that the representation was false, or had no belief in its truth, or was reckless whether it was true or false**
3. **An intent that the representation should be acted on by the claimant**
4. **Action by the claimant in reliance on the representation**
5. **Damage suffered by the claimant in reliance on the representation**

The tort of deceit is a useful tool if a director or shareholder has made a false representation on behalf of a company which for example induced another party into a contract. In this case, the Court can order the individual who made the false representation to pay damages to the victim which can give effect to veil piercing.

Indeed, deceit was pleaded in *VTB Capital v Nutritek* and more recently in the case of *Inter Export v Townley*[7] the directors of a company were found personally liable for the companies debts/liabilities following false representations made by them in respect of the company's ability to pay for goods it had purchased.

Parent Company Liability

The question of whether a parent company may be liable in tort for the actions of a subsidiary was dealt with by the Supreme Court in *Vedanta v Lungowe*[8] where it was found that a UK parent company could be liable for the operations of its subsidiaries overseas.

The judgment in Vedanta coupled with a rise in the importance for companies, lenders and investors in ESG means that understanding parent company liability is becoming more important for practitioners as well as to those running, lending or investing in companies and gives effect to veil piercing.

2 Salomon v A Salomon & Co Ltd [1897] AC 22
3 VTB Capital plc v Nutritek International Corp and others [2013] UKSC 5
4 Prest v Petrodel Resources Limited & Others [2013] UKSC 34
5 Hurstwood Properties (A) Ltd and others v Rossendale Borough Council and another [2021] UKSC 16
6 Para 35, Sumption LJ, Prest v Petrodel Resources Limited & Others [2013] UKSC 34
7 Inter Export LLC v Jonathan Townley and Yaroslavna Lasytsya [2018] EWCA Civ 2068
8 Vedanta Resources Plc v Lungowe [2019] UKSC 20

The Marex Tort

In 2020 the Supreme Court recognised the new "Marex tort" in *Sevilleja v Marex*[9] and confirmed in *Lakatamia v Nobu Su*[10].

The elements required to establish a *Marex* tort claim are:

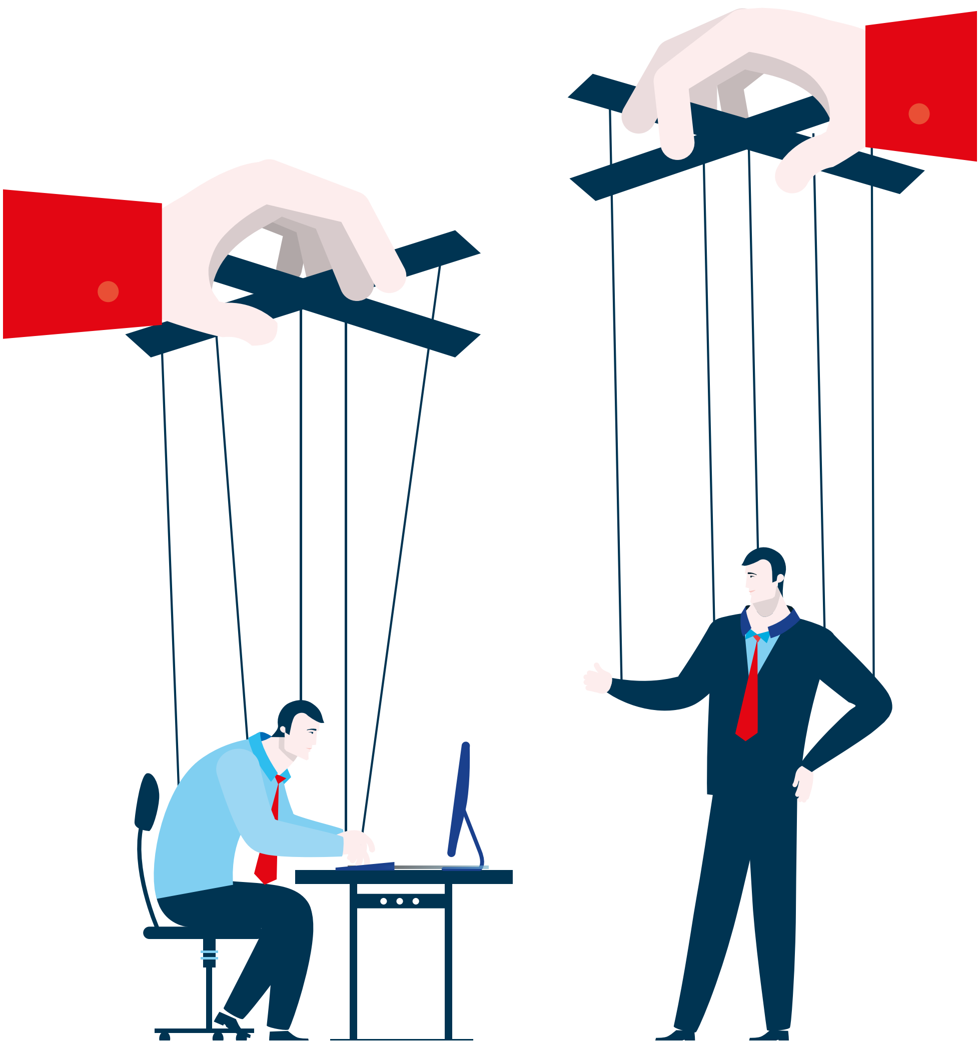
1. **The entry of a judgment in the claimant's favour;**
2. **Breach of the rights existing under that judgment;**
3. **The procurement or inducement of that breach by the defendant;**
4. **Knowledge of the judgment on the part of the defendant; and**
5. **Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment.**

Accordingly, this may be a remedy available to a party where the owner (i.e. director/shareholder) of a judgment debtor (a company) dissipates assets following judgment and gives effect to veil piercing.

Wrongful and Fraudulent Trading (Insolvency Act 1986, ss 213 & 214)

If in the course of winding up a company it becomes apparent that the business of that company has been carried out with the intent to defraud creditors of the company, or for any fraudulent purpose, upon an application by a liquidator the court may order those persons who were knowingly carrying on the business liable to make contributions to the company's assets.

Accordingly, those who own and/or control the company can be made personally liable for company debts which is in effect the same as piercing the corporate veil.



Transactions Defrauding Creditors (Insolvency Act 1986, s 423)

If victims of a transaction at an undervalue are able to show it was carried out for the purpose of putting assets beyond the reach of creditors they will be able to bring a claim against the company who carried out the transaction. The Court, essentially, is able to restore the position to what it would have been if the transaction had not been entered into and protect the interest of victims of the transaction which gives effect to veil piercing.

Conclusion

This is not an exhaustive list of alternative remedies and circumstances which give effect to veil piercing. For example, the exceptions to reflective loss[11], unlawful means conspiracy, sham and devices cases such as *Jones v Lipman [1962] 1 All ER 442* and Proceeds of Crime Act 2002 – confiscation proceedings also come to mind. This article merely seeks to show examples of the way the law operates to provide alternative remedies that give effect to piercing the corporate veil.

Accordingly, it is ever more prudent for practitioners to be aware of the alternative remedies that give effect to piercing the corporate veil especially so in light of the pandemic in circumstances where it appears that there has been wholesale bounce back loan fraud and an ever rising importance of ESG.

9 Sevilleja v Marex Financial Ltd [2020] UKSC 31
10 Lakatamia Shipping Co Ltd v Nobu Su [2021] EWHC
11 See Sevilleja v Marex Financial Ltd [2020] UKSC 31

MUSINGS OF A YOUNG LAWYER

Authored by: Jonathan Muk - LVM Law Chambers

At Singapore's Opening of the Legal Year 2022, the new President of the Law Society of Singapore, Mr Adrian Tan, spoke of how the number of young lawyers leaving the profession spiked to a 5 year high in 2021.

Since his speech, the issue of young lawyers leaving the legal industry in droves has been extensively discussed in the mainstream media. Lawyers from all seniorities have chimed in on LinkedIn as well. Shocking anecdotes have been shared; in this regard, I cite the following story from a news article to provide some context:

"The hours were really horrible. I was waking up at 5.30am and going to sleep at 2am. The worst part is, this is what's expected of you. If you wanted to go for dinner, you had to get permission from the partner you were reporting to. If you wanted to go to sleep at 2am, you had to inform the partner," said the 25-year-old, who asked not to be named.

"When I left, an international law firm reached out offering compensation several times what I was getting (at the Big Four firm). I said no. It was a really difficult decision but I had such a horrible experience that I decided it just wasn't worth it,""

In my view, the less-than-ideal work culture in many law firms today presents a large reason for young associates to leave the industry in droves. Why bother staying in a job that simply drains one to the extent that one day, one wakes up and finds himself or herself lonely, unfulfilled, and hating one's life?

To the extent that the same industry pressures drive the legal industry elsewhere, it is my hope that through this article we may, as an industry, globally begin to think about how we may do better.

Perhaps it is appropriate to begin with an examination of the pressures that contribute to the stress among young lawyers. From a disputes perspective (the field in which I practice), young lawyers generally manage three large stakeholders – the Court or the Tribunal, the senior partner, and the clients.

The demands imposed on young lawyers from these three stakeholders in a globally connected, technology driven world can often be immense and taxing.

Imagine applying for an emergency arbitration. Upon the filing of the application, tribunals then seek to conduct a hearing as quickly as possible. To achieve this, it is then necessary for witness statements and briefs to be tendered at lightning speed. It is not unusual that timelines are fixed such that a party has to respond by the next day to witness statements filed by one's opponent. The timelines are set against the backdrop of senior partners, who may wish to obtain drafts within an even shorter period of time, not to

mention having to manage the emotions of anxious and irate client – the happy disputes client is, frankly, a unicorn. All these, on top of one's regular files which have to be worked on.

These pressures often mean that young lawyers not just sacrifice sleep, which is vital for one's mental well-being, but also precious time with family and friends. They are also relatively commonplace in the legal industry. The reality is that the cut and thrust of legal work already pose sufficient challenge to young lawyers who may have, apart from their work, other life priorities such as family, marriage, and children. Yet, when young lawyers raise concerns about work life balance, many are often brushed aside as *"strawberries"* or not being *"tough enough"* – notably, in a report by the Law Society of Singapore entitled *"Levelling the Playing Field"*, it was found that one of the major reasons in the way of a better-represented profession gender-wise was that some senior female lawyers felt that the modern day female junior lawyer is *"too soft"* and their advice was to *"toughen up"* as the senior female lawyers had it much harder in their time.

Well, senior lawyers never had technology connecting them to their clients 24/7 back in the day, or 24 hour turnaround times responding to statements that may be hundreds of pages long.

Is it any surprise then that, without a reason to stay and without the will for reform, many young lawyers choose leave the industry in the hopes of finding a job that will hopefully impose less work pressures on them such that they are able to spend sufficient time with people who matter to them?

The other prevalent reason for young lawyers who leave the industry are poor bosses who breed workplace toxicity, which can take place in many ways – intellectual bullying and sexual harassment are just two of the ways which come to mind. A particularly troubling story from a news article reads as follows:

"A young lawyer who worked under a senior counsel in major law firm said the partner often "bragged" about working even while in labour.

The lawyer said: "Because of the high levels of stress, the partners don't see others as humans who need to have a life. A lot of them would say they have gone through this. It's baffling that this sort of culture is allowed to persist in a major law firm.

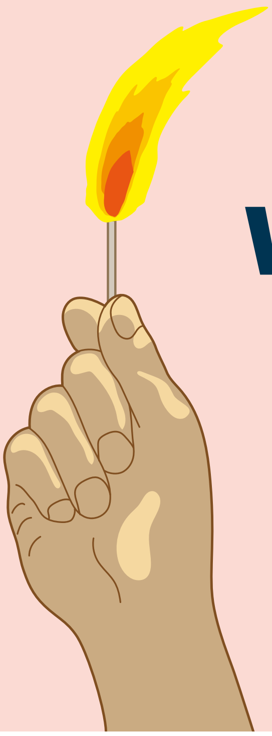
"Why is the Law Society surprised that junior lawyers quit when managers like that get appointed senior counsel?"[1]

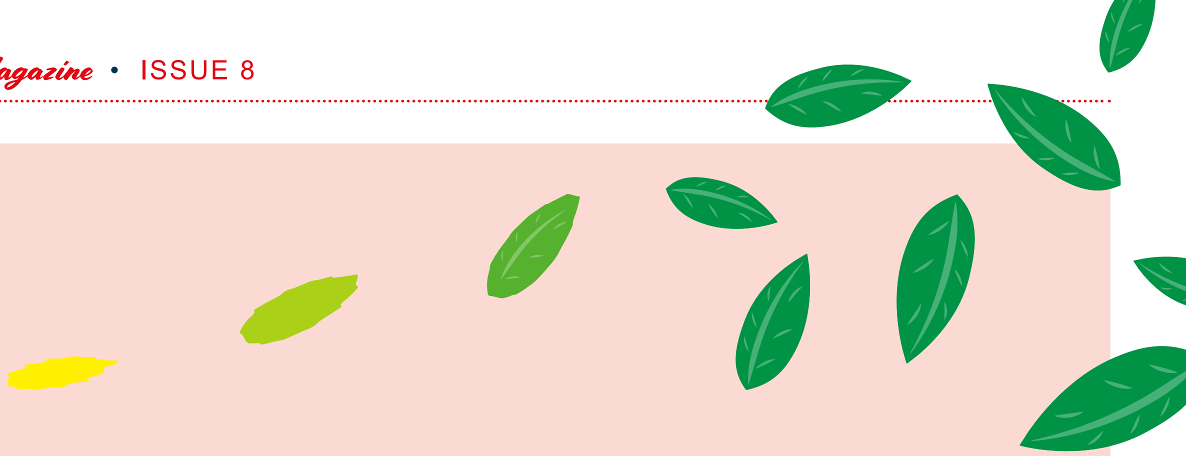
I pause to make an observation. What does it say when there are senior lawyers taking pride in working while going through labour, or working their associates as if they worked in a sweatshop? Does it not point to a deeper insecurity among legal professionals, both senior and junior, that causes them to place work, or feel that they have to place work, on such a pedestal that all else must yield at its altar - including one's health, family and friends?

If so, then perhaps it is incumbent on us as an industry to reflect on what the industry has become, and what we hope the industry to be.

Whether I can be described as a "young" lawyer is increasingly questionable as the years go by. My aim in sharing some of my thoughts in this short article is to hopefully provide a starting point to think through how the industry may reform from within to be more sustainable. Afterall, the persons at our deathbeds will not our clients and work, but our friends and family.

1 For context, a Senior Counsel is regarded as Singapore's equivalent of a Queen's Counsel.





WHAT THE EVOLVING LANDSCAPE OF ESG MEANS FOR FIRE PRACTITIONERS.

Authored by: Rick Brown and Neil Chauhan - HFW

What is ESG?

Environmental, Social and Corporate Governance, otherwise known as "ESG", are the three criteria widely used to evaluate a company's sustainability performance. The criteria, which were originally coined as investment criteria to help socially conscious investors differentiate between target companies, are intended to demonstrate whether companies are remaining conscious of their impact on the environment, their contribution to society and their accountability to the public.

The relevance of ESG to a company's business model is that more and more investors and purchasers are looking to carry out business with those who "do good" and act conscientiously to achieve a positive social and environmental outcome. For some purchasers and investors, this desire to enter into contracts with companies with good ESG ratings is part of an effort to invest purely into businesses with a commitment to responsible investment. For others, the motive is financial: it is well known that companies with a focus on socially responsible practices can often attract a larger customer base on account of the growing interest in ESG and the demand to purchase from companies who share similar values. Consequently, ESG can have a vast impact on the success of a company.

Why is ESG becoming more important?

In addition to being financially lucrative, companies are under increasing pressure to publish their ESG data in the wake of COP26 and the publication of the UK's strategy to reach net-zero emissions by 2050. ESG is now a board-level concern, and more companies are beginning to implement and publicise their ESG strategies and advocate ESG principles as part of their business model in order to keep up with this new zeitgeist.

However, increased interest in sustainable finance, ESG ratings and pressure on companies to report this data has created a number of issues for FIRE practitioners.

(1) Restructuring

As businesses begin to emerge from the Covid-19 pandemic (many with significant debts) companies adopting some form of restructuring should expect ESG scrutiny from investors and lenders. This is because ESG factors are of increasing importance to both investors and lenders given the growing popularity of sustainable practices to the public at large and the reputational hit that poor ESG practices can have on a business. Banks and other institutional lenders, for example, will be giving careful consideration to a company's business plan and the aspects related to ESG.

Practitioners will therefore need to be astute to the growing demand to have proper ESG policies and guidelines in place before reaching out to investors and lenders alike.

(2) Fraud

ESG funds (namely investment funds whose portfolio of investment companies is made up of businesses who put ESG at the forefront of their business model) have seen exceptional investment in recent years ($51.1 billion of net new money was invested into ESG funds in 2020, up from $21 billion in 2019[1]).

However, in circumstances where ESG remains largely unregulated and is still a term which remains open to interpretation, there i s fertile ground for fraudulent activity.

This was recognised in April 2021 by the U.S. Securities and Exchange Commission issuing a 'Risk Alert' stating that investment firms may have misguided investors about the ESG credentials of their funds and exemplified the importance of carefully articulating what investors mean by "ESG" before attempting to draw investors in[2].

Carbon offsetting schemes also have potentially fraudulent consequences. These schemes allow companies to invest in environmental projects which will balance their own greenhouse gas emissions. To offset their emissions, companies purchase the equivalent volume of carbon credits. However, the carbon credit scheme has been mired by fraud (for example, where carbon credits did not exist, or the projects invested in did not actually reduce emissions). In addition, it has come under scrutiny from the likes of Greenpeace, who claim that it 'doesn't really work'.[3]

This ties into increased instances of 'greenwashing', a term coined in the 1980s to describe the practice of labelling an act designed to increase profit as environmentally conscientious. Evidence of greenwashing often comes from spending differences, for example when a company spends significantly more money or time on advertising being perceived as 'green' than on environmentally sound practices. While there is no specific anti-greenwashing legislation in the UK to combat the number of companies misleading the public, on 20 September 2021 the Competition and Markets Authority published its Green Claims Code (the **Code**)[4]. The Code aims to help businesses comply with consumer protection laws and avoid misleading consumers in relation to their environmental impact.

(3) Disputes

With an increase in reports of false greenwashing claims and exaggerated carbon offsetting statistics, it is very likely that more and more disputes will follow, whether in the form of breach of contract or misrepresentation. Claims in the UK are also likely increase in light of the growing awareness of ESG issues and the appetite for holding companies and government bodies accountable for their environmental footprint.

Indeed, environmental organisations and other NGOs understand that litigation can be a useful tool in challenging organisations which fail to adhere to their own ESG policies, or simply do not implement ESG strategies at all. One example of this is the challenge brought by the environmental organisation, Plan B, against the government's plans to expand Heathrow Airport. Plan B claimed that the government had failed to consider that the expansion plans were incompatible with the UK's climate commitments under the Paris Agreement. While the final Supreme Court ruling was decided in the government's favour[5], the case is one of a growing number of examples of public concern regarding the environmental and social impact of government bodies and corporate entities.

Conclusion

The recognition of ESG issues, and the establishment of a coherent ESG strategy, are increasingly important for businesses and government bodies alike. Reputational considerations and the threat of court litigation will require organisations to embed ESG into their operations in order to survive and stay competitive. Failure to consider ESG issues may lead to the restructuring or demise of companies. In addition, the rise of ESG on the corporate agenda and the pressure that entails will mean that instances of ESG-related fraud will inevitably increase.

The authors thank Bea Bray, trainee solicitor at HFW, for her contribution to this article

1 ESG investment funds more than doubled in 2020 (cnbc.com)

2 esg-risk-alert.pdf (sec.gov)

3 https://www.greenpeace.org.uk/news/the-biggest-problem-with-carbon-offsetting-is-that-it-doesnt-really-work/?source=GA&subsource=GOFRNAOAGA024K&gclid=Cj0KCQiAqbyNBhC2ARIsALDwAsA829_nLyj8zSQN8R_gXarWxw137HDVeBfBTr_Iw0vaWFLh8rHpVngaArO7EALw_wcB

4 Green claims code: making environmental claims - GOV.UK (www.gov.uk)

5 R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant) [2020] UKSC 52

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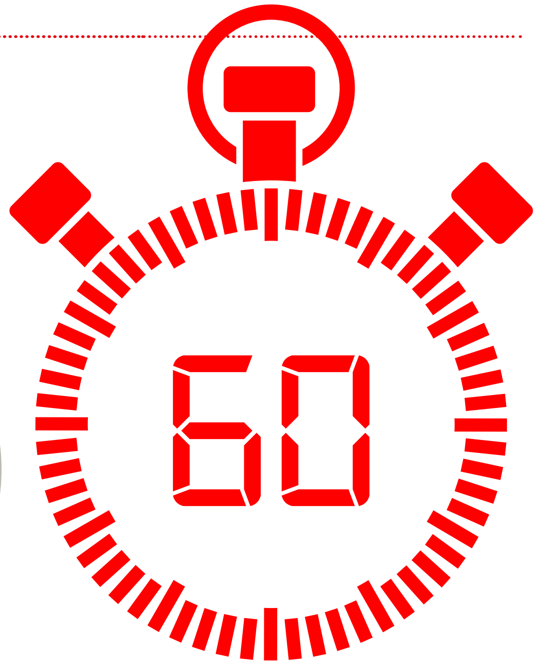

DAVID HINRICHSEN
DIRECTOR
FRP

Q What would you be doing if you weren't in this profession?

A Probably a chef, because I love the science behind cooking, and the way it requires both order and creativity. And I like eating.

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

A It's quite hard to identify the "strangest thing" when you work in insolvency. Most cases find new ways of creating new notions of "bizarre". Especially in cases of fraud, those we are investigating tend to come up with explanations that really push the boundaries of the imagination.

Q What is the easiest/hardest aspect of your job?

A The easiest part is getting excited about a new situation or case and planning avenues of investigation and recovery. Having a great team around me is part of that and I love the buzz of a new challenge for the team to get involved in. The hardest part is knowing that because of commercial realities and some of the peculiarities of insolvency law, not every pursuit is commercially viable, and therefore restoring "fairness" is often out of reach.

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

A Never feel embarrassed to ask a question and appreciate that you will never stop learning or seeing new things – that is a good thing and what makes the job so exciting. If something doesn't make sense, question it. And be prepared to put in the hours – sometimes the job is demanding but it's rarely dull!

Q What do you think will be the most significant trend in your practice over the next 12 months?

A We will undoubtedly see plenty of fraud committed under the shadow of the pandemic – either directly through misused support funding or indirectly where the pandemic is used as a cover for fraudulent conduct. Investment fraud fueled by a sustained period of low interest rates is also going to continue to be a hot topic.

Q If you could learn to do anything, what would it be?

A Either to fly a plane or to learn to play the guitar beyond 4 basic chords. While the latter sounds perhaps more realistic, I've owned a guitar for over 25 years and am still no further, making the possibility of learning to fly actually more likely.

Q What is the one thing you could not live without?

A A pair of trainers. I struggle to make it through 48 hours without some form of exercise. (See also "I like eating.")

Q If you could meet anyone, living or dead, who would you meet?

A It would probably have to be David Attenborough. He must have some absolutely fascinating stories and his messages about sustainability and human impact on climate and nature resonate quite strongly with me.

Q What songs are included on the soundtrack to your life?

A There are way too many to list out here. My "random favourites" playlist contains everything from Metallica to Miles Davis and Warren Zevon to Wu-Tang. However, no playlist should be without "Africa" by Toto.

Q What does the perfect weekend look like?

A Without being too specific, it would include a beach, some form of exercise (maybe a bit of paddle boarding), a BBQ and an Old Fashioned or two.

Q Looking forward to 2022, what are you most looking forward to?

A Hopefully seeing the pandemic in the rear-view mirror and being able to make plans again. And of course many exciting new insolvency appointments and challenges where we can demonstrate the value of the FIRE community.

GETTING PERSONAL:

UNDERSTANDING YOUR OPPONENT IN ASSET RECOVERY

Authored by: Carly Stone - Mintz Group

When it comes to recovering unpaid debts, a judgement in your favour is rarely enough. If, for example, the debtor is based in a former soviet state - with imperfect legal systems which they know to exploit - a creditor can often find themselves playing a costly game of cat and mouse.

Creditors need to get creative, and play a more holistic, more psychographic game focused on the personal aspirations, fears and desires of the debtor, and that of the network surrounding them.

Consider, for example, the case of a Russian debtor who simply ignored a judgment against him after defaulting on a loan of hundreds of millions of dollars. His creditor had failed in attempts to seize bank accounts, factories, inventory and the other companies that comprised the bulk of the assets securing the loan. This debtor, however, also owned a stable of racehorses. Whilst the cash value of the racehorses was a trivial fraction of the amount at stake, their value to the debtor in terms of status, prestige and it being his passion was immeasurable. Having a bailiff show up at his stables to seize some of the debtor's prize horses got this attention in a way that previous court orders had failed to do so.

Not every debtor is a horse racing enthusiast. But understanding and mapping out a debtor's lifestyle and interests can present a number of opportunities for disruption that are not immediately obvious on paper. Expensive golf memberships, a passion for sailing or an interest in antique cars and fine art can convert into tangible opportunities for enforcement, and embarrassment within a niche group of enthusiasts where status can be more important to the debtor than the asset value itself.

Understanding the lifestyle and jurisdictional footprint of the debtor's close family members can be vital in asset recovery. A creditor finding it difficult to navigate the local legal system to seize a debtor's factory in, say, Moldova, may find it much easier to place a charge on the London flat the debtor bought for his son. Looking closely at the asset position of a debtor's children and spouse may also provide evidence for other legal routes that may be key to your recovery strategy. Debtors often transfer

valuable assets and business holdings to close family members in attempts to conceal them from creditors –so studying the asset footprint of debtors' wife or children may lead to hidden assets and evidence of dissipation. Developing an argument of fraudulent conveyance, receipt of the proceeds of crime and money laundering, thus entrapping loved ones into legal proceedings can provide a powerful lever for encouraging settlement discussions.

A combination of aggressive civil and criminal litigation can be an effective tool in the fight for asset recovery.

If a debtor happens to be a wealthy individual with a dubious source of wealth, who happens to send their children to an English boarding school or pays university fees in the United States, then this could present an opportunity to seek disclosure as to the sources of the fees and/or provide opportunity to develop legal arguments around financial crime. Following the money can open up valuable asset leads to the debtor's financial infrastructure; providing attack points for further disclosure and freezing actions.

Exploring private criminal prosecution options against a debtor in a jurisdiction of professional or personal importance can be an effective way to limit their movements and activities. Take for example, the subject of an intellectual property dispute, who was based in Eastern Europe and wanted to expand their business portfolio in England, which was also a jurisdiction of personal importance for the Subject's family. A successful criminal complaint filed against the subject in England meant that they were unable to travel to the jurisdiction for fear of arrest, limiting their ability to conduct business. The threat of such a move may well bring a debtor to the negotiation table.

A high-profile debtor engaged in ongoing negotiations for a large business deal will be keen to protect their reputation, so developing evidence of criminal or adverse activities – liaising with relevant regulatory and law enforcement bodies and/or running a public relations campaign in parallel - can be used to magnify pressure. Understanding any pressure points related to immediate family such as instances of criminal or dubious activities, may also provide points of leverage which can be exploited. Protecting the reputation of themselves and their family members may be of tantamount importance to a debtor, especially if they are in the public eye or seeking investors in a new business venture.

After leaving creditors high and dry, the debtor is likely already on the next business venture; so, understanding their business activities may present avenues for potential disruption. Mapping out supply chains and distribution channels can provide opportunities to seize goods in transit and/or targeting account receivables owed by their customers, and understanding upcoming business ventures and close partners may provide further angles of attack.

Asset recovery isn't always about recovering the assets. Opportunities for asset recovery extend far beyond the usual paper trail, and a creative strategy, informed by a thorough understanding of your opponent and their pain points, is often key to success.

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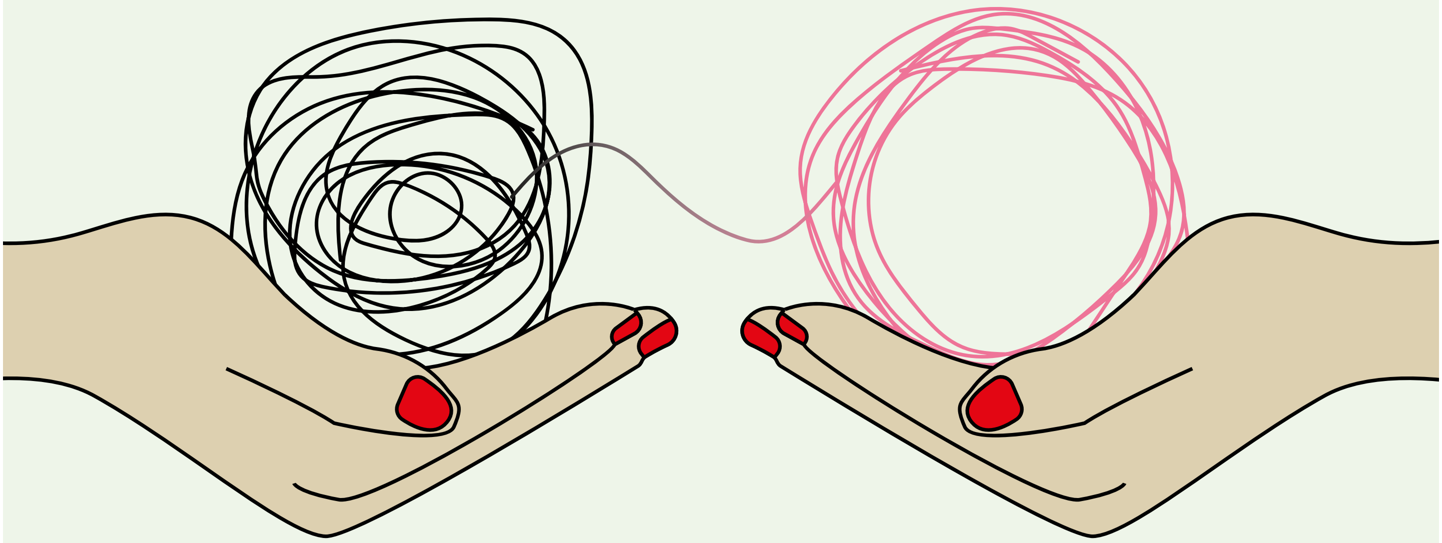
UNTANGLING DISHONEST ASSISTANCE AND KNOWING RECEIPT



Authored by: Natasha Partos - Campbells and Kim Dennison - Alvarez and Marshal

Despite the media portrayal of offshore jurisdictions, not all offshore companies are vehicles of fraud. However, there are undoubtedly cases where offshore companies are used to receive the proceeds of fraud.

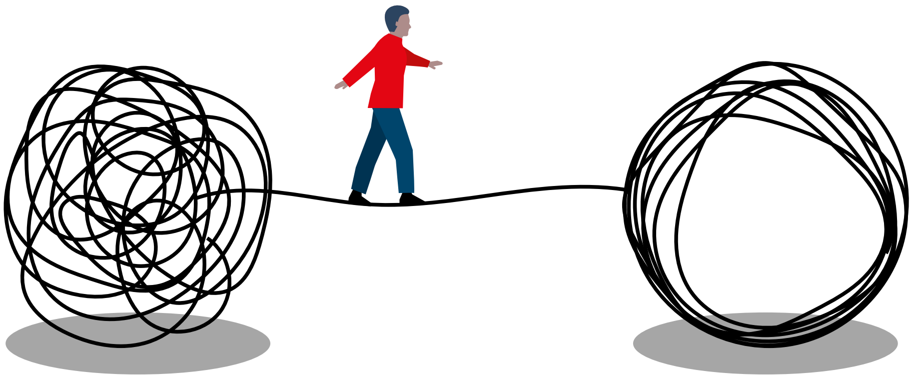
For liquidators assisting the victims of such frauds in recovering assets from offshore companies, the legal doctrines of Dishonest Assistance and Knowing Receipt provide an effective way of seeking redress.

On 27 January 2022 Lord Justice Newey handed down the Court of Appeal's decision in Byers v Saudi National Bank (previously Samba Financial Group) [2022] EWCA Civ 43 dismissing the Claimants' appeal and upholding Mr Justice Fancourt's decision in the High Court at first instance. Specifically, the Court of Appeal was asked to consider whether: (i) a claim for knowing receipt depends on a claimant maintaining a proprietary interest in the property in the hands of the defendant; and (ii) whether that interest existed on the facts of the case before it.

By way of brief background, dishonest assistance refers to a cause of action under which a third party becomes personally liable for procuring or assisting a breach of trust of one or more trustees.

Liability arises where the third party defendant has acted dishonestly and provided assistance to a trustee to enable a breach of trust, although the breach of trust itself does not have to be fiduciary in nature. The assistance provided by the third party defendant must be more than minimal although the third party does not have to know that a fiduciary duty by the trustee existed. Furthermore, for accountability to be attributed to the third party defendant, the trustee does not have to have acted dishonestly for the cause of action to be made out. In this context the test of honesty is an objective test.

Conversely, knowing receipt is a separate equitable remedy which prevents a party from receiving and retaining property, for his or her benefit, to which he is not entitled, knowing that the transfer to him was of property which beneficially belonged to a third party/claimant. In order for this equitable cause of action to succeed, it is necessary for the defendant to have some degree of culpability. Therefore, for such a claim to succeed there must be a transfer of property amounting to a breach of fiduciary duty owed to the claimant where the defendant's state of knowledge makes it unconscionable for them to retain the property. However, and unlike a claim of dishonest assistance, the claimant does not have to show that the defendant acted dishonestly when they received the property.



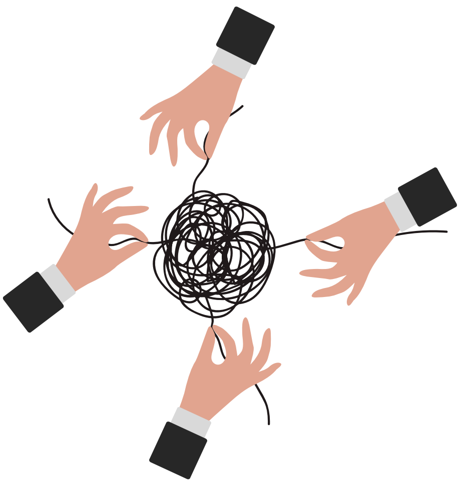
In Byers v Samba Financial Group the Court of Appeal and Mr Justice Fancourt in the High Court had been asked to consider the law of knowing receipt in the context of a claim brought by the Joint Official Liquidators of Saad Investments Company Limited ("SICL"), a Cayman Islands Registered Company, against a Saudi Arabian Bank for the value of shares in five Saudi Arabian companies which were transferred to the Bank, in it was alleged breach of trust. The High Court considered the distinction between dishonest assistance and knowing receipt in light of a long line of case law which at best had blurred the distinctions between the two legal principles, and in turn the Court of Appeal was asked to determine whether the claimants' interest in the disputed property had been extinguished so as to forfeit its rights to bring a claim against the defendant for knowing receipt.

Lord Justice Newey confirmed that the authorities and academic commentary both supported a finding that for a claim of knowing receipt to succeed a claimant must be able to show that: (i) the defendant is guilty of an element of wrongdoing; and (ii) the claimant was a beneficiary of the property in question and maintained an equitable interest in the property at the time the defendant had knowledge of the breach of trust.

The Court of Appeal confirmed that it is the existence of the claimant's equitable interest in the property which gives rise to the custodial duties of a defendant upon receipt of the property. In turn it is the existence of the claimant's interest in the disputed property coupled with the defendant's knowledge of a breach of trust at the point of receipt which makes it unconscionable for the defendant to retain the property which in turn gives rise to the equitable remedies available in a claim of knowing receipt.

Lord Justice Newey confirmed that Mr Justice Fancourt had correctly concluded that a claimant's continuing proprietary interest in the property is therefore a necessary component in a claim for knowing receipt and as a matter of fact in the case before the Court the claimants' absence of a continuing proprietary interest in the disputed securities at the time of registration mean that the Liquidators' claim against the defendant for knowing receipt must fail.

The parties did not appeal Fancourt LJ's decision with respect of the distinct legal difference between liability for dishonest assistance and for knowing receipt and therefore the decision at first instance remains good in law and helpful authority on the point.



Fancourt LJ confirmed that while the distinction between the two legal principles may become blurred, if as the facts present themselves, a defendant is liable for both dishonest assistance and knowing receipt, this does not close the gap on the difference between the two legal principles, namely that:

1. **Dishonest assistance is a truly fault based offence requiring the defendant to be dishonest in assisting a trustee to commit a breach of trust.**
2. **Knowing receipt is unconnected with dishonesty, at least at the moment of receipt.**
3. **The recipient, in a case of knowing receipt is not liable in such a claim for wrongly agreeing to receive the property; once received the recipient must deal with the property as if he were a trustee of it and restore it to the trust. It would be unconscionable to do otherwise. The recipient does not have to have acted dishonestly and his duties arise as of the moment he is in receipt of the property because of his knowledge.**

In the context of asset recovery in offshore jurisdictions, the Court of Appeal's decision, upholding Mr Justice Fancourt's decision at first instance, is a helpful and important judgment which brings the law of dishonest assistance and knowing receipt up to date. This decision also provides guidance on how a court will approach cases concerning these legal principles in both the Cayman Islands, which adopts the common law from the UK in the absence of any specific jurisprudence from its own court, and also the UK.

While the Court of Appeal's decision in Byers v Samba Financial Group is a helpful judgment which clarifies the legal position, as a matter of common law, the practical issues that Liquidators must consider in their efforts to recover assets and return value to fraud victims are no less complicated.

CRYPTO AND REGULATION:

THE TENSION BETWEEN TWO BALANCING FORCES AND AN OPPORTUNITY FOR FRAUD

Authored by: Carmel King and Andrew Sidaway - Grant Thornton

As we start off 2022, cryptoassets remain a hot topic. Chainalysis recently released a preview of its 2022 Crypto Crime Trends for 2022 report[1] which confirms that cryptocurrency usage is continuing to increase at significant pace. The continued growth of the crypto market has been met with increasing interest in the space from regulators and this seems likely to continue into 2022. Not surprisingly, fraud associated with cryptocurrency has also increased. Chainalysis' research identifies rug pulls and scams associated with DeFi as two key trends.

With the continued growth of the market, cryptoassets are becoming more and more relevant to the professional services industry. There is an increasing opportunity for professionals to add value for clients through our understanding of the legislation and regulatory framework, how to mitigate the potential risks that could impact our clients, how to react when the worst happens, and what is on the horizon. We are seeing an increasing number of enquiries with crypto components and the nature of those enquiries is diverse. From jurisdictions including Brazil, Hong Kong, the US and India, crypto-related enquiries span a range of disciplines from insolvency to tax, audit and fraud investigation, forensics and disputes.

The UK Cryptoassets Taskforce (comprised of HM Treasury, the FCA and Bank of England) released its final report on cryptoassets 2018.[2] The aim of that report was to provide "an overview of cryptoassets and the underlying technology, asses the associated risks and potential benefits" and to provide an overview of the proposed regulatory framework in the UK. At the time of its 2018 report, the Cryptoassets Taskforce's goals included protecting consumers while also enabling innovators in the financial sector that "play by the rules" to thrive.[3]

1 Crypto Crime Trends for 2022: Illicit Transaction Activity Reaches All-Time High in Value, All-Time Low in Share of All Cryptocurrency Activity - Chainalysis

2 Cryptoassets Taskforce: final report

3 Cryptoassets Taskforce: final report

How well is that approach faring five years later? HM Treasury's Cryptoasset Promotions paper[4] highlights some key findings from the FCA's 2021 research which indicate the potential for fraud in the crypto ecosystem remains high: consumers holding cryptoassets rose from 3.9% of the population to 4.4% of the UK population (2.3m people), only 71% of those holding cryptoassets correctly identified its definition. The FCA's research[5] indicates that cryptoasset consumers are not entirely sophisticated. It is reported that 31% of cryptoasset holders acquired their investment by responding to an online advertisement, a well-known entry point for fraud in this space.

Buying and trading cryptoassets is becoming increasingly easy for the average consumer. We've seen companies like Paypal and Revolut enable cryptocurrency trading, making it more accessible to a larger consumer base. Despite initial skepticism about cryptoassets, financial institutions like Goldman Sachs have now likened Bitcoin to gold and all of the major investment banks have opened their crypto desks. Milo, an American based fintech company has become the first to offer a U.S. crypto mortgage allowing consumers to use Bitcoin to back property purchases.[6]

HM Treasury's January 2022 Cryptoasset Promotions Response paper[7] reports that ownership has risen however consumer understanding appears to have declined. In its view, this supports the need for regulatory intervention to ensure cryptoasset promotions are "fair, clear and not misleading." It refers to the Government's approach to cryptoasset regulation as being a staged and

proportionate approach which is sensitive to risks and responsive to new developments. In light of the rate at which cryptoassets are being adopted by consumers and the rapid development in this space (for example, the emergence of NFTs and DeFi), the authors question whether this approach is sufficiently agile enough to adopt and respond to emerging risks without having to implement further legislation and regulation.

In light of the increasing adoption of cryptoassets and the ease of which they are available to the average consumer, it is not surprising that cryptocurrency-based crime continues to increase.

Chainalysis' report states that cryptocurrency-based crime hit a new high in 2021 with the amount being received by illicit addresses almost doubling from $7.8 billion in 2020 to $14 billion in 2021.

The Theodex rug pull is an example of a single fraud having a significant impact on the statistics, with c. 90% of the value lost to rug pulls in 2021 being attributed to it.

Innovation is high on the Taskforce's agenda but it must be within "the rules". It is clear from the guidance being produced by the regulators in the UK that protection of the consumer trumps innovation. However, it is arguable that the Government's staged approach is reactive, and while attempting to build in safeguards to legislation to keep it sufficiently applicable to new technologies there are gaps that are being exploited by criminals. Chainalysis notes that while law enforcement's ability to combat crypto-based crime is evolving, stolen funds and scams stand out for their growth in 2021.[8]

There is increased focus in other parts of the world on regulating the crypto market, and the regulator landscape continues to evolve. China tightened its restrictions on crypto transactions in 2021 and more recently Russia's central bank has proposed banning the use and mining of cryptocurrency on Russian

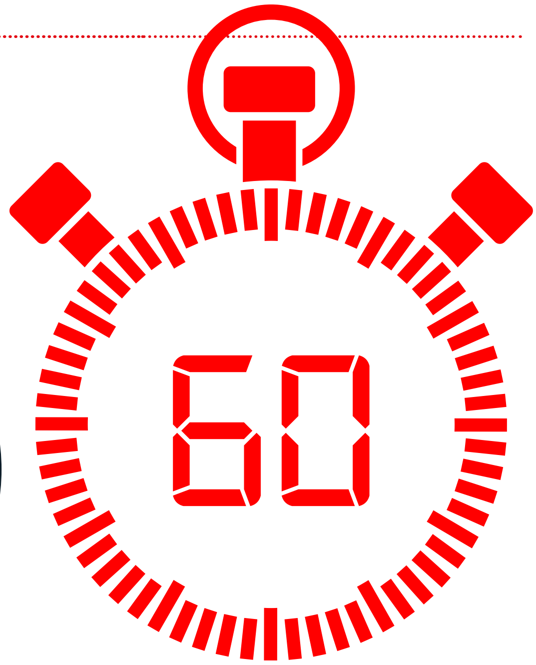
territory. Other nations have adopted a more friendly approach to cryptoassets, seeking to implement and strengthen regulation rather than implement blanket bans. The EU's Markets in Crypto Assets ("MiCA") framework seeks to simplify regulation of cryptoassets and firms (including exchanges) across the EU. Rather than implement regulation via different agencies or institutions (like we have seen in the U.S. and to some extent the UK), MiCA seeks to implement a comprehensive consistent regulatory framework for the entire EU. The European Council and European Parliament are progressing negotiations regarding the proposed framework before it is ratified and adopted into legislation.[9]

Members of the Grant Thornton team will be running a workshop at the FIRE Starters Dublin event in February which, without giving too much away, will incorporate some instances of how crypto assets have become relevant to recent referrals and how we dealt with those referrals. There will also be a cryptoasset-specific session on Friday where delegates will have the opportunity to ask the panelists anything about crypto – there are no stupid questions!

4 Cryptoasset_Financial_Promotions_Response.pdf (publishing.service.gov.uk)
5 Research Note: Cryptoasset consumer research 2021 | FCA
6 Milo | Get a mortgage with Cryptocurrency (milocredit.com)
7 Cryptoasset_Financial_Promotions_Response.pdf (publishing.service.gov.uk)
8 Crypto Crime Trends for 2022: Illicit Transaction Activity Reaches All-Time High in Value, All-Time Low in Share of All Cryptocurrency Activity - Chainalysis
9 European Council Takes One Step Closer to Ratifying Landmark Crypto Regulation (coindesk.com)

60-SECONDS WITH:

REBECCA HALE
ASSOCIATE
BEDELL CRISTIN, GUERNSEY



Q What would you be doing if you weren't in this profession?

A Something to do with property – buying, selling, renovating or decorating, or a combination of all four! My capacity to watch programs such as Grand Designs, Your Home Made Perfect and anything with George Clark in it is truly endless. Slightly different but Selling Sunset is a firm favourite, too.

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

A Not strange, necessarily, but for me moving to Guernsey from the UK in 2016, at 1 year PQE, was very exciting, not to mention challenging. The move meant familiarizing myself with a new legal landscape, in which while the principles were often familiar local case law, legislation, convention and practice was not. For example, it is sometimes necessary to consult old French texts on matters of Norman customary law, which is not something I ever had to do in the UK! Since moving to the Island I have worked on all manner of cases for all manner of clients based all over the world, not only in Guernsey and Jersey but also in Russia, Hong Kong, the US and the Middle East (to name a few). Not knowing where the next instruction is going to come from is generally very exciting.

Q What is the easiest/hardest aspect of your job?

A It's a cliché but the easiest aspect of my job is the people involved, whether colleagues, clients or intermediaries. The hardest part is fitting everything in. I love meeting people and helping with local events in the legal and wider business industry, which generally means there is almost always something to be done of an evening. I'm involved at director/committee level with both the Young Business Group and the Guernsey International Legal Association – if any Guernsey based readers would like to know more about either organization please don't hesitate to get in touch!

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

A Initiative and enthusiasm will get you far.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A As the support made available to businesses through the pandemic starts to dry up I do think we'll see an increase in administrations and insolvencies. Sadly, I also suspect there are individuals who will have seen the past few years as an opportunity to take advantage of the vulnerable and/or the measures enacted to facilitate remote working for example for their won dishonest gains, as a result of which we may see increased activity in the fraud and asset recovery space.

Q If you could learn to do anything, what would it be?

A I'm originally from South Wales. As Welsh people are generally known to be able to carry a tune, I would love to be able to sing. That I'm tone-deaf feels like I'm letting the nation down.

Q What is the one thing you could not live without?

A Carbs, specifically cheese, pasta and bread.

Q If you could meet anyone, living or dead, who would you meet?

A Lin Manuel Miranda.

Q What songs are included on the soundtrack to your life?

A See above – a few from Hamilton for sure, as well as from the likes of the Killers and Kings of Leon (I graduated in the late noughties) and, given the Welsh connection, the Stereophonics and Tom Jones, naturally.

Q What does the perfect weekend look like?

A If in Guernsey, drinks Friday night, a cliff run or a game of squash Saturday morning, dinner out Saturday night followed by the papers, brunch and a beach trip on Sunday – generally lots of eating and drinking!

Q Looking forward to 2022, what are you most looking forward to?

A Life (hopefully) returning to normal – no more masks or social distancing and finally being able to travel freely.

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GETTING THE APPLICATION HOME(SHIELD)

A PROTECTION PLAN WHEN APPLYING FOR PRE-ACTION DISCLOSURE: DOMESTIC & GENERAL INSURANCE PLC AND OTHERS V HOMESHIELD DIRECT LTD AND ANOTHER [2021] 4 WLUK 278

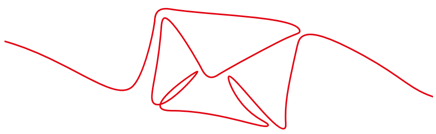
Authored by: Stephanie Duncan and Mary Barrett - Charles Russell Speechlys

Introduction

The High Court Judgment in *Domestic & General Insurance plc and others v Homeshield Direct Ltd and another [2021] 4 WLUK 278* provides valuable lessons for practitioners seeking pre-action disclosure.

The backdrop was a mounting campaign by Domestic & General (the **Applicants**) against companies suspected of making unsolicited sales calls to their customers.

The Applicants claimed that the Respondents' sales agents, posing as agents of Domestic & General, had been fraudulently misrepresenting that customers' insurance cover was expiring, inducing them to pay for unnecessary protection for their appliances.



Pre-Action Correspondence

The Applicants first raised the allegations in a letter before action dated November 2019 (the **LBA**). The contents and timing of the LBA became particularly significant.

In the LBA, the Applicants relied on evidence from: 1) transcripts of their online customer chat service where customers complained of unsolicited calls; and 2) human surveillance intelligence, obtained by an agent for the Applicants operating undercover at Homeshield. This "mole" had collected audio and video recordings and photographs of scripts and training material used by Homeshield's sales agents.

The Applicants delayed bringing their application for pre-action disclosure.

The Pre-Action Disclosure Application

Notably, the Applicants did not include the surveillance evidence in their application. Its existence was mentioned only in passing and the pre-action correspondence exhibited to the Applicants' witness statement was redacted on the basis that the Applicants believed disputes would ensue about its admissibility in future proceedings.

Further, the Applicants' solicitors and counsel had been "sanitised", that is not provided with information concerning the surveillance evidence to avoid suggestions that they had withheld relevant evidence from the Court.

The Applicants sought three categories of documents:

(1) recordings of all sales calls made to customers identified as having been contacted;

(2) recordings of all sales calls on three dates; and

(3) all written training materials found as a result of a reasonable search compliant with CPR 31.7.

Legal Principles

Pursuant to Civil Procedure Rule (**CPR**) 31.16:

(3) The court may make an order under this rule only where–

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

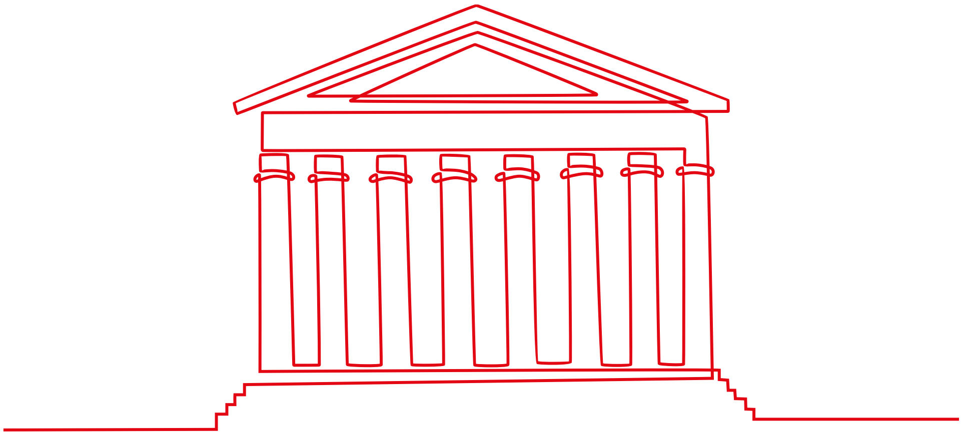
(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.



The requirements set out in CPR 31.16(3) represent: a) the legal threshold; and b) if satisfied, the court's discretion to make the order.

Deputy Judge Coppel, presiding over the application, reviewed the case law and identified the following key points:

1. According to the legal principles summarised in *Carillion Plc v KPMG LLP* [2020] EWHC 1416 (Comm), important considerations included:
   - the nature of the loss, the clarity of the issues, the nature of the documents requested, pre-action inquiries, and the opportunity to make the case without pre-action disclosure (*Black v Sumitomo Corp*);
   - the anticipated claim must have a real prospect of success; and
   - in commercial cases, pre-action disclosure even if not exceptional, is unusual.
2. Drawing on *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm) and *Snowstar Shipping v Graig Shipping* [2003] EWHC 367 (Comm), a request must be "highly focused" and confined to what was "strictly necessary".
3. The Court must "*stand back… and look at the matter in the round*" – does the request for pre-action disclosure further the overriding objective? (*Total E&P Soudan SA v Edmonds* [2007] EWCA Civ 50 and *Hands v Morrison Construction Services Ltd*., [2006] EWHC 2018 (Ch)).
4. As to CPR 31.16(3)(d)(i) - the fair disposal of proceedings - does early disclosure add fairness, such as the opportunity to plead an otherwise unpleadable case or a more focused Statement of Case to avoid cost and disruption cause by an amendment after normal disclosure (*Hands v Morrison*)?

The Legal Threshold

Pre-action disclosure was refused.

Lesson 1 – Documents sought must fall within standard disclosure

In considering CPR 31.16(3)(c), whilst the first and third category of documents could fall within the remit of standard disclosure, the second category could not. This related to thousands of calls, many of which were not to the Applicants' customers. They were not documents on which the Respondents would rely, documents which would adversely affect the Applicants' or another party's case, or support another party's case (Hutchinson).

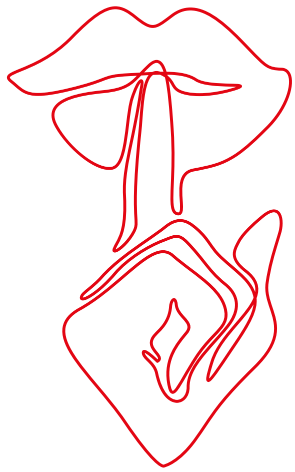
The Respondents might be ordered to disclose snapshots of transcripts but that was likely to be by way of specific disclosure.

Lesson 2 – Failure to refer to the full body of evidence

Judge Coppel considered that a: "*Dispute or potential dispute as to the admissibility of evidence does not justify a failure to refer to it or to deal with its contents in submissions on an application for pre-action disclosure.*"

In assessing CPR 31.16(3)(d), the Applicants had not discharged the burden of showing that the pre-action disclosure was "strictly necessary" to dispose fairly of the proceedings or save costs. Where the surveillance evidence had been deliberately left out, he was unable to judge whether ordering further materials would materially advance the pleading of the Applicants' case, thereby saving costs. He was "*dubious*" that this would be the case in light of the detailed allegations set out in the LBA.

The Applicants' failure to rely on the surveillance evidence was a "*notable shortcoming*" (paragraph 11).



Discretion

Working through the criteria in the leading case of *Black v Sumitomo Corporation* (paragraph 88), even if the threshold criteria had been satisfied, Judge Coppel would not have exercised his discretion to make the order.

Lesson 3 – Delay and pre-action conduct

Whilst the potential losses could be significant, the delay in bringing the application for pre-action disclosure was "*curious*" and suggested that the Applicants did not regard the activities as a particular threat to their business. That the Applicants had been directing their attentions to other rogue callers rang hollow given their economic strength.

Further, pre-action disclosure was not necessary to clarify the issues which were clearly identified in the LBA. Seemingly, the Applicants had a good opportunity to make their case without pre-action disclosure given the surveillance evidence. By failing to refer to its existence, they prevented themselves from rebutting such a finding.

In addition, the Judge raised the Applicants' pre-action conduct. The Applicants had failed to provide the full body of the surveillance evidence to the Respondents until late March 2021, several months after issuing the application.

These factors weighed against the exercise of discretion.

Lesson 4 – Commercial Sensitivity

As to the training materials in the third category, caution had to be exercised when dealing with commercial competitors requesting documents that were potentially commercially sensitive. Pre-action disclosure is not the norm and is unusual in commercial proceedings.

Looking at the pre-action application "in the round", Judge Coppel stated that:

"this does not seem to me to be a case which is out of the ordinary and which qualifies as the unusual if not exceptional case for pre-action disclosure in a commercial dispute. The applicants have access to substantial material on which a claim could be based, much of which they have chosen not to deploy on this application." (paragraph 33).

Key takeaways

- Requests for pre-action disclosure must not be too wide. Documents must fall within standard disclosure. Requests should be: "*highly focused*" and confined to what is "*strictly necessary*" (Carillion and Hutchinson).
- There should be a case for why early (as opposed to normal) disclosure is required. Bear in mind the overriding objective.
- Potential disputes as to admissibility do not justify a failure to refer to evidence in the application.
- Pre-action disclosure in commercial disputes is unusual. Caution will be exercised where the application involves sensitive commercial information between competitors.
- Unjustified delay in bringing an application may suggest to the Court that the application is not "strictly necessary", and question the losses sustained.
- It was not appropriate to reserve costs when it was uncertain that proceedings would be issued.

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND ITS RELATIONSHIP WITH THE UK

Authored by: Menelaos Karampetsos - Brown Rudnick

Background

The European Public Prosecutor's Office ("EPPO") has been fully operational since June 2021. The EPPO, established under Council Regulation (EU) 2017/1939[1] ("the EPPO Regulation") and underpinned by Directive (EU) 2017/1371[2] ("the Directive"), is the EU's new independent public prosecution office whose mandate is to investigate and prosecute crimes against the EU's financial interests.

Article 2 of the Directive defines financial interests as "all revenues, expenditure and assets covered by, acquired through or due to" the Union budget, and the budgets of Union institutions, bodies, offices, and agencies established pursuant to the Treaties, or budgets (directly or indirectly) managed and monitored by such parties. Articles 3 and 4 of the Directive then define the crimes captured by the EPPO's mandate; these include but are not limited to cross-border VAT fraud resulting in total damages of at least EUR 10m (a threshold prescribed in Article 2 of the Directive), misappropriation of EU funds or assets by public officials, and corruption that is likely to or actually damages the EU's financial interests.

The EPPO operates at two levels. Centrally, it comprises the European Chief Prosecutor, 22 European Prosecutors (each appointed by participating EU countries), and the Administrative Director. At national level, within participating EU countries, there are then European Delegated Prosecutors who operate independently from national authorities and are supervised by the EPPO. The main difference between the EPPO and the European Anti-Fraud Office (OLAF), which also investigates offences against the EU's financial interests, is that OLAF has no law enforcement powers or reach at national level. The EPPO, by contrast, operates directly across member states and is envisaged as an agency that will allow for expedient and direct action. The EPPO can investigate crimes committed after 20 November 2017 and its starting caseload included 3,000 cases.

1 https://eur-lex.europa.eu/eli/reg/2017/1939/oj

2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.198.01.0029.01.ENG

Relationship with the UK

An overarching element of the relationship between the EPPO and the UK authorities is that the UK continues to receive EU funding under the EU's spending framework.[3]

The EPPO is therefore expected to have access to mechanisms that enable it to investigate crimes committed by nationals of participating member states or EU officials who are within the UK. The frameworks affecting the EPPO's relationship with the UK authorities are set out below.

Relevant provisions under the Trade and Cooperation Agreement

The EU has notified the UK that the EPPO is a competent authority for the purposes of Titles VIII and XI of Part Three of the Trade and Cooperation Agreement ("TCA"). Title VIII deals with matters of mutual assistance while Title XI deals with freezing and confiscation proceedings.[4]

In the context of Title VIII of Part Three of the TCA, requests for mutual legal assistance will have to take a form to be specified by the Specialised Committee of Law Enforcement and Judicial Cooperation, and conditions of assistance will entail meeting requirements of necessity and proportionality, as well as evidence that the investigative measure(s) within the request could have been ordered under the same conditions in a similar domestic case. Time limits for requests require the recipient state of a request for mutual legal assistance to determine its execution or lack thereof within 45 days after receipt.[5]

In the context of Title XI of Part Three of the TCA, cooperation between the UK and designated Union bodies (of which the EPPO is one) is provided for in Article LAW.CONFISC.1. Forms of assistance within the ambit of Title XI include, but are not limited to, any measure providing and securing evidence in connection with any aspect of (i) property or properties used or intended to be used, wholly or in part, to commit a criminal offence; (ii) proceeds from such property; and (iii) any other property.[6]

Relevant provisions under the Eurojust Regulation

Cooperation between the UK and Eurojust (the EU's agency for coordination of work of national authorities in investigating and prosecuting transnational crime) is provided for in Title VI of Part Three of the TCA, which specifies that Eurojust and competent authorities of the UK are to cooperate in combating serious crimes which include, but are not limited to, terrorism and money-laundering activities.[7]

UK authorities may encounter the EPPO while cooperating with Eurojust.[8] In accordance with Article 50 of Regulation (EU) 2018/1727 ("Eurojust Regulation"), Eurojust is to address any EPPO request for support without undue delay, and it also is to inform the EPPO of, and, where appropriate, associate it with its activities concerning cross-border cases.[9]

Outlook

The precise relationship between the EPPO and UK authorities remains to be crystallised.

Politically, the UK remains relatively tight lipped on any pronouncements, with the Minister for Future Borders and Immigration merely confirming that the UK would consider any mutual legal assistance requests from the EPPO on a case-by-case basis.[10]

The Minister's statement comes at a time where a proposed Regulation at EU level seeks to increase support by Europol towards EPPO investigations[11]. The proposal has prompted scrutiny by UK parliamentarians, as it envisages that Europol (whose cooperative relationship with UK authorities is specifically envisaged in Title V of Part Three of the TCA) will process large datasets to support the EPPO, potentially including personal data that UK authorities share with Europol for the purposes of cooperation in investigations.[12]

Generally, UK practitioners advising beneficiaries of EU funding in the UK will need to be mindful of the possibility of encountering the EPPO directly or indirectly (via its relationship with Europol, for example).

3 https://www.gov.uk/guidance/getting-eu-funding
4 CELEX_22020X1231(02)_EN_TXT
5 Article LAW.MUTAS.115 – Article LAW.MUTAS.120 of the Trade and Cooperation Agreement
6 Article LAW.CONFISC.3 of the Trade and Cooperation Agreement
7 Article LAW.EUROJUST.61, Annex LAW-4 of the Trade and Cooperation Agreement
8 "Cooperation with EU agencies and bodies under the EU–UK Trade and Cooperation Agreement1: Eurojust, OLAF and the EPPO", by Niblock R. in New Journal of European Criminal Law 2021, Vol. 12(2) 277–282
9 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1727
10 http://europeanmemoranda.cabinetoffice.gov.uk/files/2021/04/15042021_Letter_from_Minister_Foster_to_ESC_Chair.pdf
11 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0796
12 https://publications.parliament.uk/pa/cm5802/cmselect/cmeuleg/121-i/12109.htm

FUTURE PROOFING KEY SKILLS AND CAPABILITIES FOR INVESTIGATORS

Authored by: Kurun Bhandari - Stoneturn

Introduction

The disruption to standard working practices caused by the global pandemic has created an unstoppable shift towards a hybrid working model for most organisations. Whilst this disruption may cause a logistical and operational headache, it also provides opportunities for key control functions to reassess their previously efficient target operating models and resource composition. Internal investigations functions are no different.

In addition to the evolving ways in which we work, the effectiveness of internal investigations functions is a constant agenda item for many companies and regulators, seeking to ensure that each investigation is treated with due care and attention by all stakeholders. This focus is heightened by a widespread expectation that the number of investigations into areas of interest for regulators will increase, including Covid-19 related frauds, diversity & inclusion failings, and ESG misrepresentation (e.g. “greenwashing”). Consequently, the outcomes and quality control of investigations functions will once again be under the regulatory spotlight.

In this paper, we examine how reviewing and refreshing your investigation team’s skills and capabilities framework (“S&C Framework”) can be used to:

- Prepare your investigators to conduct their work under a hybrid working model;
- Establish a higher quality standard for your investigations;
- Create cost and operational efficiencies for the investigations function;
- Boost employee engagement within your investigations team; and
- Ensure that your investigations team is fit for purpose in the eyes of the regulator.

Why now?

In an office environment, Heads of Investigations have sufficient visibility and influence over their teams to ensure that established investigation methodologies are being followed. However, the move to hybrid working risks employees becoming more siloed in their work, to the possible detriment of standardised investigation approaches and consistent outputs.

The increase in working remotely also reduces the opportunity for organic, “on the job” learning that is integral to upskilling junior investigators.

This reduction of time spent in the office diminishes knowledge sharing opportunities between seasoned investigators to instil team best practices, whilst also resulting in team members feeling disengaged from each other.

The transition to a hybrid working model could render previously defined investigative skills as outdated. Whilst the core competencies required by an investigator remain constant, conducting an investigation virtually requires a more nuanced approach.

For example, performing interviews via webcam has presented new challenges for investigators.

Virtual interviews lessen the ability to read body language and call for a varied approach to structuring lines of questioning when compared to interviewing in person.

As such, the interview training delivered to in-house investigators may demand a refresh to ensure that their skills remain fit for purpose. For example, how does one handle use of documents presented to interviewees? How can the investigator ensure they have the attention and avoid distraction of the interviewee? What are the rules of etiquette in terms of ground rules?

What is the benefit of performing a review?

An updated S&C framework helps provide confidence and assurance that your investigation team's technical knowledge and skillset is re-calibrated for hybrid working, and that a consistent methodology is being applied throughout your team.

Additionally, the implementation of revised training can re-baseline your team's collective knowledge at a higher level.

In addition to improving your investigator's technical skills, the holistic refresh could also aid in the administrative side of investigations. A revised S&C Framework could be used to improve case management workflows and revise review systems to operate more efficiently, by encompassing operational and administrative skills in addition to technical capabilities.

Opportunities for the team to interact in-person

A refresh can be used to reconnect your investigators at a time where it is increasingly common for professionals to feel disconnected from their colleagues and disengaged from their roles. By implementing a revised, more stringent S&C Framework you can provide continual professional development and help to re-motivate team members.

With different levels of competence, an S&C Framework can provide a clearly defined pathway for your investigators as they look to follow best practices and progress through their careers. This in turn can bolster the performance management process, with progression to higher levels of competence factored into goal plans and year-end targets.

At a time when many organisations are incentivising their employees to come back to the office, updating the training programmes provided to your team can act as a driver to bring them together under one roof. However, whilst most training tends to be formalised and delivered by external providers, a revised S&C Framework can be utilised to increase internal training, as well as informal learning.

Identifying skills gaps and developing mentoring circles

Administering a revised S&C Framework provides Heads of Investigations with a renewed understanding of each individual's strengths and areas for development. These strengths can be leveraged by having more seasoned investigators train the team on their respective specialisms. This increased oversight will assist Heads of Investigations with resourcing decisions, allowing for pairing of investigators supporting each other's differing strengths.

For example, an investigator who has strong report writing skills but is not a confident interviewer could be paired with another member of the team who has advanced interview skills. This not only ensures that the investigation will be handled with appropriate care and skill, but should also provide an opportunity for knowledge sharing and professional growth. Furthermore, by incorporating differing levels of competence into the S&C Framework, Heads of Investigations can ensure that only the most competent of investigators are given complex and potentially sensitive casework.

Whilst also creating efficiencies in resourcing, the renewed oversight afforded to Heads of Investigations can create further efficiencies when making hiring and training decisions. Gaps identified post implementation of the revised framework can be filled by targeted training, or by hiring of new resources into the team. This in turn creates cost efficiencies for the team and the organisation as a whole.

What is the value for the business?

At first glance, the positive outcomes of performing a refresh of your investigator S&C Framework apply only to the members of the team. However, there are wider benefits for the organisation as a whole. Upskilling your investigators, engaging with them through training and other means, could consequently reduce employee turnover, potentially help boost retention and recruit new talent.

Furthermore, a highly skilled, engaged and experienced team should boost the efficacy, efficiency, and quality of your investigations, saving both time and money for your organisation.

Administering a more structured and robust S&C framework facilitates the building of trust and confidence between your organisation, the regulator, and your employees. With investigator competence being measured against the S&C Framework, you can ensure that your investigations function is meeting the expectations of the regulators, whilst fulfilling its duty of care to your employees. As such, the most valuable benefit of performing a review of this kind is confidence and assurance for the organisation that your employees are effectively safeguarded in the hands of competent professionals.

JUST AND EQUITABLE WINDING UP: THE STATUS QUO IN JERSEY

Authored by: Charlie Dessain - Ogier

1. INTRODUCTION

The Royal Court of Jersey may grant a winding up order on the grounds that it is just and equitable to do so pursuant to article 155 Companies (Jersey) Law 1991 (**Companies Law**). This can apply to a solvent or insolvent company. It is similar to the statutory powers of the English courts under section 122(1)(g) Insolvency Act 1986 (**English Insolvency Act**). Although the Royal Court will have regard to English case law in assisting their interpretation of "*just and equitable*"[1], recent Jersey case law appears to have developed a much wider discretionary application. This has inevitably led to the widening of circumstances in which such an order will be granted in Jersey.

2. BACKGROUND

By way of a brief background, the main procedures for winding up a company in Jersey are as follows:

A En désastre

Pursuant to the Bankruptcy (*Désastre*) (Jersey) Law 1990, a debtor or a creditor with a liquidated claim of more than £3,000 may issue an application to the Royal Court seeking a declaration that a debtor's property is declared *en désastre*. Once the Royal Court has established that the company is unable to pay its debts as they fall due and exercised its discretion to declare its property *en désastre*, the company's assets vest in the Viscount of Jersey for the purpose of adjudication and distribution.

B Creditors' winding up

This process is similar in nature to a creditor's voluntary winding up under the English Insolvency Act. However, despite its name, this process is initiated by a company's shareholders. It is not a process which can be initiated by creditors whose only available avenue to place a company into an insolvency procedure, at present, is via a declaration en désastre (although in some circumstances creditors may apply some degree of pressure on the directors/ shareholders to initiate this process as an

1 In Re Leveraged Income Fund Limited [2002] JRC 209, the Royal Court (at paragraph 10) noted that article 155 of the Companies Law is based on the English Insolvency Act which is why English authorities are of particular assistance.

alternative to a declaration en désastre). As discussed below, amendments to the Companies Law (which come into force on 1 March 2022) will provide a further avenue for creditors to initiate a winding up process. Pursuant to articles 156-186 of the Companies Law, this process is initiated by a company's shareholders passing a special resolution requiring a two thirds majority at a general meeting. The appointment of a liquidator is usually effective from a subsequent creditors' meeting or where there is no creditor nomination, by the shareholders at the general meeting.

C Summary winding up

This procedure (under articles 145 to 154A of the Companies Law) is also initiated by a shareholder's special resolution. However, this procedure applies to solvent liquidations where a company has neither assets nor liabilities or if it has assets and all its directors declare solvency and affirming that the company's debts can be discharged in full (within six months from the start of the winding up).

APPLICABILITY

Having regard to the above Jersey insolvency procedures, one can see how there may be circumstances in which they will neither be appropriate nor provide the best outcome for creditors in cases of insolvency. In those circumstances, the following individuals will have standing to issue an application seeking the winding up of a company on just and equitable grounds in accordance with article 155(2) of the Companies Law: the company, director(s), shareholder(s); the Chief Minister; the Minister for Treasury and Resources; or the Jersey Financial Services Commission.

In the recent case of *Financial Technology Ventures and Others v ETFS Capital Limited and Graham Tuckwell*[2], the Royal Court recognised that there is not an exhaustive list of all the circumstances in which it may be just and equitable to wind up a company in light of its wide discretion but recognised the following examples:

- where the substratum of a company (ie its purpose/ main objects on which the company was formed) has been lost or abandoned[3];
- where there is a deadlock between the members and/ or directors preventing decisions being made[4];
- where there is a breakdown of relations between participants in a quasi-partnership preventing co-operation in the conduct of the company's affairs[5]; and
- where an insolvent company's affairs need to be investigated[6].

In addition to the above, other notable examples include:

- to keep an insolvent company trading for a limited period in order to sell its remaining stock at retail value for the benefit of the company's creditors[7];
- where there is a pre-pack sale[8];
- where there is no shareholder support and so a creditors' winding up procedure cannot be initiated[9]; and
- where there are special circumstances involving regulated companies[10].

Taking a recent case by way of an example, *Re Betindex Limited*[11] (**Betindex**) involved a Jersey incorporated company operating an online gambling platform designed to resemble stock market investments but in respect of professional football players. Initially, the Royal Court sought the assistance of the English courts to place Betindex into administration (a procedure not available in Jersey) but once the English courts determined that administration would not achieve its purpose, it was ordered that the administration be discharged conditional on Betindex being placed into liquidation in Jersey through either a declaration *en désastre* or a just and equitable winding up. The Royal Court concluded it was appropriate to grant a winding up order on just and equitable grounds for the following reasons:

2 [2021] JRC 025

3 For example, see Re Draganfly Investments Limited [2020] JRC103 / Re Betindex Limited [2021] JRC 309

4 For example, see Bisson v Barker [2008] JRC 193

5 For example, see Re Green Equity Limited [2013] JRC 169A

6 For example, see Re Belgravia Financial Services Group Limited [2008] JRC 161

7 For example, see Re Poundworld [2009] JRC 042

8 For example, see Re Collections Group [2013] JRC 096

9 For example, see Re Huelin-Renouf Shipping Limited [2013] JRC 164

10 For example, see Horizon Investments Limited [2012] JRC 039

11 [2021] JRC 309

A The substratum had arguably been lost as Betindex was unable to provide gambling services.

B It was a high-profile collapse involving thousands of traders and gambling regulators both in Jersey and the UK. It was therefore in Jersey's reputational interests and the public interest more broadly for the Royal Court to supervise the winding up.

C This matter would likely involve complex court applications relating to creditor claims valued between £65.2 million and £90 million and adjudication of those claims including an application under article 51 of the Trusts (Jersey) Law 1984 concerning the administration of the funds held in trust account totalling approximately £4.5 million.

D It was more flexible than a creditor's winding up given that the Royal Court is able to make "*whatever orders were required to suit the needs of each case*".

E It was more preferable to a declaration *en désastre* given the complexities which would require the Viscount to engage external advisers. Instead, it was preferable for the winding up to be conducted by professional insolvency experts.

CONCLUSION

An important feature of a just and equitable winding up pursuant to article 155(4) of the Companies Law is the Royal Court's ability not only to appoint a liquidator but also its ability to direct the manner in which the winding up is to be conducted and "*make such orders as it sees fit to ensure that the winding-up is conducted in an orderly manner*"[12]. Unlike English courts, the Royal Court is not bound by statute to consider whether another remedy is available or whether a shareholder making such an application is acting unreasonably rather than pursuing another remedy[13], however, case law has made clear that the Royal Court will want to be satisfied that there are compelling reasons for a just and equitable winding up and that other available procedures are not appropriate. What is also clear from the abundance of case law is the Royal Court willingness to exercise a very wide discretion and grant an order on just and equitable grounds where the outcome will be more beneficial for creditors.

In accordance with the upcoming amendments to the Companies Law[14] coming into force on 1 March 2022, a creditor will now have the option to issue a winding up application (initiated by a statutory demand) and to appoint a liquidator (or provisional liquidator) from a register of private sector insolvency practitioners maintained by the Viscount. This is a momentous development in the Jersey insolvency jurisdiction. It therefore remains to be seen how these amendments may affect the use of just and equitable winding up applications as they may alleviate creditor pressure previously applied on directors and shareholders (particularly in circumstances where creditors wish to be the driving force behind the winding up process with a steer on their preferred liquidator). In our view they will remain a flexible and useful tool to maintain value.

12 Article 5(4) Companies Law

13 Section 125 English Insolvency Act

14 Companies (Amendment No. 8) (Jersey) Regulations 2022

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