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ISSUE 4

Global Asset Recovery

Q1 2021

Looking back…

…and Looking ahead

THE GLOBAL ASSET RECOVERY COMMUNITY

INTRODUCTION

"The best way to predict your future is to create it."

- Abraham Lincoln

After the "unprecedented" year that was 2020, Q1 of 2021 has been fast and furious for both **ThoughtLeaders4 FIRE** and the Asset Recovery Community.

As office doors creak open, wingtips start to hit the pavements and signs of life cautiously return to London, our authors review this quarter with one eye firmly fixed on the future.

In the last 4 months TL4 FIRE has launched our members portal, hosted 13 virtual events and announced **FIRE UK: Welcome Back – 23rd & 24th Sept 2021,** our first physical event of the year. The overwhelming support and excitement for our plans moving forward reaffirms how strong our growing Community is and how vital knowledge sharing is. With many more virtual and physical events in the pipeline and much more content and insight to share we are approaching 2021 with a "full steam ahead attitude" and we have no intention of slowing down.

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Syon Park

London, UK

Dan McCrum

Investigative Reporter

FINANCIAL TIMES

Keynote Speaker

Exposing Wirecard -

Gain insight into how FT Journalist Dan McCrum brought down a billion dollar fraud

FIRE in London

Redefine the Asset Recovery Experience

Hilton London Syon Park

Located barely nine miles from Charing Cross, and sitting on the edge of one of the last surviving ducal estates of London, join us at FIRE UK and escape to the country within the capital. Promising a historic post pandemic experience in a profoundly historic setting!

Bringing US Back Together

As we ease out of lockdown, we are hearing a loud and clear desire to get back to normal life. We invite you to reunite, reconnect and network at the FIRE community's first Asset Recovery event in real life.

Originally slated to speak at FIRE International in Villamoura, multi-award-winning Financial Times journalist Dan McCrum will join us, live and in person, at Syon Park to speak about his investigation and exposure of the Wirecard fraud scandal.

Covid-19 Clause

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If the event runs on the designated date and any delegate is unable to attend due to:

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- Restrictions in the country hosting the event
- Any requirement to self-isolate or quarantine
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All bookings will have the option of:

- Sending a replacement at no extra cost
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- A full refund

If the event does not run as scheduled all bookings will have the option of:

- Transferring to the 2022 date at no extra cost
- A full refund

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OBTAINING DOCUMENTS IN THE US FOR PROCEEDINGS IN ENGLAND

Authored by: Stewart Hey and Simon Heatley - Charles Russell Speechlys LLP

In the recent, widely reported case of *KBR, Inc, R (on the application of) v Director of the Serious Fraud Office* [2021] UKSC 2, the Supreme Court limited the extraterritorial effects of the Serious Fraud Office's (SFO) powers. The SFO did not have the statutory power to compel a US company to produce documents held by in the US. The SFO subsequently announced that it would no longer be investigating KBR's UK subsidiaries, their employees or their agents for alleged bribery offences.

While the decision was concerned with the scope of an investigatory authority's powers, it may have given litigants in the English courts pause for thought as to what avenues exist to obtain documents from third parties located in the US, whether that is for the purpose of fraud or other proceedings. This article examines three potential routes.

Hague Convention on Taking of Evidence

The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters has both the UK and US as signatories. It is a well-established method for the provision of documents between one country where evidence is sought for use in proceedings and the other country where evidence is located.

A party in English proceedings may apply to the English court to issue a letter of request to the designated central authority in the US. This process of central authority transmission is not a straightforward procedure and can be beset with delays.

In England, an application must first be made to a Master in the High Court and then to the Senior Master at the Foreign Process Section, following which, if it is signed off, the letter of request will be passed to the Foreign & Commonwealth Office for onward transmission. On receipt, the US presently states on the Hague Convention website that the average time for execution of a letter of request is two to three months for evidence obtained on a voluntary basis, while for evidence that needs to be compelled, the average time for execution is three to six months.

For these reasons, it is unlikely to be an option used extensively in practice, particularly where other, more direct routes for obtaining evidence may be available – and just such routes exist in the US.

"The district court of the district in which a person resides or is found may order him… to produce a document or other thing for use in a proceeding in a foreign or international tribunal including criminal investigations conducted before formal accusations."

1782 applications

Where evidence is sought from a person who is within the jurisdiction of a US district court, section 1782 of title 28 of the US Code may be utilised.

The section is cast in wide terms, providing that: *"The district court of the district in which a person resides or is found may order him… to produce a document or other thing for use in a proceeding in a foreign or international tribunal including criminal investigations conducted before formal accusations."*

The request can be made by the English court (using the letter of request route) or "upon the application of any interested person", which allows the English party – via local counsel – to make a direct application to the relevant US court. In *South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" NV* [1986] 3 All ER 487 (HL), the House of Lords confirmed that either mode could be used by a party in English proceedings.

Compared with the Hague Convention route, a direct application will almost certainly be faster given that it does not depend on transmission through diplomatic channels. The scope for possible challenges is reduced as well: whereas a letter of request is susceptible to challenge by both the requesting and receiving courts, a 1782 application is a matter only for the relevant US court and the English court will be slow to interfere.

The Commercial Court's decision in *Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH and another* [2018] EWHC 2267 (Comm) underlines the point. There, the court refused an application to continue an injunction preventing enforcement of a section 1782 order requiring a company director resident in the US to disclose documents and provide deposition evidence for foreign court proceedings (in the BVI and in Cyprus). It held that the court did not have a legitimate interest in policing an attempt to obtain documents for use in foreign proceedings, and that it would be a serious breach of comity for the English court to say the US court's conclusions regarding the section 1782 order were wrong and to restrain enforcement.

A 1782 application can therefore be a potentially very powerful tool for a litigant in England seeking discovery of documents in the US. The application will be determined in accordance with US discovery procedures, which are recognised to be very broad, and the US courts have ruled that there is no requirement to demonstrate admissibility or discoverability of the evidence under the rules of the state where the evidence is sought to be issued.

This is tempered by the wide discretion available to the US district courts who can, for example, refuse an application that would be unduly burdensome to comply with. Meanwhile, the application will depend on the "target" in fact being located in the relevant district and there has been division between the circuits

over the section's applicability to private arbitration proceedings, with the US Supreme Court expected to rule on the matter later this year.

Chapter 15 discovery

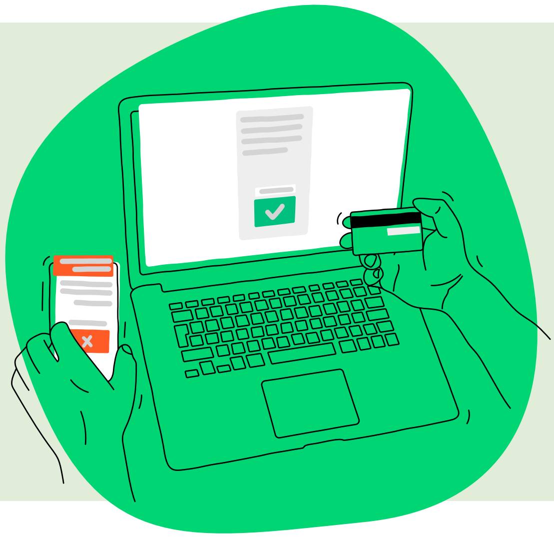
A further and potentially more powerful tool still is available to English litigants, albeit to a narrower class. This can be found in the provisions of the United States Bankruptcy Code, 11 USC (Chapter 15). Even though it was enacted in 2005, Chapter 15 remains a relatively new and underutilised tool for parties seeking discovery of documents located in the US.

Unlike 1782 applications, Chapter 15 is a process only available to foreign insolvency practitioners, whereby they can file a petition in a US bankruptcy court, seeking recognition of the foreign insolvency proceedings.

Once the bankruptcy court has recognised the foreign proceedings, the court may grant 'any appropriate relief' to protect the debtor's assets or creditor's interests, including providing for the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. This is a broad power – much wider than 1782 – and the concept can be looked on as enabling an insolvency practitioner/office-holder to harvest wide-ranging evidence within the US Court's jurisdiction (even where responsive evidence may be stored outside the US) to equip investigation into the distressed estate's affairs.

Indeed, there is authority for stating that Chapter 15 recognition can be sought for the sole purpose of utilising the extensive evidence gathering powers. Further, it is no bar if the US target has previously provided disclosure, nor does the requesting party have to establish that it has sought disclosure from alternative sources before utilising Chapter 15.

It should be noted that the discovery powers under Chapter 15 are not entirely unchecked. For example, relief will only be granted if the interests of creditors and other interested entities are sufficiently protected – that is, it requires a balance between the relief sought by the insolvency practitioner and the interests of other persons who may be affected by that relief. And there is a public policy exception which provides that a court may refuse to take action – including recognition of foreign proceedings – if that action would be manifestly contrary to the public policy of the United States. However, the words 'manifestly contrary' set a high threshold and would likely only be invoked in limited circumstances.



ENGLISH HIGH COURT LIMITS QUINCECARE DUTY IN APP FRAUD CASES

Authored by: Rick Brown, Nicola Gare with additional research conducted by Trainee Solicitor Rebekah Halkett – HFW

In its recent judgment, the English High Court has confirmed that a bank's *Quincecare* duty (i.e. the duty to act with reasonable care and skill when executing a customer's payment instructions) does not extend to authorised push payment ("**APP**") frauds involving individual customers. The ruling, which reflects the growing judicial trend in APP frauds, and on which we have previously written[1], has important ramifications for individual and corporate customers alike.

Background facts

In *Phillips v Barclays Bank UK Plc* [2021][2], which concerned a summary judgment application made by the defendant bank, the claimant alleged that the bank owed a duty of care to protect her from the consequences of APP fraud. However, the bank argued that the Quincecare duty did not extend to a duty to protect the claimant from the consequences of her own actions. As the claimant's payment instructions were valid and not fraudulently given (i.e. authorised), the bank held that it should not "*be made an insurer of last resort for fraud perpetrated against customers*".

What did the High Court decide?

The High Court was asked to consider whether the *Quincecare* duty owed by the bank required it to have policies and procedures in place to detect and prevent APP fraud, or otherwise to assist in the recovery of money transferred as a result of it. The High Court answered in the negative and granted the bank's application for summary judgment, primarily for three reasons:

1. The bank is not a gatekeeper
if the bank owed a duty to its customers to detect and prevent APP fraud (or otherwise assist in the recovery of monies lost as a result), the *Quincecare* duty would be elevated to a status above a bank's primary duty to act on a customer's instructions. This would necessarily undermine the effectiveness of customer instructions and impose an onerous obligation on the bank to second-guess genuine payment instructions.

2. Not practical to extend the duty
the High Court held that if the *Quincecare* duty was to be extended, as proposed by the claimant, this would have to be by reference to some form of industry-recognised rules, under which the bank could identify the particular circumstances in which it should not act (or make further enquiries before acting) upon a customer's payment instructions. Such rules and safeguards are currently non-existent at industry-level (save for the APP Voluntary Code, for which see below).

3. The Quincecare duty applies to corporate customers and unincorporated associations only
pointing to the decision in Singularis[3], the High Court observed that the Supreme Court "*said nothing about a bank protecting an individual customer (and her monies) from her own intentional decision.*" The *Quincecare* duty is limited to circumstances where an agent of the bank's corporate customer (or unincorporated association customer, as the case may be) misappropriates the customer's monies. Therefore, where an individual customer makes a genuine payment as a result of deceit, any later action to rescind the payment and reclaim the monies from the fraudster will not support a related claim against the bank.

Comments

This will no doubt be a disappointing decision for individual customers, particularly in light of the increasing number of APP fraud cases. However, individual customers may instead seek relief via the APP Voluntary Code[4] under which a number of banks have agreed to reimburse victims of APP fraud (subject to certain conditions being met).

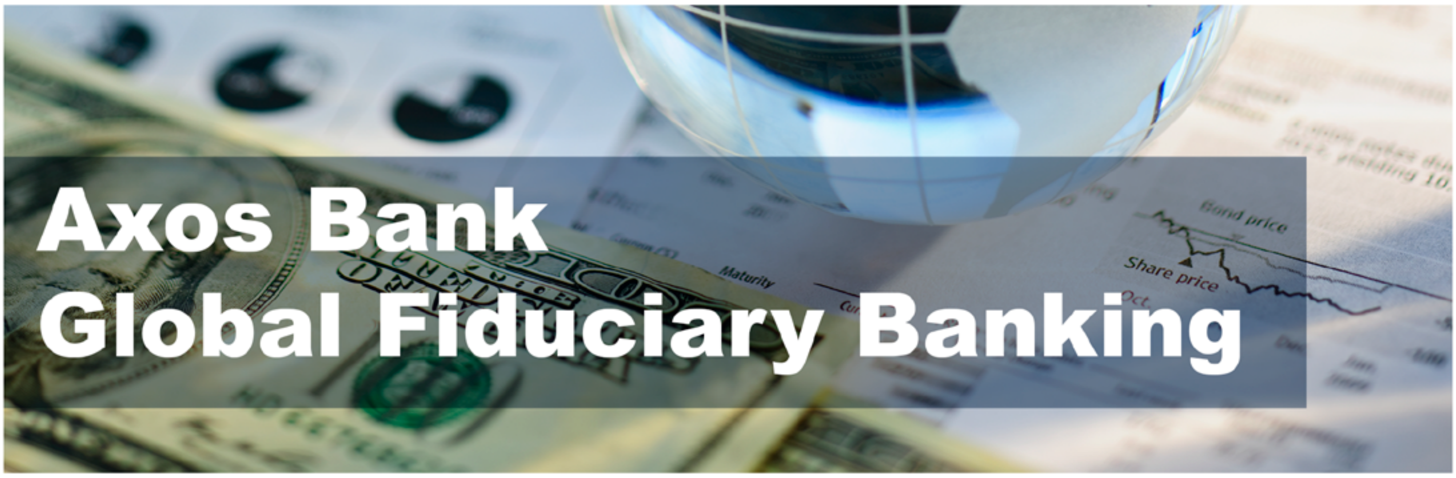
For most banks however, this decision will be welcome clarification that the scope of the *Quincecare* duty extends only to corporate clients.

The judgment provides for an application for permission to appeal (with a deadline to file on 10 February 2021). HFW will continue to monitor the case over the coming months and provide further updates as necessary.

For more information, please contact the authors of this article or your usual HFW contact.

1 https://www.hfw.com/downloads/001890-HFW-Quincecare-duty-in-the-spotlight-more-trouble-for-banks-March-2020.pdf
2 Phillips v Barclays Bank UK Plc [2021] EWHC 10 (Comm)
3 Singularis Holdings Ltd v Daiwa Capital Markets [2019] UKSC 50
4 https://appcrmsteeringgroup.uk/wp-content/uploads/2019/05/CRM-code-LSB-final-280519.pdf

Axos Bank Global Fiduciary Banking



Axos Bank is pleased to announce the formation of the specialized Global Fiduciary Banking team. Leading the team will be Marchand Boyd, SVP & Sr. Managing Director. Marchand is an industry veteran who brings over 25 years of Fiduciary management experience in international and domestic markets.

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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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DAWN RAIDS 101: THE BOOT CAMP

Authored by: Erick Gunawan – BRG

Being dawn raided is never a fun experience, but good preparation can make a massive difference.

It really is the case that most businesses could be dragged into a dawn raid and need to be prepared: the best way to sleep soundly is to have a plan. And that's something I can help with. I've worked on dozens of dawn raids, and there are plenty of things every business can do before, during, and after a raid.

So, without further ado, this is my Dawn Raid 101 Bootcamp.

Before you have been raided, there are a few obvious things you can do.

1. **The first is to look at your document retention policy**, what you have and what you don't. If there are documents that are past their lifetime, can you get rid of them? Take advice. Find out how much you must keep by law and how much you need keep for your operations. Offload useless data accordingly, and this can reduce unnecessary risks.

2. **How sophisticated is your information governance policy?** Where is your data kept? Is it on the servers in the room in the basement, or is it kept across various servers in various locations in various countries, with various data and discovery laws? Again, take advice and have a hard think about what you need to do.

3. **Which parts of the business own which files or servers?** Is all your data jumbled together or clearly demarked? Good organisation will help investigators get what they need rather than kitchen-sink the job.

4. **Develop a raid communication protocol**. Should a raid happen, who needs to get to the office quickly? A senior member of staff and legal are a must, and that lawyer needs to be on top of data law. Independent consultants might be a good idea too. And how do you make sure that when the investigators come, whoever is at the door knows what to do? Get a communications cascade plan in place.

5. **Train employees.** Make sure that they are aware that raids are possible, not because the company has been doing anything wrong, but because investigations can be wide ranging. Ensure they know what to do if one happens.

6. **Establish a dawn raid response team** made up of the people who will be responsible for handling an on-site inspection. The team should include senior legal personnel, senior IT staff, outside counsel, external forensic experts, a media relations professional, and an administrative team that can assist with note taking and photocopying and be the point of contact for the regulators.

7. **Draft an internal alert email.** The company legal team should prepare an internal draft email with instructions to staff that can be circulated in the event of a dawn raid. The message should tell employees not to destroy or remove any documents during the raid. In addition, the email should advise employees of their right to have counsel present for any substantive questioning by authorities and note that people outside of the company should not be informed of the raid.

8. Finally, **consider wargaming a dawn raid**. I will explain more in my next article, but, as long as very few people are given advanced notice, it is usually a useful exercise.

Moving on to the day itself, what can you do during the raid?

1. Again, I'll explain more about the day itself in another post. But in short, the investigators probably will be happy to wait around for an hour or so before taking matters into their own hands. **When your team is (promptly) assembled, accompany the investigators.** Record what they take, help them get what they need, and check that they are taking only what they are entitled to take. Ensure they take the data they need without damaging equipment or removing a mission-critical IT kit. This stage is best overseen by an independent advisor who will challenge but not obstruct.

2. Once the investigators have gone, **get your forensic expert and the administrative team to write a full report**. The investigators might not have told you what they were looking for. But if you know what they took, you might be able to work it out and mount your own investigation.

3. **Collect an inspection record.** Outside counsel should collect reports from personnel who accompanied the authorities during the search, which include any incidents that occurred during the raid.

4. **Debrief.** The response team and outside counsel must meet to discuss issues such as potentially relevant documents that the authorities did not find and whether any documents that were taken are subject to privilege.

5. **Notify auditors, insurers, and/or regulators.** Consider to whom the company needs to make disclosures relating to the raid.

6. Then, **begin your internal investigation.** If you find evidence of wrongdoing, give it to the investigators. It will win you more than just brownie points.

I'm often asked if dawn raids only happen at dawn.

The answer is no. They can happen at any time.

But usually when you least expect it.

In my next article, I will complete my trio of dawn-raid posts with a more detailed run-through of what typically happens during the raid itself, from the surprise call to the investigators leaving the building.

However, I'll leave you with this thought: I'm often asked if dawn raids only happen at dawn.

The answer is no. They can happen at any time. But usually when you least expect it.

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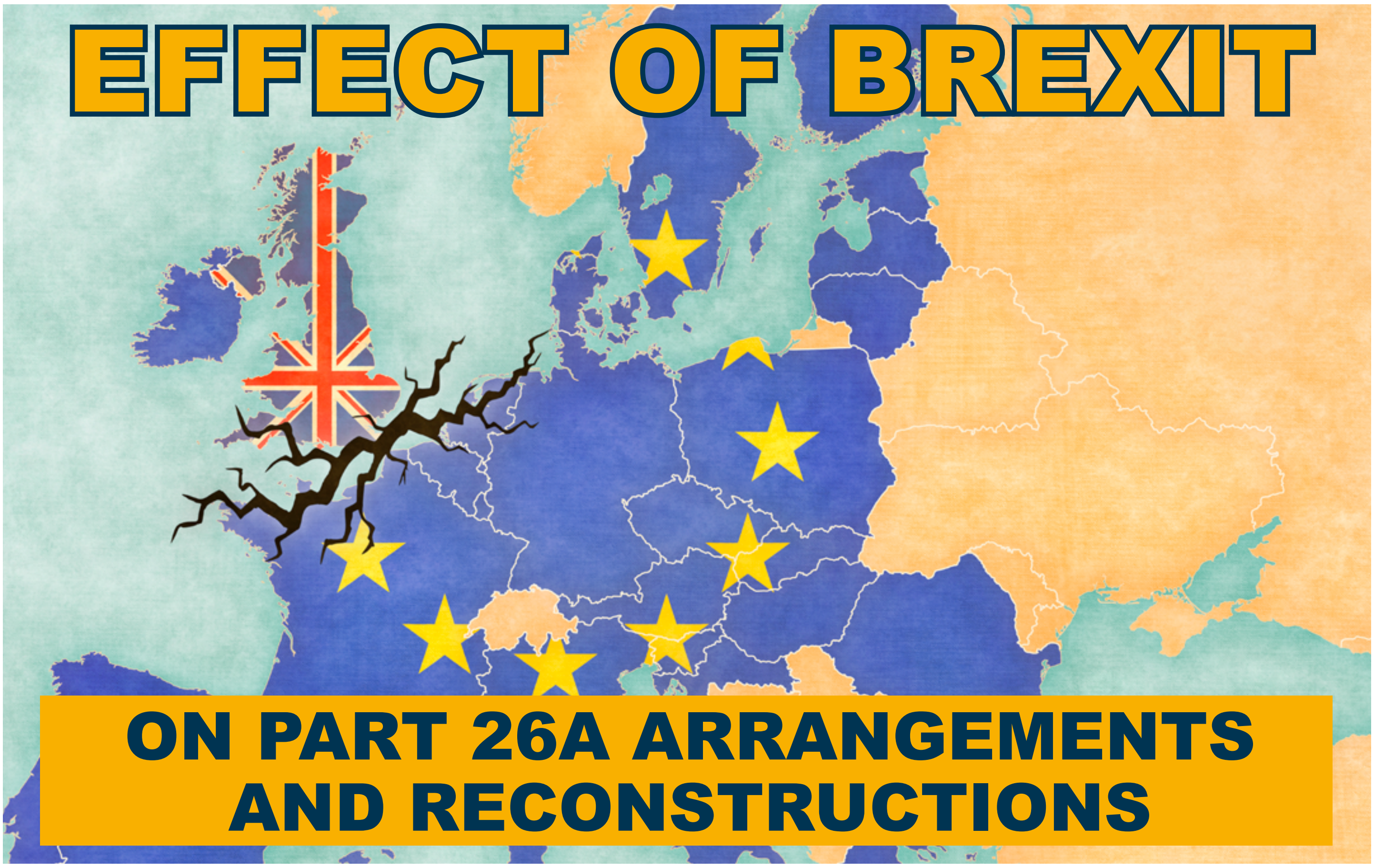


EFFECT OF BREXIT ON PART 26A ARRANGEMENTS AND RECONSTRUCTIONS

Authored by: Daniel Lewis – Wilberforce Chambers

1. It is one of the ironies of Brexit that the UK has effectively implemented many of the features of the 2019 EU Restructuring Directive, providing for restructuring plans with cross-class cram down and moratoria, before all of the remaining EU member states (although the Corporate Insolvency and Governance Act 2020 was avowedly not the implementation of EU law). Already and increasingly, a company in financial distress looking to restructure has a variety of fora within Europe within which to shop. The Restructuring Directive itself allows member states a relatively free hand as to the form that its implementation may take, leading to a wide range of similar but different restructuring solutions depending upon the jurisdiction chosen, to which the provisions of Part 26A of the Companies Act 2006 are but one addition.

2. Where the UK courts have most obviously departed from the EU has been in their readiness to accept jurisdiction in reconstructions that have limited connection to the UK. It is another irony that the jurisdictional basis (or perhaps, justification) for this departure has been the application of EU law and the Recast Judgments Regulation.

3. In several cases where the debtor has had marginal connection to the jurisdiction, the UK courts have accepted that the restructuring would be recognised and therefore effective in EU member states. After 1 January 2021, that conclusion does not necessarily follow.

4. The Recast Judgments Regulation no longer applies, and what is left is the more flexible (or, to the European critic, arbitrary) test of sufficient connection. The relegation of COMI to only one of many factors in the application of that test is antithetical to the EU ideal of uniformity and the primacy of the debtor's 'home' court. The reception of a UK Part 26A restructuring plan in this new environment has yet to be tested. A less-than-warm welcome might be anticipated in those jurisdictions where the debtor has its COMI and which have also implemented their own restructuring schemes. This will ultimately affect the international effectiveness of restructuring schemes and, in turn, the readiness of the UK courts to sanction them.

5. Question of international jurisdiction arise in three ways in relation to schemes and reconstructions:

(1) Is the company liable to be wound up under the Insolvency Act 1986?

(2) Does the English court have jurisdiction over the plan creditors (referred to as the test of "sufficient connection")?

(3) Is there a reasonable prospect that scheme will be recognised and given effect in other relevant jurisdictions so as not to be capable of being undermined by action by dissenting creditors (referred to as the test of "international effectiveness")?

(1) Company liable to be wound up

6. Companies to which Parts 26 and 26A may apply are defined in sections 895(2)(b) and 901A(4)(b) as "any company liable to be wound up under the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989." Since the English court has jurisdiction to wind up any unregistered company under section 221 of the Insolvency Act 1986 this includes foreign companies. All that is required is that the entity in question falls within "the juridical concept of a company".

(2) Sufficiency of connection

7. Until 31 December 2020 the question of the Court's jurisdiction over plan creditors was determined in accordance with the Recast Judgments Regulation. The approach of the courts to Part 26 schemes was applied to Part 26A restructuring plans, it being accepted that both were "a civil or commercial matter" to which the Regulation applied. *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) marked a departure from that consensus in the case of Part 26A reconstructions, which were held to fall within the bankruptcy exception in the Lugano Convention. This is a distinction of diminishing significance, however, since the only relevant EU legislation to survive from 1 January 2021 is the attenuated form of the Recast Insolvency Regulation created by the Insolvency (Amendment) (EU Exit) Regulations 2019.

8. For any proceedings for approval of a Part 26 scheme commenced after 1 January 2021, the Recast Judgments Regulation no longer applies. Jurisdiction will be determined in cases where there is an exclusive jurisdiction agreement under the Hague Convention on Choice of Court Agreements 2005 and in all other cases in accordance with common law. For Part 26A reconstructions, the adapted Insolvency Regulation will apply (following the *Gategroup* decision) but that also allows for a sufficiency of connection test, as "grounds for jurisdiction to open such proceedings which are based on the laws of any part of the United Kingdom" under Article 1(1).

9. In cases where there is no exclusive jurisdiction agreement, the common law rules lack the uniformity and certainty previously offered by the Recast Judgments Regulation. It seems quite possible that this may result in a less exorbitant approach and a greater need to establish sufficiency of connection. If, for instance, a bare majority of trade creditors domiciled in England was "amply sufficient" to satisfy article 8 in the *Virgin Atlantic* case, the same might not be said in determining sufficiency of connection under the common law absent other connecting factors.

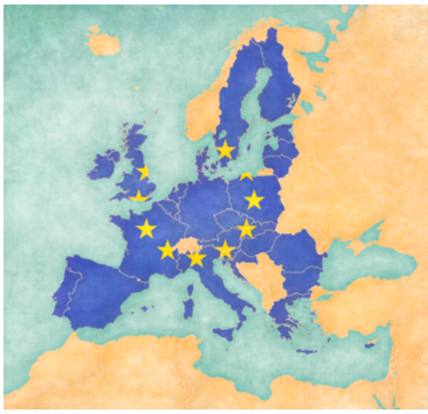
10. The 'rules' of the Recast Judgments Regulation might be said to have provided pegs on which to hang jurisdiction in marginal cases. It is likely that greater emphasis will now be placed upon the COMI of the company and the domicile of most of the scheme creditors. Concerns about international effectiveness are now likely to promote a more cautious application of the test of sufficiency of connection.

(3) International effectiveness

11. After 1 January 2021, the recognition of UK restructuring plans in the EU (and therefore their international effectiveness) is likely to prove more difficult. It is likely that the EU member states will compete as attractive venues for restructuring, and the Restructuring Directive certainly promotes that aim. Such EU schemes have the advantage of automatic recognition within the EU not afforded to UK restructuring plans.

12. With the increasing availability of alternative regimes in EU member states (having the same and in some cases more favourable essential features as the UK regime), it is more difficult to see cases of limited connection being recognised in member states and therefore being internationally effective. In this context, lock-up agreements effective in the jurisdictions where the company is incorporated and its assets located may have a more important role in securing recognition and in turn demonstrating effectiveness.

13. Schemes under Part 26 and 26A have been long been recognised as a form of forum shopping, albeit of the "good forum shopping" kind (*Re Codere Finance* [2015] EWHC 3778 (Ch)). The preparedness of the courts of EU member states to accept such forum shopping (even if considered by the UK courts to be of the "good" kind) is now open to serious doubt, particularly in the absence of a reciprocal framework requiring them to do so. This is an area where rapid development can be expected in the coming months.



PRINCIPLES APPLICABLE TO AN 'INSOLVENT' TRUST

Authored by: Daniel Maine – Ogier (Jersey)

It is important that trustees understand their obligations if their trust structure comes under financial stress. Helpfully, the Jersey courts have provided guidance on the principles applicable to 'insolvent' trusts, which is likely to be highly persuasive in other jurisdictions.

When is a trust insolvent?

Whether a trust is insolvent is determined using the cash-flow test: is the trustee unable to meet its debts as trustee as they fall due out of the trust property?

> ***As the Royal Court noted in Re Z Trusts [2015] JRC 196C, "[t]o talk of an insolvent trust is, of course, a misnomer. A trust is not a separate legal entity and cannot, as a matter of law, be insolvent." Nonetheless, the Court described the term as a useful shorthand.***

Why does it matter?

Insolvency in a trust brings about a shift towards the interests of creditors (analogous to that seen in company law). This means the trust should be administered by the trustee on the basis that the creditors, not the beneficiaries, have the economic interest. Importantly, the trust is to be administered for the benefit of the creditors as a class, not simply a majority of them.

Trustees may find administering a trust for the benefit of creditors to be an unusual and uncomfortable experience. The Royal Court has cautioned that "[t]he trustee or fiduciary of [an insolvent] trust would be wise … to exercise their powers either with the consent of all of the creditors or under directions given by the Court".

What insolvency regime applies?

In Re Z Trusts [2015] JRC 214 the Royal Court concluded it has a discretion as to the appropriate insolvency regime to implement, reasoning as follows:

- The starting point for the Court is to supervise the administration of an insolvent trust in the interests of the creditors.
- On the facts, the trustees had the power to appoint insolvency practitioners (**IP**) voluntarily to assist them in the administration of the trusts and to delegate tasks to them (whether this is the case in other trusts will depend on the terms of the relevant trust deed and the circumstances of the trust and its creditors).
- There is precedent for the Court appointing receivers over trusts, but this power has been exercised rarely and there was no obvious example of this being done in relation to insolvent trusts.
- However, the Court does in principle have the power to make such an order given the breadth of its inherent supervisory jurisdiction.
- Non-exhaustive examples of where it may be appropriate to make such an order include where there are lay trustees without the necessary skills to conduct an orderly winding-up, or where the trustee found itself in a position of real conflict.
- However, where there was no unmanageable conflict it may be more cost effective for the trustee to operate the regime under the Court's supervision.
- There is no *"one size fits all"* solution: the Court retains a discretion as to the appropriate regime to implement, and *"should be flexible in its approach, having regard always to the best interests of the creditors as a body"*.

On the facts, the Court saw *"little point"* in a formal claims process when, with one exception, the creditor claims were all accepted. In contrast (and demonstrating the Court's 'flexible approach'):

- In Re Z III Trust [2019] JRC 069, the Court imposed an insolvency regime similar to that for personal and corporate insolvencies, but with the trustee (not an IP) conducting it. The Court considered that, on the facts, this would ensure fair treatment of creditors and resolve the matter without undue delay.
- In Re Z II and Z III Trusts [2020] JRC 072, given the *"sheer extent"* of the conflicts faced by the trustee the Court ordered the trustee to exercise its power to appoint an IP.

Priority of a trustee's equitable lien

Jersey's Court of Appeal in Re Z II Trust [2019] JCA 106 considered important questions as to whether a former trustee's equitable rights have priority over the rights of other claimants to the assets of an insolvent trust (including successor trustees).

The starting point was the Privy Council's judgment in Investec Trust (Guernsey) Ltd v Glenella Properties Ltd [2018] UKPC 7, which recognised that (under Jersey law) a trustee has an equitable lien on trust assets to secure its right of indemnity for liabilities properly incurred as trustee.

The Court went on to conclude that:

- A trustee's priority over trust assets arises by virtue of its office, and ranks ahead of beneficiaries and those deriving title from them. Each trustee therefore possesses its own equitable interest and right of lien enforceable as a first charge against the trust assets.
- The general rule that equitable interests rank according to their order of creation applies between trustees, such that a former trustee's right of lien ranks ahead of that of a successor trustee.
- The trustee's equitable lien has priority over the claims of creditors falling within the scope of Article 32(1)(a) of the *Trusts (Jersey) Law 1984* (which provides that, where a creditor knows a trustee is acting as trustee, its claims will only extend to the trust property).
- The ranking in priority exists whilst the trust 'remains solvent' and if it becomes 'insolvent'.
- Each trustee's rights of indemnity and lien are continuing rights that do not depend upon there being any actual liability at a given time. Their ranking depends solely upon the date each trustee took up appointment as trustee.

Conclusion

The above cases give rise to various practical considerations for trustees. Importantly, they must ensure they give due regard to creditors' interests where the trust comes under financial stress. Further, before being appointed they should consider how to mitigate the risk that a predecessor 'scoops the pot' in connection with a past liability.

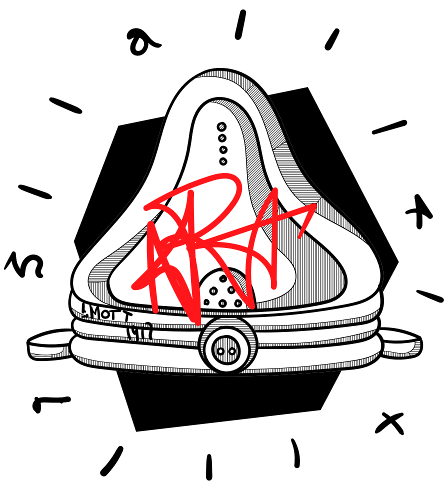
Ultimately, trustees should remember that they are subject to the Court's supervision, and are therefore entitled to expect the Court's assistance in cases of genuine difficulty – including when administering an insolvent trust.

THE ART OF ALTERNATIVE INVESTMENT SCAMS

Authored by: Tim Maxwell and Jil Birnbaum - Charles Russell Speechlys

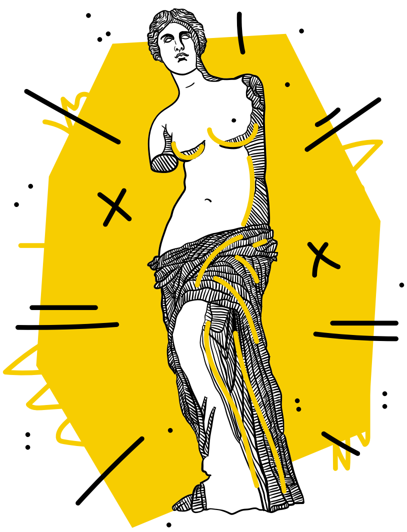
In an age of low-interest rates and the talk of economic recessions, investors are shopping around for returns. Art is increasingly being offered as a potential alternative investment, but what pitfalls does this present? Unfortunately, uninitiated investors can be misled or bullied into spending on art with no or relatively little prospects of success. In recent months, we have seen more and more predatory business practices sail close to the wind and sometimes cross that thin red line into fraud.

The types of fraud within the art market are manifold: ranging from a collector or artist being invited to send an artwork for an exhibition, which subsequently disappears; to art galleries trading while knowingly insolvent; to selling shares in art to investors for more than the art is worth; or to multi-million-pound cybercrimes. As the art market is becoming more sophisticated so are these fraudulent schemes. The authorities have historically had a limited interest in investigating these frauds as they tend not to affect the man on the Clapham omnibus but increasingly investment scams are being pushed on consumers encouraging them to buy dubious art of questionable value with the promise of future returns based on the market performance of a few very well-known artists.



The high-profile case involving the once-prestigious Knoedler & Co Gallery epitomises and offers a glimpse behind the scenes of the art world. This case subsequently led to the gallery's demise amid lawsuits claiming the gallery had sold $80 million in forged works falsely attributed to some of the leading Modernists and Abstract Expressionists, including Jackson Pollock and Mark Rothko. The paintings came to the gallery's inventory by way of an art dealer Glafira Rosales, who claimed that a Swiss collector who preferred to remain anonymous had consigned them. This Swiss collector never existed; instead, Rosales commissioned the paintings from a Chinese artist for a mere few thousand dollars.

Despite many of the subsequent lawsuits settling in 2016, there remains an interest in the case, which has recently turned into a blockbuster documentary – perhaps because so many details remain unknown and some of the settlements confidential. It raises important legal questions as to whose duty it is to undertake due diligence into the consignor of the



artwork, investigate the authenticity of the artwork and research its provenance and whether the legal doctrine of *caveat emptor* is suitable, even when purchasers are advised by high-profile experts, collectors and museums.

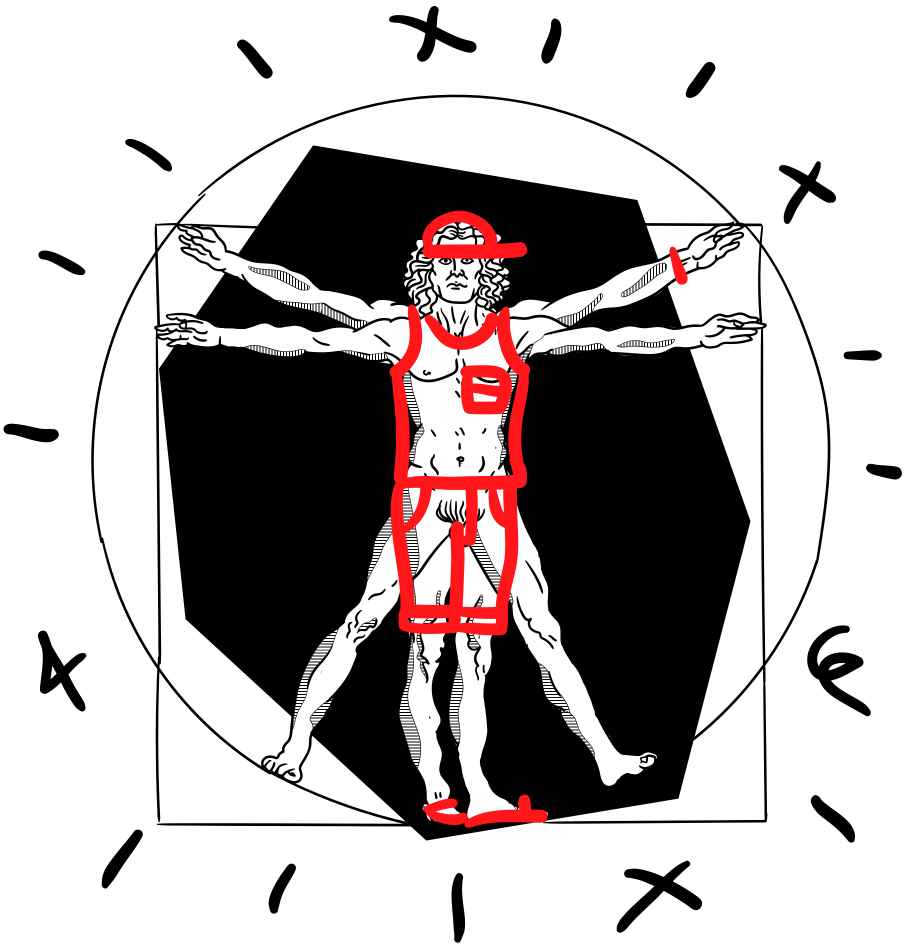
However, it is difficult for absolute lessons to be learnt, given the sophistication behind some of the schemes and involvement of offshore corporate structures. A recent example involved two art investment companies, Wardells Design Limited and Camp Partners Limited, which fraudulently took over half a million pounds from investors. The companies were wound up in the high court in December 2020 and it transpired that between 2019 and 2020 alone, Wardells Design Limited and Camp Partners Limited had received £600,000 from investors who thought they were investing in works of art painted by renowned artists. In actual fact, the funds had been transferred from the companies' bank accounts to offshore locations with investigators unable to trace them so it was too late to freeze accounts, despite the court accepting that the companies had been incorporated and used as vehicles for fraud, with their sole purpose of receiving monies wrongly obtained as investments from consumers.

Another alleged fraud case that has dominated the art market's attention is that of prominent dealer Inigo Philbrick's. He has been charged with wire fraud and aggravated identity theft. Philbrick is alleged to have defrauded clients by selling artworks he did not own and overlapping shares in the same art in a quasi Ponzi-scheme. He is also alleged to have given false representations and used fraudulent contracts to inflate the value of the art he sold.

Art cases do not only occur onshore; they also set sail. The Park West Gallery Inc. faced multiple lawsuits regarding the authenticity of artworks auctioned by Park West on certain cruise ships. Cruise passengers argued that the art they purchased in onboard auctions were misrepresented as original art created by artists Salvador Dali, Pablo Picasso and Rembrandt, when, in fact, some were forgeries.

More recently, the Covid-19 pandemic has sparked a rise in online fraud and presented fraudsters with an opportunity as people work from home and spend more time online. During the sales negotiations between the Rijksmuseum and a London art dealership of a £2.4 million John Constable, cybercriminals impersonated the dealership and duped the museum into sending the payment to the wrong bank account.

The above cases illustrate just a handful of the opaque practices of the art market. While the 5th Anti-Money Laundering Directive aims to curb such transactions by implementing rigorous customer and source of funds due diligence in the art market, there is still an information in-balance between the so-called art experts and the innocent investors looking to diversify their asset pool. While conflicts of interest remain rife and there is a lack of independent and verifiable market data, without further regulatory oversight (either from within or externally) the art market will continue to attract unscrupulous practices and put investors' funds at risk.



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FRAUD AND WORLDWIDE FREEZING INJUNCTIONS IN CYPRUS

Authored by: Kyriakos Karatsis and Antonia Argyrou – N.Pirilides & Associates LLC

As it has turned out the situation to be during any periods of worldwide crises, the current Covid-19 crisis which unfortunately and inevitably leads to the next global financial crisis has contributed to the significantly increased number of civil fraud disputes in Cyprus, as a result of which the wrongdoing of fraud has made it to the top of the list concerning the most common types of litigation disputes before the Cyprus Courts.

Cyprus, being a common law jurisdiction, draws guidance from the English legal system which admittedly set the pillars and launched the global practice engaged in 'fraud' and 'asset recovery' arenas by developing powerful orders for relief, such as the *Mareva* injunctions.

Although the Mareva injunctions have been proven to be saviors on many instances of complicated fraudulent schemes, a smoke screen is hovering in Cyprus as to their worldwide application and implementation mainly due to the lack of any legislation or regulation or any concrete criteria identified by case law explicitly determining their exact scope and extent.

More particularly, Cyprus section 32 of the Courts Law of 1960 which provides for the jurisdiction of the Cyprus Courts to issue interim injunctions limits itself solely to the basic criteria of issuing such injunctions namely that (i) there is a serious issue to be tried, (ii) there is a possibility for the plaintiff to succeed with its claim and (iii) it will be hard or impossible for justice to be awarded at a later stage if the interlocutory injunction is not issued, thus giving plenty of room to different interpretations and large uncertainty as to the scope and extent of such injunctions, encouraging the instigation of numerous legal arguments on the matter, especially considering the nowadays claims which involve frauds of a large international scale.

Despite the aforesaid uncertainty caused by the general and vague wording of section 32 of the Courts Law of 1960, the Cyprus Courts recognised their jurisdiction to issue freezing injunctions with worldwide effect in 2007 in the landmark decision of *Seamark Consultancy Services Ltd and others v. Joseph P. Lasala and others* (2007) 1 CLR 162. In that case, the Supreme Court clarified that such an injunction may be issued only against a person who falls within the jurisdiction of the Cypriot Courts since such an injunction constitutes a personal relief (*in personam*) and in case of contempt penalties may be imposed to the person who disobeys the injunction only if such person is located/resides within the jurisdiction of the Court that issued the injunction.

Nevertheless, and regardless of the aforesaid judgment of the Supreme Court, in the relatively recent case of Shishkarev v. Lanuria Limited, Civil Appeal no. I385/2016, dated 07.06.2018 the Supreme Court unanimously decided to maintain in force a worldwide freezing injunction issued against a non-Cypriot defendant residing in Ukraine, but without specifying (as it was expected) any special grounds that have to be shown for the issue of a worldwide injunction against parties not domiciled, resident or present in Cyprus. As a result, the aforesaid judgment has created confusion and further uncertainty as to the scope and effective policing of freezing injunctions, instead of giving light to specific criteria for such freezing injunctions to be granted on a worldwide basis.

Although disagreeing with the conclusion of the Supreme Court in *Shishkarev v. Lanuria Limited* (above) in view of both the absence of any regulatory framework permitting the extension of the scope of worldwide freezing injunctions to persons/entities not residing or located in Cyprus as well as the lack of imposition of any additional factors/special grounds for the granting of such a worldwide relief, we do believe that such an extension of freezing injunctions to parties not resident/located within the jurisdiction of Cyprus Courts is necessary as it will operate as a deterrent to the implementation of fraudulent schemes and will in any event prevent the injustice of a fraudster's assets or even the proceeds of the fraud itself being dissipated, especially considering the international nature of the nowadays fraudulent schemes, thus depriving any victims of fraud of the fruits of any judgment that may be obtained. As to how such injunctions would be effectively policed, and thus successfully implemented, remains uncertain.

Of course, in our view, for the avoidance of any abusive or vexatious applications for worldwide freezing injunctions against persons not domiciled/present in Cyprus, special factors should be identified – either by the legislatures or the Courts – and be imposed on any applicant for the issue of such orders. For example, the applicants must present evidence showing that there are insufficient (or not at all) assets within the Cyprus jurisdiction or that the respondent maintains the ability to transfer large sums of money around several jurisdictions swiftly. Furthermore, our Courts need to consider the inclusion of special provisions, in the context of the worldwide freezing orders issued, for the protection of any foreign – based third parties outside the Cypriot jurisdiction who are not bound by the terms of the worldwide freezing orders and may become unsure whether they should comply with the injunction or with their contractual obligations, similar to the Babanaft proviso which has now been incorporated into the standard wording for a worldwide injunction issued in England and Wales.

To conclude, taking into account the increased number of civil fraud disputes in Cyprus involving an international element and the necessity of a clear framework leading to more efficient mechanisms of confronting fraudulent actions and schemes as well as protecting the victims of fraud, the need to reform the Cyprus legislation concerning the issue of interim injunctions is now imperative and must be seriously concerned right away.

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HOT TOPICS

IN ENFORCEMENT IN ENGLAND AND WALES (NOT JUST BREXIT-RELATED!)

Authored by: Jon Felce - PCB Byrne LLP

Having seen a surge in recent enquiries in connection with the enforcement of overseas judgments and arbitral awards in England and Wales, it seems that non-compliance by judgment and award debtors is – perhaps unsurprisingly in the current economic climate – on the rise. This brings into sharp focus some of the points that need to be considered when enforcing (and resisting enforcement) in England and Wales as a favoured jurisdiction for enforcement – not all of which points are (for once) Brexit-related!

This article addresses a selection of hot topics in this regard: (i) how and what do you serve on a State, (ii) enforcement of ICSID awards, (iii) resisting enforcement in fraud cases, (iv) jurisdiction agreements, (v) enforcement of judgments from certain EU Member States, and (vi) enforcement of judgments on judgments. Notwithstanding the ongoing debate in relation to some of these topics, there is inevitably a way to cut through them and find a solution.

How and what do you serve on a State?

The courts have been grappling with the interplay between State immunity legislation – by which *"any writ or other document required to be served for instituting proceedings against the State"* must be served through the Foreign and Commonwealth Office (FCO) – and the procedural rules concerning applications for permission to enforce arbitral awards which, on the face of it, only require the order giving permission to be served on the award debtor.

The answer to the question is…. watch this space. In December 2020, the Supreme Court heard an appeal in the *General Dynamics v Libya case*[1] and judgment is awaited.

In the meantime, the current position is that, whilst it is the document that institutes proceedings, the arbitration claim form does not need to be served through the FCO (procedural rules only require the order to be served). Conversely, the order permitting enforcement must be served (in accordance with those rules) but as – unlike the claim form - it is not a document instituting proceedings, it does not need to be served through the FCO. Pending the Supreme Court's decision, the solution may be to try to serve all documents out of an abundance of caution.

However, that is sometimes easier said than done. Effecting service can be an issue when it comes to service on flawed States or States that are being evasive. The current position (again from the *General Dynamics* case) is that service of the order (i.e. the only document required to be served) can be dispensed with, but the State must be notified that the order has been made. On a related note, although some *obiter dicta* in *General Dynamics* could be construed as suggesting that alternative service is never possible, the case of *Union Fenosa Gas v Egypt*[2] did permit alternative service of the order, again on the basis that it is not a document instituting proceedings that is required to be served.

Enforcement of ICSID awards

Staying on the topic of enforcing against States, inevitably the State in question will vigorously resist. Two particular issues have been hot topics in this context: (i) whether payment of an award by an EU Member State will constitute illegal State aid, and (ii) the impact of the CJEU's infamous decision in the *Achmea* case which held that the arbitration mechanism in a bilateral investment treaty between two EU Member States adversely affected the autonomy of EU law and is therefore incompatible with EU law. Both of these are considerations in cases in which I

1 [2019] EWCA Civ 1110
2 [2020] EWHC 1723 (Comm)

am involved, but for present purposes I just want to focus on one point – and that is their relevance in ICSID cases when it comes to the grant of permission to enforce the ICSID award. The position there would appear to be a positive one. In the *Micula v Romania* case[3] the Supreme Court lifted a stay on enforcement, including because (i) the ICSID regime was embodied in UK legislation before the UK's accession to the EU – and the TFEU preserved such pre-existing obligations, and (ii) the grounds for a challenge to permitting enforcement are extremely narrow in ICSID cases and the issue of state aid was a substantive one. Not least in a post-Brexit world, this bodes well for the enforcement in England and Wales of ICSID (and perhaps non-ICSID) awards against EU Member States.

Resisting enforcement in fraud cases

Another hot topic relates to a recent case involving a State[4] (*Process & Industrial Developments v Nigeria*) but the issue is of wider application. Notwithstanding an unprecedented delay of 4.5 years since the liability award and 2.5 years since the final award, Nigeria was granted an extension of time to challenge the awards on the basis of an alleged fraud. Of many points of interest was a debate between the parties as to whether the Supreme Court's decision in *Takhar v Gracefield Developments*[5] had established a general principle - that a fraudster cannot resist a challenge to an arbitration award by alleging that a party failed to exercise reasonable diligence to uncover a fraud. In the event, the judge did not need to decide whether the "fraud unravels all" maxim applied. However, he commented that, had he needed to do so, the party looking to rely on the maxim had the better of the arguments. This will undoubtedly be seized upon in future cases where allegations are made that an award has been obtained fraudulently.

Jurisdiction agreements

The first of two hot topics here concerns the enforcement of cases involving exclusive jurisdiction agreements falling within the 2005 Hague Convention, where those agreements were concluded between 1 October 2015 (when the UK acceded to the convention through its membership of the EU) and 31 December 2020 (when the Brexit transition period ended and the UK acceded in its own right). The UK's position appears to be settled by paragraph 7 of Schedule 5 to the Private International Law (Implementation of Agreements) Act 2020: exclusive jurisdiction agreements between the two dates are caught by the Convention. However, given the European Commission's position to the contrary[6], it seems that this issue may well be tested in the courts and give rise to an increase in anti-suit injunctions. A solution in the interim may simply be for the parties to jurisdiction agreements to restate them now that we are post 1 January 2021.

The second hot topic concerns asymmetric jurisdiction agreements, which do not provide the same jurisdictional rights for all contractual parties – for example by conferring exclusive jurisdiction on proceedings commenced by one party only. The question is whether the 2005 Hague Convention covers asymmetric clauses. Three recent cases contain obiter comments on the issue and reach conflicting decisions[7], with two High Court views in favour of such clauses falling within the Convention and the other (and a Court of Appeal view) reaching a view to the contrary. If the UK signs up to the Lugano Convention, this may become academic as this Convention will apply to all jurisdiction agreements in favour of member states.

Enforcement under the 1920/ 1933 Acts of judgments from certain EU Member States

Assuming the 2005 Hague Convention does not apply, then there are a number of EU Member States whose judgments were – at least until the Brussels I Convention in 1987 - subject to the provisions of the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal) Enforcement Act 1933. In the case of Norway, agreement has been expressly reached that the 1933 Act continues to apply to Norwegian judgments that do not fall within the transitional arrangements post-Brexit. As for the remaining countries, the question appears to be less certain. On the one hand, it is arguable that pre-Brussels Convention arrangements continue to apply as those bilateral treaties remain in force; on the other, it can be argued that the rules were displaced by Brussels I. If, however, the 1920 or 1933 Act is not available, then the simple answer is to rely upon the common law to enforce the overseas judgment.

Can you enforce a judgment on a judgment?

On the subject of the 1920 Act, the final hot topic concerns whether, if a judgment in one state is registered in a second state, that registered judgment can then be registered in England and Wales. Whilst the position under the 1933 Act is covered by the Act itself[8], the position under the 1920 Act is not, but was recently confirmed by the Court of Appeal[9]. In both cases, the answer is that it cannot be enforced. However, it is apparent from the judgment that the position under the common law (which applies to the enforcement of judgments from jurisdictions such as the USA and Russia where there are no reciprocal arrangements) has not been determined, and therefore that possibility remains.

Conclusion

Whilst some interesting issues remain to be resolved, England and Wales remains a jurisdiction of choice when it comes to the enforcement of judgments and awards. With disputes on the rise and judgment and award debtors becoming more incalcitrant, there will no doubt be a corresponding increase in enforcement cases as enforcement itself becomes the hot topic.

3 [2020] UKSC 5
4 [2020] EWHC 2379 (Comm)
5 [2019] UKSC 13
6 See section 3.3 of its Notice to Stakeholders dated 27 August 2020
7 Commerzbank Aktiengesellshcaft v Liquimar Tankers Management and another [2017] EWHC 161 (Comm); Clearlake Shipping Pte Limited v Ziang Da Marine Pte Limited [2019] EWHC 1536 (Comm); Etihad Airways PJSC v Flother [2019] EWHC 3107 (Comm) and [2020] EWCA Civ 1707
8 See section 1(2A)(c)
9 See Strategic Technologies PTE Ltd v Procurement Bureau of the Republic of China Ministry of National Defence [2020] EWCA Civ 1604


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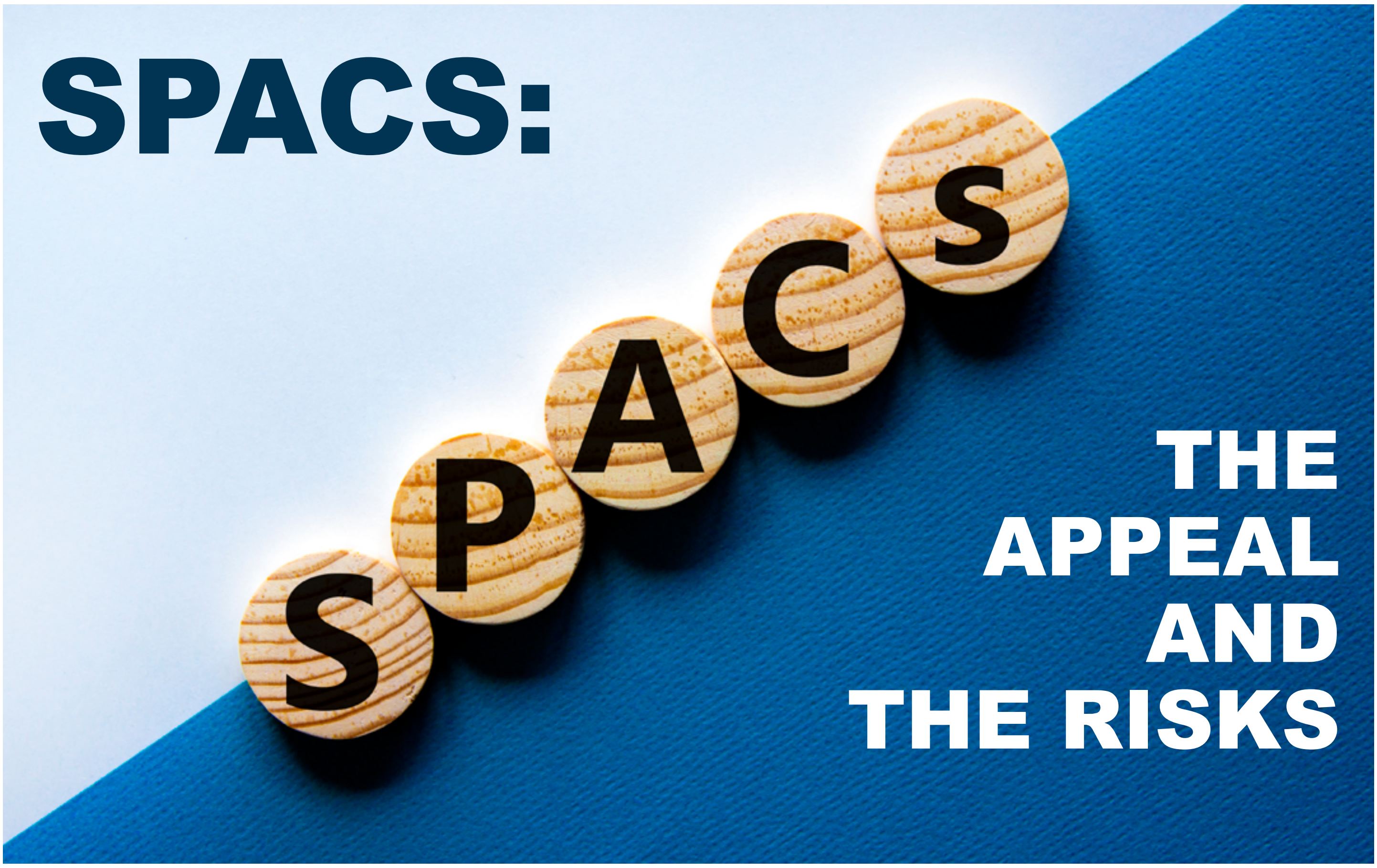


SPACS: THE APPEAL AND THE RISKS

Authored by: Syed Rahman - Rahman Ravelli

In the normal way of doing things, a company is created, looks for business and does what it can to maximise its opportunities. At a certain stage in its development, it may decide it wishes to go public.

In practical terms, this means conducting an initial public offering (IPO), where shares in that private company are issued and made available to public investors. An audit is carried out to examine all aspects of the company's finances, the business then prepares a registration statement to file with the appropriate exchange commission – such as the US Securities and Exchange Commission (SEC) or the UK's Financial Conduct Authority (FCA) – and a stock exchange is approached to arrange the listing of an agreed number of shares at a certain price.

The IPO has been recognised as the way of going public for as long as any of us can remember. And yet it is coming under threat from the rise of the SPAC as the brash, new and popular kid on the block. The SPAC – which stands for special purpose acquisition company – has become an increasingly common way for a company to go from private to public in the US. Informed estimates say that around $64 billion in funding was raised via approximately 200 SPACs going public in 2020; a figure

that is almost equal to the combined total of all IPOs that year.

The UK government is now set to examine a Treasury-backed review of the City that calls for company listing rules to be redrawn so that London can secure some of the rapidly-increasing SPAC business. It seems as if this side of the Atlantic may be set to enthusiastically embrace SPACs, which may not be surprising when it is considered that London has only been involved in 5% of the world's IPOs in the last five years.

Supporters of SPACS believe they enable a private company to make the transition to a publicly-traded company in a way that offers more certainty over share prices and better control over the terms of the deal than are available by taking the traditional IPO route.

In its simplest terms, a SPAC is created – also known as sponsored – by a team of large investors with the express aim of buying another company. When a SPAC's sponsors then raise more money (via its own IPO), the subsequent investors do not know the target company that the SPAC is looking to acquire; hence SPACS often being referred to as "blank check companies''. Once the SPAC has raised capital, it is held in an account until those running it identify a suitable private company that is seeking to go public through an acquisition. If and when such an acquisition is concluded,

those who invested in the SPAC can swap their shares in it for shares of the acquired company or cash in their SPAC shares for what they paid plus accrued interest. Should a SPAC's sponsors not find a suitable company to acquire within a set deadline – which tends to be two years after the SPAC's IPO – it is liquidated and investors have their money returned.

It is a process that, on paper, appears straightforward. But there are inherent risks. The due diligence involved in the SPAC process is not as rigorous as a traditional IPO. It is a business model that allows sponsors to promote the SPAC (with other people's money) in any way that they believe is appropriate. That in itself can lead to value destruction and the risks of "pump and dump", where shares are bought low, these purchases are then heavily publicised and then the shares are sold when they reach what looks to be their high point.

There is also the risk of misleading statements and misleading impressions which, in the UK, are covered by sections 89 and 90 of the Financial Services Act 2012, respectively. It would also be appropriate to consider the risk of accounting fraud, as whether most SPACS have proper accounting controls or compliance has been the subject of some concern. After all, the initial stages of a SPAC's creation only involves convincing a small number of individuals to invest, which enables the SPAC to avoid much regulatory scrutiny. This in itself should raise alarm bells in relation to investment fraud.

While SPACs clearly have their supporters, they certainly carry risk for investors. Such investment is as close to being a leap in the dark as possible – which can only make the risk if investment fraud a sizeable one. When investing in SPACs you are unable to review trading history and performance, as you can when investing in companies that have been listed in the markets for a significant period of time. There is a reliance on SPAC company statements and any reported news regarding them which, in effect, puts everything in the hands of its sponsors.

If anyone believes they have been ripped off via a SPAC, an aggressive response is the only course of action. Preparing a bundle to the relevant regulators is an option, in order to pinpoint whether there have been any breaches of market integrity. The issues of investor protection and how the SPAC raised capital should be highlighted when taking such a step, as should any suspicions of insider dealing disclosure of information and other forms of market manipulation.

To determine if there has been any wrongdoing, any such allegations will have to be weighed up by the relevant regulator and / or enforcement agency in light of existing legislation. Yet any would-be investor would arguably be much better off if they spent time putting the SPAC under the microscope before they invested in it, rather than afterwards.

LIMITATION AND DELIBERATE CONCEALMENT AFTER CANADA SQUARE V POTTER [2021] EWCA CIV 339 ("CANADA SQUARE")

Authored by: Tom Robinson - Wilberforce Chambers

Introduction

In *Canada Square* the Court of Appeal considered s.32(1)(b) and s.32(2) of the Limitation Act 1980, which extend limitation periods in cases of "deliberate concealment". The context was a claim under the Consumer Credit Act 1974 alleging an "unfair relationship" due to non-disclosure of payment protection insurance commission. However the decision is of far wider relevance. The Court held:

(i) S.32(1)(b) covers cases where any fact relevant to the claimant's right of action has been "deliberately concealed" from him by the defendant. There is no need to show "active concealment" of a fact relevant to the claimant's cause of action, nor to show the defendant was under a pre-existing legal duty to disclose it. It is enough that the defendant was under an obligation to disclose arising from "utility and morality", but deliberately failed to disclose.

(ii) An alternative to s.32(1)(b) is s.32(2), allowing the claimant to postpone limitation by showing deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time. The relevant "breach of duty" need not be contractual, tortious or fiduciary. Any "legal wrongdoing" giving rise to the claimant's right of action is sufficient.

(iii) For both s.32(1)(b) and s.32(2), the defendant's act or failure must be deliberate. That is satisfied by recklessness, in the *R v G and anor*[1] sense. It is enough that the defendant was aware of a risk (that he ought to disclose the fact, or that he had committed a breach of duty), and it was in the circumstances known to him objectively unreasonable to take that risk, but he continued regardless.

This last point is controversial: other cases appear to hold that the defendant must be aware of his wrongdoing, not just aware of a risk of the wrongdoing.

Legal Background

The Law Commission has described the purpose of limitation as being:[2]-

(a) To protect defendants from stale claims;

(b) To encourage claimants to institute proceedings without unreasonable delay and thus enable actions to be tried at a time when the recollection of witnesses is still clear; and

(c) To enable a person to feel confident, after a lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.

That purpose is given effect by statutory rules requiring claims to be brought within a set period of the accrual of a cause of action. After that period, the defendant is entitled to certainty (statutes of limitation have been called "statutes of peace"[3]), and to defeat a claim by relying on no more than the passage of time.

Part II of the Limitation Act 1980[4] can qualify this certainty, and mitigate the potential harshness of the rules. It covers extensions to the statutory time

1 [2003] UKHL 50
2 Final Report on limitations of actions, 1977, Cmnd 6923, para 1.7.
3 Cave v Robinson, Jarvis & Rolf (a firm) [2003] 1 AC 384 at 390E.
4 References to section numbers hereafter are to sections of the Limitation Act 1980 unless otherwise stated.

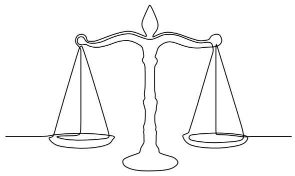
limits found in Part I of that Act. One such extension is where a claim is based on the fraud of the defendant.[5] Another is where the claim is for relief from the consequences of a mistake of law or fact.[6] A third, and the subject of this article, is where the defendant has "deliberately concealed" any fact relevant to the claimant's right of action.[7] In all three cases, time does not run until the claimant discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it. Section 32 thus recognises the unfairness of time running against a claimant before he could reasonably be expected to bring his claim.

Canada Square

In 2006 Mrs Potter took out a loan with Canada Square for £16,953. When it offered the loan, Canada Square also suggested Mrs Potter take out payment protection insurance, which she did. Canada Square acted as the insurance intermediary in relation to that insurance and received commission. The amount of the commission was over 95% of the sum Mrs Potter was told she was paying for the insurance. This fact was not disclosed to Mrs Potter.

Mrs Potter made the payments required of her and the agreement ended in 2010. In 2014 the Supreme Court ruled[8] that non-disclosure of a very high commission charged to a borrower made the relationship between the creditor and borrower 'unfair' within the meaning of section 140A of the Consumer Credit Act 1974 ("s.140A").

In December 2018 Mrs Potter brought proceedings against Canada Square, relying on s.140A. She relied on s.32(1)(b) and s.32(2) as postponing the running of time until she discovered the commission.



Analysis

As noted in the Introduction, the Court of Appeal (Sir Julian Flaux C., Males LJ and Rose LJ) held that for s.32(1)(b) there did not need to be active concealment of the fact in question. Rose LJ said that *"inherent in the concept of "concealing" something is the existence of some obligation to disclose it"*, but that the obligation need not arise from a pre-existing legal duty. It could arise "from a combination of utility and morality", as had occurred in a case called The Kriti Palm.[9] In that case the majority in the Court of Appeal held that a party that had been instructed to certify the quality of a cargo, who later learns of a material inaccuracy in his certificate, is obliged as a matter of "common sense" to disclose it. For Canada Square, the obligation to act fairly that was imposed by s.140A was a sufficient obligation to disclose for s.32 purposes.

Turning to s.32(2), the Court discussed the phrase "commission of a breach of duty" and followed the insolvency case of *Giles v Rhind and anor* (No. 2) [2008] EWCA Civ 118 in holding that the breach did not need to be a breach of contract, in tort or of fiduciary duties. A "legal wrongdoing" was enough. In Giles it was held that a claim under s.423 of the Insolvency Act 1986 was a claim for "breach of duty" within s.32(2), given "the context of a debtor's responsibilities to his creditors generally". Following that approach, the creation of an unfair relationship under s.140A was a "breach of duty."

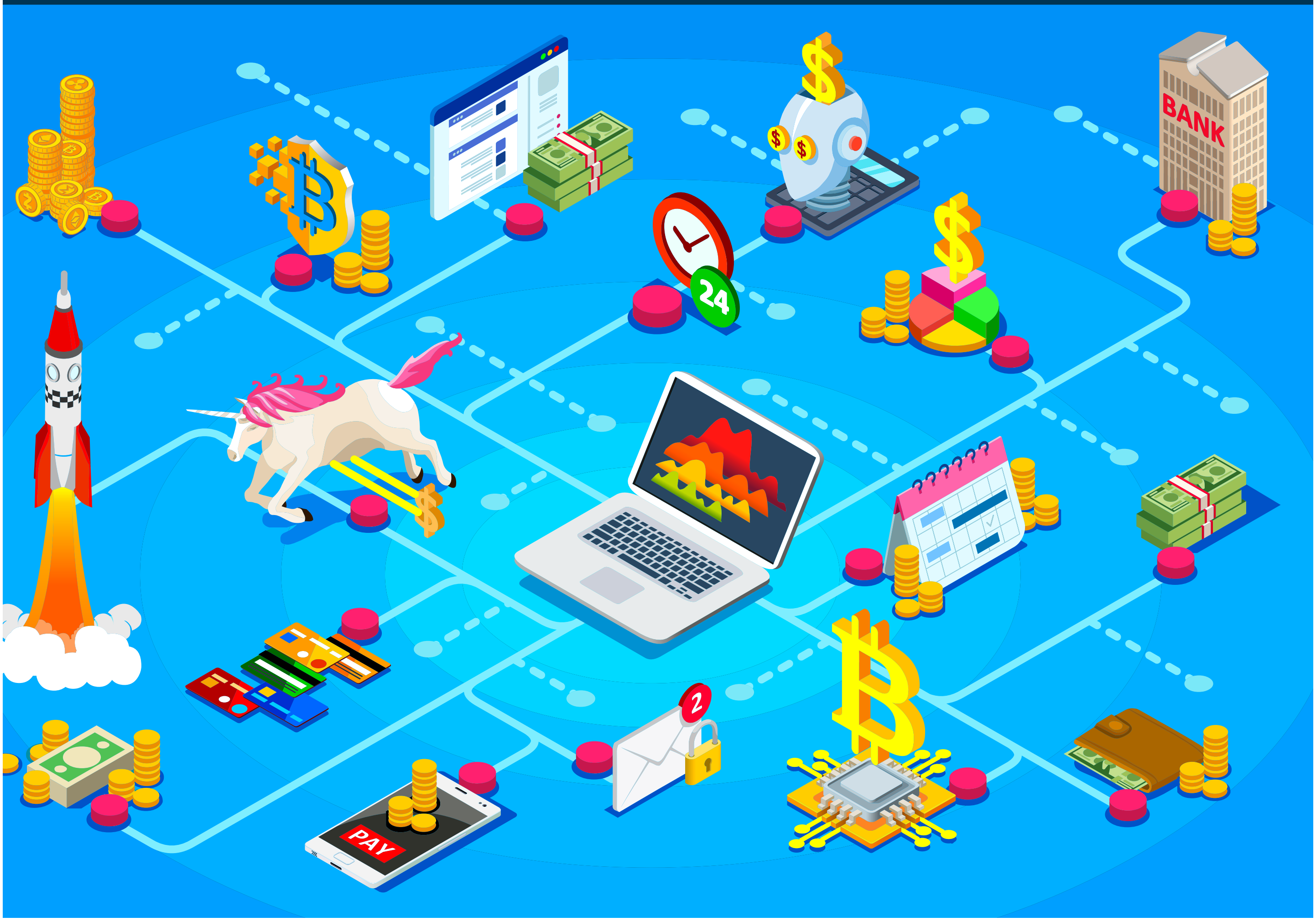
The most controversial conclusion the Court reached is likely to be on the meaning of "deliberate". The parties agreed that it meant the same in s.32(1)(b) and 32(2). The Court held that it meant reckless, with both a subjective and an objective element. It adopted the approach of Lord Bingham in *R v G and anor*[10]: a person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk. It reached this conclusion by holding (i) there is no natural meaning of "deliberate" in this context, (ii) the case law was inconclusive, (iii) recklessness was enough for the doctrine of "concealed fraud" pre-1980, and s.32 was not intended to be any more restrictive for the claimant than the previous law as regards the mental element of the defendant's conduct.

Each of these three steps seems debatable. As to (i), "deliberate" may not have one natural meaning, but it is possible to say that it does not naturally mean the same as reckless. This is particularly so as what must be construed is a phrase in s.32: "deliberately concealed" or "deliberate commission". In that context, "deliberate" imparts a sense of the concealment or commission being an intended consequence as opposed to an unintended result. As to (ii), Lord Scott in Cave v Robinson Jarvis & Rolf[11] said that deliberate commission of a breach of duty is to be contrasted with a breach "that the actor was not aware he was committing". He considered that the defendant must know he was committing a breach, or intend to do so, for s.32(2) to apply. As to (iii), reliance on the pre-1980 law must be secondary to the words of s.32 itself.

The case seems destined for the Supreme Court. The case law is unclear and the point is one of real importance. As Rose LJ said, *"it is unlikely that Canada Square are pursuing this appeal for the sake of the £7,953 they may owe to Mrs Potter".* ***The ramifications of a "recklessness" test are very significant. If a board of directors receives advice that a proposed course of conduct poses a 15% risk of breaching a contract, and the circumstances are such that either any breach is unlikely to be discovered for some time, or there might be said to be an obligation in "utility and morality" to tell the counterparty, can the directors safely proceed without disclosing? Their company would appear unable to rely on a limitation defence unless a court later concludes that it was objectively reasonable for them to act as they did. If a company in insolvency pursues a director for breach of duty, can it postpone limitation if the director was aware of a risk he was in breach because a director's failure to disclose actual knowledge of his breach has been held to fall within s.32(1)(b).[12] This seems a long way from the certainty for defendants that limitation is supposed to advance.***

5 S.32(1)(a).
6 S.32(1)(c), recently considered by the Supreme Court in the FII Group litigation [2020] UKSC 47.
7 S.32(1)(b).
8 In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61.
9 *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601.
10 [2003] UKHL 50.
11 [2003] 1 AC 384.
12 *IT Human Resources plc v Land* [2014] EWHC 3812 (Ch) at [134-5].

WHAT COIN?



Authored by: Robert Capper - Ankura

2020 was another ground-breaking year for cryptocurrency. Soaring coin prices and a renewed public interest have corresponded with an uptick in related casework in the fraud and investigations sector – and most of it extremely high value. So, what are the investigative options on these cases, and what can be done to not only understand these crimes and the key protagonists, but even freeze crypto assets?

Some of these cases actually have very little to do with cryptocurrency as such; moreover, they are simply reinventions of the multi-level marketing or 'pyramid' schemes to which we are all well accustomed. The only discernible difference being that instead of cosmetics or health supplements, the commodity is an apparent cryptocurrency – which very often doesn't exist. Two examples of these with which my team have had direct experience in the past year are the One Coin fraud (with global losses approaching $4bn) and LyfCoin – a simple pyramid scheme which took around £5m from UK based investors.

Although contrasting in scale, the ruse of both schemes was the same, with investors passing money through friends and family to purchase coins pre-launch (usually through an ICO or Initial Coin Offering), subscribing to a narrative that prices are increasing by the day. In these types of instance, there is no cryptocurrency, and the frauds often play out like Ponzi schemes, with occasional cash distributions being made before the whole thing implodes. Investors and investigators alike are then faced with the typical challenges of these types of fraud; a lack of unifying 'hubs', multiple recipients of funds, a paucity of paperwork, and a general reluctance to chase down lost investments due to the fact that many parties would be faced with implicating family and friends. From an investigative point of view however, these types of fraud are well-trodden ground.

But with over 4000 different cryptocurrencies currently in existence and reported global crypto crime in 2020 alone hitting almost $2bn, a great deal of these cases *do* involve a blockchain. Statistics from finance website *Finaria* show that fraud was the leading crypto crime last year, followed by theft and ransomware. Also of note was that decentralised finance (DeFi) related hacks and scams added almost $150m to these figures, suggesting it may become one of the next key areas for money laundering.

So in these types of cases, what can be done, and how complex are the challenges faced?

In many ways, identifying and investigating a fraud or theft that involves a blockchain is preferable and easier to work than one focussed on bank accounts, nominees or shell companies. Not only is key data concerning transactions, timelines, amounts and other important activity documented, but you can 'play back' this data to understand exactly what happened. Similarly, when analysing crypto wallets, you can see how much money is in them, when and how it got there, and even what it's being spent on. This is not to say that such investigations are straightforward, but notwithstanding the usual caveats surrounding how sophisticated your protagonists have been, there exists a powerful and quickly developing toolkit to help the analyst unpick the necessary information. And, like all investigations, the more information you have, the more likely you are to find a mistake, an indicator or something unexpected which begins to give you solid leads to pursue.

Likewise, freezing and seizing crypto assets is not only possible, but an increasingly well-established practice. Like so many other types of asset search and seizure, it is often important to have an amenable jurisdiction involved (in these cases for the exchanges used), and we are also increasingly seeing the major players – such as Coinbase or Kraken – take an active role in assisting these types of investigation. As with most asset classes, there are always exceptions, and ultimately if a crypto asset is held in what is termed 'cold storage' or wallets that use personal hardware, then they are that much more protected from investigation and detection. The trade-off is that using personal equipment and operating outside the security of an exchange is a risk, which can carry huge financial cost if hardware is lost, damaged or cannot be accessed.

Finally, we ought to consider the point where cryptocurrency hits the real world. Whether through bitcoin ATMs or (more commonly) physical exchanges, at some point people will "cash out", which of course provides various opportunities to any investigative team. Most exchanges now insist on various paperwork and identification checks, and with many coins being exceptionally volatile in value, it is not unusual to expect people to want to place stolen

funds into a more secure portfolio of asset classes. We have seen this exact circumstance first-hand in a recent case, in which the investigation of a high-value crypto theft saw parallel research by our cyber team (focusing on wallets, exchanges and transaction histories) with the more 'traditional' investigation of other assets and investments, and the location of the individuals concerned, to inform and enable a range of criminal and civil proceedings.

Although the popularity of crypto currency continues to grow, it remains a volatile investment class and a fairly limited mechanism to fund one's day to day life – two themes which are likely to ensure that at some point, this movement to more traditional structures and asset types is likely to occur. The opportunity such movements present from an investigative standpoint will therefore also likely continue to exist for some time.

But cryptocurrency is no longer a 'fad' and seems to be here to stay. Fortunately, as the development of analytical tools and specialist investigative teams continues at pace, so too do the legal frameworks through which to execute effective enforcement strategies. The 'cat and mouse' games will certainly evolve over the next few years, but as the growing body of global casework has proven in recent years, victims of crypto-crime have multiple options to not only respond, but to satisfactorily resolve a range of challenges.

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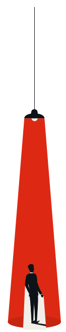
EMERGING FROM THE PANDEMIC: ISSUES FOR DIRECTORS AS WE RETURN TO NORMALITY

Authored by: Tim Carter and Helen Martin - Stevens & Bolton

The events of the past year have left directors walking a tightrope of uncertainty, with no obvious end in sight. As hopes of a genuine return to some form of normality over the next few months seem to be gaining momentum, we take a look at some of the immediate and ongoing risks for directors arising out of the extraordinary events of the past year.



Directors in the spotlight

Since March last year, temporary periods of suspension of wrongful trading have given directors some comfort to continue trading (when permitted), in circumstances where they might be unsure of the long-term solvency of the company. These have just been extended and are now due to expire on 30 June 2021. However, this suspension is by no means a 'get out of jail free' card for directors. Crucially, any director should bear in mind that if the company does ultimately enter into insolvency proceedings, their conduct will be investigated by the appointed insolvency practitioner – potentially resulting in personal liability for loss caused by breach of duty, not to mention possible disqualification proceedings if there has been alleged misconduct. And then there is the offence of fraudulent trading, which has not been suspended and imposes a similar personal liability on a director, notwithstanding its required higher burden of proof.

A director owes a number of statutory duties to the company, including a duty to act in the best interests of the company for the benefit of its members as a whole. However, where a company is under financial stress and is likely to become insolvent, the director must instead reflect upon and act accordingly to protect the interests of the company's creditors, noting that there remains a residual duty to shareholders, employees etc. Failure to do so leaves directors at risk of a potential misfeasance action by any later appointed liquidator or administrator. The consequences of this for an individual director could be severe, rendering them personally liable to restore the company's assets. Due to the difficulty in assessing a company's ongoing solvency - caused by fallout from the pandemic - protection and preservation of the company's assets for the benefit of creditors (whilst not causing any undue harm to shareholders) should be a foremost concern for directors.

Government support schemes – easy target for fraud?

The various coronavirus schemes introduced by the government to offer financial assistance have provided a lifeline to many businesses over the past year – but also offered an easy target for fraud. The Bounce Back Loan Scheme (BBLS) has been particularly vulnerable, given the (intentional) lack of any real checks or oversight at the application stage to facilitate the overriding objective of getting money to smaller businesses quickly.

Whether under the BBLS or the Coronavirus Business Interruption Loan Scheme (CIBLS), directors are at risk of breach of duty claims down the line if and when their companies enter an insolvency process, where the loans are taken out with the knowledge that the company will be unable to repay them, or where loans are not used for the benefit of the company i.e. the purpose intended. There is also a risk of civil or criminal liability for fraud, for instance where an application has been made based on false information. Any insolvency practitioner appointed will be closely scrutinising such loan applications, and the subsequent application of funds – this will especially be the case where directors have used such funds to pay off existing loan facilities backed by personal guarantees, and the only discernible benefit is for the director rather than the company.

Worrying reports have also arisen of business identify theft in relation to the BBLS scheme, with criminals (possibly employees) using the details of honest businesses to make applications and having the monies paid into their own bank accounts. It is vital that directors seek immediate advice if they become aware of any unauthorised applications being made in the name of their company.

Finance Act 2020: new risks for directors

The Finance Act 2020 contains provisions enabling HMRC to hold company directors personally liable for the company's unpaid tax debts where it is, or is likely to become insolvent. HMRC has the power to impose a "Joint Liability Notice" on directors (including shadow directors) in certain circumstances where they have been responsible for, facilitated or received a benefit from tax avoidance or tax evasive conduct, or where "phoenixism" has been used to avoid tax liabilities. The effect of a Joint Liability Notice is to make the recipient jointly and severally liable with the company for the unpaid tax.

A Joint Liability Notice may also be issued to directors in relation to wrongly claimed amounts under various coronavirus support schemes. Most significantly at present, this includes the Coronavirus Job Retention Scheme (CJRS) - however other support schemes, such as grants or even loans may be retrospectively added. Where a business has claimed an amount under a relevant scheme to which it is not entitled (or subsequently ceases to be entitled), the amount will be clawed-back by way of a 100% tax charge. In the event of insolvency, individual directors may be held jointly and severally liable for the repayment of such amounts through a Joint Liability Notice.

The immediate future – a look ahead

As we slowly emerge from the pandemic, and directors turn their minds from immediate crisis management to longer term recovery, it may be extremely difficult to make accurate judgements as to a company's likely ongoing solvency. Given the high stakes, where personal assets might be at risk, it is absolutely vital that directors understand and act in accordance with their duties and wider obligations.

In uncertain times, it is likely that the best interests of both creditors and shareholders will be served by a prudent management approach which focuses on preserving and maximising the assets and long-term value of the company as a whole. The board should meet regularly and ensure that all discussions and decisions are carefully minuted and based on up-to-date financial information, with professional advice sought when appropriate.

For the reasons cited above, directors should exercise particular care with relation to payments claimed over the past year under the various coronavirus support schemes, ensuring that strict internal controls are maintained and documented, with regard to the use of such funds.

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