FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 7

2021 Asset Recovery Year in Review

SO THIS IS 2021 AND WHAT HAVE YOU DONE?
ANOTHER YEAR OVER, A NEW ONE JUST BEGUN

INTRODUCTION

"New year – a new chapter, new verse, or just the same old story? Ultimately we write it. The choice is ours"

- Alex Morritt

2021 has continued to present new challenges due to the global pandemic. Despite this, here at ThoughtLeaders4 we are proud to have brought the FIRE community back together in person. We are delighted to have seen so many of you at our events, from FIRE UK: Welcome Back Summit, to FIRE Middle East.

Guest edited by Mary Young, Partner at Kingsley Napley, our Year in Review authors discuss some of the significant cases and trends over the past 12 months.

Thank you to our authors, members, and community partners for their continued support and contribution. We look forward to seeing and hearing from you all in 2022.

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A letter from our GUEST EDITOR

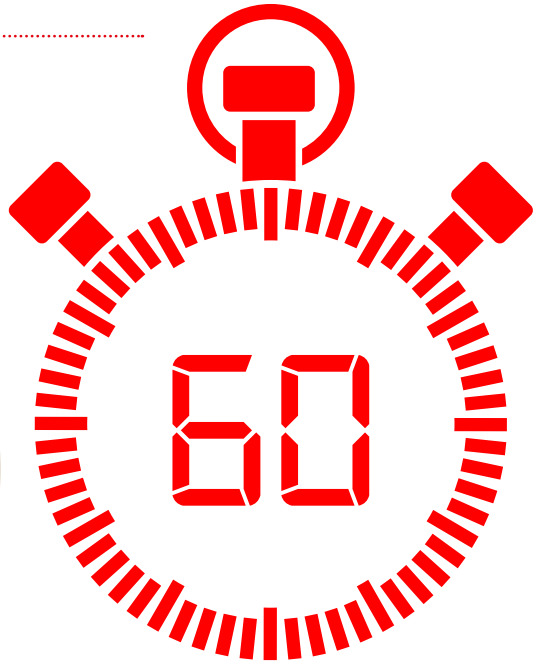
MARY YOUNG

Mary has worked in commercial litigation since qualifying as a solicitor in 2009. Her practice covers a wide range of areas but Mary's particular interests and expertise lie in civil fraud and asset tracing as well as claims against professionals in negligence, breach of fiduciary duty and breach of trust. Mary is recommended in Who's Who Legal: Asset Recovery Global Guide 2021. She also regularly acts on insolvency cases which involve fraud or dishonesty.

This time last year we were hearing about a delta variant and wondering whether Christmas was going to happen. Although the winter seems to be repeating itself, the world of FIRE has moved on. To help you stay up to date and bang on trend we've yet again collected summaries of some of the key decisions, developments and trends of 2021 for your reading pleasure. Written by our friends and colleagues who make up the FIRE community, this edition covers issues ranging from the return of the Black Swan, ESG in litigation, the importance of forming a team of diverse thinkers to developments in insolvency and beneficial ownership in Liechtenstein. Come for the snappy titles – stay for the content.

60-SECONDS WITH:

ANTHONY RIEM
SENIOR PARTNER
PCB BYRNE



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

A In some ways, it would be easier to say what I would not have been. Before becoming a lawyer, I worked in banking and insurance but they did not grab my attention. I think I would either have been a historian as I am fascinated by the past – a good job at my age! – and our continual failure to learn from mistakes that have been repeatedly made during the course of history or, dare I say it, a politician. However, I think any political career would have been short-lived as it appears that strategic thinking and an ability to actually answer questions are traits that do not sit comfortably with being a successful politician.

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

A Highlights include from the 1980's being chased around the Elephant & Castle Estate in London by an angry husband with a knife after I had served him with a divorce petition; from the 1990's having to escape out of a building where we had been locked in by our client and in seeking to find a way out through a window had found a room where he had created documents to support his case; from the 2000's pursuing a fraudster to stop him fleeing the jurisdiction and then having him arrested and in another case getting full recovery of stolen monies because the defendant wanted his passport back which we had seized; and more recently, working on the deals by which Burford took an investment in our firm and our subsequent merger.

Q What is the easiest/hardest aspect of working on FIRE cases?

A The answer to both these questions is the challenges they bring. It is the challenge of identifying a route by which the client recovers assets; the challenge of finding a strategy that works to recover those assets; the challenge of adapting that strategy to take account of developments as they happen; the challenge of co-ordinating teams in several jurisdictions when seeking interim relief; the challenge of ensuring the client understands what is happening and why it is happening. All these challenges and more can be difficult but they are also exhilarating.

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

A Put in the hard yards. Asset recovery requires solid foundations: a good understanding of the relevant law and procedure. A solid foundation then enables you to build the skill sets necessary to build and implement successful asset recovery strategies.

Q What has been the most interesting case you have seen in 2021?

A I am going to have to pick a case that appears to have generated more column inches that any other case which luckily enough happens to be one of my cases! It is the Akhmedova case as it involved bringing or defending proceedings in several jurisdictions, each of which threw up its own particular challenges. As a practitioner, there is nothing more interesting than finding ways to overcome or sidestep those challenges. One particular cherry on the cake was to obtain an order in the US to require Google to disclose contents of emails, notwithstanding the hurdles put in our way by the defendant and Google.

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

A The growth in cybercrime and crypto currency and more generally in digital assets and fintech. We are investing heavily in this area.

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

A Learn to play a musical instrument. As I am close to tone deaf and lacking any proper form of musical co-ordination, I think this is best left as an aspiration.

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

A To my mind there is nothing better than a good book, so it would be settling down with a kindle loaded with books (and a marmite sandwich and whisky)

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

A Given my interest in history, I would be happy meeting any of the dominant world figures. If I had to choose someone, then it would be Napoleon, just as much for his introduction of the Napoleonic Code as for his military prowess.

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

A Various Clash tracks – London Calling, Rock the Casbah, Should I stay or should I go; Lou Reed – Perfect Day, Femme Fatale; David Bowie – practically anything from Ziggy Stardust, Diamond Dogs and Station to Station; Otis Redding – Sittin on the Dock of the Bay; The Police – Walking on the Moon; Dexy's Midnight Runners – Come on Eileen. That's enough to get started with.

Q What does the perfect weekend look like?

A A lie in, leisurely breakfast, country walk with the missus and dog to a pub for lunch, a sporting afternoon either going to a game (rugby/football/cricket – all fine though the latter requires all day participation!) or "playing" golf followed by dinner with friends and/or family.

Q Reflecting on 2021, what have you been most grateful for?

A The support of family, friends and work colleagues (and for Breaking Bad which I finally found time to watch during lockdown!).

FIRE International

FIRE International 2022

18th - 20th May 2022

Anantara Hotel, Vilamoura, Portugal

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TRENDS IN FRAUD 2021

Authored by: Charlotte Pender, Abigail Rushton and Simon Heatley – Charles Russell Speechlys

This year has seen a number of cases in which the courts have had to grapple with novel issues arising in fraud disputes. This article explores three trends to have emerged: (1) limits to the Serious Fraud Office's (SFO) extraterritorial reach; (2) the interaction between criminal restraint orders (CROs) and worldwide freezing orders (WFOs); and (3) the, perhaps unsurprising, continuing rise in cases involving cryptocurrency and crypto fraud.

1. The SFO's Extraterritorial Reach

The scope of the SFO's extraterritorial investigative powers came under scrutiny by the Supreme Court in KBR, Inc, R (on the application of) v Director of the Serious Fraud Office [2021] UKSC 2 with judgment handed down in February this year.

The Supreme Court held that the SFO could not require a foreign company to produce documents held overseas under section 2(3) of the Criminal Justice Act 1987 (a notice which can be used by the SFO to compel companies and individuals to produce documents relevant to an investigation), as part of an investigation into one of the foreign company's UK subsidiaries.

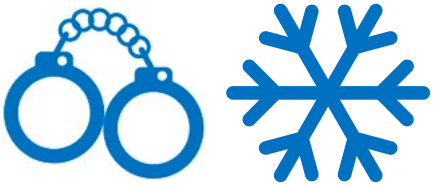
The decision overturned a Divisional Court decision, in which the court had "read in" extraterritorial application to section 2(3) powers, provided that a "sufficient connection" could be drawn between the company which was the recipient of the notice and the UK.

The decision limits the SFO's investigative reach as the SFO cannot compel a foreign company or individual to comply with a section 2 notice in respect of documents and/or evidence it holds abroad that may be relevant to the SFO's investigation.

1.1 Comment

The judgment is narrow in scope as it focuses only upon the position of a foreign company with no current or historic business presence in the UK. However, this means that there are outstanding issues which are likely to play out in the courts in the future or may result in a change to the applicable legislation. These include:

1. In the absence of other case law or detailed wording in the statute, whether section 2(3) might have some extraterritorial effect in other scenarios.
2. The impact the decision may have on other UK investigatory and enforcement agencies (e.g. the FCA) and the reach of their investigative powers.
3. Whether the SFO will start to use other mechanisms to investigate and compel document production (e.g. Overseas Production Orders) or continue to use Mutual Legal Assistance agreements and rely on co-operation between countries, which can be slow and cumbersome.
4. The KBR decision made it clear that any extension to the international reach of such powers would be a matter for Parliament rather than the courts. So, this could be an area of change.



2.CROs and WFOS

The interaction between CROs and WFOs came under the spotlight in the Court of Appeal in March this year.

In AA v BB [2021] EWCA Civ 1017, the appellants were two directors of a company in administration who were subject to WFOs. They appealed against the WFOs on the grounds that CROs preventing the dissipation of their assets were already in place and there was therefore no material risk of dissipation. Their appeal was dismissed and the WFOs remained in place.

This followed London Capital & Finance Plc & Ors v Thomson & Ors [2020] ECHW 2463 (Ch), which was heard by the High Court in September 2020 and held that WFOs against two respondents (who were already subject to CROs obtained by the SFO) had to continue.

On a similar basis to London Capital & Finance the Court of Appeal's reasoning in AA v BB was that:

1. There was insufficient provision for the administrators (who were the beneficiaries of the WFOs) to be given notice if the CRO was varied or discharged. They may therefore not have been able to apply in time for a WFO if that happened.
2. The administrators may have separate and well-founded reasons to object to any requested use of the subject assets which would not be considered by the SFO when deciding whether to consent. The CRO therefore might not protect the legitimate interests of the claimant administrators to the extent required.

1.2 Comment

These cases illustrate the interaction between asset preservation in civil and criminal proceedings.

The burden of having to comply with both a WFO and CRO might be raised by respondents. But both may be necessary where the CRO does not deal comprehensively with the risk of asset dissipation. In principle, there is no reason why both a CRO and WFO cannot be ordered in respect of the same assets, but this will depend on the facts of the case.

There might be cases where a CRO is so watertight that it could remove the need for a WFO. But there are pragmatic and systemic reasons which mean that is unlikely. As illustrated by these cases, claimants in civil proceedings have no control over CROs obtained by other parties in criminal proceedings, which can leave them vulnerable to changes to the CRO by other parties or the court. This can result in claimants being left in the dark or finding out when it is too late to obtain a WFO.

The courts recognise that there is a fundamental difference between criminal proceedings and WFOs available in civil proceedings. The trend in the case law makes clear that the existence of a CRO will not necessarily stand in the way of the grant of a WFO or, in itself, remove the risk of asset dissipation.

3.Cryptocurrency and Crypto Fraud

2021 has seen the courts consider, amongst other things, two important legal issues: (1) how to define persons unknown and (2) the lex situs of crypto assets. The case of Fetch.AI Ltd & Anor v Persons Unknown Category A & Ors [2021] EWHC 2254 (Comm) (15 July 2021) presented the opportunity for the Commercial Court to examine both issues.

In Fetch.AI, the unknown fraudsters gained access to the claimants' cryptocurrency trading accounts and were then able to trade the crypto assets at an undervalue. The crypto assets were ultimately transferred to third party accounts, which the claimants alleged were operated by or on behalf of the fraudsters. The claimants issued proceedings against numerous categories of persons unknown and the cryptocurrency exchange involved. They were granted

a proprietary injunction, WFO and various disclosure related orders.

1.3 How to define persons unknown

One of the issues for the court was how to define the persons unknown against whom the order was being made. The court found that there were different categories of persons unknown, being those who:

1. were involved in the fraud;
2. received assets without having paid full price for them; and
3. innocent receivers (i.e. those who did not know or have reasonable ground to believe that assets belonging to the claimant had been credited to their account).

The court focussed on the relief being sought against each category of persons unknown and was keen to ensure that innocent receivers did not find themselves in breach of the order granted. The proprietary injunction was therefore drafted to restrict the scope of the proprietary relief against innocent receivers so that the fraudsters were subject to the freezing orders, but innocent receivers were not.

1.4 The lex situs of crypto assets

The court also considered where crypto assets were situated (for an application for permission to serve out of the jurisdiction on persons unknown). The court followed the reasoning in Ion Science Ltd v Persons Unknown and others (unreported), 21 December 2020 (Commercial Court) and re-confirmed that the lex situs (i.e. the law of the place where the property is situated) of a crypto asset is the place where the person or company who owns the crypto asset in question is domiciled (in this case, in England).

This is helpful for victims of fraud as they will be able to use their local courts for relief and, for the purposes of jurisdiction, will not have deal with the likely complex and costly issue of identifying where the crypto assets have been dissipated to.

1.5 Comment

Fetch.AI illustrates how the courts are continuing to develop their response to crypto fraud and helping to lay the legal foundations for future cases, which will no doubt follow given the growth of cryptocurrency and the evolving nature of the related legal framework.

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AVENGERS ASSEMBLE:

FIGHTING FIRE WITH DIVERSITY

Authored by: Richard Clayman – Kingsley Napley

The issue of diversity and inclusion has gained increasing prominence in the media over the course of the last year, spurred on by the outrage felt by many in response to the murders of George Floyd and Sarah Everard, and the myriad accounts of discrimination still experienced in many corners of society. When I explained to my wife that I had proposed to do some extracurricular writing on the subject of diversity she (imperceptibly to outsiders) raised an eyebrow.

The implicit question: What do you know about diversity?

It is true that I am male, pale, increasingly stale, and can barely speak for the cosmic silver-spoon wedged firmly in my chops. But, don't be deterred – I am not the best advert for a diverse and inclusive society, however, this article is not intended to virtue signal, rather to signpost the way toward (it is hoped) a greater future to which all FIRE thought leaders are headed.

Before I begin, the concept of organisational diversity can be summarised in this way: a diverse organisation is one that incorporates via its members a wide range of characteristics and perspectives across the matrices of age, sex, race, religion, gender identity, sexual orientation, disability, neurodiversity, educational attainment, and socio-economic background. A homogenous organisation is one whose members' characteristics and perspectives typically align in the same categories across these matrices.

Before considering the positives of diversity, take a moment to recognise the stark downsides of organisational homogeneity - Matthew Syed, a celebrant of diversity, has written about an example that sticks in the mind [1]: In the wake of 9/11, academics sought to figure out how such a catastrophe could happen under the watch of the most powerful intelligence service on the planet.

Two intelligence experts, Milo Jones and Phillipe Silberzahn, discovered an unwelcome answer: "The first consistent attribute of the CIA's identity and culture from 1947 to 2001 is homogeneity of its personnel in terms of race, sex, ethnicity, and class background (relative both to the rest of America and to the world as a whole)."

The CIA's entire recruitment process had been geared toward selecting a uniform 'elite' – the white, male, heterosexual, protestant, ivy-leaguer (sound familiar?). The upshot of this uniformity was that it was all too easy for a misguided consensus to take hold which dismissed the grave threat posed by Al-Qaeda. Simply put, Langley lacked the ethno-cultural scope to perceive the powerful symbolism of Bin Laden's call to arms, and wholly underestimated the capabilities of his acolytes. The rest, sadly, is history.

Conversely, the benefits conferred by diversity are well-documented and consistently corroborated by research.

1 https://www.bbc.co.uk/news/world-us-canada-49582852

A study by McKinsey found that of the 366 U.S. public companies surveyed, those in the top 25% for ethnic and racial diversity in management were 35% more likely to have financial returns above their industry mean, and those in the top 25% for gender diversity were 15% more likely to have returns above the industry mean [2].

And it is not just financial performance that appears to improve with greater diversity. A group of researchers led by Barbara Casu of the City University Cass Business School reported in January 2020 that European banks with more female directors on their boards faced lower and less-frequent fines for misconduct, in particular misconduct linked to fraud. Even after adjusting for other variables, the conclusion of the research was clear: Banks with more women on their boards committed less fraud, and this in turn saved those institutions $7.84 million per year on average [3].

So what is the causal link between organisational diversity and positive commercial outcomes? Evidence indicates that diverse groups maintain objectivity and factual focus in ways that homogenous groups do not [4]. Similarly, diverse groups are inherently better at cancelling out conscious and unconscious biases by disrupting set thought-patterns, challenging orthodoxy, and re-examining facts from multiple perspectives [5]. This aspect of diversity is perhaps the most obviously beneficial for FIRE practitioners- today's fraudsters are as diverse as their motives and modus operandi – consider some recent examples: The young, female, Eastern-European crypto-queen [6]; A GP embezzling company funds to feed his gambling addiction [7]; the elusive kleptocrat [8], and Winchester-based boiler-room scammers [9].

These are all very different frauds; very different perpetrators; very different challenges and obstacles. Approaching the complexities of fraud from a variety of angles and with the benefit of diverse experience can, as many of you will already know, provide a huge leap toward successfully recovering assets for clients.

However, diversity alone will not necessarily always lead to more dynamism within teams.

In order to harness the full potential of diversity, FIRE teams should also strive to create a culture that promotes "psychological safety" – i.e. the belief that one will not be punished or humiliated for speaking up with ideas, questions, concerns, or mistakes.

Without psychological safety, people do not fully contribute, and the potential of diversity may remain untapped. Furthermore, the absence of psychological safety gives rise to defensive behaviours that militate against creative thought [10]. In order to promote psychological safety, team members, in particular team leaders, need to be more curious, inquiring, experimental, and nurturing. Hierarchical structures need to be flattened, and directive, controlling, and conforming behaviours curtailed.

While there is still plenty more to do, the legal sector visibly embraces the value and importance of diversity, as do many other professional services sectors. However, the greater challenge is likely to be fostering a culture that promotes psychological safety. Professional services firms are, in large part, hierarchical, rigidly structured, and while many accept that 'to err is human and to forgive divine' – neither are company policy. Add to that the extremely high expectations of the Court, clients, and opponents, the conditions needed for psychological safety may be in short supply for FIRE practitioners.

So, how can FIRE practitioners make the most of diversity? In the first instance, organisations should ensure that their own recruitment practices are up to scratch in this regard [11]. Furthermore, clients increasingly expect their advisors to have taken meaningful action to promote diversity, with some moving to withhold fees unless diversity and inclusion are given due prominence[12].

Ensuring diversity within is therefore becoming a no-brainer.

However, FIRE practitioners in particular can benefit from careful selection of their case partners – insolvency practitioners, investigators, forensic analysts, counsel teams, and experts all have roles to play in contributing to the problem solving effort. By ensuring your case partners embrace diversity, your collective output is very likely to benefit from greater objectivity and reduced risk of conscious or unconscious bias, which may be the difference between winning and losing the case in hand.

The greater challenge will likely be creating the conditions which allow you and your case partners to operate in psychological safety – it is unlikely that there are any easy short-cuts here, as these conditions must exist at the intra and inter-organisational level to truly be felt. And this is where The Avengers come in – as we all know, they are an ostensibly diverse bunch; they tend to operate in high-pressure environments (just like FIRE practitioners); some come from rigidly hierarchical backgrounds; and yet they are psychologically safe and sound (except for the Hulk, of course) – one attribute stands out – they don't fight, they don't blame, they work through conflicts before it turns ugly: Iron Man and Captain America – different worldviews, forceful communicators, but when it comes to the crunch they see the value each brings to the table, they set ego aside, perform their roles, and save the world [13]. Bare this in mind when assembling your Avengers.

2 https://www.mckinsey.com/~/media/mckinsey/business%20functions/people%20and%20organizational%20performance/our%20insights/why%20diversity%20matters/why%20diversity%20matters.pdf
3 https://www.bayes.city.ac.uk/__data/assets/pdf_file/0009/510975/Arnaboldi_et_al_2020.pdf
4 See for example: https://www.apa.org/pubs/journals/releases/psp-904597.pdf
5 Mishcon de Reya have produced an insightful and brief webinar on this topic https://www.mishcon.com/news/events/current/dishonesty-uncovered-thinking-about-thinking
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10 https://hbr.org/2018/04/the-two-traits-of-the-best-problem-solving-teams
11 See for example the best practice guidance promoted by Legal CORE https://www.legalcore.co.uk/.
12 https://www.lawgazette.co.uk/practice/we-demand-results-coca-cola-threatens-to-deduct-30-from-fees-over-diversity/5107250.article
13 https://www.orangescrum.com/blog/5-team-work-lessons-from-team-avengers.html

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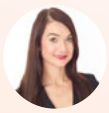

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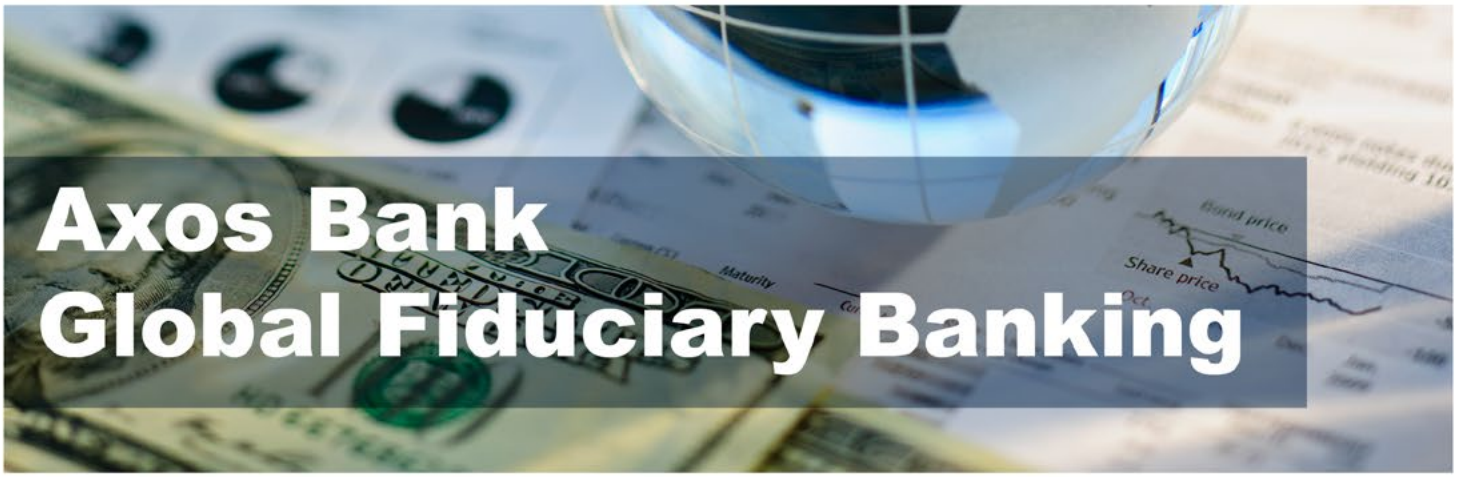

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2021: DEVELOPMENTS IN QUINCECARE

Authored by: Kit Smith – Keidan Harrison, and Justina Stewart – Outer Temple Chambers

The Supreme Court's 2019 decision in Singularis[1], the first in which a breach of Quincecare duty[2] was found, brought about a rejuvenated appetite for a duty that had lain relatively dormant for decades. This year's cases have further tested the limits and application of the duty.

For example, is the duty owed to creditors? Is it owed to non-customer beneficial owners of an account? How if at all can the duty be excluded by contractual terms? Further and significantly, the subject matter of cases also reflects the massive technological advances since the duty was first articulated, nearly thirty years ago. With those advances have come sophisticated APP [3] and phishing scams, and customers seeking redress for their losses by invoking the Quincecare duty against deep-pocketed financial institutions.

Below we summarise key 2021 decisions on Quincecare. Along the way, we illustrate some of the apparently divergent approaches across different jurisdictions and contemplate what may be in store for the Quincecare duty in 2022 and beyond.

England and Wales

Philipp v Barclays Bank UK Plc[4]

2021 started off well for financial institutions with January's decision in Philipp restricting the ambit of the Quincecare duty to internal fraud only, i.e. fraud by an authorised or trusted agent of the customer.

The case involved an APP fraud. Mrs Philipp sought to hold Barclays accountable for her loss on the basis that it had failed to comply with a duty to have in place policies and procedures for detecting potential APP fraud and to protect her from its consequences.

1 Singularis Holdings Ltd (in Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50

2 Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363. Per Steyn J (as he then was), this is the duty of a banker to "refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds … for believing that the order is an attempt to misappropriate the funds of the company". Following the decision of the English High Court in Hamblin v World First Limited [2020] EWHC 2383 (Comm), it seems that the Quincecare duty extends to financial institutions more widely (Hamlin involved a payment services provider)

3 "Authorised Push Payment" fraud. This is a scam involving the fraudster tricking a victim into willingly making large bank transfers to the fraudster

4 [2021] EWHC 10 (Comm)

Unfortunately for Mrs Philipp, HHJ Russen struck out her claim. He found that Mrs Philipp was in effect inviting the court to extend the Quincecare duty beyond the confines of attempted misappropriation of the customer's funds by the customer's agent, to situations involving ostensibly freely willed transactions of the customer herself. Such an extension (found the ourt) would elevate the Quincecare duty, which is subordinate or ancillary to the bank's primary duty to act on the customer's instructions, to a point where there would be too much doubt over the effectiveness of customers' instructions. Further, there is no clear framework of rules by reference to which such an extended duty might operate, and the purpose of the Quincecare duty really relates to testing the genuineness of the instruction to pay monies, not the genuineness of the payee[5].

Yet it seems this is not the last word on the matter; Mrs Philipp has been granted permission to appeal, with the appeal due to be heard in February 2022. Given the prevalence of APP fraud, this decision may have significant implications for financial institutions.

Stanford International Bank Ltd ("SIB") v HSBC Bank Plc[6]

April brought further good cheer for the financial institutions, with the Court of Appeal's decision in Stanford.

The case concerns the multi-billion dollar Ponzi scheme masterminded by the now notorious Robert Stanford. The Court of Appeal found that SIB had suffered no loss capable of sounding in damages for breach of the Quincecare duty in respect of c.£116m of the c.£118m claimed. That c.£116m had been paid to discharge SIB liabilities pre-liquidation. While it was the case that had the c.£116m not been paid out, there would have been more in the pot for creditors upon liquidation, HSBC did not owe a Quincecare duty to SIB's creditors, only to SIB – even if SIB was insolvent at the time of the payments. As the payments were balance sheet neutral, SIB had not lost anything[7].

The cheer for financial institutions was perhaps dampened when the Supreme Court granted SIB permission to appeal, with the appeal due to be heard in early 2022. We understand the grounds of appeal will provide the Supreme Court the opportunity to clarify whether recoverable losses for breach of the Quincecare duty are confined to payments that impact the customer's balance sheet or whether they can extend to payments reducing assets available for distribution in insolvency.

The Rest of the World

Scotland: Sekers Fabrics Limited v Clydesdale Bank[8]

Sekers was another APP fraud case. However, in a chink of light for victims of APP fraud, the Court of Session declined to strike out Sekers' claim.

While the court declined to find that the Quincecare duty extends beyond internal fraud [9], Lord Clark distinguished Philipp; the claimant's case there was much broader than the case here and earlier authorities bearing upon the bank's general implied duty of care, under its contract with the bank, to exercise reasonable skill and care, were not before the court[10]. In particular, Sekers involved pre-authorisation communications between Sekers and Clydesdale regarding whether the individual who had contacted the claimant was a genuine member of the bank's staff. The question therefore arose as to whether the existence of a duty to exercise reasonable skill and care may have application in the present context of the pre-authorisation communications with the bank, and if so, whether the bank, when giving advice, fell below the required standard. It remains to be seen if such reliance on a more "general" duty becomes a feature of these types of claims.

Hong Kong: Luk Wing Yan v CMB Wing Lung Bank Ltd[11]

Shortly after Philipp came Coleman J's judgment in the Hong Kong Court of First Instance in Yan. Ms Yan was deceived by a bank employee into transferring significant sums into the employee's personal account for the purpose of an investment with apparently fantastic returns. As the Judge wisely said, "[i]t is often said that if something seems too good to be true, it probably is". So it was.

Ms Yan founded her claim against the bank in negligence on the Quincecare duty. However, in line with Philipp, Coleman J found that the duty is limited to internal fraud. Ms Yan's contention "would require a significant extension to the previously described delineation of that duty" in that the bank's duty would arise when it has reasonable grounds for believing that the payment is meant to defraud the customer "in any way and by any person". This was significantly more onerous than the duty envisaged.

Malaysia: Lee Cheong Chee v HSBC Bank Malaysia Berhad[12]

In 2019, England's Court of Appeal in JP Morgan v Nigeria [13] declined to give summary judgment to JP Morgan on the basis that the Quincecare duty was negated or excluded by the terms of a depositary agreement. This left financial institutions wondering what words (if any) could achieve this purpose.

5 At [158]-[160], [172], [174]

6 [2021] EWCA Civ 535

7 [29] to [39]

8 [2021] CSOH 89 CA13/18

9 [21]

10 Including Hilton v Westminster Bank Ltd (1926) 135 LT 358 CA; Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 WLR 1555; Karak Rubber Co Ltd v Burden (No.2) [1972] 1 WLR 602, at 629. The defender was adopting just such an untenable position; Royal Products Ltd v Midland Bank Ltd [1981] 2 Lloyd's Rep 194 at 198.

11 [2021] HKCFI 279

12 [2021] MLJU 574

13 JP Morgan Chase Bank NA v Federal Republic of Nigeria [2019] EWCA Civ 1641

As Nigeria proceeds to trial (due in 2022), JP Morgan may wish they had been before the judge hearing the Malaysia High Court case of Chee v HSBC. This involved investments by Mr Chee in a fraudulent scheme. He relied heavily upon the Quincecare duty. However, his claim was struck out on the basis that the relationship between a bank and its customers is purely contractual. The court found that to impose onerous duties in tort on the banks would cause banking transactions to slow down or bring them to a stop entirely and customers are solely responsible for transactions; the bank's role is merely to facilitate them, seek authorisation and execute the order.

UAE – DIFC: Aegis Resources DMCC v Union Bank Of India (DIFC) Branch[14]

July brought the DIFC Court of First Instance decision in Aegis. This concerned a phishing scam, whereby the bank paid out money to a fraudster on emailed payment instructions, purportedly from its customer but in fact from a fraudster who had hacked into the customer's email system.

The court found that the bank acted outside its mandate in paying out on fraudulent payment instructions, the terms of the contracts between the parties not entitling the bank to do so if it acted negligently, which it did.

In addition, Aegis succeeded in relying on a breach of the Quincecare duty. On one level, this is understandable; as in Singularis there was a conflation of red flags so that the bank had reasonable grounds for believing the order was an attempt to misappropriate the company's funds [15]. However, this decision does appear to extend the ambit of the Quincecare duty beyond internal fraud (in the sense of being by an authorised or trusted agent of the customer) to phishing, which is carried out by a third party. It remains to be seen whether other jurisdictions will adopt this approach. If so, given the prevalence of phishing, this could have significant implications for financial institutions.

Of interest to financial institutions is also the bank's unsuccessful attempt to rely on various contractual terms to escape liability for breach of its Quincecare duty.

Isle of Man: RBSI v JP SPC 4 & another [16]

In 2020, the Isle of Man Court of Appeal found that, while there is nothing unusual in a bank holding customer accounts which it knows are designated by the bank in a way that indicates the funds are beneficially owned by persons other than the customer, there was no authority shown to the court which indicated that a duty of care in negligence was owed to those beneficiaries. Nor should the duty be so extended.

In January 2021, the Privy Council granted permission to appeal the decision. Should the decision go the claimants' way, by widening the pool of potential claimants, this could also have significant implications for financial institutions.

2022 and Beyond?

It is likely that Quincecare claims will remain a popular route for defrauded parties to pursue – the fundamental reason being that the claims circumvent the need for expensive asset tracing exercises that may have little or no prospect of success.

A raft of eagerly awaited cases are due to be heard in 2022, not least Nigeria, Stanford, RBSI and Philipp. All of the cases have potentially significant implications.

However, in our view, one of the most significant issues is the extent to which the Quincecare duty may adapt to the very different world to that existing nearly 30 years ago, a world of ever evolving and sophisticated frauds, in particular APP and phishing scams. It might be said that adaptation to the modern world would be consistent with the growing reliance on financial institutions to play an important part in reducing and uncovering financial crime and money laundering (a factor noted by Rose J (as she then was) in Singularis). On the other hand, it may simply be a matter of square peg, round hole, and new tools being required to address these issues – for example, by relying on a more general duty or the introduction of new legislation / regulatory obligations for financial institutions.

14 [2020] DIFC CFI 004

15 The payment process being applied for the two payments in question was outside the normal process for Aegis; the beneficiaries were parties with which Aegis had not previously dealt; the Bank was unable (as it was required to do by the contract) to identify whether the beneficiaries were parties with which Aegis was licensed to trade;Aegis had never previously sent money to Mexico; and there was no way of confirming that the payments related to payment connected with the manufacturing of steel

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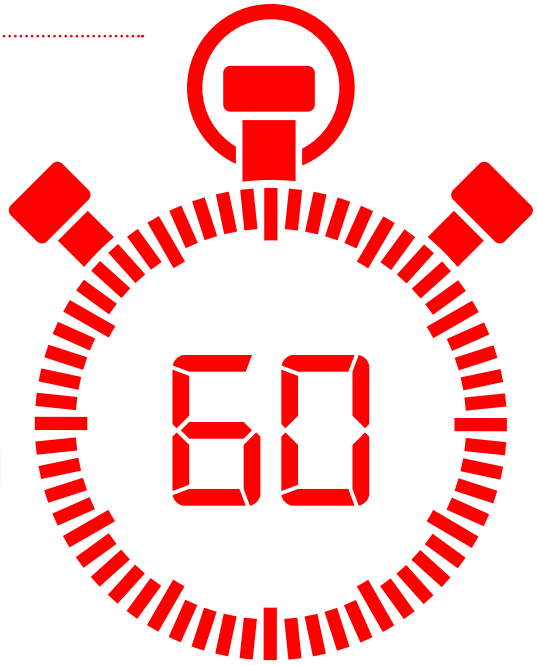

Q What would you be doing if you weren't in this profession?

A I started my career in international development and would have probably continued on that path had I not come across investigations. At the time, I was also considering applying to the Portuguese Foreign Ministry to pursue a career as a diplomat. But I think I would make a decent child's party planner. I am creative and visual by nature and have a blast conceptualizing my kids' ideas for their special day. I also do make a mean margarita so maybe an adjacent tequila bar to my party planning studio could be on the cards.

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

A Founding Raedas. It was a challenging time as I was only three months into my second maternity leave when I resigned from my previous firm. Not only were we setting up a company from scratch, but I was also starting my practice without the backing of an established brand. We were the new kids on the block. This meant we had to work twice as hard to earn a reputation for trustworthiness and skill - with both clients and talent. Looking at our growth in the past five years, from just the three of us in a sitting room to a top ranked firm of 25 fantastic staff, I have to pinch myself.

Q What is the easiest/hardest aspect of working on FIRE cases?

A I wouldn't say any case is easy, but the variety of work – both regional and topical - and doing it alongside top practitioners makes it very enjoyable. The hardest aspect of it is that I take it personally. My clients' wins are my own, which makes it difficult to switch off.

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

A Network. Asset recovery is mostly about the interplay between experts. The more people you get to know and the more you understand their practice and value, the more helpful you can be to your clients. And don't be afraid to do favors.

Q What has been the most interesting case you have seen in 2021?

A My most interesting case this year was a sanctions-busting matter partially focused on disproving evidence submitted by the other side. We worked tirelessly gathering and analyzing insane volumes of technical data, including trading records and months' worth of satellite imagery of VLCCs. I had never imagined I could dream so much about VLCCs, but it was a fascinating case nonetheless.

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

A The increased prominence of cryptoassets and how to address the complexities associated with tracing and recovering them.

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

A Play the piano.

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

A Music. And 50/52 weeks in the year, my husband and kids.

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

A Having recently seen her lifetime exhibition at the Tate, I would say Paula Rego (no, we are not related). Such a complex mind; she has a childlike, yet morally disturbing creativity. She has also been a bold messenger for societal problems and women's rights in Portugal for over five decades. And like me, she also calls the UK home. She has an incredible strength of character that comes through in her works. Having the opportunity to explore our country's history and shared experiences as women through her mind, would be a privilege.

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

A A lot of funk and rock; some blues, soul, classic, grunge, electronic and pop; a little folk (including fado), no drill.

Q What does the perfect weekend look like?

A Somewhere hot, preferably on a beach and with nowhere to be.

Q Reflecting on 2021, what have you been most grateful for?

A Our collective resilience. And great Portuguese wine.

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SUMMARILY JUDGING FRAUD:

BRINGING CLAIMS TO AN EARLY CLOSE

Authored by: Jack Watson – Wilberforce Chambers

The conventional wisdom when faced with a fraud claim is that the claim will not be subject to early termination whether by way of strike out or of summary judgment in the Claimant's favour. The nature of fraud claims, involving serious factual findings against the Defendant make them generally inappropriate for summary determination.

However, a number of decisions over the past year should serve to remind parties that even when faced with a fraud case, summary judgment and strike out are available to both Claimants and Defendants and in the appropriate case where claims or defences are inadequately pleaded or where the evidence is overwhelming, the court will be willing to bring the litigation to an early close.

Foglia v Family Officer Ltd

In Foglia v Family Officer Ltd [2021] EWHC 650 (Comm), the Claimant claimed to have been a victim of a fraud whereby €15 million had been misappropriated from a bank account in the Cayman Islands in the account of a company that was owned and controlled by the Defendant. The transfers were obtained through fraudulent telephone calls and a fraudulent fax purporting to instruct the transfer. The Claimant had managed, through freezing and non-party disclosure orders to recover around €11 million from third parties and brought a claim against the Defendant and his company for the balance.

Through a number of non-party disclosure orders, the Claimant was able to show that the instructions for the fraudulent transfer came from a phone purchased by an employee of the defendant and made from within 100 metres of his office. The Claimant also adduced evidence that the monies had been used to settle debts by the Defendant and his company. While the Defendant produced emails which he claimed evidenced his belief that the monies came from a new client, these emails were shown to have been falsified.

Cockerill J referred to the oft-cited authorities of Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] which has been approved by the Court of Appeal (inter alia in AC Ward & Sons v Catlin (Five) Ltd [2009] EWCA Civ 1098 at [24]) and noted the guidance from Sir Igor Judge PQBD in Wrexham Association Football Club v Crucialmove Ltd [2006] EWCA Civ 237 at [57]-[58] (later approved by Sir Terence Etherton CHC in Allied Fort Insurance Services Ltd v Ahmed [2015] EWCA Civ 841 at [81]) that a finding adverse to the integrity of one of the parties may in and of itself provide a compelling reason to allow a case to proceed to trial.

She therefore held that "bearing in mind the stage of the proceedings the approach of looking to see if any honest explanation is possible, as at the pleading stage, is almost certainly a sound cautionary check."

Having done so, she considered that the combination of the email fabrication, the mobile phone evidence and the use of the proceeds rendered any innocent explanation fanciful. The email fabrication was itself sufficient for summary judgment but the further two points were also very close to being sufficient in themselves. The Defendant had provided no satisfactory explanation of these points. While the Defendant raised a number of points which he stated required further investigation, he had not carried out any investigation for seven months and they did not affect the three "red flag" issues identified such that Cockerill J found that they amounted to little more than "surmise and Micawberism". She was therefore prepared, despite the considerable caution required in this area, to grant summary judgment. She further held that, even if she had not granted summary judgment, this was a case where she would have made

a conditional order which required the outstanding sum to be paid into the court funds office.

This case demonstrates that the courts will not shy away from granting summary judgment provided clear and uncontestable evidence is obtained against the Defendant which they are unable satisfactorily to explain.

Rahbarpoor v Suliman

In Rahbarpoor v Suliman [2021] EWHC 2686 (Ch), the Claimants brought claims that the Defendants had unlawfully trespassed on their property and misappropriated rental income from tenants. The Defendants relied upon a declaration of trust which appeared to bear a forged signature. The Claimants therefore sought summary judgment.

Clare Ambrose, sitting as a deputy judge of the High Court, referred to Foglia and noted that while a court must show very considerable caution in granting summary judgment where dishonesty is critical to the claim in question, especially where each side will effectively be saying that the other is lying, Foglia and Easyair do suggest that the court may properly be willing to grasp the nettle where there is firm, unanswerable contemporaneous evidence suggesting that the defence to the allegation of dishonesty has no real prospect of success. In this case while the judge held that the Defendants faced an "uphill battle" in defending their case, they should nevertheless be able to test the Claimants' evidence at trial.

However, in light of the "very strong evidence that the defendants have acted dishonestly regarding this property and that it is highly improbable that they will successfully defend the claim" together with the inconsistent evidence put forward by the Defendants, the judge was prepared to order that the Defendants give security for the Claimants' costs.

King v Stiefel

At the other end of the spectrum, in King v Stiefel [2021] EWHC 1045 (Comm) the Court emphasised the importance of clear pleading in fraud cases. The Claimants had previously sought to bring fraudulent misrepresentation claims against the Second to Fourth Defendants which they had then discontinued on day 10 of a 20-day trial.

This led to what Cockerill J described as "a multiplicity of litigation" which "must inevitably put any observer with a taste for nineteenth century fiction in mind of the infamous Jarndyce case."

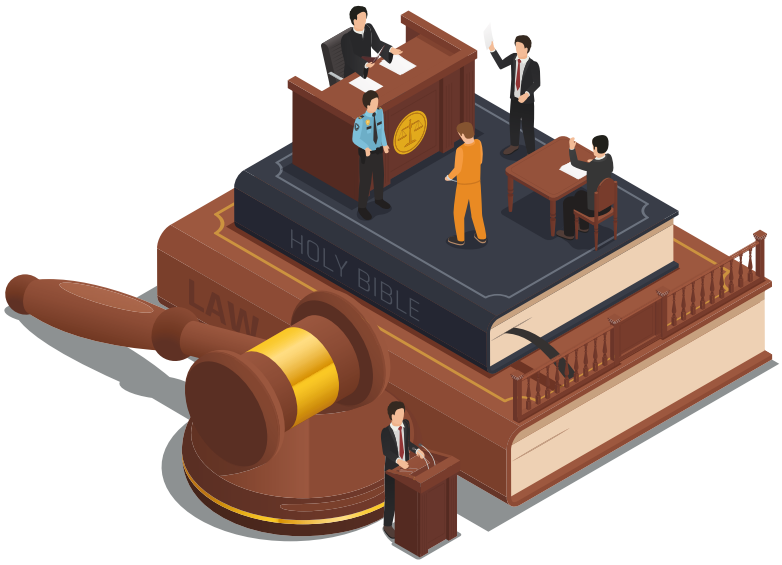
The Claimants here alleged that there was a conspiracy between a number of different parties which caused them to lose their misrepresentation claim.

The Defendants' application for strike out/summary judgment was successful. Cockerill J noted that fraud claims would be struck out where the particulars of claim were inadequate to support the claims being made: AAI Consulting Ltd v FCA [2016] EWHC 2812 (Comm) and Cunningham v Ellis [2018] EWHC 3188 (Comm). She noted that clear pleadings had three purposes (a) to enable the defendants to know the case they were required to meet; (b) to enable the parties to prepare for trial and (c) importantly, to perform an audit of the completeness of the party's cause of action or defence. None of these objectives were met in the present case and, following a detailed exposition of the pleaded case, Cockerill J held that the particulars were structurally fatally flawed, abusive and lacking in pleadable substance.

Particular attention should also be paid to the postscript at paragraph 456 onwards in which Cockerill J noted that the proceedings had been characterised by unpleaded and unsubstantiated allegations of wrongdoing against both the Defendants and their legal team. She noted that such conduct was becoming too common and reiterated the Commercial Court Guide's expectation of a high level of co-operation and realism from parties' legal representatives.

Conclusion

Taken together these cases demonstrate the importance of parties clearly setting out their case at an early stage in fraud cases. If a fraud claim is to be maintained it must be clearly pleaded and, where strong evidence of dishonesty is identified, a party should carry out the investigations necessary in order to articulate their explanation at an early stage. Parties cannot simply wait for trial in the hope that something will turn up – in doing so, even as Defendants, they run the risk that the court will use its powers to bring the proceedings to a close or will use their case management powers to make leave to defend the claim conditional upon a significant payment into court.



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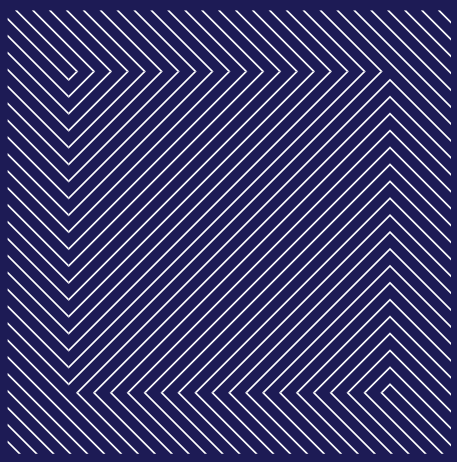

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AKHMEDOVA V AKHMEDOV – A CASE STUDY IN DEALING WITH DIFFICULT DEFENDANTS

Authored by: Anthony Riem and Andrew McLeod – PCB Byrne

In this article, Anthony Riem and Andrew McLeod, Senior Partner and Associate at the London firm of PCB Byrne LLP, review the recent litigation in the judgment of Mrs Justice Knowles in the Family Division of the High Court in Akhmedova v Akhmedov 2021 EWHC 545, [2021] 4 WLR 88 (Fam), and the lessons that can be learned about dealing with a recalcitrant defendant in civil fraud proceedings. Such defendants seek to ignore their obligations to the Court or even actively frustrate the Court's orders and processes. That type of litigation conduct might be seen in the short term to have benefits, in disrupting or even derailing claims against them. Yet the various powers of the English court to grant interim remedies enable it to interrogate a defendant's claims and if necessary find other methods to compel a defendant to comply with their obligations. These present not only the ability to counteract a defendants' efforts to defeat the court's processes, but the opportunity to convert that litigation conduct into a successful outcome at trial.

Introduction

"All happy families are alike, each unhappy family is unhappy in its own way. With apologies to Tolstoy, the Akhmedova family is one of the unhappiest ever to have appeared in my courtroom".

Thus began Mrs Justice Knowles in her judgment in Akhmedova v Akhmedov [2021] EWHC 545, [2021] 4 WLR 88 (Fam). Her quote is more than a nod to the parties' Russian heritage; it reflects the troubled history of a high-profile divorce where every step was taken to try to prevent the enforcement of the court's earlier judgment in favour of Tatiana Akhmedova. In the course of the proceedings before her Ladyship, Temur Akhmedov was found to have "lied to this court on numerous occasions; breached court orders; and failed to provide full disclosure of his assets" and to be "a dishonest individual who will do anything to assist his father" in his scheme to put every penny of his wealth beyond Ms Akhmedova's reach[1].

Yet despite such aggressive and obstructive litigation conduct, Ms Akhmedova was overwhelmingly successful against respondents who were all found to have deliberately failed to comply with their disclosure obligations[2]. That result was the culmination of over a year of procedural wrangling in courts, both domestic and foreign, against the Respondents and various third-parties. In particular, Temur

1 Akhmedova v Akhmedov & Ors (Rev 1) [2021] EWHC 545 (Fam), [2021] 4 WLR 88 at [6].

2 Ibid, [130].

had been made subject to a suite of civil orders to compel or obtain disclosure. Each of these contributed in some small way to the documents at trial and ultimately the judgment against him.

This article presents the proceedings against Temur as a case study in the use of interim applications and the English court's coercive powers to compel such a defendant to produce documents that may be used to obtain a judgment against them.

Background

The background to the case rests in the marriage between Ms Akhmedova and Farkhad Akhmedov in Russia in 1993. Ms Akhmedova issued a petition for divorce and by a judgment handed down on 15 December 2016, Mr Justice Haddon-Cave (as he was then) awarded Ms Akhmedova an amount equal in value to the total sum of £453,576,152.

Despite having submitted to the jurisdiction, Mr Akhmedov failed to appear at the financial remedies hearing[3]. Instead, immediately before and during the trial he transferred substantially all his assets into a Liechtenstein trust structure. Mr Akhmedov then entered into a global effort to resist enforcement, describing it publicly as a war that he would "continue to fight for as long as it takes, and in whatever jurisdiction necessary" to resist a judgment he graphically described as "worth as much as toilet paper".

Ms Akhmedova's claims in England

Ms Akhmedova's claims were aimed at obtaining English judgments against third parties who had received assets from Mr Akhmedov as part of his evasionary scheme, as transactions made for a purpose of frustrating or impeding enforcement (under s.423 of the Insolvency Act 1986 and/or s.37 of the Matrimonial Causes Act 1973). For his part, Temur Akhmedov (one of the couple's sons) had received approximately US$100 million from Mr Akhmedov and his entities, as well as the beneficial ownership of a valuable central Moscow property with a value of £6.58 million, for no consideration and for the purpose, at least in part, of protecting them from enforcement by Ms Akhmedova against Mr Akhmedov.

Breach of disclosure obligations

The starting point was Temur's deficient disclosure. In July 2020, he served disclosure which contained none of his own documents[4], save for two discrete emails from 2013 (which he believed to be helpful to his case)[5], and did not cover most of the period in issue[6]. His disclosure statement explained that Temur no longer had relevant documents in his control because they had been destroyed, ostensibly for "security reasons"[7].

It belied belief that this non-disclosure was anything but deliberate. This approach is not unusual, with a defendant perhaps thinking they can frustrate a claimant's case.

Regardless, the lack of disclosure provided an opening for the use of the Court's other powers to expose the true position.

Interim application: Forensic Examination Order

Immediately following Temur's disclosure and his claim not to be able to access relevant documents, Ms Akhmedova applied for and obtained a delivery-up order, requiring that Temur deliver up his electronic devices, and access to four Google-hosted email accounts, to an independent forensic expert (Stroz Freidberg, an Aon subsidiary). Such an order is available in circumstances where the Court is seeking to ensure a party is complying with their disclosure obligations, and to confirm whether documents said to have been irretrievably destroyed can in fact be retrieved.

Temur's response was to further frustrate the order[8]. Having purported to arrange his devices to be delivered to Aon by DHL, the parcel "mysteriously disappeared prior to reaching DHL's warehouse"[9]. Temur later admitted to having masterminded a plan to use an employee to "lose" a parcel containing an old device, so as to provide a false excuse for his non-compliance with that order[10].

He also claimed to be unable to remember the password or recovery details for his Google-hosted email accounts. This was despite Aon's investigation revealing that Temur had accessed and deleted one of his accounts after the making of the Forensic Examination Order[11]. Regardless, another route to the emails would be required.

While Google were willing to produce non-content information (i.e. email header information) if served with a US subpoena, it declined to produce content information (i.e. the emails themselves) unless Temur followed their account recovery process – which he was "unable" to do. A motion to the US District Court was brought seeking an order compelling Google to produce the emails in the named accounts to Aon. That application was made with the assistance of the English Court – first, Mrs Justice Knowles ordered

3 Akhmedova v Akhmedov & Ors (Injunctive Relief) [2019] EWHC 1705 (Fam) at [7].
4 Akhmedova v Akhmedov & Ors (Rev 1) [2021] EWHC 545 (Fam), [2021] 4 WLR 88 at [134].
5 Akhmedova v Akhmedov & Ors [2020] EWHC 3005 (Fam) at [23].
6 Akhmedova v Akhmedov & Ors (Rev 1) [2021] EWHC 545 (Fam), [2021] 4 WLR 88 at [134].
7 Ibid, [133].
8 Ibid, [138].
9 Ibid, [138].
10 Ibid, [141](c).
11 Ibid, [138].

Temur to execute signed mandates authorising and instructing Google to release his emails to Aon; then, when Google sought to argue that the English court did not need the documents, her Ladyship wrote a strongly worded note to the US District Court that confirmed English court required its assistance in producing the emails. Google were finally compelled by the US District Court to produce the emails in Temur's accounts.

Interim application: worldwide freezing order

The purpose of a worldwide freezing order is only intended to prevent a defendant from putting assets beyond the reach of possible judgment creditors. However, the Court's jurisdiction also carries with it the power to make whatever ancillary orders are necessary to make it effective, including disclosure information about assets. In fraud proceedings, the value of this ancillary disclosure cannot be overlooked.

In this case, a without notice worldwide freezing order was granted against Temur's assets up to US$120 million and – importantly – ancillary orders compelling Temur to disclose of his worldwide assets, after Ms Akhmedova learned that, in steps deliberately concealed from both Ms Akhmedova and the Court, Temur dissipated his interest in the Moscow Property by transferring it back to Mr Akhmedov shortly following proceedings being commenced against him in 2020 (the "WFO").

That ancillary disclosure was of some significance. In particular, it enabled other deficiencies in Temur's disclosure to be identified – in particular, his bank account records identified the existence of further email and storage accounts with Google and Amazon that had not been disclosed[12].

In addition, the WFO resulted in Temur seeking to mortgage a London property he beneficially owned, and which he claimed was his only asset of value, for the purpose of financing his participation in the proceedings. A variation to the WFO was agreed which made Temur's ability to raise funds conditional on making asset disclosure – this functioned as a mechanism to compel his compliance with the ancillary disclosure order.

Interim application: Anton Piller / Search Order relief

Pursuant to Temur's variation to the WFO, he was required to disclose documents relating to the funding. In late October 2020 – barely two months out from the trial – Ms Akhmedova received from Temur's solicitors a valuation report with photographs of the flat showing a number of electronic devices in Temur's study that plainly had not been disclosed by Temur pursuant to the Forensic Examination Order.

Anton Piller / Search Order relief is a draconian measure [13] with the purpose of preservation, not disclosure – however, while evidence is seized to prevent its destruction (and not per se its inspection or), it enables access to a source of relevant evidence that otherwise would not have been disclosed.

The execution of the search order on Temur's property did exactly that. A significant number of computers, phones, and storage devices – 47 in number – were found when the Search Order was executed, which contained "a mass of relevant documents"[14]. Amongst them were documents which countered Temur's claim not to have been involved in his father's contemptuous conduct[15], and the Order exposed another instance of Temur's contemptuous conduct.

Conclusion

The case showed how the Court's powers can be used by a claimant seeking to get around a defendant's refusal to comply with disclosure obligations. Successive interim applications create momentum and while each will have a distinct purpose, they inevitably become interlinked both in narrative and effect, with disclosure from one assisting another – sometimes, as with the Search Order, in unintended ways. When overseas defendants introduce an international angle to proceedings, there may be a wide range of other options available in other jurisdictions.

However, these efforts are ultimately a race against the clock. Indeed, efforts to obtain disclosure can play into a defendant's hands if they seek to slow down progress or even use them as the basis to seek an adjournment under the guise of needing time to comply. Claimants need to balance the value of obtaining these documents against the risks of prejudicing their ability to proceed with a trial, and the need to maintain momentum in the proceedings. That momentum is crucial not simply to exert pressure on defendants, but to maintain the stamina and willingness of all participants, when to do so feels like (with hopefully a final apology to Russian literature) its own personal Crime and Punishment.

Ms Akhmedova was represented by PCB Byrne LLP (Anthony Riem, Rachel Turner, Andrew McLeod, Catherine Eason, Caitlin Foster) and funded by Burford Capital.

12 Ibid, [139].

13 JSC BTA Bank v Ablyazov (No 1) [2015] UKSC 64; [2015] 1 WLR 4754 at [19].

14 Akhmedova v Akhmedov & Ors (Rev 1) [2021] EWHC 545 (Fam), [2021] 4 WLR 88 at [136].

15 Ibid, [280].

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ESG DOMINATES THE CORPORATE AGENDA IN 2021

Authored by: Tristan Yelland – Grant Thornton

If 2020 was the wake-up call that thrust the ESG movement into mainstream society's consciousness, then 2021 was the year in which it came to dominate the corporate and regulatory agenda in the UK and much of Europe. This has significantly increased pressures on ESG targets and results, which will inevitably lead to a greater risk of fraud.

The rapidly evolving ESG landscape

Although it had been gaining momentum for a number of years, until recently the ESG movement was often considered the preserve of activists or niche investors. However, the Covid-19 pandemic, together with an increasing number of extreme weather events, have demonstrated how acutely an environmental crisis can impact economies, businesses, and societies at large. This awakening has extended beyond the climate crisis to social issues, embodied by movements such as Black Lives Matter.

As a result, a company's ethical values, environmental footprint and standards of governance have become defining issues for investors, consumers and regulators alike. In response, ESG issues have been top of mind for boards and managers in 2021, who have had to grapple with the rapidly evolving needs and expectations of their stakeholders.

This was reflected in a recent Grant Thornton survey of 600 UK businesses, in which respondents considered a strong ESG strategy to be a significant factor in their company's:

- **Overall value creation (92%)**
- **Ability to obtain funding (91%)**
- **Attractiveness to investors (90%)**

However, although it seems right that businesses should be rewarded for doing the right thing and making a positive contribution to society, the rapidly evolving ESG landscape has also created an environment that satisfies all three elements of the classic "fraud triangle" – pressure, opportunity and rationale.

Pressure

It is readily apparent that companies are coming under increasing pressure to meet the ESG expectations of both their internal and external stakeholders. This means that boards and CEOs have to consider the welfare of the planet, their customers and their employees in ways considered unimaginable just a few years ago. Failure to do so will be met with a wave of negative publicity, such as that which has dogged online fast fashion retailer Boohoo Group Plc for much of the past 12 months, in the wake of revelations about the working conditions in its supply chain.

NGOs and activist investors are increasingly challenging companies and holding them to account for what they consider to be sub-standard behavior, resorting to litigation if necessary. This led to a groundbreaking judgement in May 2021, in which the Hague District Court ordered Royal Dutch Shell Plc to reduce its worldwide CO2 emissions by 45% by 2030. More recently, in October 2021, miner BHP Plc suffered a shareholder rebellion against its "climate transition action plan" [1], based on concerns regarding its scope and the alignment of its target with the latest climate science [2].

It is therefore unsurprising that boards and CEOs should feel pressure to respond to the changing demands of their stakeholders. However, actually

1 https://www.ft.com/content/09fb8916-2bda-4d8f-8f72-c0fc3198c0dd

2 https://www.ft.com/content/79c73edf-9b1e-4852-ad6e-91fdae0aca36

doing this in practice may prove to be incredibly difficult.

This is particularly true for those businesses and industries whose operating models are not intrinsically "ESG friendly", but who are still facing calls from shareholders to improve their ESG performance, while maintaining profitability.

Opportunity

Faced with the pressure to improve their ESG performance, boards and CEOs may be tempted to artificially enhance their ESG credentials. They could either do this through a concerted PR campaign ("greenwashing") or by manipulating their underlying ESG data. Two key factors create ample opportunity to do this.

Firstly, although 2021 saw both the FCA and the Department for Business, Energy & Industrial Strategy launch consultations on mandatary climate-related financial disclosures, as yet there are no common ESG and sustainability reporting frameworks in place. This makes it difficult for investors, consumers and other stakeholders to assess an organization's true sustainability and ESG performance. It also means that any ESG control environment will, by definition, be immature and vulnerable to threats.

Secondly, within whatever ESG reporting framework is chosen, there are no natural checks on the integrity of the underlying ESG data. This contrasts with the financial side of the business, for which one fundamental principle will always apply: Thanks to double-entry bookkeeping, financial crimes and manipulation will always leave a trace that can be detected and remedied. This is because, with double-entry book-keeping, every debit must have an equal and corresponding credit. This balancing mechanism is an effective fraud-detection tool, which can be used to identify and mitigate threats.

By contrast, ESG reporting and monitoring relies on a single-entry recording system (if it is properly recorded at all). As this is not a self-balancing system numbers can be easily manipulated, presenting plenty of opportunities for fraud.

Rationale

Rationale is often the most personal aspect of the fraud triangle.

The majority of people commit financial frauds on the basis of wrong treatment in the workplace, personal hardship, or because senior management is also committing fraud.

However, while all of these are applicable to ESG fraud (particularly if remuneration is linked to ESG performance) additional factors may also apply.

In situations where companies are facing pressure to improve their ESG performance, while maintaining profitability, individuals may feel that they have no choice but to resort to fraud – rather than invest in making fundamental changes to their organization's infrastructure and operating models (which would affect profit), they can simply manipulate ESG data, relying on the inherent weaknesses of sustainability reporting to do so.

Likewise, in a world where consumers are more than happy to hold corporate decision makers to account, doing whatever it takes to ensure that newly made Net Zero commitments (47 of the FTSE100 had signed up to net zero goals by the start of COP26 [3]) are achieved provides further motivation for committing ESG fraud.

Conclusion

Climate change and sustainability dominated the news for much of 2021. This culminated in the highly anticipated COP26 conference (which had just started at the time of writing), at which it is hoped a number of ambitious emission reduction plans will be presented and agreed. While this will be critical for bridging the 'Emissions Gap' by 2030, it will also place even more pressure on companies to improve their ESG performance. Looking forward to 2022 and beyond, this could well lead to an increase in ESG frauds.

3 https://www.ft.com/content/7d9cfef0-963b-487f-95a5-0e265d0eb25d

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FREEZING IN THE CARIBBEAN

Authored by: Paul Kennedy and Nienke Lillington - Campbells

"Black Swan BVI;

Siskina must die;

Freestanding Mareva;

Test from Ninemia;

Privy Council states the law;

We can't take it any more!"

("We Didn't Start the FIRE" – With apologies to Billy Joel)

There has been more heat than light in the area of freezing injunctions in the British Virgin Islands (the "BVI"), in particular in recent years so it comes as a welcome relief that the Privy Council have cast a cold eye over the law in Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24 (the "Judgment"). The Judgment is, as recognised by his Lordship Sir Geoffrey Vos, "ground-breaking" (para. 221).

Although the Judgment provides definitive clarity in relation to some points of uncertainty in the BVI not all of the same points arise in relation to other Caribbean jurisdictions, such as the Cayman Islands. Nevertheless, their Lordships' statement in the Judgment as to the purpose and scope of interim relief will undoubtedly be useful and relied upon for its general statement that the court is able to modify existing practices to provide effective remedies in changing circumstances, and its more specific, purposive, approach to the use of freezing injunctions.

The background to the Judgment is as follows: the claimant (appellant), Convoy Collateral Limited, sought a freezing injunction in the BVI in support of ongoing proceedings in Hong Kong against the defendant (second respondent), Mr Cho. The Hong Kong proceedings were capable of resulting in a judgment for damages equivalent to US$92 million. A freezing injunction was sought against both Broad Idea International Limited ("Broad Idea") (the first respondent), a BVI company in which Mr Cho held a 50.1% stake, and Mr Cho personally. Whilst Broad Idea was a company incorporated in the BVI, Mr Cho was habitually resident in Hong Kong.

The Privy Council was asked to consider two questions:

1) whether, under the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the "EC CPR") the court has power to authorise service on a defendant outside of the jurisdiction of a claim form in which a freezing injunction is the only relief sought (the "Service Out Issue"); and

2) whether the High Court of the BVI has power to grant a freezing injunction against a party over which it has personal jurisdiction, to assist enforcement of a prospective (or existing) foreign judgment (the "Freezing Issue").

This article will focus on the Freezing Issue. Nevertheless, it is noteworthy that the Privy Council found that, regarding the issue of service out of the jurisdiction, the House of Lords' judgment in The Siskina must prevail in circumstances where the wording of the EC CPR is materially similar to the English rules of court which were applicable at the time of The Siskina.

EC CPR 7.3(1)(b) provides that "A claim form may be served out of the jurisdiction if a claim is made (…) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction".

As a consequence, the court could not authorise service out of the jurisdiction on Mr Cho. The Privy Council noted that "if a wrong turning has been taken, the appropriate means to getting the law of the BVI back on track is by amending the EC CPR" (para. 2 of the Judgment). In this regard the Privy Council found that the appellant could not be "third time lucky".

In relation to the Freezing Issue, Lord Leggatt (in ghostbusting mode) said the following: "The shades of The Siskina have haunted this area of the law for far too long and they should now finally be laid to rest." With those words, the Privy Council ended the 44-year reign of the House of Lords decision in Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA [1979] AC 210, better known as "The Siskina". The Siskina was authority for the proposition that the court had no power to grant an interlocutory injunction unless it was ancillary to a cause of action. In that regard, the Privy Council stated that: "the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound" (para. 120 of the Judgment).

The Privy Council found that The Siskina was inconsistent with section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act (the "BVI Act"), which was applicable in the circumstances of the Broad Idea proceedings. Section 24(1) of the BVI Act gives the BVI Supreme Court (High Court) the power to grant an injunction by "an interlocutory order (…) in all cases in which it appears to the court or judge to be just or convenient that the order should be made (…)". Lord Leggatt noted that it would be difficult to cast the power to grant an interlocutory order in wider terms, and that (in any event) there was no limit on the power of the courts with equitable jurisdiction to grant injunctive relief, except where restrictions had been imposed by statute.

Consequently, Lord Leggatt concluded that, in circumstances where the BVI Act did not impose limits on the court's power to grant a freezing injunction, any impediment could only be based on established practice.

Moving on to consider 'established practice', Lord Leggatt concluded that on the basis of a "true analysis" freezing injunctions are not ancillary to a cause of action, in the sense of a claim for substantive relief (para. 83 of the Judgment). Instead, the purpose of the injunction is "to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced" (para. 89). Once this is appreciated, "there is no reason in principle to link the grant of such an injunction to the existence of a cause of action" (para. 90). What matters is "that the applicant has a good arguable case for being granted substantive relief in the form of a judgment that will be enforceable by the court from which a freezing injunction is sought" (para. 92).

Although Sir Geoffrey Vos considered the Privy Council's decision ground-breaking, he also deemed the majority's decision obiter, on the basis of the Judicial Committee's unanimous decision in relation to the Service Out Issue. Indeed, for future purposes the Judgment became 'superfluous' to the BVI insofar as the legislature of the BVI had, by the time the Judgment was handed down, intervened to provide the Eastern Caribbean Supreme Court statutory powers to grant interim relief in support of proceedings commenced in a foreign jurisdiction (per s. 24A(1) of the BVI Act).

Similar developments had previously occurred in the Cayman Islands where s. 11A of the Grand Court Act was enacted as a consequence of the Cayman Islands Court of Appeal decision in VTB Capital plc v Universal Telecom Management [2013] 2 CILR 94. Consequently, in the Cayman Islands, the ability of the Grand Court to grant freezing injunctions in aid of proceedings commenced in foreign jurisdictions, has been established for some time insofar as such proceedings are capable of giving rise to a judgment which may be enforced in the Cayman Islands. Nevertheless, the Privy Council's decision will undoubtedly be highly persuasive and eagerly followed in circumstances where there is a practical need for effective remedies in a world where assets are increasingly easily dissipated.

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2021: DEVELOPMENTS IN CUM-EX

Authored by: Syed Rahman – Rahman Ravelli

Syed Rahman, partner at financial crime specialists Rahman Ravelli, examines this year's significant events in the share-selling scandal

The past 12 months have seen matters come to a head on a number of issues in relation to Cum-Ex.

Putting it in the most straightforward of terms, Cum-Ex describes the trading strategies (also known as arbitrage) that were used to obtain dividend withholding tax refunds on dividend payments. Shares were traded rapidly with ("cum") and without ("ex") dividend rights, so that the identity of the actual owner was concealed. An agreement would be made to sell a company stock before the dividend was paid out, but it was not delivered until after the dividend had been paid. This enabled both parties to claim tax rebates, even though that tax had only been paid once, at most. Huge volumes of rapid trading between various parties gave the impression of numerous owners, creating large profits from tax rebate claims. Losses to European treasuries attributed to Cum-Ex are, according to the most recent research, estimated to be approximately €150 billion.

But while the use of Cum-Ex was uncovered by German authorities in 2012, investigations have only gathered pace in recent years. And 2021 has been, arguably, the most significant year in terms of those investigations.

Germany

German authorities believe Cum-Ex cost the country's treasury around €10 billion in lost revenue.

The country is one of the most active jurisdictions when it comes to Cum-Ex prosecutions and recovery of lost funds, with over 100 banks under investigation in Germany

This year saw the German Federal Court of Justice confirm the 2020 decision of the Bonn District Court that Cum-Ex transactions were criminal tax evasion and that the confiscation of €176 million as the proceeds of crime from Hamburg-based private bank M.M. Warburg was justified.

The Federal Court rejected the argument that the two British bankers convicted at the District Court were merely exploiting a tax loophole in German tax legislation. According to the Federal Court, the defendants "deliberately" asked the German authorities to reimburse allegedly-paid capital gains tax, by filing "untruthful" tax returns – which showed a criminal intent to commit tax fraud. The federal judges stated that there had been no such loophole in the legislation at the time.

It is now established in German case law that Cum-Ex is tax fraud – a development that will surely assist further prosecutions in the country. Just a month before this Federal Court ruling, Bonn District Court was also at the eye of the Cum-Ex storm when it jailed a former M.M. Warburg executive for five and a half years. He had been charged with 13 counts of aggravated tax fraud, committed between 2006 and 2013, in connection with Cum-Ex trading.

While this decision may yet be challenged in the Federal Court, the case is a clear sign of German authorities' intent to take a hard line regarding those it believes were to blame for Cum-Ex's financial consequences. February 2021 saw the German authorities ask INTERPOL

to issue a Red Notice against New Zealand citizen Paul Mora for his involvement as a London-based banker in Cum-Ex. The following month, the trial began at Wiesbaden of German tax lawyer Hanno Berger, who has been called one of the architects of Cum-Ex. Germany had sought Berger's extradition from Switzerland in what was another sign of its determination to move decisively against those involved in Cum-Ex.

UK

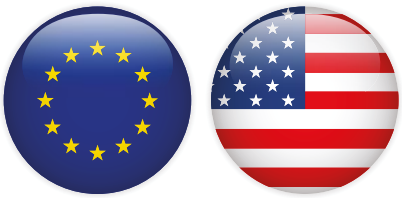
The UK does not have a withholding tax system relating to the payment of dividends. As a result, it has not lost money to Cum-Ex. But the UK legal system has already played a prominent role in investigations relating to Cum-Ex. A number of 2021 cases could prove pivotal in future Cum-Ex prosecutions.

In January 2021, the High Court upheld the validity of the European Arrest Warrant (EAW) after the UK's departure from European Union. It rejected an application by hedge fund worker Vijaya Sankar, who was challenging the EAW issued against him by German Cum-Ex investigators. The court ruled that extradition could not be halted due to Brexit, as the EAW was issued before Britain left the European Union and the UK and EU had agreed that the UK would honour EAWs issued during the Brexit transition period. It is a case that illustrates that although Britain is no longer an EU member, individuals based here that may be targeted by foreign authorities investigating Cum-Ex cannot expect to be immune to the possibility of being extradited.

In May 2021, the UK's Financial Conduct Authority (FCA) fined the broker Sapien Capital £178,000 – under Section 206(1) of the Financial Services and Markets Act 2000 and FCA Principles 2 and 3 - for money laundering failings connected to Cum-Ex trading.

Sapien was alleged to have acted as a broker for over-the-counter (OTC) trades worth £2.5 billion in Danish equities and £3.8 billion in Belgian equities The FCA claimed that these trades were conducted to improperly gain tax rebates via Cum-Ex. It was a significant case as it was the first Cum-Ex action taken by a regulator that is not based in a country affected by the share-selling scandal. The FCA's action was also notable as it did not directly address the legality of Cum-Ex. Instead, it focused on Sapien's failure to meet its procedural obligations. This tactical approach gave the FCA a more clear-cut opportunity to penalise the company than would have been possible if it had focused on the Cum-Ex trading itself.

May 2021 also saw the High Court dismiss a civil action for fraud damages brought by the Danish tax authority SKAT against approximately 100 defendants. In this case, SKAT v Solo Capital Partners LLP & Ors [2021] EWHC 974, the court found that the common law "revenue rule" prevents an English court enforcing a foreign public, revenue or penal law. It was the first case to determine that the revenue rule could apply in such circumstances and may restrict authorities' attempts to recoup cross-border Cum-Ex losses.



Europe and the United States

In 2020, the European Banking Authority stated that the identification and tackling of fraudulent tax schemes such as Cum-Ex was hampered by there being little coordination between EU member states' authorities and a lack of harmonised tax legislation.

But July 2021 saw the EU Commission announce that it was assessing whether to introduce a standardised withholding tax relief system to help prevent practices such as Cum-Ex.

It said it was also looking at how to improve cooperation and the exchange of information between tax administrations and regulators.

The announcement in itself is a sign that the Commission is prepared to take action. It should also be noted that 2021 has seen the creation of the European Public Prosecutor's Office (EPPO), which may lead to more coordinated enforcement action against those believed to have been involved in Cum-Ex or other trading schemes.

While 2021 has seen Germany and the UK taking significant action regarding Cum-Ex, other countries in Europe – notably Denmark and Austria – have also been putting time and resources into their own investigations this year. In the US, law enforcement agencies have brought multiple cases that touch upon Cum-Ex issues. There is a strong possibility that Cum-Ex cases will eventually be brought by the Department of Justice or Securities and Exchange Commission.

The results of such activities in these countries may well become apparent in the next 12 months.

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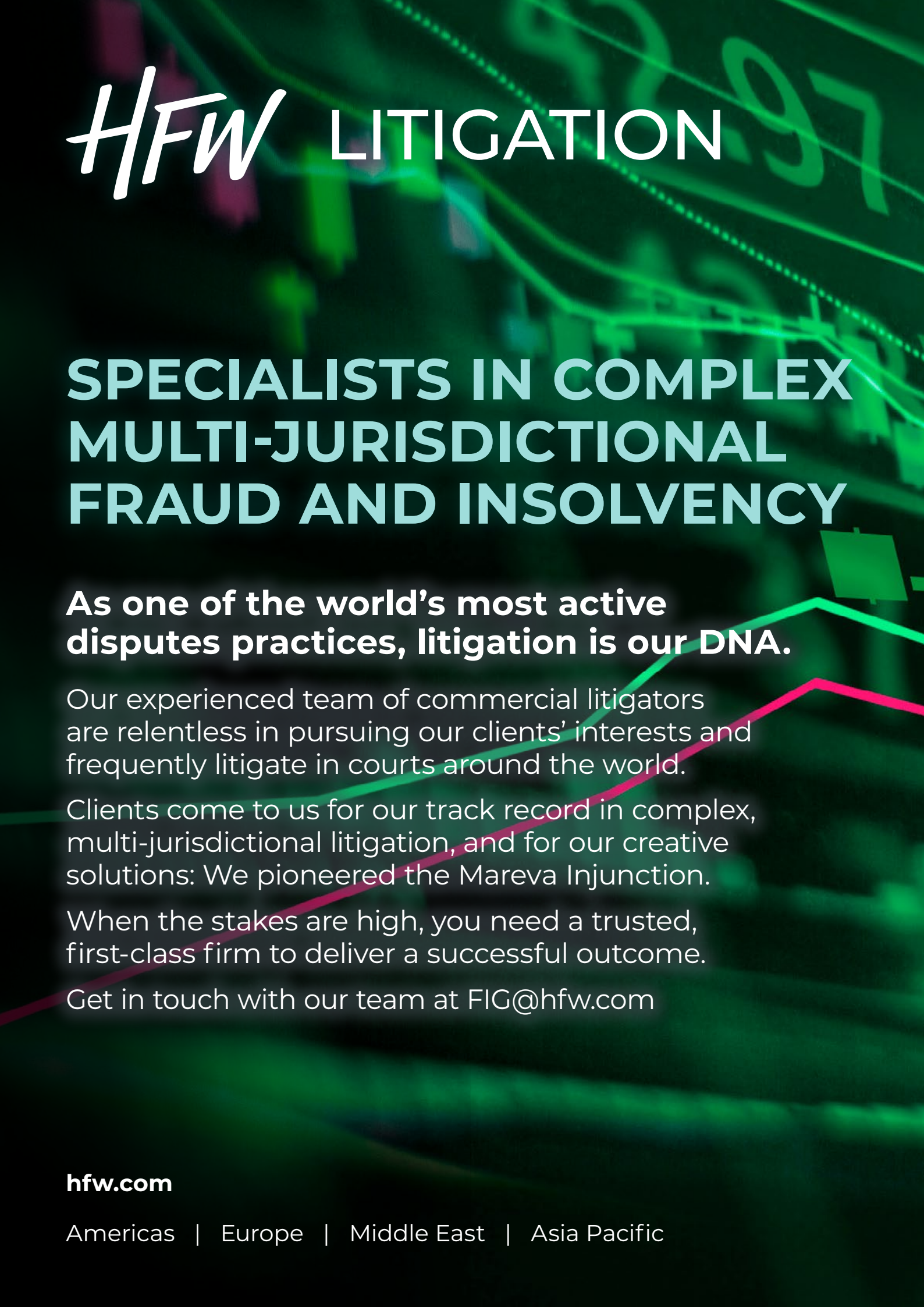
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THE EXPLOITATION OF COVID-19 GOVERNMENT SUPPORT SCHEMES:

Authored by: Simon Jerrum and Beatrice Bray – HFW

1. INTRODUCTION

In response to the economic disruption caused by the COVID-19 pandemic, the government rapidly introduced several large-scale schemes to support vulnerable businesses. Two of the most utilised government support measures were the Coronavirus Job Retention Scheme (**'CJRS'**) and the Bounce Back Loan Scheme (**'BBLS'**). Whilst these measures have provided a lifeline for many businesses, they have also facilitated an increase in fraudulent activity. This is evidenced by a reported 24% rise in fraud during the pandemic.[1] Now that these measures have ended, what are the government proposals for how to hold those involved in the fraudulent exploitation of these schemes accountable?

2. FRAUDULENT EXPLOITATION OF GOVERNMENT MEASURES

2.1 Coronavirus Job Retention Scheme

The CJRS was introduced on 20 April 2020. It supported businesses by paying 80% of the wages of employees placed on "furlough" (up to £2,500 per month). It ended on 30 September 2021 having been in place for 11 months, during which over 11.7 million jobs were supported and over £70 billion was paid.

Whilst the CJRS has been successful in protecting jobs across the UK, it was introduced at haste resulting in over-complexity which has been described as a 'magnet for fraudsters'.[2]

Subsequently, at least 5-10% of the £70 billion distributed under the scheme is estimated to have been claimed fraudulently. In some cases, this has been on a large scale: a Financial Times investigation uncovered a group of companies that received up to £40 million in furlough support in a single month, despite seemingly having no staff.[3]

1 https://www.gov.uk/government/news/joint-taskforce-relaunched-to-protect-against-rise-in-fraud-crime

2 https://parliamentlive.tv/Event/Index/7e05fe6c-40a2-404b-9d31-2840624a64be

3 https://www.ft.com/content/b3c70369-5170-47ca-b779-fc0898fd29e6

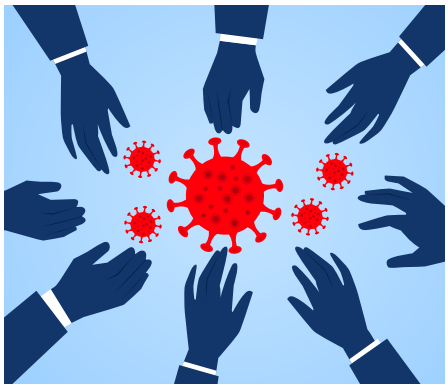
2.2 Bounce Back Loan Scheme

The BBLS was designed to provide financial support to businesses across the UK by providing loans of up to £50,000, or a maximum of 25% of annual turnover, to help businesses maintain their financial health during the pandemic. The scheme offered lenders a 100% government-backed guarantee against the outstanding balance of the facility (both capital and interest). In the 11 months between its inception on 4 May 2020 and its end on 31 March 2021, over £46 billion has been loaned under the scheme.

The Public Accounts Committee has suggested that the focus on speed of delivery of the BBLS exposed taxpayers to potential losses in the region of £15 billion to £26 billion. While most of these will likely be credit losses, the extent of fraudulent claims under the scheme is yet to be revealed.

It does however seem probable that there will be a multitude of fraudulent claims given the application procedure involved in claims under the BBLS (which merely required self-certification and did not require lenders to check the information on the loan application form, nor to perform credit and affordability checks). Additionally, banks did not collect information on how businesses used the loans once they were granted. This left the scheme extremely vulnerable to exploitation by fraudsters.

Arrests have already been made in relation to fraudulent use of the BBLS, including three men who were arrested for claims totalling over £6 million,[4] and two individuals who have been imprisoned for fraudulently claiming £489,000 through the scheme.[5] However, the real scale of the problem is expected to become increasingly apparent over the coming months as the first repayments become due.



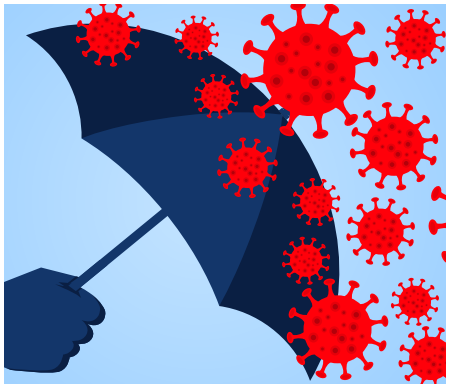
3. GOVERNMENT RESPONSE

The government has announced several strategies in response to the rise in fraud during the COVID-19 pandemic. Perhaps the most significant of these is the proposed Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill 2021 (the **'Bill'**) which is now in its third reading in the House of Lords. Relating specifically to BBLS fraud, it will give the Insolvency Service powers to investigate and take action to disqualify directors of companies who have fraudulently claimed loans and have since been dissolved. This power will be retrospective to allow conduct that took place before the law comes into force to be investigated.

However, the effectiveness of the Bill (if it is passed) will turn on how these new powers are funded, how the government will prosecute directors it holds culpable, and what the approach to the dissolved companies themselves will be.

Only time will tell how the Bill will operate in practice, but we can expect the Insolvency Service to be extremely busy over the next 12 months dealing with the unknown number of fraudulent BBLS claims.

In addition, the Taxpayer Protection Taskforce (**'TPT'**), announced in March 2021 will be staffed by more than 1,250 HMRC employees who will be responsible for investigating those who have sought to fraudulently claim taxpayers' money, including those claiming fraudulently under the CJRS and BBLS. This will extend the number of people within HMRC with powers to investigate claims. The success of this taskforce is yet to be seen, but on 27 October it was announced that a further £55 million will be invested (in addition to the original £100 million provided for the initiative), suggesting a significant number of claims are already being investigated.



4. CONCLUSION

The true scale of fraudulent activity in relation to government support measures over the past 18 months remains to be seen, as does the effectiveness of the government's proposed response. It seems likely that as the year draws to a close data will reveal higher instances of fraud than have presently been reported, with delays in fraud detection continuing to present challenges. HMRC and the government will need to collaborate in their approach to combatting the fraudulent use of support measures, as the effects of COVID-19 will last long after the public health crisis subsides. Lessons should also be learned from the drafting of emergency support measures, to ensure that opportunities for fraud are thoroughly considered before measures are implemented to try and reduce the vulnerability of similar schemes in the future.

4 https://www.theguardian.com/uk-news/2021/jan/23/three-men-arrested-amid-inquiry-into-6m-covid-loan

5 https://www.lexisnexis.co.uk/blog/covid-19/two-jailed-for-exploiting-coronavirus-covid-19-bounce-back-loans

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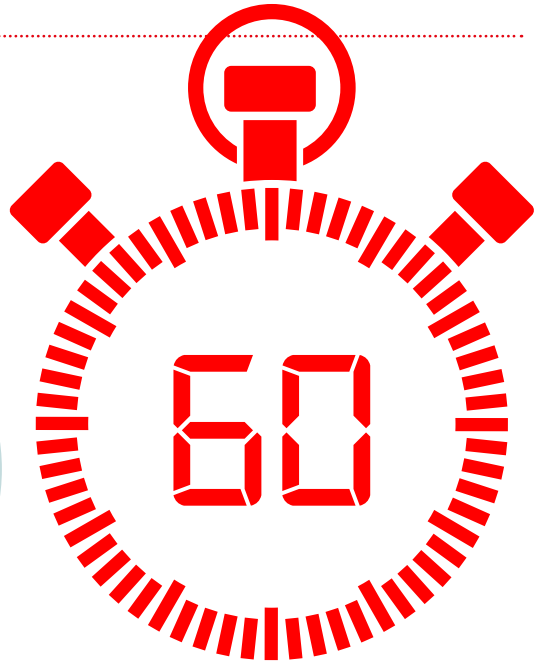


Q What would you be doing if you weren't in this profession?

A My answer to this question has shifted each decade I have spent in the profession. My boyhood dream was to be a Formula 1 motor racing driver. Sadly I had neither the talent nor the funding to be able to achieve that. Nowadays, I could picture myself in the Italian mountains. I'd be in the Sella Ronda, running a small family cycle/ski hotel. In the summer, I would spend my days on a bike guiding guests through spectacular mountain passes and climbs, and during the winter, I would do the same, but on skis.

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

A I started my career as a shipping litigator at Norton Rose. I was newly qualified, and a colleague and I were asked to meet a client's directors on board one of their vessels moored at Tilbury Docks. The ship was a bulk carrier and was probably about 40,000 gross tonnage, so a fairly large vessel for the Thames. It was already docked when we arrived. As we got ready to board, the vessel started to move despite the huge steel cables connecting it to the dock. It soon became clear that the force of the Thames was slowly but surely pushing it away from the dock. The cables started to creak and stretch until they, one by one, snapped with a huge bang. Luckily no one was hurt, as anyone standing near them when they snapped would surely have been killed. Eventually, the vessel broke free and was at the mercy of the Thames as there had not been enough time for the vessel to start its engines. Thankfully at least five tugs soon appeared and managed to secure the ship, preventing what could have been a very serious accident. It was amazing to witness the whole incident from the dock and to watch a real life salvage operation in process. Sadly we didn't get to meet the client or have a tour of the ship, but it was a day neither of us will ever forget.

Q What is the easiest/hardest aspect of working on FIRE cases?

A The easiest element of working on a FIRE case is being able to rely on my fantastic colleagues at Kingsley Napley, knowing that we will all work together to try and achieve the best possible result for our client. I know this sounds trite, but it is true. The hardest aspect is always managing the client's expectations, especially when acting for an individual or SME who, as a victim of fraud, really are at risk of losing it all.

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

A If I have to choose one piece of advice, then it would be to realize that they will never be perfect. As such, they should understand that mistakes happen. If they make a mistake then that is fine so long as they learn from it and they ensure they report it, so it can be dealt with as necessary. I know I'm only supposed to pick one piece of advice, but I would also encourage them to choose to practice in an area of law that gets them out of bed in the morning.

Q What has been the most interesting case you have seen in 2021?

A There have been two Supreme Court cases over the past month which Kingsley Napley won. Both are really interesting and potentially impactful. The first was Lady Brownlie's success in her jurisdictional challenge securing the right to take action in the UK over the tragic death of her husband Sir Ian Brownlie QC in Egypt. The second was the victory of Aquila over the Crown Prosecution Service, who were attempting to take control of monies owed to Aquila. The Supreme Court confirmed that the illegality of a director cannot be attributed to the company as that would offer the director a defence to the company's potential claim against them for breach of their director's duties. The Supreme Court also rejected the CPS's argument that a constructive trust in favour of the company is inconsistent with the regime established under POCA. Whilst the cases were significantly different, in both, we were successful in protecting the rights of our client.

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

A I think that most fraud litigators would say that we will see a surge in insolvency related cases over the next 12 months following the phasing out of COVID related government financial assistance and temporary restrictions on creditor action, expected interest rate rises, and as the impact of Brexit continues. I think this is a strong possibility but only time will tell.

What is clear is that the UK economy will be left with a painfully large number of companies, both Zombie and otherwise, with problems to solve. Insolvencies will undoubtedly increase and directors who have breached their duties will be brought to task.

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

A I am a truly awful linguist, so learning to speak another language would be great. I am also tone deaf, so being able to sing would likewise be amazing. More realistically, I would like to learn how to descend a mountain on a road bike, a mountain bike, and skis without being worried about crashing.

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

A One thing? That's an impossible question. Outside of family, friends and my stable of road bikes, it would have to be my season ticket at QPR, where I go with my 17 year old son.

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

A My uncle Frank who died aged 24 in January 1946 having survived the Second World War. He was in the RAF and was a Mosquito pilot in the Far East. He volunteered to test fly an aircraft that had been repaired, but it crashed. He is buried in a military cemetery on the island of Labuan. I would have liked to have asked him about his life and to have thanked him for everything he had done to protect us.

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

A Ok so I will limit this to the following 10 tracks (in no particular order):

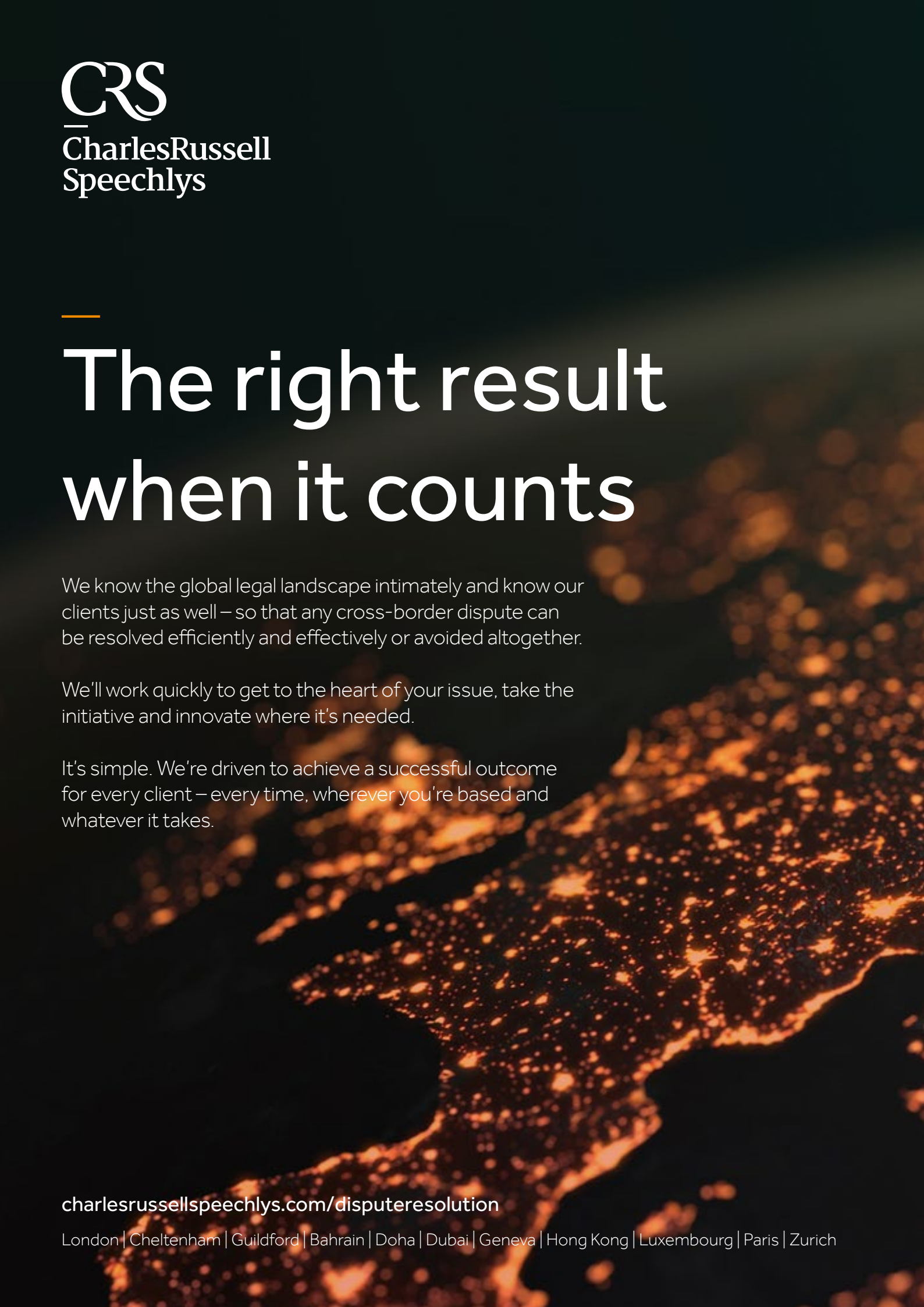
Racing in the Street – Bruce Springsteen
Afterglow – Genesis
Stargazer – Rainbow
Your Feet's Too Big – Fats Waller
Teenage Kicks – The Undertones
Fake Plastic Trees – Radiohead
Fly Me to the Moon – Frank Sinatra
Zombie – The Cranberries
Adagio for Strings – Samuel Barber
Hells Bells - ACDC

Q What does the perfect weekend look like?

A I live in Kent and assuming I am home then it would be an early round of golf with my younger brother (also a litigator), followed by going to QPR with my son, then dinner in London with family and friends. There would also be an early cycle with my older brother (also a litigator, can you see the trend?) and friends, followed by isotonic recovery drinks in my local pub and a lazy afternoon in the garden, then a family curry and a film.

Q Reflecting on 2021, what have you been most grateful for?

A At work, it's been the support of my partners, management, and team over what has been a very difficult year. I am also grateful for the opportunity to spend time at home and to finally understand the benefits of a work/life balance!



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CVAS
KEY CASES OF 2021

Authored by: Katy Ferguson and Bethan Cunniffe – Charles Russell Speechlys

With the commercial property market being crippled by the effects of the pandemic, coupled with the pre-pandemic pressures already facing retailers, 'landlord only' CVAs have become (and look set to continue to be) an increasingly popular method of restructuring distressed retail businesses. Conjunctively, impaired landlords have galvanised to challenge such CVAs.

In this article we explore the three high-profile retail tenant cases of 2021, providing long-awaited guidance on the legality and fairness of their use by distressed retailers.

NEW LOOK

The challenge:

- The CVA was not an "arrangement" as envisaged under the Insolvency Act 1986 (the Act) because it involved separate arrangements on substantially different terms with different creditor groups and the termination right granted to New Look improperly interfered with the landlords' proprietary rights.
- It is unfairly prejudicial to compromise the claims of sub-groups of creditors where the CVA is approved by the votes of unimpaired creditors (including secured creditors). Moving to turnover rents, the 3-year rent concession period and the release of 'keep-open' covenants was unfairly prejudicial.
- There were inaccuracies in the CVA proposal and the calculation of landlords' claims for voting purposes was disputed.

The finding (in dismissing the challenge):

- Differential creditor treatment is within the scope of the Act and is not necessarily unfairly prejudicial.
- The CVA did not compromise proprietary rights; landlords were given the opportunity to surrender the lease but were not required to do so.
- Although relevant when assessing unfair prejudice, a CVA approved by the votes of unimpaired creditors is not necessarily unfairly prejudicial.
- Where a CVA reduces rent payable to landlords to below market rent, this will not necessarily lead to a finding of unfair prejudice. No rigid test exists requiring rent reductions to be to the minimum extent possible, particularly where landlords can terminate the lease under the CVA.
- Fairness is fact-specific. Assuming the 'vertical' test of fairness is satisfied (i.e. the CVA will achieve a better outcome for creditors than the relevant alternatives), without setting an all-encompassing test, the judge noted some relevant factors such as (i) whether there is a fair allocation of assets between compromised

creditors and other sub-groups and (ii) the nature and extent of, and justification for, differential treatment, and its impact on the outcome of the meeting.

- The 25% discount applied to landlords' claims for voting purposes was justified, being a reasonable method of estimating a minimum value.
- Non-disclosure will constitute a material irregularity if there was a substantial chance that the undisclosed material would have affected how creditors voted. On the facts, there had been sufficient disclosure.

REGIS

The CVA was approved in October 2018, relying partly on votes from Regis' parent company (IBL) and former parent company (Corp) whose claims were unimpaired under the CVA.

The challenge:

- Preferential treatment of IBL and Corp was unfairly prejudicial.
- Material irregularity on the basis that antecedent transactions were insufficiently disclosed, rent claims were discounted by 75% for voting purposes and the proposal incorrectly identified the relevant vertical comparator as a Regis shut-down (rather than the sale of the business through an administration process).
- Considering the above, the Nominees breached their duties by promoting the CVA and should repay their fees.

The finding (in upholding the challenge based on a single limited ground):

- Based on contemporaneous evidence, no evidence justified classifying IBL as a "critical creditor" and its preferential treatment unfairly prejudiced impaired creditors. But for the CVA, IBL would have recovered nothing.
- Applying principles established in previous case law and New Look to the particular facts, the judge rejected the remaining grounds.
- Although the Nominees fell below the required standard by failing to objectively ascertain the treatment of critical creditors, the Nominees did not have to repay his fees (an order which the judge held should be limited to egregious conduct).

CAFFÉ NERO

The day before the CVA voting deadline, EG Group (EG) offered to acquire Caffé Nero's parent company and pay all landlords' rent arrears in full provided the CVA's terms were modified and the meeting postponed.

The offer was rejected. However, the CVA was modified to include a provision that if the company was sold to EG within 6 months, the company would use its best endeavours to procure that landlords receive rent arrears in full.

The challenge (by a single landlord funded by EG):

- The above events constituted material irregularities and unfairly prejudiced his interests.
- The CVA vote should have been postponed to allow for proper consideration of the offer.
- The last-minute CVA modification was invalid as most creditors had already cast their votes.
- The offer meant that the relevant comparator shifted from an administration to a transaction where landlords would receive payment of rent arrears in full.

The finding (in dismissing the challenge):

- The Act provides no clear route to postpone the electronic decision procedure and, given the timing, there was no time to apply to the court for relief.
- The Nominees complied with their duties; EG's offer was speculative, uncertain and did not justify a delay which would increase risk of administration.
- Where CVA modifications are proposed before the end of the electronic voting period, votes already received in favour may, in certain circumstances, be counted in favour of the proposal as modified.

KEY TAKEAWAYS

Whilst positive news for retail tenants seeking much needed restructuring to their premises portfolios following the pandemic, the recent cases tell a disappointing story for landlord applicants. Although fact-specific, recent judgments clarify the parameters for bringing a challenge, the courts' approach to assessing "fairness" and give some indication of what may constitute a material irregularity. It is clear that CVAs can treat different categories of creditors differently to deliver a sustainable outcome for the CVA company.

With corporate insolvencies rising and the retail sector continuing to face revenue pressure, the use of 'landlord only' CVAs shows no sign of slowing and may pick up pace as we near March 2022 when the moratorium on enforcing rent arrears comes to an end.

Case Citations:

(1) Lazari Properties 2 Limited, (2) The Trafford Centre Limited, (3) LS Bracknell Limited and 10 Others and (4) Fort Kinnaird Nominee Limited and 20 Others v (1) New Look Retailers Limited, (2) Daniel Francis Butters and (3) Robert Scott Fishman [2021] EWHC 1209 (Ch)

Carroway Guildford (Nominee A) Limited and 18 others and (1) Regis UK Limited, (2) Edward Williams (as Joint Supervisor of Regis UK Ltd) and (3) Christine Mary Laverty (as Joint Supervisor of Regis UK Ltd) [2021] EWHC 1294 (Ch)

Young v Nero Holdings Ltd [2021] EWHC 2600 (Ch)

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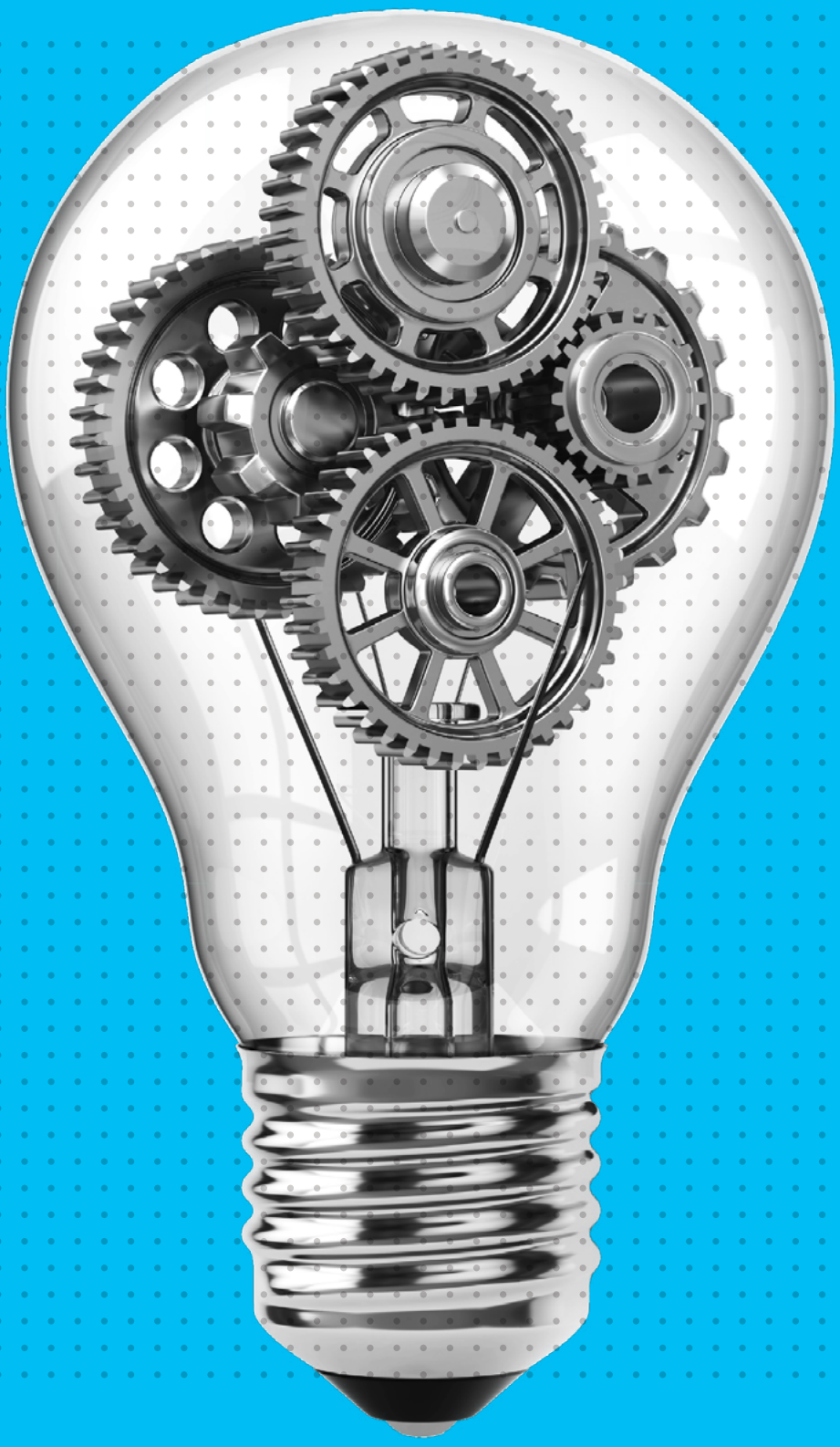

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THE RETURN OF BLACK SWAN AND MORE?

Authored by: Nick Ractliff and Steven Bird – PCB Byrne

Summary

On 4 October 2021, an enlarged seven-member Board of the Privy Council handed down a majority judgment (4:3) in the case of *Convoy Collateral Ltd v Broad Idea International Ltd*.[1] It confirmed that the British Virgin Islands' ("BVI") court has jurisdiction to grant an injunction against a non-cause of action defendant based in the BVI in support of foreign proceedings.

However, the significance of the decision has more far-reaching consequences. This was not lost on Sir Geoffrey Vos who, in giving the minority judgment, described the decision of the majority as a "ground-breaking exposition of the law of injunctions" [2]and an attempt at providing a "juridical foundation for the entire law of freezing and interlocutory injunctions" [3].

Facts

In 2018, Convoy Collateral Ltd (**"Convoy"**) applied to the BVI court for freezing orders against Broad Idea (a BVI company) and a director and shareholder of that company, Dr Cho. This was done in support of anticipated proceedings against Dr Cho in Hong Kong. Convoy also sought permission to serve Dr Cho outside of the jurisdiction. Following an ex parte hearing, the BVI court granted the freezing orders and gave Convoy permission to serve out.

At the return date, Dr Cho objected to the leave that was granted to serve him outside the jurisdiction and applied to have the freezing order discharged on the basis that the BVI Court had no power to make orders against foreign persons outside its territory. The court agreed with Dr Cho and leave to serve out was set aside and the freezing order discharged. Convoy appealed this decision.

1 [2021] UKPC 24.

2 At [221].

3 At [223].

However, the Court of Appeal of the Eastern Caribbean Supreme Court dismissed Convoy's appeal. In doing so it went a step further. It overturned Black Swan Investment ISA v Harvest View Ltd [4] and concluded that the BVI court had no power to grant a standalone freezing order unless there were also domestic proceedings claiming substantive relief.

Convoy appealed and the Privy Council had to consider two main issues:

a) Whether the BVI court has jurisdiction and/or power to grant a freezing order where the respondent is a person against whom no cause of action has arisen, and against whom no substantive proceedings are pursued, in the BVI or elsewhere; and if so

b) Whether any such jurisdiction and/or power extends to the granting of a freezing order in support of proceedings to which that person is not a party.

Judgment

The majority overturned or distinguished a number of previous Privy Council, House of Lords and English Court of Appeal decisions to hold that the granting of an injunction is not contingent on a pre-existing cause of action before a local court. As Lord Leggatt observed at [82]:

There is no principle or practice which prevents an injunction from being granted in appropriate circumstances against an entirely innocent party even when no substantive proceedings against anyone are taking place elsewhere.

Lord Leggatt also articulated that the justification for a freezing injunction was to enable enforcement of a judgment by preventing the dissipation of assets that may be used to satisfy it.[5] In synthesising these principles, and after a comprehensive review of the relevant case law, the majority held at [101] that a court with the power to grant injunctions can do so when the court has personal jurisdiction over a respondent and it is just and convenient to do so, provided that:

i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;

ii) the respondent holds assets… against which such a judgment could be enforced; and

iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets…other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

Further explanation was also provided at [102] where it was held that while other factors were potentially relevant in determining whether to grant a freezing injunction or not, there were in fact no other restrictions "on the availability in principle of the remedy".

Lord Leggatt observed that:

a) The judgment does not need to be from a domestic court. The principle also applies to foreign judgments or other awards that can be enforced via the domestic court's powers;

b) The judgment does not need to be against the respondent; and

c) There is no requirement that proceedings in which the judgment will be sought have started. Indeed, the right to bring such proceedings does not even have to have arisen. It is sufficient that the court can be satisfied that a right to bring proceedings will arise, and that they will be brought

This marks a departure by the Board from the House of Lords decision in *The Siskina* [6], which limited freezing injunctions to instances where there was also a cause of action for substantive relief.

Implications

This decision confirms that the BVI court has jurisdiction to grant a freezing order against a party over which it has personal jurisdiction and where no cause of action or other substantive proceedings are pursued against that party in the BVI or abroad.

It will be welcomed by claimant parties seeking to use a standalone freezing order to preserve the assets of a party based in the BVI in support of proceedings commenced and judgment obtained elsewhere, such as the English High Court

However, this case may well be remembered more for its summation (and arguable simplification) of the law of freezing orders at [101]-[102]. By reasoning from the foundational position that freezing injunctions exist to aid in the enforcement of judgments, the majority were able to sweep away impediments to obtaining any such injunctions (for example, the need to have a pre-existing cause of action which had arisen).

As a result, this decision reveals the advantageous flexibility of the common law that made the Mareva jurisdiction possible in the first place.

The benefits of the decision for claimant parties are therefore likely to go beyond the BVI. It will be interesting therefore to see which other courts bound by the Privy Council jurisdiction will follow *Convoy* when considering whether to grant standalone injunctions in support of proceedings commenced and judgment obtained elsewhere.

4 (BVIHCV 2009/399) (unreported) 23 March 2010.

5 At [85].

6 [1979] AC 210.

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ESG FACTORS HERE TO STAY IN FRAUD AND INSOLVENCY

Authored by: Jeremy Snead and Fay Warrilow – Ogier

Onshore or offshore, whatever your industry, ESG factors are here to stay - that was the emerging theme of a series of workshops we ran on sustainability issues within fraud and insolvency at September's FIRE Summit for fraud and insolvency practitioners.

That's not to say that the future, or even the exact nature, of ESG and sustainability in business are mapped out. In the series of sessions that we held the practitioners agreed that the nebulous scope of the topic made it hard to define the nature of the issues, particularly given the varied possibilities for focus on the 'E' (Environmental), the 'S' (Social) or the 'G' (Governance).

As an emerging field that arguably captures the current zeitgeist, ESG provides ample opportunity for innovation, but its evolving nature also presents business challenges and threats, such as the risk of fraud or investment in the 'wrong' technology.

There is clear evidence that sustainability, particularly in relation to climate change, is becoming increasingly mainstream. Indeed, one of the many announcements coming out of this UN summit on climate change, COP26, encapsulate the challenges presaged within our discussions, including proposed UK Treasury rules to compel businesses to show how they intend to hit climate change targets. Currently, the intention is that there will be no mandatory commitments, but the plans will need to be public. While campaigners have already said that transparency is not enough and there should be hard law obligations in this area, the UK Treasury believes that market forces will encourage credible planning.

Although the finance industry is considered according to some reports to be a significant contributor to the world's carbon emissions, it equally offers significant opportunities to influence global issues beyond local governmental regulation, in support of the UK Treasury's thesis [1]. From the early philanthropic investments in social good, to the 21st century recognition that consideration of ESG issues may fall within the fiduciary duties of investment and pension professionals, there has been significant growth in investment with ESG drivers. From green finance to shareholder activism, there has been a significant increase in ESG investor demand, leading to an SEC Risk Alert in April 2021 that warned investors may be misled in terms of performance and the underlying nature of investments ultimately obtained.

1 Although the authors note that the recently announced National Savings and Investment Green Bonds offer a lower gross annual equivalent rate than the National Savings and Investment "non-Green Bonds".

The relevance to fraud and insolvency of ESG issues does not depend on any particular philosophy on the climate, or social and governance issues – they are 'value neutral' in that sense. That said, it's Ogier's view that what's good for the environment and society is also good for business in the long term, and for that reason Ogier is the first offshore law firm to gain membership of the Net Zero Lawyers Alliance, to make a public commitment to the Science Based Target Initiative (SBTi) and to voluntarily disclose its gender pay gap, among other innovations..

Prior to the FIRE conference and at the start of each of our four FIRE sessions we took polls to gauge the level of interest and knowledge attendees had in ESG and sustainability issues. We thought that interest levels would be high (why would you attend that kind of session if you weren't interested?) but it was not clear what the knowledge base would be. In fact, there was a wide range of responses – from attendees who expressed little experience of the subject to those who considered it to be part of their everyday practice. The wide range of interests expressed during the feedback captured the broad ranging scope of the topic and the interconnectedness of issues – something that can be missed in newspaper headlines and soundbites.

During the course of our sessions, the practitioners recognised that the significant flight of capital to ESG values or products, either in pursuit of personal philosophies, perceived greater returns [2] or in compliance with regulatory pressure, presents potential significant opportunities, challenges and threats for practitioners in this area.

The groups also varied widely by sector, from insolvency practitioners to lawyers and supply-chain investigators. Those

different professionals brought different perspectives and interests, and topics discussed included:

- the potential future regulatory landscape (foreshadowing the changes coming out of COP26)
- opportunities and risks associated with the development of ESG-linked technologies (is investment in pioneering green technology visionary or foolhardy?)
- the potential halo effect of ESG investment and the risk that its effects may lead investors to overlook otherwise prudent governance mechanisms
- 'greenwashing' issues – when is a commitment not a commitment, and who is the arbiter of this?
- increasing shareholder activism rather than divestment
- verification and investigation of carbon trading and offsetting and the dangers of fraud in ESG enterprises – carbon credit fraud is already part of the story of ESG
- class action risks and opportunities – for example, can practitioners help businesses to avoid class actions by facilitating a genuine understanding of what is going on in their supply chains?
- the question of whether there are obligations on directors and fiduciaries to factor in ESG obligations, and whether these obligations might conflict with other duties
- the risk to insolvency office-holders of increased regulatory risk, stranded assets and asset valuation integrating ESG factors
- supply chain risk, reporting and investigations – who is best placed to do this, and are there opportunities for practitioners from different fields to work together?
- client need for genuine ESG compliance to satisfy their obligations
- employee talent perception of genuine commitment to whole range of ESG values – many attendees noted that in recent years potential recruits have been regularly asking about their businesses' commitment to ESG

We did four hour-long sessions, but we could have discussed the topics for much longer. It is clear to us that voluntary and compulsory development in these areas will continue and whatever the philosophies of practitioners in this space, ESG factors are here to stay.

2 The authors take no view on whether greater returns from ESG products are produced by qualitative factors of the underlying products, indicators of quality in the pursuit of these factors or market perception of such correlative factors, but again note the disparity between the NS&I Green Bond and non-Green bond rates.

60-SECONDS WITH:

CAROLINE GREENWELL PARTNER CHARLES RUSSELL SPEECHLYS

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

A I am completely obsessed with maps so were I not a lawyer, I think I would have been involved in cartography in some way. Either that or a weather woman. I'm always hoping for a map related fraud case…but I think I might be waiting for some time!

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

A I hesitate before describing this as strange (for fear of offending the others involved!) but working on the AHAB v Saad trial (which ran for 129 days in the Cayman Islands over a period from June 2016 to July 2017) was certainly an unusual and incredibly exciting experience.

The role went beyond simply being a fraud lawyer - I definitely did not expect to go to 5:30am spinning classes with clients, to know the team's supermarket shopping list off by heart, or to have a goat curry cooked for me by a now High Court Judge! But the intensity of the trial and the long stints away from home meant that you came to rely on the support and good humour of your team and if that meant deviating from conventional working relationships in the name of sanity, then so be it!

The more conventional side of the role was fascinating, demanding, and exhilarating. With credit to all of the solicitors, barristers, attorneys, and other technicians involved, it was a demonstration of true international litigation operating in real time. It was an impressive feat of legal excellence and technology, combined with complete dedication to our respective clients' causes. An experience that I doubt will be repeated for me, but one I shall never forget.

Q What is the easiest/hardest aspect of working on FIRE cases?

A Litigating against the highest calibre opposition is probably the hardest aspect. It is a relatively small community so FIRE practitioners tend to know each other well and be well aware of the intellect and strategic nous of their contemporaries. Having those contemporaries representing your opposition certainly keeps you on your toes!

The easiest aspect is simply the fact that there is never a dull day working on a FIRE case. You are certainly never bored!

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

A Be prepared to really care! FIRE cases are all encompassing and captivating so don't be surprised if you become extremely passionate about and committed to your client's case.

Q What has been the most interesting case you have seen in 2021?

A Broad Idea International Limited v Convoy Collateral Limited [2021] UKPC 24
I am sure that your readers are all aware but just to recap, the case essentially confirms that, where a court has personal jurisdiction over a party (the case specifically dealt with the BVI but it concerns all jurisdictions whose courts have inherited the equitable powers of the former Court of Chancery), it also has the power to grant a freezing injunction (or other interim injunction) against that party to assist the enforcement of a foreign judgment.
The Privy Council confirmed that there was no principle or practice which prevented the exercise of the power: the statements in "The Siskina", to the effect that the court had no power to grant an interlocutory injunction unless it was ancillary to a cause of action, were found to be legally unsound.
This is clearly a significant statement of principle for the kind of international fraud cases that we all work on.

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

A I am fascinated to see if and how ESG elements will start to feature in FIRE cases. As we all know, where there are (a) pressures to act fraudulently, (b) opportunities to commit frauds, and (c) a reason to do so, an environment ripe for improper behaviour emerges.

As ESG becomes a mainstream feature of doing business, and one which will bring increased regulation and scrutiny, as well opportunities, for organisations, I suspect we will see a developing trend of companies and individuals resorting to fraudulent behaviour in order to enhance their ESG credentials and optimise sustainability opportunities, with the goal, as ever, being financial gain.

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

A Ski. As in, properly ski. Not just once a year pottering around type skiing! I would love to have learned as a child when completely fearless and for it to feel as natural as walking now. All of that said, I am very excited for my next week of pottering around on the pistes early next year!

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

A A cup of tea first thing every morning.

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

A My wonderful brother, who sadly passed away aged 14.

Q What does the perfect weekend look like?

A Friday evening on the sofa (most likely falling asleep halfway through a film!) after a post work drink with my fabulous colleagues; a leisurely start to Saturday with brunch at home and copious cups of tea; champagne afternoon tea (the best meal ever invented in my opinion!) in a Mayfair hotel with my family; then live music and dancing on Saturday evening; and a walk along the river on Sunday, returning home to watch a dramatic victory for Newcastle United on Super Sunday.

Q Reflecting on 2021, what have you been most grateful for?

A The birth of my niece, Cassie. 2020 was such a tough year wasn't it, so when Cassie arrived in April 2021, life felt wonderful, joyful and full of optimism. I am admittedly a completely biased auntie, but she really is a little cracker!

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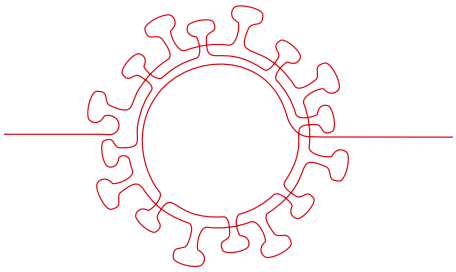
A COVID-TAKEAWAY, INSOLVENCY AND A NEW BENEFICIAL OWNERSHIP REGISTER

NOTEWORTHY DEVELOPMENTS IN THE LIECHTENSTEIN LEGAL LANDSCAPE IN 2021

Authored by: Walter Dorigatti – Gasser Partner



Making a Virtue of Necessity: A (Possible) Takeaway from COVID-19 Times

As this piece is being written, cases of infections with COVID-19 are surging (once again) all across Europe. Although we hoped that the virus would be left behind together with the year 2020, COVID has not loosened its grip over everyday life and also continues to affect judicial and administrative processes in Liechtenstein. Consequently, the Liechtenstein government has recognized the necessity to extend ancillary administrative measures (nearly) throughout the current year (until 30 September).

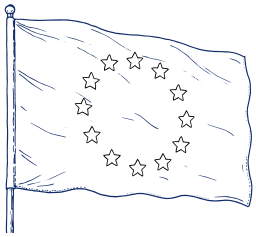
And although the possibly returning restrictions of public life and judicial process remain an ongoing matter of concern to all of us, there could be at least one positive takeaway from this precarious situation. The wish to maintain basic functions of business life, while reducing inter-personal contacts has led to a temporary introduction of the (limited) possibility to convene and conduct meetings of supreme corporate bodies of enterprises without physical presence of attendees in the form of video or telephone conferences in the COVID-19 Ancillary Measures Act.

This tool not only helped to reduce physical contacts and thereby infection chances but also enabled businesses to cut unnecessary formalities and improve efficiency and travel. The lawgiver should ponder to maintain this useful instrument even after we hopefully leave the virus behind in the year to come.

Legislation Updates: A Revision of Insolvency Law and a new Beneficial Ownership Register

However, adapting to the new normal and living with the virus in the second year since its discovery was not the only novelty in 2021. In addition to the comprehensive reform of insolvency law (in force since 1 January 2021), which my colleague Sophie Herdina covered in depth in the previous issue, the legislature enacted a total revision of the Beneficial Ownership

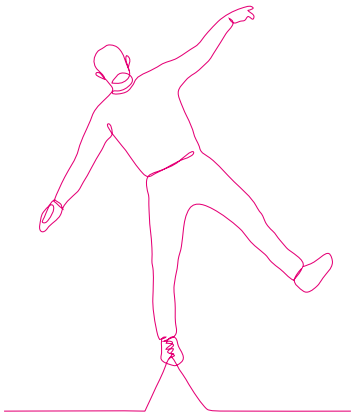
Register Act, which came into force on 1 April 2021, to implement the 5th EU Anti-Money Laundering Directive (AMLD) in Liechtenstein. The following section is aimed at covering the new Beneficial Ownership Register Act and endeavours to shed light on the implications of the enactment of the new law for corporations and practitioners.



The Growing Influence of AML as a Policy Priority on EU and National Level

The ever-present danger of an (ab) use of the international financial system for the harmful purposes of money laundering and terrorist financing has been further aggravated through the ongoing processes of globalization, digitalization and the use of technology. This has led to the combat against such abuse, becoming one of the top policy priorities within the EU and the EEA. Consequently, in the previous years, the EU has steadily out rolled, expanded and detailed its regulatory framework to prevent money laundering and terrorist financing.

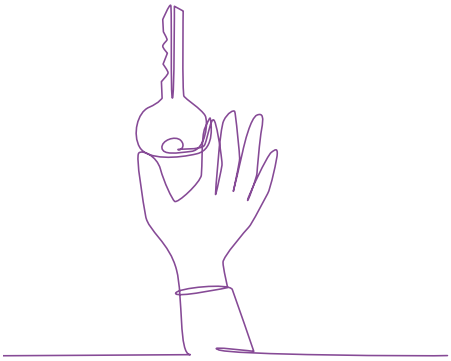
As an EEA member country, Liechtenstein participates in these efforts and is required to adopt EU level legislation accordingly into national law. Lately, the Beneficial Ownership Register Act was enacted, bringing about sweeping changes to its predecessor law which was aimed at implementing the 4th AMLD back then.



Transparency vs Privacy: A Balancing Act

The new Directive as well as the corresponding national law focus on expanding the content, transparency and accessibility of the register. Notably, the Directive aims to extend the right to inspection of the register beyond previous possibilities and thereby challenges the lawgiver to walk the tightrope between providing adequate instruments for the prevention of money laundering and terrorist financing and at the same time respecting the privacy rights of persons entered into the register. In the course of the total revision, significant adaptations were implemented in the Act (and Ordinance) on Professional Due Diligence Obligations.

From now on, a central national Beneficial Ownership Register containing the name, country of residence, citizenship and date of birth of the beneficial owner will be maintained by the Department of Justice. All legal entities are obliged to enter their beneficial owners, i.e. the natural persons on whose behalf or in whose interest an entity is finally managed, into the register.

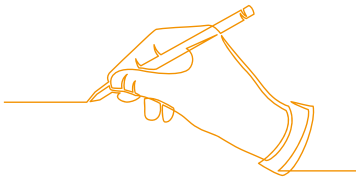


Possibilities and Limits of Disclosure

National authorities like the public prosecutor's office, the Financial Market Authority (FMA) or the Financial Intelligence Unit (FIU) enjoy unlimited access. However, for fraud and asset recovery practitioners, the newly introduced provisions on potential access to the register by third persons are of far greater interest. Third person access in general has been a hot-button issue in the legislative process leading to the enactment of the law and has been heavily criticized by the Liechtenstein Bar Association for constituting an infringement on the fundamental rights of citizens, namely privacy and data protection.

Firstly, banks and other financial institutions may request disclosure of information in order to fulfil their own professional due diligence obligations. Secondly, according to the new law any foreign or domestic natural person or legal entity may request disclosure of information from the register against payment of a fee under certain conditions.

For such application for disclosure to be approved, the applicant needs to substantiate a legitimate interest. A legitimate interest will only be assumed where disclosure is necessary to combat money laundering, predicate offenses to money laundering or terrorist financing. Practically, such interest will be hard to prove for a private individual. Furthermore, all third-party applications will be served upon the concerned legal entity for a statement on the fulfilment of disclosure requirements. The application and statement will then be submitted together to a special independent commission which decides all cases where third parties are seeking disclosure. In special cases where criminal offences or harassment against parties entered into the register must be assumed, access and disclosure can be restricted beforehand.



Conclusion

These restrictions make it considerably more difficult to achieve disclosure and can be considered a result of critical voices (e.g. of the Bar Association and the Association of Professional Trustees) heard in the legislative process.

The overall solution implemented by the legislature at least strives to balance the (sometimes opposed) interests of ensuring transparency while considering legitimate privacy and secrecy needs without giving undifferentiated precedence to transparency which seems to be en vogue these days.

However, the concrete application, handling and relevance of this provision in future cases is yet to be conclusively determined by the authorities and courts.

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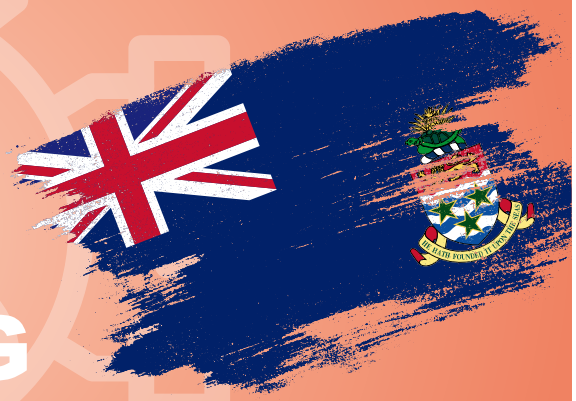
CAYMAN ISLANDS COMPANY RESTRUCTURING OFFICER REGIME



Authored by: Kai McGriele and Jamie McGee – Bedell Cristin

The Cayman Islands' Government gazetted the Companies (Amendment) Bill, 2021 (the "Bill") on 21 October 2021. The Bill introduces the facility to allow a company to restructure under the supervision of a Company Restructuring Officer ("CRO") and to provide for a stay on creditor action where a company is restructuring, for a connected purpose. The introduction of a CRO is a welcomed step to further enhance the Cayman Islands as an international restructuring jurisdiction.

Restructuring regime – the current landscape

The Cayman Islands' legislative framework does not currently contain reorganisation processes akin to those found in the UK and the USA, i.e. the administration regime or Chapter 11, respectively. Accordingly the Cayman Courts, which are well acquainted with some of the most complex cross border insolvencies and restructurings in the world, have adapted the provisions of the Companies Act to provide a mechanism for companies seeking to be restructured to be put into a provisional liquidation. This provides time for the directors, the provisional liquidator and the stakeholders to endeavour to restructure the Company whilst it has protection in the form of a moratorium on claims of unsecured creditors and an automatic stay of proceedings against the company.

While this manner of restructuring has been incredibly successful, the concept of seeking to put a company into liquidation, including filing a winding up petition with the Court, for the purposes of a reorganisation is often times alien to those unfamiliar with the Cayman process. Further, there is a certain unwelcomed stigma attached to a company being put into liquidation, albeit provisional, which could potentially impede or disrupt a smooth restructuring.

Proposed changes to the legislation

Long in the making, these changes have arisen as a result of formidable alliance between the private sector and the Cayman Islands Legislature – which is one of the reasons Cayman is able to continue to grow as one of the world's leading offshore financial centres.

Amongst other things, the Bill seeks to introduce the framework for a process whereby companies could restructure outside of the liquidation process, via the appointment (by the Court) of a CRO, on the grounds that the company is, or is likely to become, unable to pay its debts; and intends to present a compromise or arrangement to its creditors. Further, the proposed process is capable of being initiated by the directors of the company in way previously not possible, save for where they were explicitly authorised in the company's constitutional documents.

The CRO would be an officer of the Court in the same way as an official liquidator and would be required to meet similar professional qualification, insurance and independence requirements.

The introduction of the Bill is a welcomed step forward in the Cayman restructuring sphere which has the ability to encourage companies facing financial difficulty to work with its stakeholders to collaborate on the reorganisation and restructuring of the company with the aim of reviving the company's financial health, outside of the stigma of liquidation.

UNDER CONSTRUCTION:

THE INTERACTION OF CONFISCATION ORDERS AND CONSTRUCTIVE TRUSTS

Authored by: Hannah Fitzwilliam – Kingsley Napley

In the Crown Prosecution Service v Aquila [2021] UKSC 49, the Supreme Court considered whether a company could assert its rights under a constructive trust in the face of confiscation orders obtained by the Crown Prosecution Service ("CPS") over the proceeds of crime.

THE FACTS

Two directors of a company called VTL facilitated false claims for tax relief and made a secret profit of £4.55 million. The directors were convicted in a criminal court of cheating the public revenue and the CPS obtained confiscation orders under the Proceeds of Crime Act 2002 ("POCA") over a portion of the proceeds of the crime.

However, there was a competing interest over the money: Aquila, the company which had acquired VTL's proprietary rights, asserted a claim over the entirety of the £4.55 million. Aquila argued that the directors had acquired the profit on behalf of the company in breach of their directors' duties, and therefore that the profit was beneficially owned by VTL under a constructive trust. This is in line with the principles set out in FHR European Ventures LLP v Mankarious [2014] UKSC 45; [2015] AC 250 ("FHR"), which follows a long line of English authority that secret profits made by an agent in breach of fiduciary duty are held on constructive trust. Aquila argued that its proprietary claim had priority over the CPS's criminal confiscation orders.

THE ISSUES

The court at first instance decided that Aquila's proprietary claim had priority and declared that the secret profit was held on constructive trust for VTL. The CPS appealed. It accepted that the confiscation orders did not give it a proprietary claim, and it also accepted that VTL had a proprietary claim to the £4.55m in accordance with the decision in FHR. However, the CPS argued that the constructive trust was unenforceable because the illegal acts of its directors should be attributed to VTL itself.

The Court of Appeal applied Bilta (UK) Ltd v Nazir [2015] UKSC 23; [2016] AC 1 ("Bilta"). Bilta confirms that a director who is sued by a company for a loss caused by a breach of their fiduciary duties cannot rely on principles of attribution to defeat the claim, even if the illegal scheme involved the company in the fraud. The Court of Appeal therefore dismissed the CPS's appeal.

In the Supreme Court, the CPS sought to distinguish Bilta and argued that the directors' fraud should be attributed to VTL in this case because VTL stood to profit from the fraud, rather than being the target or victim. The CPS also argued that VTL should not be allowed to benefit from the proceeds of crime

as it would be inconsistent with the purpose of POCA.

THE DECISION

The Supreme Court unanimously dismissed the CPS's appeal. The Court confirmed that the illegality of a director cannot be attributed to the company as that would offer the director a defence to the company's potential claim against them for breach of their director's duties. The Court also rejected the CPS's argument that a constructive trust in favour of VTL is inconsistent with the regime established by POCA.

CONSEQUENCES

In none of the previous secret profits or bribes cases, including FHR, has the English court had to consider whether a director's fraud should be attributed to the principal so as to prevent the principal, by reason of the defence of illegality, from relying on a constructive trust in priority to the claims of unsecured creditors.

This case reaffirms the fundamental principles around a director's fiduciary duties to a company. The decision confirms that a director cannot be allowed to benefit from his or her breach of fiduciary duty regardless of whether the company also benefited from the illegal scheme. This applies even where it may be argued that there are public policy reasons for a director not to account to the principal.

If the CPS had been successful, directors might in future have been allowed to argue that they should keep a secret profit just because they also intended the company to benefit from the fraud. The Supreme Court's decision therefore avoids creating real uncertainty in the law. It also maintains the important deterrent that a director who breaches their fiduciary duty knows they will be stripped of their profit.

The CPS's other key argument was that POCA should not permit Aquila to benefit from the actions of criminals. However, the Supreme Court noted that POCA is intended to protect existing property rights regardless of how they arise. The Court was clear that the operation of POCA was not frustrated in this case. The CPS could have chosen to use certain other provisions in POCA to deprive VTL of the secret profit. For example, the CPS could have added VTL to the indictment and sought a confiscation order against the company, but it did not do so in this case. It may well be that this case leads to a change in the CPS decision-making at the prosecution stage, and how it goes about trying to recover the proceeds of crime from convicted criminals.

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RECEIVED WISDOM

THE INVESTEC ARGUMENTS BROUGHT TO ENGLAND

Authored by: James Lister – Stevens & Bolton

Ever since the Privy Council's landmark decision in Investec v Glenalla[1] in April 2018, there have been various attempts to use the arguments raised in that case in England, on both sides of the issue (being in the main whether a trust's creditors could enforce their claims against the trust's assets directly, or had to rely on pursuing the trustees and the trustees' right of indemnity from the trust assets in turn).

January of 2021 saw a particularly ambitious attempt to use the Investec authority to the advantage of the trustees of a family will trust, endeavouring (as they were) to avoid several millions of pounds of liability to a (purportedly) secured lender.

In Williams v Simm[2] the Court was asked to look afresh at the Privy Council's decision in Investec as it applied to a notionally simple domestic will trust.

Facts

The trustees owned a significant parcel of land in Cumbria, and wanted to develop it for residential properties. To fund that development, the trustees borrowed some £4.5m from LSC Finance Limited, which was secured against the land itself (or so LSC thought, at least) in October 2016, with further funds being drawn down between 2017 and 2019.

The development did not go as the trustees planned. They had hoped to complete enough development at the site by the summer of 2019 to repay LSC's lending. That didn't happen, and consequently the trustees defaulted on repayment in September 2019. The claimants were appointed as fixed charge receivers by LSC in November 2019, and took steps to take possession of the land for the purposes of recouping LSC's debt (which by September 2020 stood at a little over £6.3m) including a sale of the land.

The trustees defended the receivers' claim, and deployed several different lines of attack to do so:

1. That some of the security paperwork was "confused" about the capacity in which the trustees had contracted with LSC, and that as there were some clauses which suggested that LSC had mistakenly tried to contract with "the trust" as opposed to "the trustees", there was in fact no security given at all (because the trust is not a legal entity at all);
2. That the beneficiaries of the trust had not consented to LSC's borrowing, and further the trustees in fact had no power under the terms of the trust to borrow funds. The trustees alleged that as LSC were aware that the trustees had no power to borrow, its legal charge over the land should be declared void, giving LSC no security for their debt;
3. That the amount of the borrowing had been varied by certain communications from LSC's Managing Director, such that LSC were now estopped from seeking repayment of the full debt; and
4. That as the beneficiaries were in actual occupation of the land when the receivers took possession, LSC had to take possession subject to those beneficiaries' interests, and couldn't therefore sell the land.

1 [2018] UKPC 7
2 [2021] EWHC 121 (Ch)

Argument

The first two of these contentions by the trustees are by far the most interesting (the others having a certain ring of desperation to them).

The trustees were correct, according to the judge, that the various facility documents "appear[ed] to demonstrate a confusion as to the true legal status of a trustee vis-à-vis the trust of which he or she is a trustee…and as to the capacity by which and in which a trustee enters into a contract as trustee of a trust where the correct position is that the trust has no distinct legal personality, and the counterparty to the contract entered into with the trustee has no right of recourse as against the trustee assets save to the extent of the trustee's entitlement to an indemnity out of the trust assets".

Many will recognise that formulation as being exactly the issue that the Privy Council was asked to deal with (in materially more complex circumstances, admittedly) in Investec.

However, the judge plainly recognised that to accept the trustees' suggestion that LSC had mistakenly contracted with a non-existent legal entity, and thereby had no recourse to recover its loans at all was obviously too bold, quite apart from being nonsensical in any commercial sense.

The second contention, that LSC knew the trustees had no authority to borrow, and shouldn't therefore have agreed to lend to them, was also given short shrift. It was true that LSC had indeed inspected the trust deed (here, the relevant Will) and must have noticed that the trustees didn't have the power to borrow even if they wanted to. However, the trustees were not allowed to pursue this line further because their own solicitor had provided a certificate for the registration of LSC's charge over the trust land which said in terms that the lending complied with the terms of the trust. Even though that may not in fact have been legally correct, LSC were still entitled to rely on that certificate (having no duty to advise the trustees themselves) and its security was valid.

The judge was satisfied overall that the receivers should be allowed to sell the land so as to recoup LSC's lending.

Conclusions

Although the trustees' arguments in this case failed entirely, the fact that the arguments were given air time at all should be a warning to secured lenders, particularly given the numerous paragraphs of the judgment dedicated to highlighting the inconsistencies between the loan, charge and facility documentation produced by LSC. But for the somewhat careless drafting of those documents, the trustees would have been unlikely to be able to mount such a defence of the receivers' action.

The case therefore serves as a fresh reminder that the Investec line of authorities remains "live" in the English Courts as well as elsewhere, and lenders should be careful in how their documentation is constructed when dealing with any trust structure as a result.

THE TAX MAN COMETH:

VIRTUAL CURRENCY INDUSTRY BEWARE

Authored by: Valerie Charles and Kyla Curley – Stoneturn

The anonymity offered by the cryptocurrency market may soon be no more, and it may not be long before regulators are knocking at your door. In addition to the DOJ and the SEC, the Joint Chiefs of Global Tax Enforcement (J5) and the Internal Revenue Service (IRS) have made it clear that they are increasingly focused on cryptocurrency entities and efforts to facilitate or enable tax evasion.

On this episode of Leading the Way, StoneTurn experts Valerie Charles and Kyla Curley are joined by Carlos Ortiz, a partner at McDermott Will & Emery, to examine the significant increase in regulatory interest in the cryptocurrency market, and how individuals and financial institutions utilizing digital currencies can minimize risks.

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