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TL4 FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 11

2022 FIRE Year In Review

EVERYONE HAS THE FIRE, BUT THE CHAMPIONS KNOW WHEN TO IGNITE THE SPARK

INTRODUCTION

"We will open the book. Its pages are blank. We are going to put words on them ourselves. The book is called Opportunity and its first chapter is New Year's Day."

Edith Lovejoy Pierce

We are delighted to present the final FIRE issue of 2022, our 'Year in Review' edition. Issue 11 features an article with the Female Fraud Forum, who discuss their experiences of business development and networking in the FIRE industry. This issue also covers a variety of topical issues that have faced practitioners over the past year in different jurisdictions, including sanctions, NFT's and crypto, ESG, and recent cases.

Thank you to our members, contributors and community partners for their continued support in 2022. It has been a busy year for FIRE, and we look forward to seeing you all in 2023!

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Americas

FIRE Americas: Cayman

12th - 14th March 2023 | The Westin, Grand Cayman

Bringing together experts from across North America, South America and the Caribbean

Featured Article

BUILDING BRIDGES

IN CONVERSATION WITH THE FEMALE FRAUD FORUM

Authored by: Phoebe Waters, Alexandra Underwood, Stephanie Duncan and Caitlin Bruce - The Female Fraud Forum

Phoebe Waters, Chair of the Female Fraud Forum (FFF) and Director in the Disputes team at J.S.Held, interviews three lawyers and members of the FFF, to explore their personal experiences of business development and networking in our industry. The FFF is a multi-disciplinary community comprising practitioners (of all genders as of this year, and all levels of experience) in the fraud, asset recovery and investigations field. The FFF spearheads the fight for change so that gender equality and equity become ingrained in the workplace and secured for future generations. With happily over 1000 in its community now, the FFF has been a partner of TL4 FIRE since August 2021.

Phoebe talks to Alexandra Underwood, Secretary of the FFF and Partner at Fieldfisher; Stephanie Duncan, Education Sub-committee member of the FFF and Senior Associate at Charles Russell Speechlys, and; Caitlin Bruce, member of the FFF and Associate at Collas Crill, Jersey.

Phoebe: Hello there, friends!

Thank you for joining me for this discussion. Let's start by explaining to our readers why we have chosen to name our article "Building Bridges".

I recently completed the inspiring, and surprisingly but perfectly practical, course "Women Leading Changing: Shaping Our Future" at the University of Cambridge's Institute of Sustainability Leadership, where I heard how Sociologist, Centola, uses the analogy of bridges to symbolise our connections in a diverse social network. The theory is that although building 'narrow bridges' can result in faster communications between parties, constructing 'wide bridges' between parties can help strengthen mutual trust and credibility. Creating wider bridges is achieved through forging multiple contacts between micro (individual) and meso (organisational) stakeholders and is something that we should all do and should all want to do. Building wide bridges helps to: a) form more effective business relationships; and b) develop initiatives to better our working practices and accelerate change for a more equal, positive, and profitable future. Social change happens through networks around us.

When we started our discussions for this article, we resonated with the metaphor of bridges and thought it helped to visualise our experience and goals in the world of BD and networking.

Perhaps we should briefly tell everyone how we all know each other as it is rather microcosmic for how we meet people in our industry on a wider scale. And how did you first come across the FFF and/or TL4? Over to you Alex to kick us off please.

Alex: I was introduced to the FFF by Committee Member Emma Makepeace (Deputy Director of Clerking at 25 Bedford Row). We were at a mutual friend's birthday party and she suggested coming along to one of the FFF breakfasts to meet a group of likeminded women.

Steph: Phoebe is a family friend and I spotted her FFF posts on LinkedIn. I signed up to one of the virtual FFF networking events during Covid. It was daunting joining a Zoom call without knowing anyone, but the group gave me a really warm welcome, making sure to integrate me into the conversation and I felt at ease. I then attended the FFF Summer Party (their first in-person event after lockdown in 2021) on my own where I experienced the same warm welcome, with FFF members taking the time to introduce me to other attendees. I met Alex through the FFF Committee (we were both elected at the AGM in February 2022) and Cait at a FFF drinks reception we held at the TL4 FIRE Starters conference in Dublin in the same month.

Cait: I first met Phoebe and another FFF Committee Member, Molly Sandquest (Senior Manager at FRP Advisory), at that same TL4 FIRE Starters conference. This event was my first international conference since moving to Jersey from Johannesburg in July 2020. Phoebe and Molly, seeing my obvious wit and charm in a sea of new people (read: nervous-babbling) invited me to attend an FFF pre-drinks the following evening where I met Steph and Alex.

Phoebe: **You are rather witty Cait, pretty charming too when you want to be (!). Those Dublin drinks were organised with such short notice but we had an incredible turnout and party. We then went back to the same spot post-conference dinner with essentially all of the FIRE Starters in tow. I have to say the 'accidental' appearance of Luke Dockwray and Ashley Fairbrother (both of EMM) at the FFF drinks has to be a highlight. We didn't expect so many new-comers to our community at an international event – especially one not organised by us – it was remarkable, and really warming actually.**

So, would you say that your involvement in, and exposure to the FFF and TL4 has helped your career progression? If so, how has it done so?

Steph: I joined the FFF at a time when I was hoping to be promoted. I knew I needed to develop my personal brand and external network, but I hadn't found the right environment in which to do it. Conferences were generally only attended by those more senior to me. After attending my first TL4 event, a one day event in London, I asked my firm if I could attend the Dublin conference just mentioned, given lots of my new contacts had indicated that they were planning to attend and I thought it would be a good opportunity to build on those relationships. It has since been easy to make a business case for attending subsequent TL4 events as they are well respected, and the mixture of seniority levels (FIRE Starters, the Summer School, etc.) makes them more relevant for different levels. I can also target the events of particular interest to me and my practice.

The FFF and TL4 have both provided me with excellent opportunities to help my career progression. A member of the FFF kindly recommended me to TL4 to speak at the FIRE Summer School at the University of Cambridge. This was my first experience of significant external public speaking and has led to further speaking opportunities. I have also written articles for the TL4 and FFF Newsletters, and have been included in marketing by both communities on social media. I was able to show the good networking I was doing and how this has developed my personal profile when making my business case for promotion.

Cait: I was fortunate to have won the 2021 TL4 FIRE Starters Essay Competition which not only made me LinkedIn famous for the first quarter of the year but also landed me tickets to the Dublin conference (where I was introduced to the FFF) and TL4 FIRE Vilamoura. I was given the opportunity to present my essay in Dublin which was exciting and daunting in equal measures. I have always found it quite easy to meet and speak to new people. In fact it is one of the aspects of my job that I enjoy the most. But I moved jurisdictions during COVID so TL4 FIRE Dublin was not only an opportunity to establish myself in a new network (which was also, equal parts daunting/exciting) but also an opportunity to show Collas Crill, my then (fairly) new employer, that this was something that I could do. I could not have predicted the extent to which winning the essay competition would boost my career though. I have benefited hugely from the digital marketing that came from the TL4 FIRE Starters Essay Competition and FFF events (thank you TL4 and Phoebe!). I met incredible people in Dublin who I have been able to maintain contact with at the various follow up TL4 events and through the events of networks that overlap with TL4, like the FFF. Some of these connections have referred work to Collas Crill which has served to boost my profile internally too. It is very rare to get this kind of exposure as a junior lawyer and I cannot recommend it enough for anyone considering entering the competition this year.

Phoebe: **Thank you both - brilliant insights.**

Purton, 2020, defines collaboration as "welcoming problem-solving assistance from others to uncover the best solutions, sharing their ambitions and seeking allies and advocates who are aligned with their vision."

Together, we have previously discussed the idea that we each have a very personal role to play in bolstering our points of connection: we need to commit our time (often post 'traditional' work hours) and effort to collaborate with others.

Against the backdrop of Purton's definition, which he formed in the context of writing about how to successfully effect change, can you tell me how you collaborate? How do you form your networks and maintain valuable working relationships?

Alex: I keep in touch with people I have worked with on previous cases because I've enjoyed working with them and have a clear idea of their strengths. I attend seminars and events which keep me up to date on the latest developments of law and practice but also because there are lots of interesting people to meet who I hope to work with in the future. My firm has signed up to pledges to offer our clients gender balanced shortlists for proposed arbitrators and experts. For this reason I regularly meet with female professionals so that I can understand the talent in the market and give my clients the best options.

The collaboration that I do will depend on the expertise of the person concerned. With accountants and investigators I often introduce them to the rest of my team by inviting them to share their knowledge with us. I'm also delighted to present to them on how we can use the powers of the Court to unlock investigations, access information and preserve assets. Our approach is to show investigators and accountants how they can use us to help their clients. We can help them to uncover the full extent of a fraud and to recover as much of the loss as possible. I meet a lot of funders at both TL4 and FFF. This is really helpful because we are increasingly instructed to find funding for fraud cases with strong merits. It is always helpful to know someone at the funder so that your request for money is not the first interaction you have with the organisation. And finally, TL4 and FFF provide networks where I can collaborate more easily with other lawyers – this article being just one example.

Steph: I follow up with new contacts and have been added to mailing lists, and invited to some really interesting events as a result. The benefit of TL4 and the FFF is that I then see those contacts at several events which strengthens the relationship. I've learnt that my aim is not to "work" the whole room. Instead, I try to take the time to build meaningful and lasting relationships with those I connect with, and that happens much more naturally when we have a normal conversation about pets, travel, and all manner of life experiences! It's just as important to strengthen existing relationships (or widen those bridges, P!) and they organically lead to further connections as a contact introduces you to those they know.

Importantly, TL4 and the FFF have created opportunities where I am meeting the right contacts – contacts relevant to my specialisms and with whom I could genuinely collaborate on cases in the future. By understanding more of what my cross-disciplinary contacts do, I have a better awareness of how they can be brought on board to assist my clients. I have had exposure to new creative thinking in various jurisdictions, such as through Cait and the presentation of her TL4 article. The power of collaboration really can be astonishing when you bring together people with a variety of talents and experiences, all pulling in the same direction.

Cait: In Jersey, there is a well-established framework for networking - there are numerous events and functions that are put on to encourage people in the finance industry to make connections. I think this is one of the benefits of living in Jersey which has a fairly transient workforce. It seems to me that the industry recognises that there will constantly be a sea change of people (okay…lawyers, accountants and bankers) needing to establish and expand their professional networks. Since moving to Jersey I have made a point of putting my hand up for as many of these events as possible so that I can meet new people and boost my profile in Jersey. Often you will see a lot of the same people at different events throughout the year (widening the bridges!) but even on an island of 110,000 people you can fall out of the loop with certain people so I try to maintain contact informally (either over email or meeting up for coffee) after an event.

TL4 and FFF have provided that framework for networking for me in the UK (and internationally). I don't get to London as often as I would like (despite the very short flight) but when I do the trip is usually centred around a TL4 or FFF event. I think something that is particularly great about these events is the fact that they draw such a multidisciplinary crowd. Ultimately, I think that if you are looking for a solicitor, barrister, investigator, e-Discovery provider or insolvency practitioner to work with on a matter you want to know not only that they can do the job but also will they get along with the rest of the team and importantly, the client. I think a firm's reputation can go a long way in telling you whether an individual can do the job but getting to know someone at a conference or an event definitely helps in establishing whether you would feel confident recommending them to your client or colleagues!

Phoebe: **It seems like you are all adept at creating those wide bridges already, that's excellent and you provided some great pragmatic examples of how to do so.**

Alex – such a good point on your differing collaboration tactics dependent on the practitioner's expertise. Plus, I really like that Fieldfisher pledges to offer your clients gender balanced shortlists; I have heard a few chambers doing that so far - more firms/companies should follow suit. There is so much female talent in our sector, some of whom may be being overlooked. We do also need to ensure that Equality, Diversity and Inclusion initiatives are implemented for all differences between persons though – racial, neurodiverse, disabilities and so on. Operational steps such as pledges can help expedite positive (and much needed) societal change. There is a lot to be done!

A further area of study in the CISL course was how influence mapping can be a helpful exercise to complete, as well as stakeholder mapping. This form of mapping pinpoints those around us who have the influence to effect change. It enables us to understand the depths of our own strengths and skills, and those of others, in addition to appreciating our limits, in order to bring about both small and large shifts on micro, meso and macro levels. It also means that we can identify and prioritise the traditionally overlooked. The two further pillars of Purton's practice points to successfully effect change (Collaboration, as touched upon above, being one) are Humility ("acknowledging the things we do not know and welcoming opportunities to learn") and Flexibility ("remaining open to new approaches that challenge existing practices and beliefs").

Do any of you practice influence mapping?

Alex: I have to admit that I don't do this but I probably should. I have always taken the approach that networking is a long game and that in litigation you never know where the next piece of work will come from. My approach has been to provide as much help to others as I can in the hope, and dare I say it, expectation, that the good deed will be repaid. The only time when I really focus on identifying the decision maker / work generator is when I am targeting a specific piece of work that I know the client needs help with. In my experience, most cases don't fall into this category.

Steph: I haven't heard of influence mapping before, so thank you Phoebe! But it will be something I bear in mind going forwards.

Cait: I too have not heard of influence mapping before and will be taking a leaf out of Steph's book in this regard.

Phoebe: **OK, swiftly moving on then! The FFF's mission statement is to support and encourage the advancement of women (I would seriously consider having this as my next tattoo). One particular goal of mine as part of this statement, through leading the FFF, is to help build the confidence of our members.**

Do you have suggestions to members of our communities on how they can build their confidence? How has your self-assurance developed over your careers?

Alex: This is a tricky one. Confidence is so important in BD and it is a challenge for many women. When members of my team ask me about confidence I suggest they start by watching the TED talk by Amy Cuddy. Amy's talk explains how the physical poses we adopt convey the appearance of confidence and actually make you feel more confident too. Second I advise that preparation for a meeting is key. If you know more about the subject matter than everyone else in the room, it gives you inner confidence. And finally, I say mirror the behaviours of (some) others. Try to work with colleagues who appear confident and authoritative. Then adapt their style to make it your own.

Steph: As a natural introvert, I could sometimes feel uncomfortable networking and lacked confidence when public speaking. I assumed that the best and most memorable networkers were the extroverts – the louder and bubblier personalities who others are drawn to. Now, I see that being an introvert can be a strength – it can help to build deeper and lasting connections by engaging with someone 1:1 or in smaller groups.

I also attended some training with a former actor where we filmed ourselves public speaking and then analysed it. It was slightly daunting being presented with a picture of an eagle and needing to speak on it for several l.o.n.g minutes(!), but the training really helped.

In the FFF and TL4, I've found a friendly and supportive space that really works for me. FFF members genuinely encourage each other, celebrate and champion each other's achievements, and want to see each other succeed. Likewise, when I presented at the TL4 Summer School in August of this year, it was a lot easier to stand on a stage when people are rooting for you. The key is finding the right space for you.

My advice would be to push yourself out of your comfort zone – you'll be surprised at what you can achieve, but be kind to yourself – if something doesn't go as well as you might have hoped, it is quickly forgotten and everything is a learning experience. You won't be the only person in the room feeling the nerves and it is likely you look more confident than you feel.

I also completely agree with Alex that preparation is absolutely essential. It gives you confidence, avoids the dreaded mind blank, and it really shows if you are well prepared.

Cait: Am I the only one who is going to say that I wouldn't put it past Phoebe to have the FFF mission statement inked on her?!

I must say Alex and Steph are hard acts to follow on this question. I am reluctant to answer this question by saying "what she said" but I really do agree with their points. I think then what I have to add is more anecdotal and builds on those points. It also definitely bangs the "I am new here. I come from South Africa" drum a bit more so the readers will have to bear with me on that one last time. Simply put: moving to and practicing law in a new jurisdiction in my 30s was a real knock to my confidence. I think the concept of imposter syndrome is well-trodden in today's work-wellness lexicon so I will not say much more about it here save to admit that I felt a very heightened sense of imposter syndrome at conferences and events after moving to Jersey.

I was a fairly established junior lawyer in South Africa in that I had enough confidence in my work to feel comfortable speaking to people at conferences or events (and importantly enough wherewithal to know when I didn't know enough!). Moving to Jersey felt like I had gone back to square one in a sense; having to make and prove myself to new connections again. I am naturally quite outgoing and so I did not find it difficult to convey the appearance of confidence (which definitely did make me feel more confident) but I was quietly (not so quietly) very anxious about whether it would be glaringly obvious that I was finding my feet. This is where Alex and Steph's practice point comes in for me. I was incredibly nervous about presenting my essay at TL4 FIRE Dublin and practiced it to death – researching all manner of tangents that might come in the way of questions (there were no questions, of course). It did not stop my legs shaking but it definitely went a long way to helping me relax (a bit).

I will also echo Steph's point about finding a space that works for, and is supportive of, you when getting out there to BD. Having a good team behind you (your firm or company) is crucial, as is linking yourself to networks (in which you can find teams!) like TL4 and FFF which are supportive and welcoming. It can be difficult to build your confidence so make sure that the people around you are as invested in that endeavour as you are.

Phoebe: **We are very grateful you became part of our community - and team, Cait!**

I totally agree with your point S about being self-compassionate; we can judge ourselves far too harshly. Most of us consistently try our best. That's one of the reasons communities such as the FFF and TL4 are critical – we are comprised of individuals who have common goals and are all attempting to work towards them. Let's do that together, be kind to each other and ourselves, and share the labour (and that bottle of wine, maybe?). That will make us more effective stakeholders.

In terms of the TED talk, I think I know which one you mean Alex - Amy presents on being a bear and stretching your arms out as wide as you can, at one stage. If I understand correctly, a bear makes itself as big as possible when facing a threat to try and ward off its adverse party. Amy's point is that if we do that when we are nervous, ahead of a presentation for example, take up as much physical space as possible (in preparation, not starfish on a stage) - then it will make us feel more in control and confident for confronting 'the threat'.

On that note, please each share one practical tip for people when networking or attending BD events. Mine would be to make and hold eye contact with someone you meet, at least until it gets weird (subjective, I'd say). With practice, eye contact is also a useful tool towards gaining greater self-assurance, too.

Alex: Really listen to what the person is saying and ask yourself how you can help them.

Steph: Take Phoebe as your plus one!! And if she can't attend, then don't just talk about work – your new contact is much more likely to remember you for something other than work.

Cait: I think this builds on what Alex and Steph have said above. I think one should be very wary of doing most of the talking. As I say this I am sure there are some people reading this who I have jabbered on to at BD events thinking – "That woman!? Giving advice about not talking too much? Pfff" – and they would not be entirely wrong (I am doing it right now!). I am definitely guilty of this and it is something I try to keep under wraps generally but especially at BD events. I think that listening and asking questions can widen and strengthen the bridges we build with people. I find it much easier to pick up with people at subsequent events when I know what they are interested in or what cases they are working on. In addition, I think it definitely soothes the old nerves a bit if you get into the groove of a normal conversation with someone at a BD event as opposed to what can sometimes be very static or cold work chat.

Phoebe: **Terrific tips – they may come across basic but actually so many networkers do not follow these guidelines! There is a Chinese proverb that pretty much sums up what you are all advising here: 'We have two ears and one mouth so that we can listen twice as much as we speak.' Someone first shared that with me when I had just joined the London professional scene after my Master's.**

What about any advice for what not to do at a BD event?

Alex: The one that still irritates me is when I ask a question or make a comment and the response is directed to another person in the group (often a male colleague). It is infuriating and remarkably still happens, although less so than it did in the past.

Steph: Don't forget to introduce people you know to others who approach the group. It will really shape someone else's experience of the event and help to avoid awkwardness.

Cait: Don't start a conversation and then start scanning the room for someone else to engage. This is narrow bridge energy in my view.

Phoebe: **Each one of those is definitely narrow bridge energy. Time to wrap up.**

Thank you for joining me Alex, Steph, and Cait – and if you managed to make it to the end of our piece – thank you very much, reader (seriously). We hope that some of our perceptions prove valuable for your business development and networking experiences.

We would like to end with a quote from the legend that is Ruth Bader Ginsburg: "Fight for the things that you care about. But do it in a way that will lead others to join you."

And in the wise words of Cait - what she said.

Let's build wide bridges.

To join the Female Fraud Forum as a member, or corporate partner, please go to www.thefemalefraudforum.com. We network, we educate, we socialise – and we make a difference. We welcome you to join us in disrupting the system, so that we can support women (and all genders) effect change for a more positive and profitable future together.

SANCTIONS REGIME

RECENT DEVELOPMENTS

Authored by: Clara Browne - PCB Byrne

The UK's principal Russia sanctions legislation is the Russia (Sanctions) (EU Exit) Regulations 2019 (the "Russia Regulations").

Recent amendments made to the Russia Regulations include the Russia (Sanctions) (EU Exit) (Amendment) (No.15) Regulations 2022 (the "No.15 Regulations"), the majority of which came into force on 29 October 2022, and the Russia (Sanctions) (EU Exit) (Amendment) (No. 16) Regulations 2022 (the "No. 16 Regulations") , which will enter into force on 5 December 2022.

No. 15 Regulations

Loans and credit arrangements

Regulation 3 effectively replaces category 3 loans with a new, wider class of "category 5 loans". "Category 3 loans" were loans with a maturity exceeding 30 days made or granted at any time on or after 1 March 2022 to: (i) a person connected with Russia (a "PCWR"), (ii) a person owned by a PCWR, or (iii) a person acting on behalf of or at the direction of (i) or (ii) above. Category 5 loans restrict making certain loans or credit available to persons connected with Russia and therefore bring companies outside Russia owned by a person connected with Russia into scope, including UK companies.

General Licence INT/2022/2305324 [3] allows for the continued granting of category 5 loans (or entering into arrangements to grant category 5 loans) to Gazprom Germania (otherwise known as Securing Energy for Europe) and/or its subsidiaries. The General Licence expires on 29 October 2023 and permits UK financial institutions to process payments in connection with certain loans.

Restriction on LNG imports

Regulation 6 introduces a prohibition on the import of liquified natural gas ("LNG") originating in or consigned from Russia, with the intention of LNG entering the UK. This measure also restricts technical assistance, brokering services, financial services and funds relating to such import or acquisition. This restriction will come into force on 1 January 2023.

1 https://www.legislation.gov.uk/uksi/2022/1110/contents/made
2 https://www.legislation.gov.uk/uksi/2022/1122/contents/made
3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1114576/General_Licence_INT20222305324.pdf

Other amendments to trade sanctions

Regulation 5 introduces provisions relating to the import of gold jewellery and "relevant processed gold"; Regulation 6 introduces new export and sale restrictions in relation to "Russia's vulnerable goods"; and amendments have been made to a number of the existing schedules of restricted goods, including the insertion of a new list of products into the "G7 Dependency and Further Goods" list.

No. 16 Regulations

Maritime transportation of certain oil and oil products

Regulation 4 prohibits the direct or indirect supply or delivery by ships of certain oil and oil products falling within commodity codes 2709 and 2710, from a place in Russia to a third country, or from one third country to another third country. It prohibits UK persons from providing financial services or brokering services respectively to facilitate the supply or delivery of 2709 and 2710 oil and oil products from a place in Russia to a third country, or from one third country to another third country.

Regulations 5 and 6 introduce exceptions such that Regulation 4 is not contravened by:

a. activity in which: (i) 2709 and 2710 oil and oil products originate in a country that is not Russia; (ii) are not owned by a person connected with Russia; and (iii) are only being loaded in, departing from or transiting through Russia.

b. any act done by a person, where they provide justification to the Treasury within 5 working days beginning with the day on which the act is done that the act is dealing with an emergency.

Regulation 3 has amended the implementation date for the prohibitions relating to the import of all Russian oil and oil products into the UK from 31 December 2022 to 5 December 2022.

Reporting Obligations

Regulation 9 applies to persons involved in the supply or delivery of oil and oil products, or the provision of financial services or funds or brokering services relating to the supply or delivery of oil and oil products.

Such persons must inform the Treasury as soon as practicable if they know or have reasonable cause to suspect that a person has committed an offence and the information or other matter on which the knowledge or cause for suspicion is based came to them in the course of carrying on their business. They must state the nature, amount, value, or quantity of any goods or services related to the suspected offence at the time when they first had the knowledge or suspicion.

OFSI General Licence for legal fees

The OFSI General Licence under the Russia Regulations and the Belarus Regulations INT/2022/2252300[4] (the "General Licence") took effect on 28 October 2022 and expires on 28 April 2023.

The General Licence relates to the payment of legal fees owed by individuals and entities designated under the Russia and Belarus sanctions regimes, and may enable a UK legal firm or counsel who has provided legal advice to a designated person to receive payment without having a specific OFSI licence.

For payment owed for legal work carried out in satisfaction of an obligation entered into pre-designation, there is a £500,000 cap (including VAT if applicable) on the amount that can be claimed over the duration of the licence.

For post-designation work, there is also a £500,000 cap (including VAT if applicable) in total for the duration of the licence. The hourly rates for provision of professional legal fees by a Legal Adviser must not exceed those rates listed in paragraph 12 of the General Licence and the hourly rates to be charged by Counsel must not exceed £1,500 per hour (including VAT).

A specific licence will need to be sought from OFSI when fees (combined where applicable) are above these caps.

OFSI enforcement powers

Regulation 2 of the Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No.2 and Saving Provision) Regulations 2022[5] entered into force on 15 June 2022 and:

i. Enables OFSI to impose civil monetary penalties on a strict liability basis for breaches of financial sanctions.

ii. Removes the requirement for a review of a decision by the Treasury to impose a monetary penalty to be carried out by the Minister personally.

iii. Allows the Treasury to publish notices detailing violations by persons of financial sanctions in cases where the Treasury have decided not to impose a penalty.

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1114563/General_Licence_INT20222252300.pdf

5

Understand, Investigate, & Communicate DeFi Transactions

Did you know specialist tools are available to analyze web3 transactions, trace assets, and investigate illicit activity?

With Chainalysis Storyline, investigators can trace tokens forwards and backwards in time to understand chain of custody to arrive at actionable insights.

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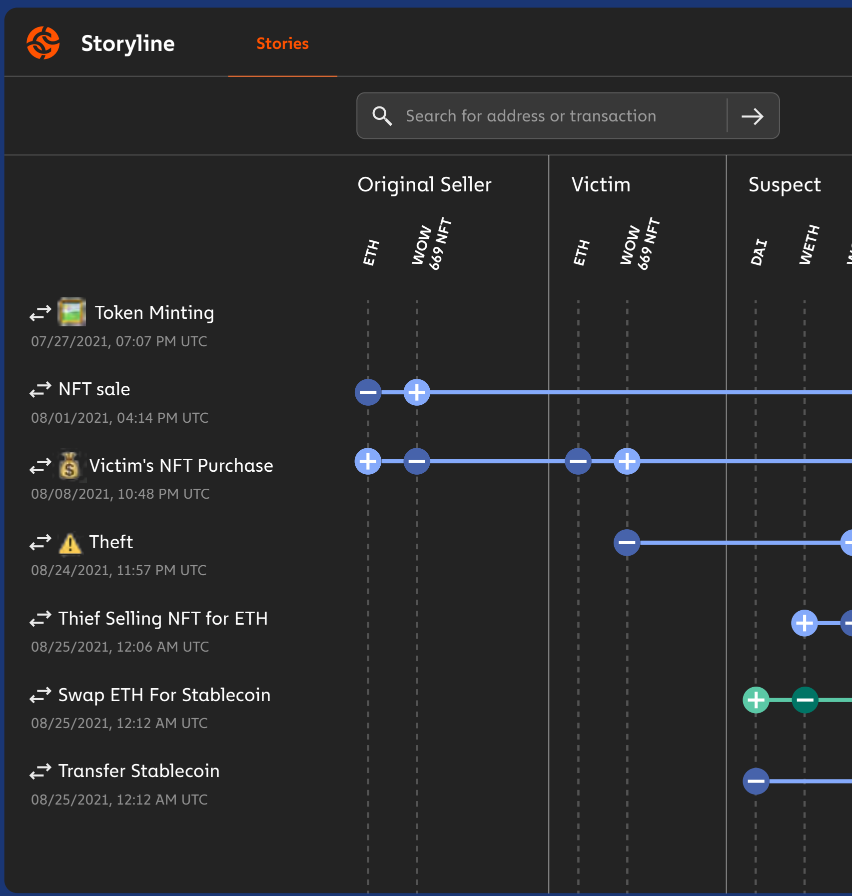


About Chainalysis

Chainalysis is the blockchain data platform. We provide data, software, services, and research to government agencies, exchanges, financial institutions, and insurance and cybersecurity companies in over 70 countries. Our data powers investigation, compliance, and market intelligence software that has been used to solve some of the world's most high-profile criminal cases and grow consumer access to cryptocurrency safely.

Chainalysis

NFTS IN 2022

NEW USE CASES, PREVENTING ILLICIT ACTIVITY, AND WHAT'S NEXT

Authored by: Katie Thornton - Chainalysis

We have all heard about non fungible tokens (NFTs), but what exactly are they?

NFTs are blockchain-based digital items that are designed to be unique, with most NFT projects built on the Ethereum blockchain. Unlike traditional cryptocurrencies, NFTs are not interchangeable, typically giving the holder ownership over associated data, media, or physical objects. They are bought and sold on specialised marketplaces.

The first NFT was minted in 2014; they gained popularity in 2017 with Crypto Kitties, but 2021 was really the year the NFT shot to fame.

According to Chainalysis' 2021 NFT Market Report, in 2021, users sent at least $44.2 billion worth of cryptocurrency to ERC-721 and ERC-1155 contracts: the two types of Ethereum smart contracts associated with NFT marketplaces and collections - up from $106 million in 2020.

In this article we will look at the evolution of NFTs and their uses over the last year.

As expected with any new technology, NFTs carry the potential for abuse. In late 2021 Chainalysis reported[1] that rug pulls accounted for 37% of all cryptocurrency scam revenue in 2021 totalling at least $2.8 billion worth of crypto. A rug pull is when the founders of a crypto project pull the rug out from under its investors by disappearing with whatever funds they have amassed at the time.

While most rugpulls involved various DeFi projects, there are several examples of NFT rug pulls. Two individuals were charged[2] by the US Department of Justice in March 2022 for their involvement in the Frosties NFT rug pull, from which they allegedly received $1.1 million in sales Law enforcement stated that they were about to embark upon another project, Embers, where they were expected to make a further $1.5 million.

In April, another rug pull, Bored Bunny NFT, reportedly[3] led to the loss of $20.7 million. The Bored Bunny NFT was promoted extensively by well known celebrities such as Floyd Mayweather and DJ Khaled, a common occurrence in the NFT world. When the project launched, it sold out within hours, making the team an initial 2000 Ether.

But it's not all doom and gloom and dirty rugs, there has been a lot of legitimate market adoption of the technology in places you would and would not expect it.

In March 2021, auction house Christie's sold an NFT by digital artist Beeple aka Mike Winkelmann for $69 million. This year, Christie's is paving the way with its Christie's 3.0[4] platform. Christie's collaborated with three active companies in the Web3 community on the project: Manifold, Chainalysis, and Spatial. Auctions will take place

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

2 https://www.justice.gov/usao-sdny/pr/two-defendants-charged-non-fungible-token-nft-fraud-and-money-laundering-scheme-0

3 https://cryptoslate.com/investors-lose-20-7-million-in-bored-bunny-nft-promoted-by-multiple-celebrities/

4 https://www.christies.com/about-us/press-archive/details?PressReleaseID=10648&lid=1https%3A//www.christies.com/about-us/press-archive/details%3FPressReleaseID%3D10648&lid=1

on the Ethereum blockchain network from start to finish, meaning that all transactions will take place on-chain. Christie's is working with Chainalysis on the compliance side, allowing for security and safety for both NFT buyers and sellers.

The legal use cases and considerations around NFTs have been all over the press this year, showing both the risk of getting into new tech while the regulatory landscape is still being built, but also the great opportunity tech has presented to overcome other challenges posed by a digital world. Real estate is often considered to be a good investment, but what about virtual real estate? NFTs representing virtual land have become a hot topic since the advent of the metaverse. Some plots of land are selling for millions of dollars.

Between September 2019 and March 2022, blockchain-based virtual real estate prices grew by 879%. Meanwhile, in the real world, prices grew by 39% (Chainalysis[5]).

What are the benefits of owning virtual real estate? Once purchased you are 100% the owner of the real estate on that platform, solidified through an NFT. You can customise the real estate to your liking, and even host virtual events.

In the legal arena this year, both in the United States and the United Kingdom, we have seen the courts grant permission to serve proceedings on defendants (persons unknown) by NFTs, using the technology to overcome some of the hurdles posed by the pseudonymous nature of the blockchain. In one of the UK cases, the judge concluded[6] that service by these means would likely lead to a greater prospect of those behind the fraud being put on notice of the order, and the commencement of proceedings.

We have even seen NFTs show up in asset recovery. February was witness to HMRC successfully securing a court order seizing three digital artwork NFTs. This was the first time a UK authority has seized NFTs in this way. The ongoing investigation relates to a £1.4 million VAT fraud.

As can be seen above, there have been varied uses of NFTs over 2022, giving lawyers, accountants, regulators, developers, investors, and virtually all stakeholders in the industry food for thought. This flow of activity yields some interesting figures and statistics.

While the number of NFT transactions has only decreased 18% since December 2021, trading volume has decreased 82% during this same period. Some of this slump can be attributed to the broader crypto market decline, but the pace at which NFT trading volume has fallen shows that this market has been hit especially hard.

What does this mean for the future of NFTs?

The general trend for NFTs is likely to have been impacted by the state of the global economy. This article has touched upon some of its use cases during 2022. We haven't even started discussing using NFTs to combat the replica industry (a $464 trillion industry), to make automatic royalty payments, or the film and TV industry which will be a topic of discussion in 2023. Scammers will always be attracted to areas of growing popularity and NFTs are unfortunately not an exception to this. Prevention through education and thorough investigation of cases will send a strong message to scammers. To this end, it is vital that industry participants who investigate and recover assets have the education and tools to implement a robust zero tolerance policy. The good news is that tools are now available not just to track the flow of funds in crypto, but which have been designed specifically to do this for NFTs and DeFi.

5 https://blog.chainalysis.com/reports/virtual-real-estate-blockchain-gaming-web3/
6 https://www.bailii.org/ew/cases/EWHC/Ch/2022/1723.html

NOT JUST ANOTHER ARTICLE ABOUT BTI V SEQUANA

Authored by: Daniel Lewis - Wilberforce Chambers

For a judgment so eagerly awaited, its arrival was a little anti-climactic

For that reason, this is not another article about the decision of the Supreme Court in BTI 2014 LLC v Sequana SA [2022] 3 W.L.R. 709; at least it is not only about that. The majority (although not ad idem as to its precise formulation) affirmed the decision of the Court of Appeal that a director's duty to act in the company's interests was modified so as to include a duty to act in the interests of creditors as a whole when the director knows or ought to have known that: (i) insolvency was "imminent" (i.e. "just round the corner and going to happen") or; (ii) it was "probable" that the company would enter into an insolvent liquidation or administration.

This article looks at the future application of the "creditor duty" (actually a duty owed to the company about its creditors) in the context of cases where questions of imminence and probability are more nuanced than the rather stark facts of Sequana allowed, and particularly with reference to liabilities to HMRC which have arisen by reason of a company's participation in tax avoidance schemes.

Tax schemes typically involve payments from the company to the directors and/or shareholders, via some intermediate step (for instance, a trust or a conditional share scheme), which is intended to relieve the obligation of the company to set aside and account for PAYE and NIC. Those schemes are typically open to attack in one of two ways, either:
(a) as a means of effecting disguised distributions in breach of Part 23 of the Companies Act 2006 which unlawful per se (as in Toone v Ross (Re Implement Consulting Ltd) [2020] 2 B.C.L.C. 537); or (b) on the basis that the directors acted in breach of their duties to act in a manner that they considered in good faith as likely to be in the best interests of the company (including, under section 172(3), the "creditor duty") (as in Hunt v Balfour-Lynn (Re Marylebone Warwick Balfour Management Ltd) [2022] EWHC 784 (Ch)).

The unlawful distribution analysis is not without logical difficulties. First, the principal (perhaps, only) creditor in the liquidation will be HMRC, whose proof of debt will be for PAYE and NIC. That does not sit easily with the argument that the payments were distributions to shareholders. Secondly, the disguised distribution analysis ignores the interposition of independent trusts and trustees.

That leaves the liquidator of a company which has participated in tax avoidance schemes with claims for breach of duty under section 172. A director is entitled to arrange a company's affairs to minimise its tax liability, providing that this does not cross the line into dishonest tax evasion. Either a scheme is successful in avoiding the tax charge prescribed by legislation or it is not, but entry into the tax avoidance scheme is unlikely itself to be a breach of duty. The question is whether the "creditor duty" makes what is otherwise permissible decision-making by directors, in seeking to limit the company's tax bill, a breach of duty?

It may take many years for the efficacy (or otherwise) of a particular scheme to be finally determined. However, that decision, when it is made, expresses

the law as it has always been (In re Spectrum Plus Ltd (in liquidation) [2005] 2 A.C. 680). That means that a company might participate in a scheme for many years, without its directors knowing that it is contrary to the law as it will eventually declared to be.

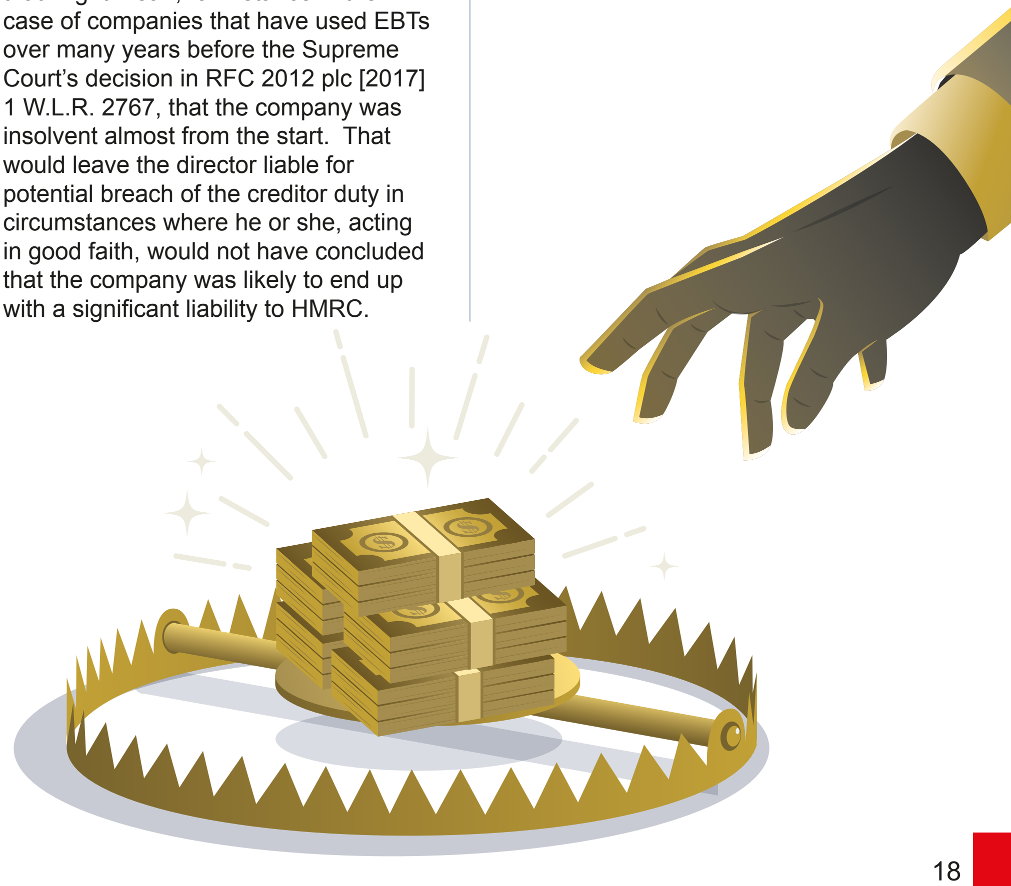
It is in those cases that the decision of the majority in Sequana is likely to be important, since it has preserved the requirement that, for the "creditor duty" to arise, the director must have actual or constructive knowledge of the company's imminent or probable insolvency.

In a case where the director has taken professional advice and has placed reasonable reliance upon it as to the probable efficacy of the tax scheme, this conclusion means that he or she is unlikely to be found to have breached the "creditor duty", both by taking the advice in the first place and by reaching the reasonable subjective view in reliance upon that advice that a liability to HMRC would be unlikely to eventuate.

Had an objective test been adopted (a solution preferred by Lord Reed, without expressing a final view on the point) that might mean, for instance in the case of companies that have used EBTs over many years before the Supreme Court's decision in RFC 2012 plc [2017] 1 W.L.R. 2767, that the company was insolvent almost from the start. That would leave the director liable for potential breach of the creditor duty in circumstances where he or she, acting in good faith, would not have concluded that the company was likely to end up with a significant liability to HMRC.

The contrary argument is that, on those same facts, the director is not obliged to enter into the tax avoidance scheme at all. The choice to do so is no doubt motivated by the personal incentive of the receipt of money through the scheme. He or she has chosen to take a risk in circumstances where the advice received from the professionals will never guarantee the participant in the scheme of success. However, such an argument would require the court to sit in judgment on commercial decision-making (an exercise the courts generally abjure). It requires the directors to hold the company harmless for liabilities which were incurred in good faith and for the benefit of the company's shareholders, no matter how negligible the risk of liability to HMRC was reasonably understood to be.

These questions are still to be worked through and (as Lady Arden observed at [416]) have not received particularly detailed consideration in the first instance decisions to date. The appeal in Marylebone Warwick (due to be heard in March next year) provides an early opportunity to do so.



FIRE Starters Global Summit: Dublin

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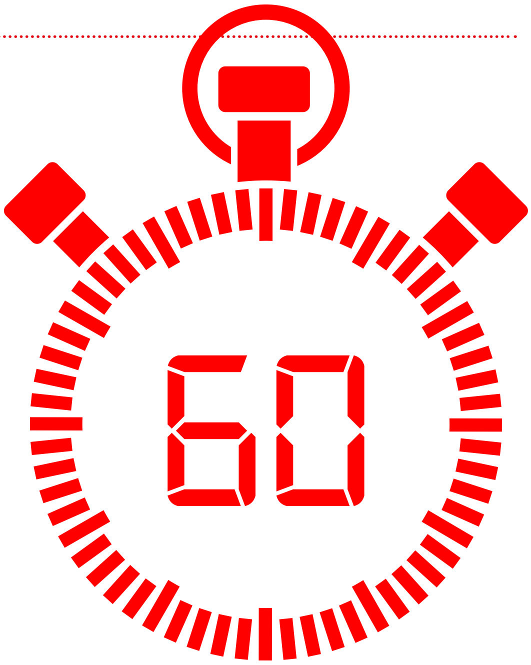


Q What do you like most about your job?

A I enjoy the fast-paced nature of a fraud and asset recovery case. The build up at the start of a case unravelling the fraud and dealing with applications for freezing orders, search orders and disclosure orders is really exhilarating. I really enjoy working as part of a team and bouncing ideas off each other.

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

A I wanted to join the police force when I was younger so perhaps I would be a bobby on the beat if I wasn't a solicitor.

Q As we approach the end of 2022, what has been the most interesting case or development in the industry you have seen this year?

A Well, we have just written an article for the Disputes Magazine year in review on the Court of Appeal's judgment in Gorbachev v Guriev focussing on the principle of territoriality. It has to be that right?! The new gateways introduced on 1 October 2022 allowing certain applications for disclosure against non-parties to be served out of the jurisdiction are pretty exciting especially for a fraud specialist. If that is not exciting enough, I wrote about fortification of damages in freezing injunctions for the FIRE Magazine year in review. You will have to read the articles to find out more..

Q What do you see as the most significant trend in your practice in a year's time?

A The level of sophisticated frauds increases year on year and I expect a rise in crypto and digital asset fraud. We have also been waiting on a wave of insolvencies following the pandemic and we are seeing them starting to seep through. I expect there will be a great deal more insolvency related work.

Q What has been your greatest work-related achievement in 2022?

A I joined Cooke Young & Keidan on 1 April 2022. It has been a fantastic move for me and I am absolutely loving it.

Q Who has been your role model in the industry?

A There are many people I look up to in the industry.

Q What is something people do not know about you?

A I am a Supervising Solicitor so can act as the independent solicitor on search, image or doorstep delivery up orders.

Q What is a book you think everyone should read and why?

A Nelson Mandella's Long Walk to Freedom (although it's a bit long for my liking). I don't think I need to say why. He is a most inspirational man.

Q If you could bring back a fashion trend, what would it be and why?

A The Velour tracksuit – I had a fantastic pink one with "JUICY" across the butt – such a shame I don't have it anymore!!

Q What item do you never travel without, and why?

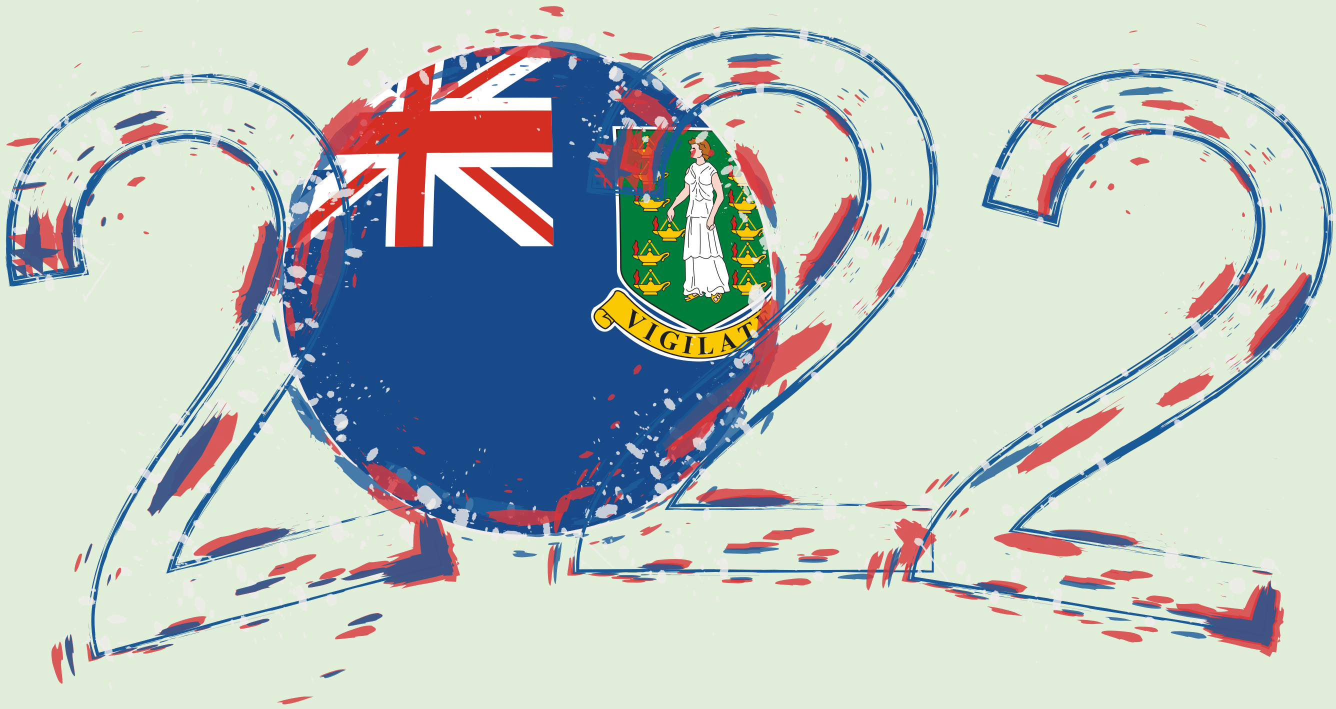
A My Swiss Army Knife. I was very fond of my father and he gave it to me. I am always using it.

Q Reflecting on 2022, what three words would you use to sum up the year?

A Frustrating (I broke my ankle), Joy (joining CYK) and Pride (I have loved spending time with my children watching them grow and develop)

Q What is one goal of yours for 2023?

A Have fun.



KEY DEVELOPMENTS IN BVI DISPUTE RESOLUTION

Authored by: Christopher Pease and Victoria Lissack - Harneys

2022 has been a busy year for BVI dispute resolution, characterised by an uptick in insolvency proceedings and work involving digital assets and cryptocurrencies. We highlight some of the key trends and decisions below.

Digital assets and cryptocurrency

The BVI's longstanding commitment to FinTech innovation has attracted some of the largest players in the digital assets space, keen to capitalise on its stable regulatory environment, experienced legal and accounting sectors and status as a leading offshore financial centre. An increase in virtual asset service providers has seen a corresponding rise in digital asset disputes. Consequently, the BVI courts have encountered novel issues that they continue to deal with in a swift and pragmatic manner.

As in other jurisdictions, BVI virtual asset service providers have been the victim of hacks, with digital assets misappropriated as a result. This has led to actions to trace and recover those assets (or seek compensation for the value of assets lost). ChainSwap Limited v Persons Unknown was a landmark decision and the first of its kind in the BVI. A cross-chain bridge protocol was the subject of two hacks which allowed the hackers to misappropriate tokens from private users and token issuers that had interacted with the bridge. The hackers used decentralised exchanges to convert the misappropriated tokens into stable coins, some of which were then transferred through a mixer, Tornado Cash, before off-ramping them using a Croatian exchange. The court was satisfied that there was sufficient evidence that wallets used to transfer tokens into, and receive tokens out of, Tornado Cash were owned or operated by the hackers to justify the grant of injunctive relief and letters of request to compel disclosure from the Croatian exchange. The court also permitted ChainSwap to serve the hackers out of the jurisdiction by alternative methods, including service via the third-party exchange. The judgment, which followed similar decisions in England and other jurisdictions, demonstrates the BVI court's capacity to adapt well-established remedies to deal with the unique challenges posed by digital asset fraud.

In June, the BVI court placed prominent crypto hedge fund Three Arrows Capital, which was reported to have had over US$3 billion in digital assets under management prior to its demise, into liquidation. The liquidators (and BVI proceedings) have since been recognised in the US and Singapore and so can seek assistance from the courts there: a critical step in complex cross-border cases. Various other high-profile crypto funds and lenders have claims in the liquidation, and its outcome will therefore have a significant impact on returns for crypto investors around the world.

Just and equitable winders to combat fraud

The just and equitable winding up jurisdiction has traditionally been used sparingly by aggrieved shareholders, however in Hydro Energy Holdings BV v Zhaoheng (BVI) Limited the BVI court affirmed the flexibility of the remedy and its importance in the commercial fraud context. In addition to agreeing that the appointment of liquidators on just and equitable grounds is clearly warranted where a BVI company has been used as a vehicle for fraud, the court declined to stay the winding up application pending the outcome of arbitration proceedings in Hong Kong under the terms of the shareholders' agreement. The winding up order was made notwithstanding that a Hong Kong company interposed between the BVI company the group's operating companies had already been placed into insolvent liquidation.

There have more recently been other applications to use the just and equitable winding up jurisdiction in a similar way.

Challenging decisions of office-holders

A series of recent decisions from the BVI Court of Appeal provide useful guidance as to when the act, omission or decision of an office-holder may be challenged under s.273 of the Insolvency Act. In addition to defining the requirements for standing, the court confirmed that a finding of perversity is necessary before the courts can interfere with a commercial or administrative decision but a decision which is not commercial or administrative in nature can be interfered with without any suggestion of perversity (Steven Goran Stevanovich v Marcus Wide and Mark McDonald). A second (confidential) judgment affirmed Stevanovich and consequently a rare decision of the Commercial Court to appoint a conflict liquidator was upheld. In Treehouse Investments Limited & Ors v Carl Stuart Jackson & Ors, the court clarified the scope of the s.273 jurisdiction, finding that where allegations against an office-holder go beyond allegations specific to a particular decision, act or omission and amount to serious allegations of impropriety and wrongdoing, the appropriate recourse is an application for the removal of the office-holder.

Use of disclosed documents

2022 also saw the BVI courts affirm their willingness to take a pragmatic view of the commercial needs and rights of third-party funders. In Fang Ankong v Green Elite Ltd (In Liquidation), the Court of Appeal held that the liquidators were entitled to share asset disclosure information produced pursuant to a freezing injunction with their third-party funder. Sharing the disclosure was for the purpose of the proceedings in which it was given and was therefore a permitted, and not collateral, use of the documents. Moreover, to the extent the implied undertaking applied to the disclosure material, sharing such information with the funder amounted to purposes ancillary to those for which the disclosure had been made (i.e. to police the injunction) because the funder should be entitled to assess the value of frozen assets which may be amenable to enforcement.

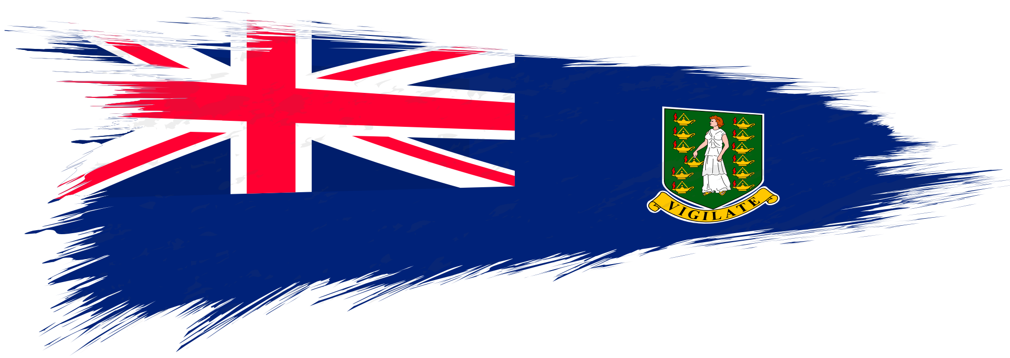
Sanctions

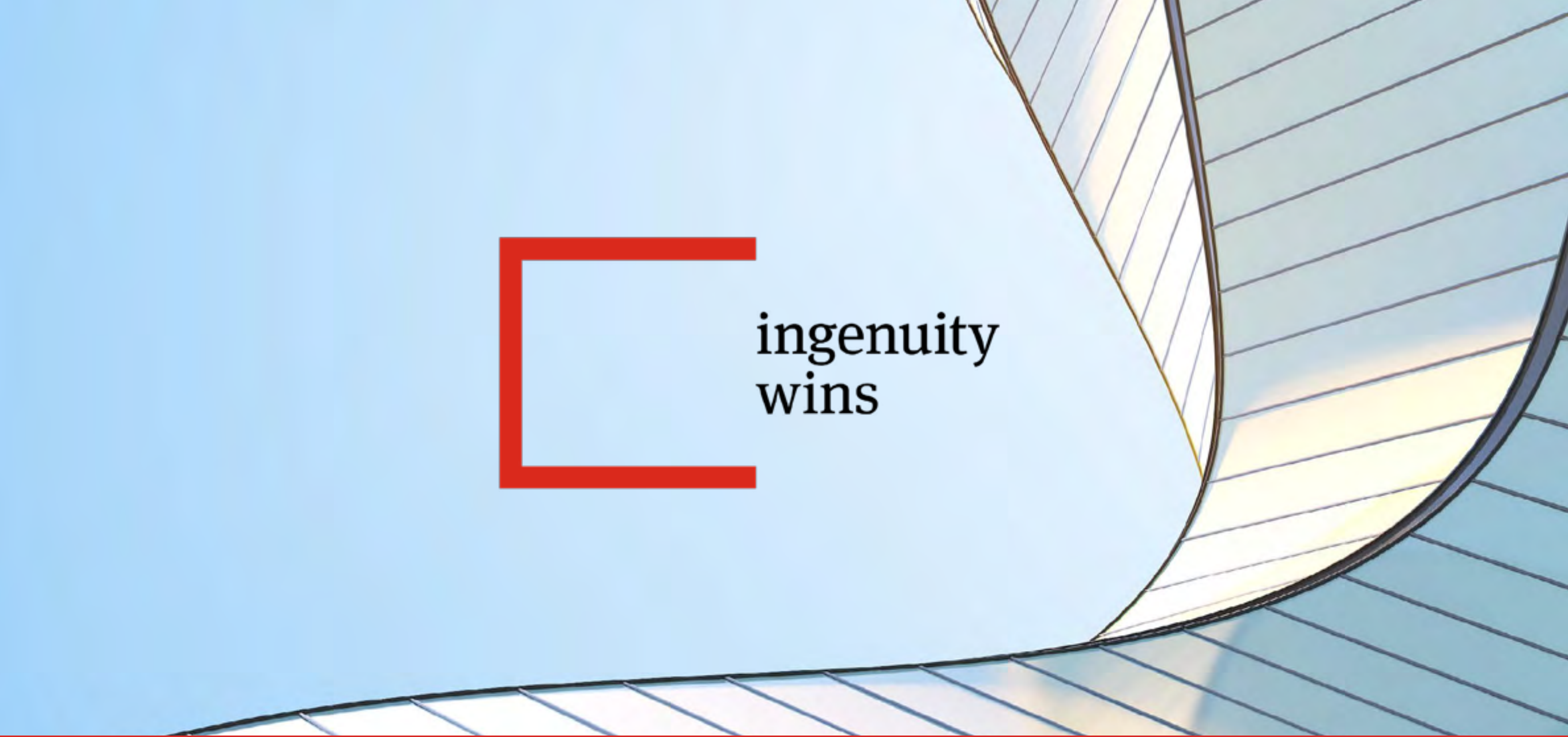
Finally, the BVI courts have started to grapple with the practical implications of the Russian sanctions regime, including the circumstances in which a BVI legal practitioner may cease to represent a sanctioned entity or individual (see, for example, the Commercial Court's recent judgments in VTB Bank v Taruta and AO Alfa-Bank v Kipford Ventures Ltd).

Conclusion

While the dispute resolution landscape is constantly evolving, 2022 has again illustrated that the BVI courts will respond quickly and pragmatically to new and unprecedented scenarios.

There are further developments on the horizon, with significant regulatory and legislative changes incoming, including substantial amendments to the Business Companies Act and a new framework governing virtual asset service providers, and the full impact of the Russian sanctions regime remaining to be seen.

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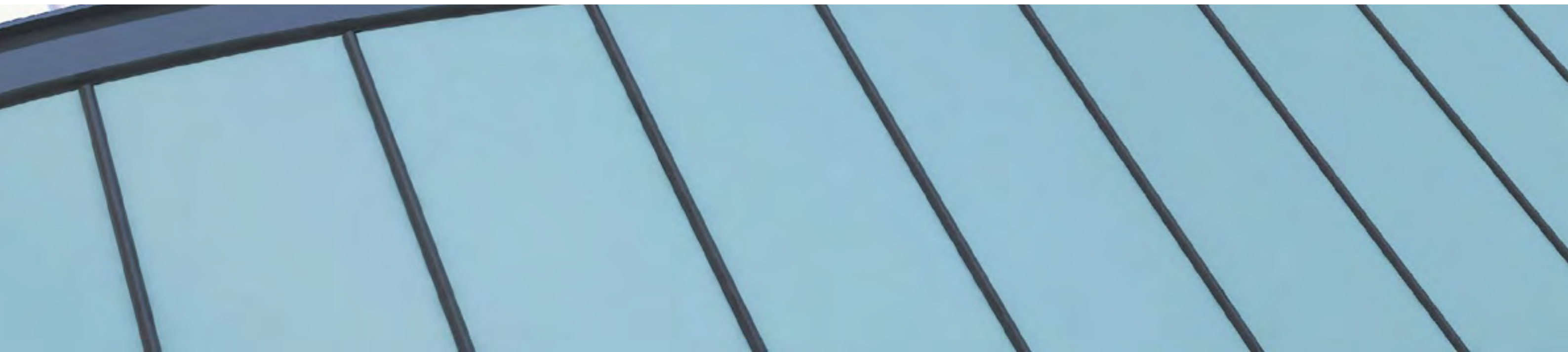


LOOKING AHEAD

ASSET RECOVERY AND THE ECONOMIC CRIME AND CORPORATE TRANSPARENCY BILL

Authored by: Joanna Curtis - Brown Rudnick

This year we saw the introduction of the Economic Crime (Transparency and Enforcement) Act 2022, which included (1) the introduction of a register of overseas owners of UK real property, and (2) broadening the scope of unexplained wealth orders (UWOs). In September this year the government also introduced the new Economic Crime and Corporate Transparency Bill (the "Bill"), which continues this trend, promising to

"bear down further on kleptocrats, criminals and terrorists who abuse our financial system, strengthening the UK's reputation as a place where legitimate business can thrive, whilst driving dirty money out of the UK".

Two of the Bills proposals are of interest for the purposes of asset-tracing and recoverability:

1. Company information and ID requirements on new and existing company directors and persons with significant control; and
2. Civil recovery powers for law enforcement over cryptoassets.

Company registration and ID requirements

The key new proposals under the Bill are:

1. New requirements on companies and limited partnerships for their registered office to be at an "appropriate address". They must also have an "appropriate" registered email address. Such addresses would be "appropriate", essentially, if documents or emails delivered to those addresses would be expected to come to the attention of a person acting on behalf of the company.
2. ID verification for company directors, persons with significant control and those delivering documents to the registrar will be carried out either by the Secretary of State or through an "authorised corporate service provider" regime overseen by the Secretary of State.
3. Stricter requirements on companies' registers of members, specifying that an individual's name in the register must include a forename and surname, and a one-off requirement to file the register of members together with the company's next annual return.

Will this make it easier for victims of fraud to use corporate information to trace assets and beneficial ownership? The changes are targeted at improving the accuracy of information held by Companies House – for example by preventing the use of anonymous P.O. boxes as registered addresses, or false or abbreviated names for directors or persons with significant control. This ought, in turn, to make it easier to identify the true owners of UK companies and the links between corporate networks, as well as making it easier to contact and serve proceedings on corporate defendants.

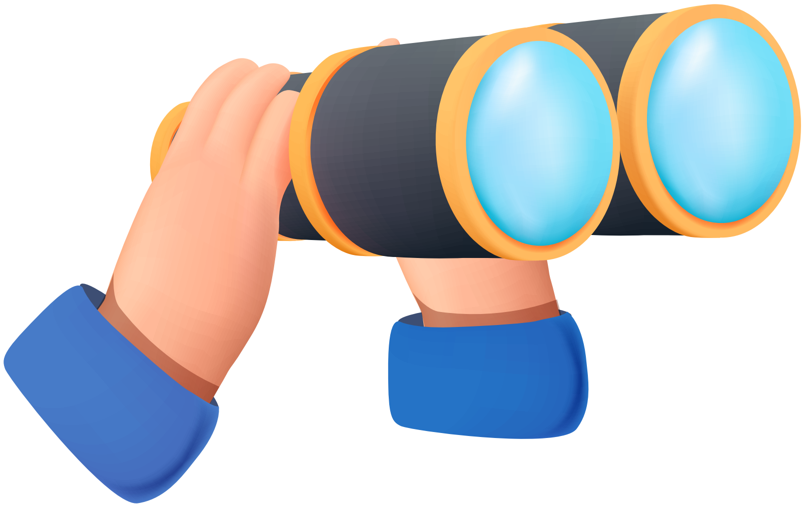
But while these changes will undoubtedly increase the amount of information available to the registrar, much of that information will not be publicly available due to confidentiality or data protection. The real impact, therefore, will depend on whether Companies House actually has the resources and capability to effectively police the information provided to it.

Civil recovery of cryptoassets under POCA 2002

The second key area of the Bill for asset-tracing and recoverability is the extension to cryptoassets of existing law enforcement powers to seize, freeze, and confiscate proceeds of crime.

Of particular interest is the way that the extraterritorial jurisdiction of the UK would work in relation to cryptoassets under the civil recovery regime in Part 5 of POCA 2002. By their nature, cryptoassets are "decentralised" - existing in digital form on the blockchain with no central administration, instead operating through a majority consensus of network participants meaning it is often difficult to establish a nexus to any particular national territory.

In civil recovery proceedings under POCA, the UK courts have extraterritorial jurisdiction where property is obtained through unlawful conduct and:



1. if the conduct occurs overseas, the conduct must be unlawful both under the law of that country as well as under UK law (dual criminality); and
2. if the property is overseas, there must be a "connection" between the case and the UK.

Despite this jurisdiction, the efficacy of extraterritorial powers under POCA depends in many cases on the assistance of overseas law enforcement agencies in facilitating the recovery of property.

The new Bill appears to take advantage of the decentralised nature of cryptoassets in order to tackle these challenges of extraterritoriality, by introducing a very broad definition of "UK-connected cryptoasset service providers" in respect of which UK authorities could obtain freezing and forfeiture orders over the wallets they administer.

Under the current draft, this definition would include exchange providers and wallet providers who:

1. are acting in the course of business carried on by them in the United Kingdom; or
2. have customer terms and conditions which provide for UK court dispute resolution; or
3. hold any customer data in the United Kingdom; or
4. have their registered office or, if they do not have one, their head office in the UK, and their day-to-day management is the responsibility of that or another UK office.

Note the breadth of these criteria, and that only one would need to be fulfilled for a crypto exchange or wallet provider to fall within them. Crypto providers may therefore wish to keep a close eye on any developments to these definitions as the Bill progresses, and to prepare themselves for potentially processing and responding to freezing and forfeiture orders by UK authorities.

The Bill also contains provisions for anyone claiming legitimate ownership of detained cryptoassets (including victims of fraud) to apply to a magistrates' court for release of those assets. This would of course only be available to the extent that law enforcement agencies decide to investigate the particular fraud in question. How law enforcers may respond to victims' requests that they exercise their new powers, will remain to be seen. Nevertheless, this could form a useful tool in the arsenal of those seeking to trace and recover stolen assets where there is a UK nexus.

At the time of writing, the Bill has had its second reading in the House of Commons and is now at Committee stage. The Public Bill Committee is scheduled to report back by 29 November 2022.

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We combine investigative experience and expertise with cutting-edge technology to forensically analyse complex transactions and trace both Fiat and virtual currencies and to identify and recover a variety of assets held across the globe through complex ownership structures.

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THE THREAT OF INVESTMENT SCAMS ON SOCIAL MEDIA PLATFORMS

Authored by: Ben Boorer and Jonathan Hancox - Kroll

Last year, the FCA announced new plans to tackle investment harm. The motivation behind this strategy was to give consumers the confidence to invest their hard-earned money without the fear of being scammed or being persuaded to make investment decisions that didn't fit their risk profile. As part of this strategy, the FCA set out a package of measures[1], from an £11 million "investment harm campaign", to being more assertive and agile in how the FCA detects, disrupts and takes action against fraudsters and scammers, designed to help consumers make more informed decisions about their investments.

These measures are welcomed, but do they provide adequate protection?

In a recent survey by the FCA's own ScamSmart initiative, more than half (53%) of the respondents reported potential scams being orchestrated through "online sources," with a growing number of said scams originating from social media platforms.

Between January 2020 and January 2021, during the worst of the COVID-19 pandemic, calls to the FCA consumer helpline for "user-generated" scams—namely through social media, forums and messaging apps—increased by a staggering 115%. While the pandemic may have eased, these so-called user-generated scamming tactics have persisted.

Between April and September 2021, the FCA received 16,400 enquiries about possible scams, up nearly a third from same period in 2020, with the most commonly reported scams being crypto asset, boiler room and recovery room scams. Latest data shows that a quarter of applications from firms wanting to join the consumer investment market are being stopped by the FCA[2]. That is an increase from the previous financial year in which 1 in 5 applications were rejected.

The Role of the FCA

The FCA has set itself ambitious targets to make investments more consumer-friendly. By 2025, it wants to reduce by 20% the number of consumers who are missing out on potential investment

1 https://www.fca.org.uk/news/press-releases/fca-sets-out-plan-tackle-investment-harm

2 https://www.fca.org.uk/news/press-releases/fca-taking-assertive-action-tackle-harm-consumer-investments-market

earnings, and it wants to halve the number of consumers who are investing in higher-risk products that aren't suited to their needs.

Crucially, the authority wants to "reduce the money consumers lose to investment scams perpetrated or facilitated by regulated firms;" however, there's too little mention of social media or "user-generated" scams in its plans.

In fact, in the FCA's 2021/22 Business Plan[3], there are only two mentions of "social media." First, in relation to using new approaches to find issues and acts of harm, and second, within its overall fraud outline: "Online platforms, such as search engines and social media platforms, play an increasingly significant role in putting consumers at risk of harm through adverts for financial products."

In the 2022/23 Business Plan[4], there is only one mention of "social media" in relation to "enhanced capabilities to identify, alert and request" unauthorised financial promotions to be taken down, and there is no mention of how they plan to tackle the rise in scams through social media.

It's clear the FCA recognises the rising risk of investment scams on social media platforms, but there are questions being raised as to whether or not it has adequate resources to cope with the threat.

The FCA is working hard to "regulate the regulated," but what about unregulated, user-generated investment scams?

Financial institutions are a known quantity for regulators but the sheer size and variety of social platforms present obvious challenges in enforcement. This is a global problem.

Over in the U.S., the Federal Trade Commission (FTC), an independent watchdog set up to look after U.S. consumers' interests, calls social media a "gold mine" for scammers. It reports that more than 95,000 people lost roughly $770 million in losses to fraudulent investments initiated on social media platforms. Given these figures, the substantial sums of money lost to scams in the UK seems comparatively minor, with Action Fraud[5] reporting that over £63 mn was lost by victims of investment fraud who made reference to a social media platform in their report.

How are Individuals Being Scammed on Social Media?

There's a reason why investment fraudsters are attracted to social media. It's a relatively low-cost way to potentially reach billions of people all around the world, and we still haven't quite figured out how to regulate it effectively. Fake profiles can be created, and existing profiles can be hacked. Without the help of artificial intelligence or machine learning, no platform can be expected to moderate every individual post or advert that is published.

When it comes to targeting older, vulnerable or less tech-savvy consumers, Facebook, Instagram and old-fashioned cold calling appear to be the primary vectors for investment fraud. In the Action Fraud statistic mentioned above, the most referenced social media platforms were Instagram (35%), followed by Facebook (18%), according to the victims. On these platforms, scammers tend to share pictures of fake luxury lifestyles to lure people in, often promoting high-risk investments that offer high-value returns. These fake ads are often deployed through paid advertising with high-profile influencers, making it exceptionally difficult for social media platforms themselves to regulate. In one recent high-profile case[6], a TV personality and influencer with over 750,000 followers shared a series of images of an FX trader claiming they had just made £1,730 profit "in the last two days." The Advertising Standards Agency (ASA) discovered that the influencer had been sent a script and was dictated the contents of the posts' caption and had also been remunerated for making the post.

It isn't just the elderly and non-tech savvy that are vulnerable to scams on social media. Younger users on platforms such as TikTok, Reddit and Discord are also being heavily targeted by investment fraudsters.

TikTok, a platform that has grown to more than one billion monthly users, attracts many "investment experts" to its platform to offer "advice" and persuade people where to invest their money. In recognition of the risk this may have posed to their users, TikTok has cracked down on this in recent months by prohibiting the promotion of all financial services and products, including cryptocurrency, forex trading and investment services, among others.

Reddit, a popular message board and discussion site, also attracts many investment advice threads, and it was heavily involved in the short squeeze of GameStop stock in January 2021. Approximately 140% of the company's public float had been sold short, and the rush to buy shares to cover those positions as the price rose caused it to rise even further, spurred on by posts on the social media site. Reddit's monthly users reached an all-time high of 1.5 billion users in H1 2021. The FCA is not investigating this incident but has warned UK investors that they could be found guilty of market abuse rules if they are found to have artificially inflated the price of the stock in "pump and dump" schemes.

Discord, a popular Voice over Internet Protocol (VoIP) and messaging platform that is extremely popular among the gaming community, also hosts many investment advice servers, where users can share advice on day trading and stock picks. While not bad in and of itself, these informal channels often play host to risky and unregulated advice that can lead to huge losses for inexperienced investors.

3 https://www.fca.org.uk/publication/business-plans/business-plan-2021-22.pdf

4 https://www.fca.org.uk/publications/business-plans/2022-23

5 https://www.actionfraud.police.uk/news/new-figures-reveal-victims-lost-over-63m-to-investment-fraud-scams-on-social-media

6 https://www.asa.org.uk/rulings/person-s--unknown-a21-1101809-person-s--unknown.html

Best Practices to Avoid and Deter Investment Fraudsters

When it comes to avoiding and deterring user-generated investment scams on social media, a multi-layered approach is needed. This should begin on the regulatory level, widening the net of enforcement with increased funding and focus on these platforms. This can be furthered through investigations and anti-fraud initiatives, bringing perpetrators to account, and proving to would-be scammers that social media isn't the lawless domain they might have thought. Finally, to ensure all levels are covered, consumers need to be educated in online fraud and taught how to spot "red flags" in order to limit the impact and potential reach of scammers.

When it comes to best practice on the part of consumers, they should remember that nothing is guaranteed in the world of investment.

Anything that claims to promise a guaranteed return should be dismissed out of hand.

They should also avoid "get rich quick" schemes or similar, often highlighted on social media with promises of "daily profits" from "secret investing tips"—these are particularly common in forex trading schemes through social media platforms. One way to advise consumers could be to do with their level of understanding of whatever investment they are making. Put simply, if a consumer doesn't understand how money is being made, or an adviser can't explain it to them easily, that investment opportunity is best avoided. When using social media, if an influencer with a high number of followers starts posting about a product, service or investment opportunity, never take it at face value and always do further independent research to ascertain whether or not it is legitimate.

Finally, as always, consumers should be prepared to lose 100% of everything they invest—nothing is guaranteed.

There is a lot of responsibility on the shoulders of consumers to make sure they are investing wisely, but the role played by regulators is just as critical. Aspiring investors should be aware of regulators such as the FCA and whether the scheme they are thinking of investing in is covered by the Financial Services Compensation Scheme (FSCS). The UK is currently debating the Online Safety Bill[7], which may introduce rules to social media and other user-generated content-based sites, compelling them to remove illegal material from their platforms, including investment scam activity. It's worth remembering, too, that investors themselves can engage legal advisors and asset tracing specialists to trace their crypto-assets and use civil law procedures to identify fraudsters and recover their capital.

What Happens Next?

The online investment fraud landscape is a complex one, made more complex by the relatively unregulated nature of social media. Despite the best efforts of bodies like the FCA, the UK government and even some social media sites themselves, scammers are still finding ways to reach consumers and defraud them out of their hard-earned money. The result is a marketplace where consumers who are happy to invest their money on platforms exist in a state of near constant risk, while potential investors who would otherwise be generating return are deterred from exploring options.

The sheer range of platforms and the ever-changing tools and techniques of fraudsters means that enforcers will be playing catch-up with investment scams, perhaps indefinitely. For that reason, consumer education on identifying the warning signs of a scam is going to be crucial in limiting their impact and deterring future scam activity. Finally, while it can be resource-heavy, investigative action is still the most valuable tool in our arsenal when it comes to deterring scammers. From due diligence research to prevent losses in the first place, through to recovering lost assets and bringing the guilty to account, the myth that social media is a lawless space that criminals can bend to their advantage can be dispelled.

7 https://bills.parliament.uk/bills/3137/publications

YEAR IN REVIEW

ESG DISPUTES

Authored by: Katie Allard - Kingsley Napley

What is ESG?

ESG stands for "Environmental, Social and Governance" and is the metric used for measuring the sustainability and ethical impact of a business or company.

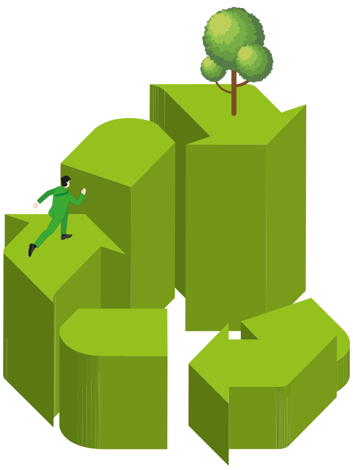
For the purposes of ESG, the three key measures are:

- **Environmental.** How an organisation acts towards the welfare of the planet and what kind of impact it has on the environment.
- **Social.** How an organisation treats its employees, customers, suppliers and local communities. This includes factors such as racial diversity, inclusiveness and recruitment practices.
- **Governance.** How an organisation is run, including the way it is audited and the way it administers shareholder rights. This also covers attitudes to executive pay as well as how a business communicates and generally interacts with its shareholders.

The number of investment funds that incorporate ESG factors has been growing rapidly since the beginning of this decade, and is expected to continue rising significantly over the decade to come.

According to Bloomberg Intelligence's (BI) latest 'ESG 2021 Midyear Outlook' report, ESG assets are on track to exceed $50 trillion by 2025, representing more than a third of the projected $140.5 trillion in total global assets under management.

As millennials, GenZers, and the generations to follow step into investor shoes, they are increasingly likely to select their portfolios based on companies that measure up to ESG metrics. According to recent figures, 9 out of 10 millennials cite investing with a focus on ESG to be a central goal, with one third exclusively investing in funds that take ESG into account.



Climate Change and The Paris Agreement

The Paris Agreement is a legally binding international treaty on climate change. It was adopted by 196 parties at COP 21 in Paris, on 12 December 2015, and entered into force on 4 November 2016. Its goal is to limit global warming to well below 2 degrees Celsius (preferably to 1.5) compared to pre-industrial levels.

To achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.

The Paris Agreement is a landmark in the multilateral climate change process because, for the first time, a binding agreement brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects.

Litigation as Activism

According to the Grantham Institute's 2021 'Global Trends in Climate Change Litigation Policy Report', the number of climate change-related cases has more than doubled since the Paris Agreement.

The impetus for many of these cases came in 2019, when the Dutch sustainable transition non-profit Urgenda won a landmark claim against the government of the Netherlands, successfully arguing that the state was taking insufficient action to address climate change, which was an abnegation of its responsibility to protect human rights.

In March 2022, ClientEarth took the battle to the UK courts, starting legal action against Shell's 13 executive and non-executive directors. It is the first ever case seeking to hold company directors personally liable for failing to properly prepare a climate strategy that is consistent with The Paris Agreement.

ClientEarth argues that the board's failure to adopt and implement a climate strategy that truly aligns with the Paris Agreement is a breach of their duties under the UK Companies Act. It is anticipated that this landmark case will open up the floodgates when it comes to ESG claims; enabling action to be taken against not only businesses, but also those individuals who control the companies and make the decisions, piercing the corporate veil.

What to expect in 2023

According to the Grantham Institute, as at 31 May 2022 there were 2,002 cases of client change litigation globally.

As we move into 2023, we expect to see a growing trend in ESG litigation brought by private individuals, not just climate activist groups. The main driving factors behind this are:

Toughening up of Global ESG Regulatory Framework

One issue to date is that the regulatory standards and metrics surrounding ESG have not been well developed, making it easier for businesses to make inaccurate or exaggerated statements about ESG practices (i.e. "greenwashing"). However, Global ESG regulation is set to make a leap with new requirements for private businesses to report on and prevent adverse impacts on climate, the environment and human rights.

For example, The European Commission has adopted a proposal for a directive on corporate sustainability due diligence ("CSDDD"). The CSDDD would impose a corporate due diligence duty on in-scope large companies operating in Europe to help ensure that they contribute to sustainable development and the sustainable transition of economies. The due diligence measures would require the identification, prevention and mitigation of human rights and environmental impacts connected with companies' own operations, as well as in relation to their subsidiaries and value chains. Non-compliant companies could be subject to pecuniary sanctions and civil liability, imposed by designated supervisory authorities operating throughout the European Union.

Anticipated disclosure requirements in the US

Another factor making "greenwashing" easier until now has been the unstandardised ESG disclosure practices in place.

On 21 March 2022, the U.S. Securities Exchange Commission (SEC) proposed rules to require climate change disclosure in the annual reports and registration statements of public companies registered with the SEC, including any company (domestic or foreign) whose stock is listed on a U.S. stock exchange.

If adopted, the proposed rules would require SEC-registered advisers to include ESG factors and strategies for investors in fund prospectuses, annual summaries and brochures.

Increased funding options

Litigation is often very expensive, and the costs involved in bringing a legal claim against an organisation or individual directors are likely to make this an unrealistic option for many. To be viable many of these cases require litigation funding.

Thankfully, the litigation funding market is now much more sophisticated and well placed to assist than it was only a couple of years ago. The funding market is expected to grow by 8.3% a year, reaching $18bn by 2025, on the back of an expanding global legal services market and better penetration of litigation funding.

The recent successes in group actions, such as that against VW, will undoubtedly have a positive impact on the level of risk imposed by litigation funders when it comes to funding similar litigation in future.

A report from Deminor, a Brussels-based funder that has an office in London, said ESG was already having an impact:

"Groups of claimants have taken action in European courts, to claim damages for environmental harm that has occurred outside Europe.

Courts have shown an openness to hear these cases. In addition, we have seen the emergence of climate litigation and human rights actions. Responsible litigation funders can play a positive role in supporting these cases and bringing about social change."

Growing climate-related group actions

Group litigation is on the rise, spurred on by the global nature of business and the introduction in some jurisdictions of legislation friendly to, for example, class action lawsuits.

In the UK, lawyers say that there are several reasons why group action litigation is growing in popularity. Firstly, there is an increasing availability of opt-out procedures in England, which automatically aggregate those affected unless they withdraw their name. Secondly, new technology is enabling certain opt-in claims that would previously have been too administratively expensive to be issued and managed at low cost. Thirdly, the increase of claimant law firms and third-party litigation funders within the market enables such claims to get off the ground. And finally, in a number of major cases, the UK courts have shown a willingness to break down barriers to large claims.

In May this year, Volkswagen agreed to pay £193m to settle 91,000 legal claims in England and Wales linked to the "dieselgate" emissions scandal that rocked the German carmaker. The prospect of large settlements such as this make group actions more attractive to litigation funders and law firms.

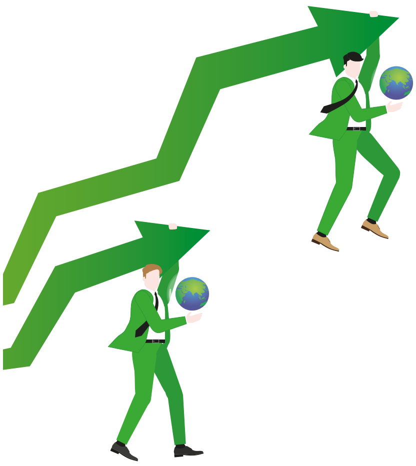
Just a few years ago, such cases were rare, but now litigation is becoming an increasingly important tool when it comes to holding companies and governments to account over their contribution to global warming.

Crackdown by Watchdogs

UK and EU Watchdogs are beginning to crackdown on how organisation present their ESG credentials to the general public.

Earlier this month, the Advertising Standards Authority (ASA) found that HSBC had misled customers with "greenwashing adverts". In the landmark ruling, the ASA said that HSBC had made unqualified claims and omitted material information about its environmental credentials in two high street adverts that appeared in October last year in the run up to COP26.

The EU's markets watchdog has suggested that a 'quality label' for market benchmarks would help prevent investors being misled by ESG claims.



Future trends in litigation

We predict litigation arising from the following scenarios:

- Investors who rely on false or misleading statements about ESG practices when deciding whether to invest in a fund.
- Shareholders of private limited companies relying on ESG information that turned out to be false or misleading.
- Shareholders in listed companies relying on false or misleading information published in listing particulars, the prospectus, annual reports and accounts directors' reports, strategic reports and corporate governance statements.
- Shareholders of a subsidiary relying on a parent company to exercise a degree of supervision and control of its subsidiaries, but when it does not in fact do so. The failure to exercise an appropriate degree of supervision and control may constitute the abdication of a responsibility that it has publicly undertaken through its ESG disclosures, and thus leave it liable to claims.

Bringing claims in such scenarios will not be straightforward, and claimants will likely face some tricky hurdles. For example, how does one prove what level of reliance each particular shareholder or investor placed on the inaccurate statement(s) when deciding to invest in a particular company or fund?

Similarly, there are likely to be issues quantifying a claimant's losses. In instances where the value of a company or fund decreases upon the revelation of false information, one might point to that difference in value as being the loss. But what about in instances where there are multiple factors at play; how does one measure what damage has been caused by which individual event?

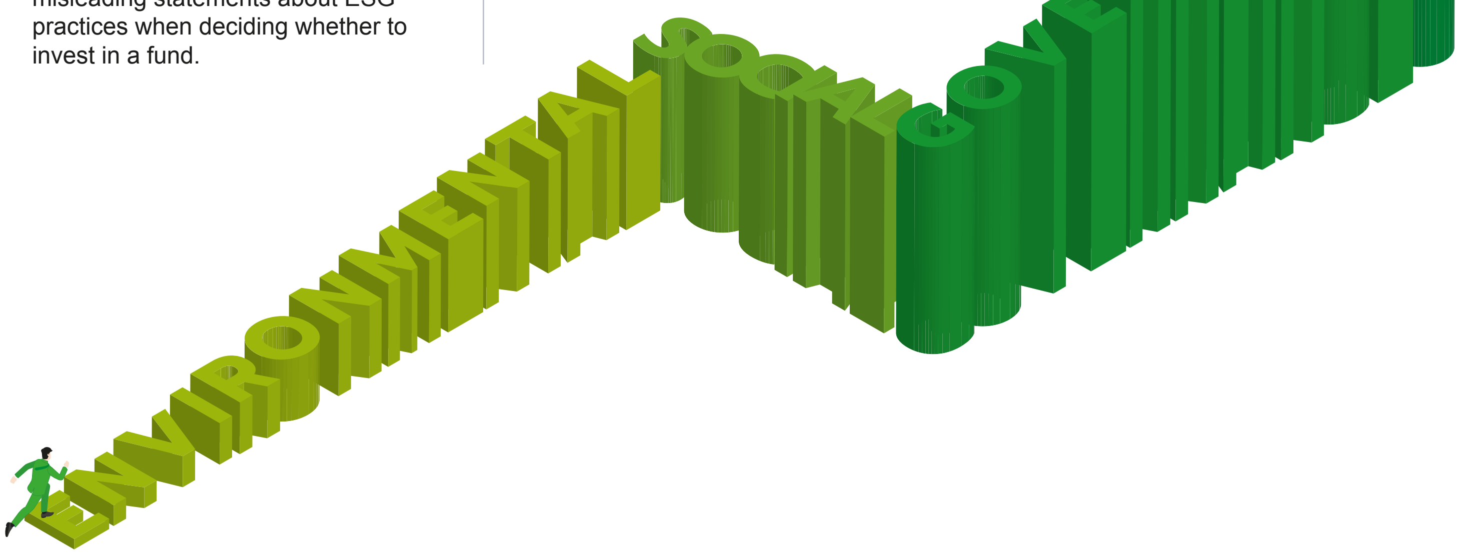
Mitigating ESG risks

As the pandemic has shown, planning for every eventuality is impossible. However, companies can anticipate and mitigate ESG risks.

Ways of doing this might include:

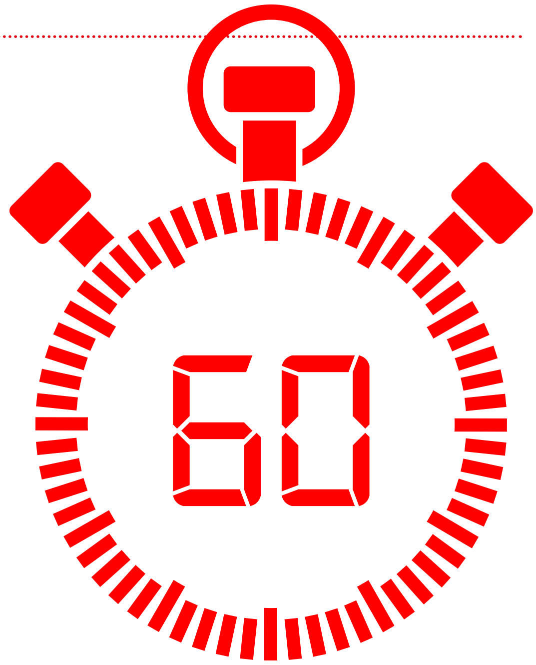
- Conducting risk assessments
- Planning for the low-carbon / carbon-neutral economy
- Setting achievable targets and commitments
- Carrying out due diligence (e.g. in supply chains)
- External auditing / validation
- Undertaking public engagement

What is for certain is that ESG is not going anywhere anytime soon, and businesses need to adapt and evolve if they intend to survive.

60-SECONDS WITH:

HANNAH DALY
BARRISTER
4 NEW SQUARE



Q What do you like most about your job?

A For brief periods of time, I get to know everything there is to know about one case. I become a temporary expert. The downside is that I also forget it very quickly.

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

A A correspondent for the BBC World Service. Or a columnist for a reputable paper where I get paid to stir up mild controversies once a week.

Q As we approach the end of 2022, what has been the most interesting case or development in the industry you have seen this year?

A This has been an interesting year for civil fraud and related cases. We've seen an important line of cases on the Quincecare duty owed by banks. We've also seen the first successful s.90 FSMA claim in the massive Autonomy litigation. We have ongoing developments relating to crypto fraud claims – most recently the expansion of the jurisdiction gateways. There is quite a lot going on.

Q What do you see as the most significant trend in your practice in a year's time?

A Many of my cases involve allegations of fraud, but I expect to see more cases with a cyber fraud element and a related cross-border element too.

Q What has been your greatest work-related achievement in 2022?

A Getting an excellent result in a mediation between warring factions of a family.

Q Who has been your role model in the industry?

A I'm not big into idolatry…

Q What is something people do not know about you?

A If they don't know it, it's probably because I don't want them to know! Or that I don't know what they don't know so haven't been able to tell them.

Q What is a book you think everyone should read and why?

A Robert Caro's biography of Lyndon Johnson. It's a fascinating account of power: creating it out of thin air, snatching it where it exists, and in Johnson's case using it for remarkable political advancement – even when he was very young.

Q If you could bring back a fashion trend, what would it be and why?

A Leg warmers. They are neat and practical; very useful when sitting at a desk in the winter.

Q What item do you never travel without, and why?

A A pocketbook. For passing thoughts.

Q Reflecting on 2022, what three words would you use to sum up the year?

A Unstable. Hot. Glitzy (all the post-covid parties).

Q What is one goal of yours for 2023?

A Visit an island somewhere warm.

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PUBLIC INTEREST WINDING UPS

THE NEXT TOOL TO DERAIL CRYPTO SCAMS?

Authored by: Andrew Sidaway & Fred Buret - Grant Thornton, Adam Porte - No5 Chambers and Tom Serafin - HFW

Get-rich-quick scams are nothing new; where there is money to be made, there are bad actors seeking to take advantage of others for personal gain. Research published by Chainalysis states that throughout 2021, USD$3.2 billion in cryptocurrency was stolen from investors; 516% more than 2020[1]. Lawyers and accountants are increasingly approached by investors who have fallen victim to these frauds.

At first glance the characteristics of crypto-related fraud appear unique, particularly in an industry laden with jargon and buzzwords. In reality, crypto-related fraud often resembles traditional investment scams, such as Ponzi schemes, where large volumes of investors lacking an understanding of the investment place a high degree of trust in the advice of bad actors.

The fallout

In the absence of third-party funding, particularly for lower-value claims, many victims of fraud have insufficient resources to fund professionals to recover or mitigate their loss, and the costs of recovery greatly exceed the value of their loss. The vulnerability of individual victims in this space, and their desire for redress, is something that regulators and courts worldwide continue to grapple with.

An existing remedy that is only relatively recently being used to combat fraud in this space is the power to wind up companies in the public interest.

Public interest winding ups

The Insolvency Act 1986 grants the Secretary of State (SoS) the power to present a winding up petition because it is expedient in the public interest to do so[2].

It is not just the SoS that can present a petition, despite being neither a director nor creditor of the company.

New powers contained in the Finance Act 2022 allow HMRC to wind up companies promoting tax avoidance schemes[3]. The Financial Conduct Authority (FCA) too has the power to present a petition to court for the winding up of a company[4]. The FCA can petition for the winding up of a company if it is carrying on a regulated activity without the authority to do so.

Where a company may be operating an investment scam, and the FCA considers it constitutes regulated activity, the FCA may seek a winding up order having considered all the circumstances. Dubious investment companies are often subject to public interest petitions.

Some examples include:

- A wine investment company which took in millions from investors using only a fraction to buy wine;
- A property investment company which took millions from investors and used most of it to pay its directors;
- Art investment companies which fraudulently took more than £500,000 from investors;
- Companies which took in more than £25 million from investors for parking spaces.

The SoS has recently made use of this power against two companies

1 Chainalysis, (6 January 2022), 'Crypto Crime Trends for 2022: Illicit Transaction Activity Reaches All-Time High in Value, All-Time Low in Share of All Cryptocurrency Activity', Chainalysis website, accessed on 27 October 2022, available at https://blog.chainalysis.com/reports/2022-crypto-crime-report-introduction/

2 s.124A Insolvency Act 1986.

3 s.85 Finance Act 2022.

4 s.367 Financial Services and Markets Act 2000.

involved in the misuse of Bounce Back Loans and unexplained large payments suspected of being connected to cryptocurrency scams[5].

What can victims do?

Both Action Fraud and the FCA have issued warnings to consumers about the rising number of cryptoassets investment scams.

Victims of such scams can complain to the SoS, with such complaints then being reviewed by the Insolvency Service's Companies Investigations (CI) department. CI is responsible for investigating companies and their directors, and whether they are, or have been in the past, trading contrary to the public interest. If CI decides to investigate further, it may appoint an inspector. The court may also make such an order[6].

There are wide powers available to the Insolvency Service and its inspectors and investigators, such as:

- The power to direct the company, or any other person, to produce information or documents[7]; and
- The power to enter and remain at premises believed to be used (whether wholly or in part) for company business[8]. It is an offence for a person to intentionally obstruct an inspector or investigator exercising this power[9].

The inspector will then report on the company's affairs. Based on the inspector's report, the Insolvency Service may petition for a winding up on the grounds of public interest[10]. This is one of several ways in which the Insolvency Service may commence such proceedings.

Before a court will make such an order, it must be satisfied it is just and equitable to wind the company up. The onus is on the SoS to persuade the court as such[11]. If so satisfied, the court will make the order, appointing the Official Receiver (OR) as Liquidator to seek to recover and realise the assets of the company for the benefit of its creditors.

It is not necessary for the company's business to involve illegality. The company can still be wound up if its business is 'inherently objectionable' because its activities are contrary to a clearly identified public interest.

An example of this is where a legitimate company trades at the expense of HMRC by failing to pay VAT or PAYE.

Where there is a clear case of a company's business engaging in a scheme to deliberately defraud customers, the court will usually not hesitate in making a winding up order, even if the company discontinued its offending activity once it came under scrutiny[12].

Furthermore, the court has power to wind-up such a company even if it is a foreign, unregistered one, provided it has a real or sufficient connection with England[13]. This 'connection' is typically characterised by the company carrying on its business in England and/or marketing and selling its goods or services to members of the public in England.

In circumstances where specific skills are required, the OR will consider a private sector appointment. Creditors are also able to requisition the appointment of a private sector insolvency practitioner if specific criteria are met. The nature of cryptoassets mean these scams are not restricted by physical boundaries: they are multi-jurisdictional and dissipation or movement of assets is a real risk. There is therefore a key role for those in the private sector who possess the necessary skills, resource and training to pursue bad actors in this space.

Conclusion

These are welcome developments in the ongoing efforts of regulators to combat fraud in this space. With HMRC, the SoS and the FCA all having public interest wind up capabilities, we expect to see more activity in this area in 2023.

Indeed, as we write this article, the Insolvency Service has publicised the public interest winding up of a company promising investors returns of up to 200% on cryptocurrency investments[14].

5 UK Government, 26 August 2022, 'Suspected cryptocurrency scam company shut down', UK Government website, accessed on 27 October 2022, available at: https://www.gov.uk/government/news/suspected-cryptocurrency-scam-company-shut-down

6 ss.432(1)-(2) Companies Act 1985

7 s.447(2)-(3) Companies Act 1985.

8 s.453A Companies Act 1985

9 s.453A(5) Companies Act 1985

10 s.124A(1)(a) Insolvency Act 1986

11 Secretary of State for Business, Innovation and Skills v PAG Management Services Ltd [2015] EWHC 2404 (Ch) at 5c per Norris J

12 Secretary of State for Business, Innovation and Skills v PGMRS Limited [2010] EWHC 2864

13 Re Titan International Inc. [1998] 1 BCLC 102 at 107 per Gibson LJ

14 UK Government, 27 October 2022, 'Cryptocurrency trading firm shut down after scamming investors', UK Government Website, accessed on 29 October 2022, available at: https://www.gov.uk/government/news/cryptocurrency-trading-firm-shut-down-after-scamming-investors

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EQUITY TRUST (JERSEY) LTD V HALABI (JERSEY) AND ITG LTD & ORS V FORT TRUSTEES LTD & ANOR (GUERNSEY) [2022] UKPC 36

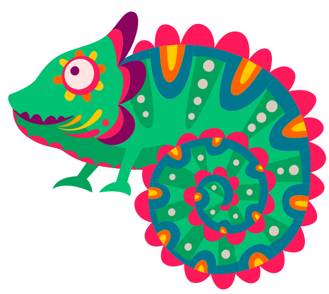
Authored by: Christopher Boardman KC and Louis Grandjouan - Radcliffe Chambers

The trustee's right to an indemnity, which is at the heart of the Privy Council's recent decision in Equity Trust (Jersey) Ltd v Halabi (Jersey) and ITG Ltd & ors v Fort Trustees Ltd & anor (Guernsey) [2022] UKPC 36, is an unusual beast. In practice and in most situations, its effect is clear enough. The trustees have a right to draw on trust assets to exonerate themselves against trust liabilities. They also have a right to be reimbursed from the trust assets for trust liabilities which they have paid from their own resources. There is also long-standing authority that the right is supported by a charge or lien over the trust fund, so that retiring trustees will retain some kind of protection once they have left office. So far so normal.

But go any further, and one rapidly encounters a conceptual minefield. If the trustee already owns the trust property, how can they have a charge or lien over it? If there is a charge or lien, what is the obligation that it secures? If it is not a security, but a proprietary interest in the trust assets, what additional right does or can a trustee have in the trust assets?

These questions cease being academic when there are multiple trustees claiming against insufficient trust assets. That was the situation which had arisen in Equity Trust and in ITG Ltd, two otherwise unconnected appeals before the Board. Both involved Jersey-law trusts which were insolvent, in the sense that the trust assets were inadequate to meet the liabilities incurred by the trustees in their capacities as trustees. Both also involved successive trustees, so that the critical question was as to the respective entitlements of the current and former trustees to be indemnified out of the remaining assets. Ultimately there were two possibilities. Either the general rule as to the priority of equal equitable interests applied, so that the indemnities ranked in the order of their creation (i.e. in the order of appointment of the trustees). Or the rights of the successive trustees ranked pari passu. The Board decided, by a majority of 4 to 3, that they should rank pari passu.

The route to this conclusion involved answering some of the fundamental questions raised above. The Board was in unanimous agreement that the right of indemnity confers a proprietary interest in the trust property in favour of the trustee, which is not lost by a transfer of the property to a new trustee. It is an equitable right, enforceable for the protection of the trustee, by an order of the court requiring the trust fund to be so applied. It is that right to specific performance which creates the trustee's proprietary interest. This is not security for the payment of a debt, as there is no debt: there is simply a right to have the trust assets applied in the exoneration or reimbursement of the trustee (that is why there was no obstacle in Jersey customary law, which does not admit of non-possessory security over movables, to its recognition).



But identifying the underlying nature of the indemnity in this way did not, in fact, supply an answer to the critical question on the appeal, as to the relative priority of the indemnity of successive trustees. Because the right is sui generis, and there was no prior case in which the issue had been decided, it was open to the court to develop a new principle other than the first-in-time rule which generally applies to the ranking of equitable interests. In Lady Arden's view, it was "a case for a principles-based solution and not a rules-based one" (para 280).

This, then, was the issue on which the Board divided. Lord Richards and Sir Nicholas Patten (with whom Lord Stephens agreed) concluded that there was no sufficient reason for developing a different principle to the general equitable rule that the trustees' interests should rank in the order of their creation. Lord Briggs (with whom Lord Reed and Lady Rose agreed) favoured pari passu distribution, as did Lady Arden for reasons which were not the same but supported those of Lord Briggs.

In one sense, the principal split between the minority and Lord Briggs' majority was over the extent to which a trust has an institutional or enduring quality of its own. In other words, it was between a traditional or conventional view of the trust, and a more modern or commercial one.

If one focuses (as did the minority) on the fact that the trust has no legal personality and it is the current trustees – not the trust or the successor trustees – who incur liabilities, and that the purpose of the indemnity is to give a trustee what, in economic terms at least, is closely analogous to a secured debt, it is difficult to see why the value of the indemnity of a trustee should be at the mercy of the conduct of his successor.

But if (as did Lord Briggs) one views the trust as a common enterprise and the trustees as performing an office for the furtherance of that enterprise, in which successive trustees are not to be regarded as competitors, so that the insufficiency of the fund to meet all of the trustees' claims is a common misfortune, pari passu sharing may be the fairest rule. In taking this view Lord Briggs appears to have been heavily influenced by the fact that rolling succession (where trustees are appointed and retire on a rolling basis in any given period) is "probably overwhelmingly the most common type of trustee service pattern historically, and still is in England" (para 259).

Both appeals, however, were cases of strict succession. In each case a given set of corporate trustees retired and were replaced by a new and different set of corporate trustees. That, as Lord Briggs acknowledged, may be a "common feature of Jersey business trusts", but the search was for a rule which applies to all trusts, and he was not swayed that a different rule should apply in a case of strict succession: "it will be happenstance whether the misfortunes which lead to a trust fund becoming inadequate to meet all trustees' claims in full owe their causes to events before or after the change of control between trustees acting in strict succession" (para 262).

But there is a caveat. Lord Briggs noted that the apparently binary choice between first in time and pari passu as the general priority rule was the consequence of there having been no other candidate put forward. He did not rule out the possibility that exceptional circumstances might arise in which the application of a pari passu rule of priority "might work such obvious inequity that an exceptional discretion to depart from it might be justified" (para 269). He posited three other possibilities: (i) the order in which trustees' liabilities are incurred and (ii) the date of the trustee's retirement and (iii) the court's discretion; but expressed the view that none of them were suitable for the general rule.

So where does this leave practitioners advising trustees of English or Jersey law trusts? Where the trustee has already retired, absent any exceptional circumstances and subject to the precise terms of any deed of resignation, the position is clear enough: they will share pari passu with all other trustees, past or present. In the case of a trustee still in office who wants to protect their position in the event of a subsequent insolvency, the position is less clear.

In England & Wales, a trustee may want to try and take a charge over the trust assets to secure their right to an indemnity in priority to successor trustees.

That may also be possible in Jersey under the Security Interests (Jersey) Law 2012, but not under customary law. However, Lady Arden suggested, although without deciding the point, that taking a charge may be excluded by the pari passu principle altogether (para 299). The only other obvious option in Jersey would be to retain a more substantial part of the fund under art 43A(1) of the Trusts (Jersey) Law 1984. Lady Arden's suggestion (at paras 282 and 298) that an outgoing trustee should monitor a successor trustee's behaviour with a view to taking court action to restrain a breach endangering its indemnity seems unworkable in certain cases.

The decision also raises a whole host of other questions which will have to await another case: such as how pari passu distribution should be achieved (whether out of court, on application by the trustees, or perhaps even by administration of the fund by the court itself), and as to the priority between the claims of trustees and trust creditors claiming through them by subrogation. There is, therefore, much law yet to be worked out, and it seems likely that these issues could also reach the Board before too long.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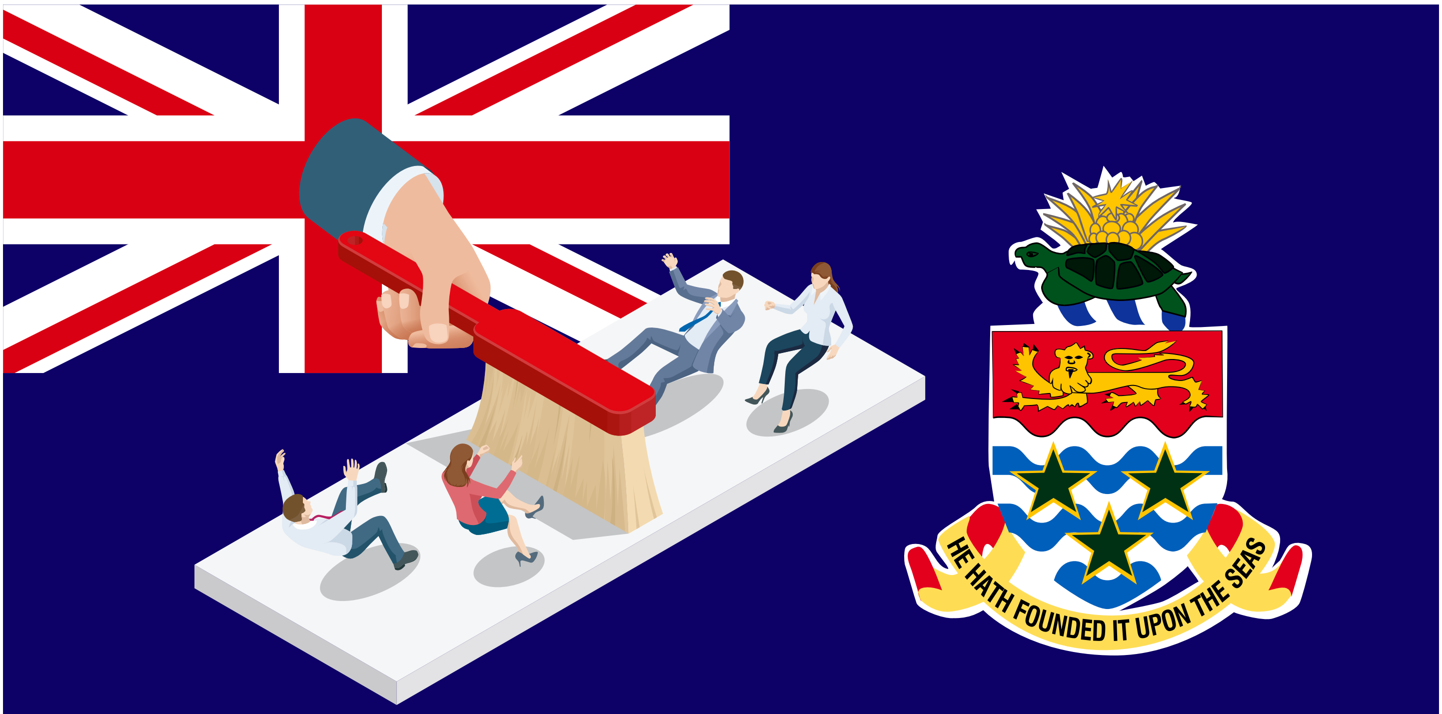


CAYMAN ISLANDS' NEW RESTRUCTURING OFFICER REGIME IS NOW IN FORCE

Authored by: Peter Hayden and Jessica Vickers - Mourant (Cayman Islands)

The Cayman Islands' Companies (Amendment) Act, 2021 (the Amendment Act) has now come into force. The Amendment Act introduces a new corporate restructuring process and the concept of a dedicated 'restructuring officer' into the Cayman Islands Companies Act (2022 Revision). Under the Amendment Act, the filing of a petition for the appointment of a restructuring officer triggers an automatic global moratorium on claims against the company, giving it the opportunity to seek to implement a restructuring.

Previous restructuring regime in the Cayman Islands

The Cayman Islands has facilitated a number of high-value, complex corporate restructurings in recent years[1], but, like some other English common law jurisdictions, had to date done so through the use of provisional liquidation rather than through a bespoke restructuring regime similar to UK administration or US Chapter 11.

Although the courts had been adept at adapting the provisional liquidation process for the purposes of restructuring, liquidation proceedings had been less than ideal for these purposes. Before being able to apply for the appointment of a provisional liquidator, it was previously necessary for a winding up petition to be presented against the company. The presentation of a winding up petition had tended to be perceived in a negative light and this had limited its use as a restructuring process. Further, the presentation of a petition was not in itself treated as the commencement of insolvency proceedings for the purposes of foreign recognition and did not give rise to any moratorium on claims being brought against the company. This only occurred when the court made an order appointing a provisional liquidator. This had led to timing issues around the foreign recognition of the restructuring proceedings and left a window during which third parties, in some cases investment managers suspected of fraudulent activity, could seek to frustrate the proceedings.

A further difficulty was highlighted by China Shanshui Cement Group Ltd 2015 (2) CILR 255, where it was held that a company's directors could not present a winding up petition without either shareholder sanction or an express provision in the articles of association of the company authorising the directors to present a petition on the company's behalf. Whilst most modern articles do contain such an authorisation, where it was absent this could be an obstacle to timely action being taken to commence restructuring proceedings.

The Companies (Amendment) Act, 2021

As set out below, the commencement of the Amendment Act has addressed the issues identified above relating to the use of provisional liquidations to implement restructurings.

1 These include the cases of Ocean Rig UDW, Inc, LDK Solar Co Ltd, Suntech Power Holdings Co Ltd, Arcapita Investment Holdings Limited, ATU Cayman Holdco Limited and Tailored Brands Worldwide Purchasing Co.

Ability of directors to commence a restructuring

Under the Amendment Act, a petition for the appointment of a restructuring officer can be presented by the directors of a company without a resolution of its members or an express power in its articles of association. Whilst it remains possible for members to include an express provision in the articles restraining the directors from doing so, the trend in modern articles has been to allow directors these powers. It should therefore usually be possible for the directors to commence a restructuring.

Appointment of a restructuring officer

Under the Amendment Act, a company has the ability to present a petition to the court for the appointment of a restructuring officer on 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 (or classes thereof), either pursuant to the Companies Act (2022 Revision) or a foreign law or by way of a consensual restructuring. Importantly, this is not a petition for its own winding up.

A restructuring officer appointed by the court shall carry out such functions as the court may confer on the restructuring officer and may have his or her powers limited by the court. This allows for debtor in possession restructuring proceedings, subject to the oversight of the restructuring officer.

A restructuring officer is required to be a qualified insolvency practitioner in the Cayman Islands, but the court may appoint a foreign practitioner to act together with the Cayman insolvency practitioner.

The company may also apply ex parte to the court for the immediate appointment of an interim restructuring officer, pending the hearing of its petition for the appointment of a full restructuring officer.

Automatic moratorium on creditor claims

The filing of a petition for the appointment of a restructuring officer gives rise to an automatic global moratorium on claims against the company. No suit, action, other proceeding or resolution for the winding up of the company, other than criminal proceedings, shall be commenced or proceeded with except with leave of the court. This prohibition has extraterritorial reach and expressly applies to proceedings brought against a company in a foreign jurisdiction.

The moratorium does not affect security interests. A secured creditor with security over the whole or part of the assets of the company is entitled to enforce their security without the leave of the court.

Variation and discharge of order appointing a restructuring officer

The Amendment Act also proposes a certain amount of flexibility in this regime and provides that, any time after the appointment of a restructuring officer, the company, the restructuring officer, a creditor or any contributory may apply to the court for the variation or discharge of the order appointing the restructuring officer.

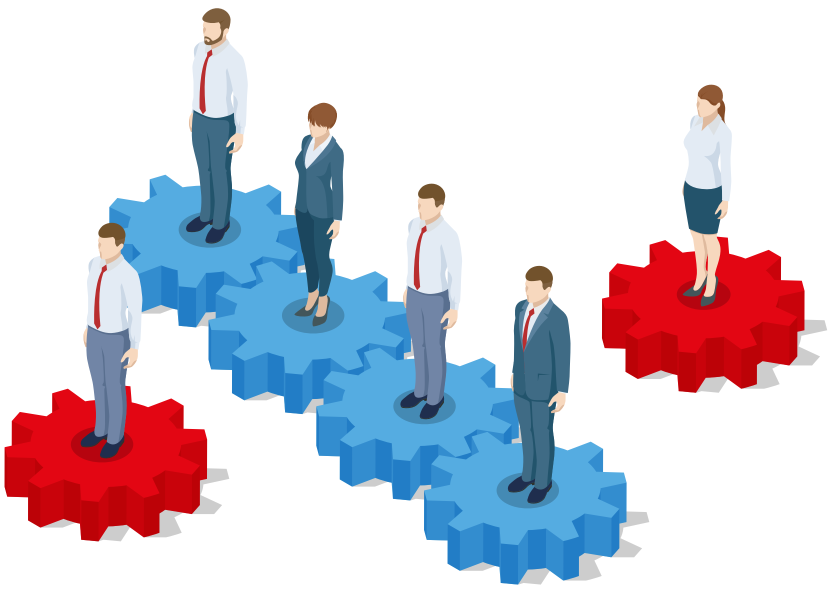
Form of restructuring

The Amendment Act proposes no substantive changes to the forms of restructuring, which have worked well historically.

Under the Amendment Act, a binding restructuring can be effected without any court involvement if all affected parties agree to it. However, if unanimous consent cannot be achieved, a restructuring can be achieved by the use of a scheme of arrangement. A scheme of arrangement can be adopted to vary the rights of creditors or shareholders under the supervision of the court. The scheme process involves the approval of the scheme by each class of the affected creditors or shareholders (by a majority in number representing 75 per cent in value of those voting at the relevant meeting) and the subsequent approval of the scheme by the court. Under the Amendment Act, a scheme can now be negotiated and implemented under the supervision of an appointed restructuring officer.

Conclusion

The new restructuring officer regime provides the Cayman Islands with a modern, flexible restructuring process. The enhancements – including the ability for the company to easily commence restructuring proceedings, an immediate global moratorium on claims, easier earlier foreign recognition of the restructuring proceedings, the ability to have a debtor in possession process and the safeguards afforded in the legislation and through the restructuring officer – should enable the Cayman Islands to continue to facilitate high value, complex corporate restructurings.



CRYPTO FRAUD LITIGATION

KEY CONSIDERATIONS FOR CRYPTO EXCHANGES

Authored by: Jennifer Craven - Pinsent Masons

There is a lot of legal noise around crypto fraud and what legal remedies exist to help the victim recover crypto that has been stolen, hacked or badly invested. A flurry of English High Court cases show Judges willing to be sympathetic to the plight of victims and demonstrating flexibility, such that the English Courts are often the forum of choice for victims of fraud.

Assuming a victim successfully navigates potential bumps in the road (such as a fraudster's attempts to conceal the crypto by executing complicated transactions known as "peeling" or going "cross-chain"), it is relatively easy to track and trace crypto – much more so than your average fraud involving fiat currency - because the transactional information is there for all to see on the publicly accessible blockchain. This means that in many circumstances the stolen crypto can be traced into an identifiable wallet held at a crypto exchange, often located overseas.

The English legal system, which continues to adapt to meet the needs of victims of crypto fraud, is also changing its rules on the service out of the jurisdiction of a claim for disclosure of information, by introducing a new procedural "gateway" (CPR PD 6B). This will make the process easier for victims to serve disclosure orders on crypto exchanges located abroad.

Consequently, crypto exchanges worldwide face a new age of global litigation related to incidents of fraud. From the English Court's perspective, this includes responding to claimant applications for disclosure orders seeking what is likely to be confidential information about the exchange's customer and the contents of the wallet. It will also involve defending High Court actions and dealing with notifications of worldwide freezing injunctions (where exchanges are asked to freeze the wallets of alleged fraudsters).

This article considers some of the legal challenges for crypto exchanges, created when they are asked to respond to applications for disclosure orders granted in the English Court, and how they might respond.

Types of disclosure order

Disclosure orders come in various forms but the most common are Bankers Trust Orders and Norwich Pharmacal Orders. The tests for each are distinct, with the former arguably being more stringent than the latter. However, both types of order are usually sought by victims, and served on crypto exchanges, because the victims know (or think they know) that an exchange holds evidence about the identity of a fraudster (or the whereabouts of the missing crypto) that, as victims, they do not have, and they believe that this information will support their investigation or case.

Bankers Trust Orders tend to be available only where there is a clear-cut case of fraud: that usually translates to a victim being able to say (1) on a clear case, that crypto belonging to them has passed through the exchange and (2) there is a real prospect that the information might lead to the location or preservation of the stolen crypto.

For Norwich Pharmacal relief to be obtained:

1. There must be a 'good arguable case' that a wrong has been committed by a wrongdoer;

2. The respondent against whom the order is sought must be "mixed up" in the wrongdoing, so as to have facilitated the wrongdoing; and

3. The order is needed to enable an action to be brought against the wrongdoer. The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued.

In practice, the two orders can be applied for in combination and if the narrower Bankers Trust jurisdiction does not apply, the Court may be able to grant an order using Norwich Pharmacal relief. An exchange will usually be notified in advance by the victim that they intend to apply for a disclosure order (it is good practice to do so), but for various reasons that is not always the case, and quite often an exchange will find itself having to respond, often in short order, to demands for the provision of information.

The legal challenges and responding to them

Whilst complying with court orders is clearly essential, crypto exchanges need to be careful that they adopt an appropriate response. Some key considerations for a crypto exchange responding to an application for a disclosure order by a victim of fraud are set out below.

Have the necessary legal tests for obtaining a disclosure order been met?

Whilst a flexible remedy, the power to order third party disclosure is a powerful tool in the English Court's armoury, and the English Court will scrutinise each application carefully. The Norwich Pharmacal jurisdiction, for example, should not be used as a fishing expedition for wide ranging discovery and the gathering of evidence. Rather, it is strictly confined to necessary information (see Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm)).

Consequently, exchanges should consider whether the stringent legal tests have been met, which will likely require expert legal advice. Exchanges may also question whether the scope of the draft order they are being asked to comply with is too broad, potentially because the provision of the information cannot actually be provided, or it simply does not relate to the factual matrix being described.

What is the underlying purpose of the disclosure order?

In circumstances where the identity of the fraudster cannot be found, it is not unrealistic that an exchange could potentially find itself the target of legal proceedings brought by the victim, in the same way banks and other financial institutions are targeted. In, D'Aloia v. (1) Persons Unknown (2) Binance Holdings Limited & Others [2022] EWHC 1723 (Ch), Mr Justice Trower acknowledged that cryptocurrency exchanges can hold misappropriated assets on constructive trust for defrauded investors.

It is too early to say whether victims of fraud will successfully pursue litigation against exchanges on this basis, and such claims are heavily fact-dependent. However, exchanges should nevertheless be mindful of the victim's motive for bringing the application, and whether it should be opposed: for example, a disclosure order should not be sought as a way of obtaining information in support of any proceedings to be brought against the exchange. Rather, the exchange against whom the order is sought must be "mixed up" in the wrongdoing, so as to have facilitated it, in order for a disclosure order to be granted.

Further, the information that is sought by the victim cannot normally be used other than for specified purposes (e.g., considering or commencing proceedings against the ultimate wrongdoer) without the permission of the Court. In I.F.T. S.A.L. Offshore v Barclays Bank Plc [2020] EWHC 3125 (Comm), IFT obtained permission to bring an application for pre-action disclosure and/or proceedings against Barclays Bank after obtaining information pursuant to a disclosure order which identified a potential claim against the Bank. Exchanges may find themselves having to respond to similar applications once information has been provided to the victim.

An exchange should obtain legal advice if it thinks an application is being brought on the wrong basis, for instance where it is ultimately in support of proceedings against the exchange, or if the provision of information is likely to compromise the position of the exchange.

Ultimately, should the exchange oppose the application for a disclosure order?

Adopting a neutral position and awaiting the outcome of the application, i.e., neither opposing or consenting to the application, may be the cheapest and most efficient response. However, just like banks and financial institutions are more traditionally required to do, exchanges will need to assess whether a neutral position can be adopted, particularly in circumstances where they may also owe duties of confidentiality to the holders of wallets. Disclosure orders are, however, quite often teamed with gagging orders which seek to prevent the exchange from "tipping off" the wallet holder or fraudster. A breach of the terms of a gagging order could have serious consequences for the exchange and care should be taken when navigating the provisions of such an order.

On a final note, provision should be made for the exchange to be compensated for its reasonable costs of providing the information, the level of which may well be significant depending on the scope and complexity of the request, and how time intensive the exercise becomes. A robust record of the time and costs incurred should be kept.

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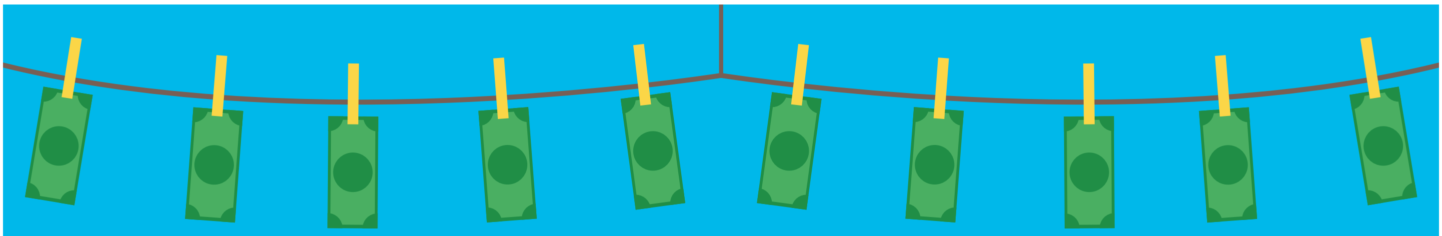


UPDATES ON MONEY LAUNDERING AND ASSET RECOVERY IN SWITZERLAND

Authored by: Natalia Hidalgo and Edouard Kaiflin - Monfrini Bitton Klein

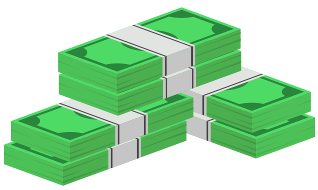
The Swiss Financial Market Supervisory Authority (FINMA) states[1] that the Swiss apparatus for combating money laundering is based on two pillars:

- Article 305bis of the Swiss Penal Code (PC), which punishes money laundering[2];
- the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA).

In asset recovery, these legal provisions are very often at the centre of disputes.

Indeed, acts of money laundering or the failure to comply with anti-money laundering regulations, particularly in terms of monitoring high risk transactions, may be causes of action for victims of crimes against banks or other financial intermediaries (as will be seen below, breaches of Article 305bis may be a cause of action for tort liability, while breaches of AMLA may be a cause of action for breach of contract or an action for performance).

Thus, the role of the Swiss legislation to combat money laundering in civil disputes as well as the various changes that the AMLA has undergone these last years are key to asset recovery.



I. The anti-money laundering legislation in asset recovery disputes

Contractual liability

First, it is important to emphasize that the acts of a financial intermediary, such as banks, can be challenged by the client based on the existing contractual relationship.

In recent years, the Swiss Federal Supreme Court has developed a large body of decisions on banking disputes. Whether a bank employee carried out transactions without the client's consent, whether he misappropriated the client's funds, or whether he executed a fraudulent order given by a third party (such a hacker), the legal basis and the issues at stake may be very different.

In all these cases, the violation of the anti-money laundering legislation never creates as such a basis for the bank's liability towards its client. Nevertheless, these violations help to prove the fault or the bad faith of the bank, conditions which will be examined by the courts in an action for breach of contract or an action for performance.

Tort liability

A tort claim is also available against financial intermediaries, where an unlawful act can be proved.

1 https://www.finma.ch/en/supervision/cross-sector-issues/combating-money-laundering/

2 « 1. Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.
1bis. An aggravated tax misdemeanour is any of the offences set out in Article 186 of the Federal Act of 14 December 1990 on Direct Federal Taxation and Article 59 paragraph 1 clause one of the Federal Act of 14 December 1990 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300 000 francs.
2. In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.
A serious case is constituted, in particular, where the offender:
a.acts as a member of a criminal or terrorist organisation;
b.acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or
c.achieves a large turnover or substantial profit through commercial money laundering.
3. The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission. »

Under Swiss case law, the breach of anti-money laundering regulations (AMLA and Article 305ter PC) is not an unlawful act triggering tort liability, since those provisions are not meant to protect the public but to protect the integrity of the Swiss financial market.

However, a violation of Article 305bis PC, which punishes money laundering may lead to tort liability towards the victim of the predicate offenses as the acts of concealment make the recovery more difficult.

When analyzing Article 305bis PC, the judge can take into consideration anti-money laundering rules, in particular the AMLA, in the following way:

- the duties arising from the AMLA create a specific obligation to monitor business relationships and, if necessary, to report them to the Money Laundering Reporting Office-Switzerland (MROS);

- this legal obligation leads to the fact that the passive behaviour of a financial intermediary can itself constitute a violation of Article 305bis PC, at least by recklessness;

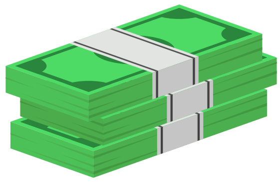
- the intentional nature of the violation of Article 305bis PC (negligence is not punishable) can be established by relying, among other factors, on the seriousness of the violation of the AMLA duties.

It should also be noted that a bank can be held responsible in tort for the acts and omissions of its employees in the performance of their work (Article 55 of the Swiss Code of Obligations).

In 2020, the Geneva Court of Justice issued an interesting decision on this issue[3].

Investors had transferred their funds to accounts held by a third party (an independent asset manager) and by a company. In the bank forms, the asset manager had falsely declared that he was the beneficial owner of these assets while he was actually using these accounts to defraud the investors.

In its analysis, the court pointed to the bank's passivity with respect to suspicious transactions that were indicative of money laundering, in breach of its AMLA obligations. The court found that the conditions of Article 305bis PC were met (even though the criminal proceedings had not resulted in a conviction because of the statute of limitations). As a result, the bank was held liable in tort for the damage caused to these investors (the victims of the predicate offense).



II. Entry into force of the revised AMLA on 1 January 2023

Following the fourth review of Switzerland conducted by the Financial Action Task Force (FATF) in 2016, the AMLA was amended in order to comply with the FATF recommendations.

On 19 March 2021, the Parliament approved the revision of the AMLA.

A first part of these changes came into force on 1 January 2022 but the main part will apply from 1 January 2023.

Generally speaking, most of these changes reflect already existing practices within financial intermediaries, in particular within banks.

These are some of the most important amendments:

- **verification of the identity of the beneficial owner:** the amended AMLA explicitly states that financial intermediaries have not only the duty to identify the beneficial owner of a bank account but they also have the obligation to verify the identity of the person designated as a beneficial owner, in order to confirm its plausibility (Article 4 para. 1 AMLA).

- **updating of client data:** the new AMLA also provides that financial intermediaries must periodically check whether the required documents are up-to-date and update them if necessary. The obligation to update applies to all the business relationships and is not limited to increased risk clients (Article 7 para. 1bis AMLA).

- **definition of a "well-founded suspicion":** According to Article 9 para. 1 AMLA, financial intermediaries must file a report to the MROS if he knows or has "well-founded suspicion" that the assets involved in the business relationship are connected to any of the offences listed such as money-laundering.

The revised law defines the concept of "well-founded suspicion", i.e. when the financial intermediary has a concrete indication or several elements suggesting that the assets involved in the business relationship are linked to an illegal activity and further clarifications do not dispel the suspicion (Article 9 al. 1quater AMLA). In fact, this amendment uses the definition developed by the Swiss Federal Supreme Court.

In other words, as soon as the financial intermediary becomes suspicious, he must continue his investigations until he knows what is going on: either the transaction that appeared suspicious is regular, or his suspicions were well-founded and he must report the relationship to MROS.

3 See Geneva High Court decision ACJC/1202/2020, dated 1 September 2020.

SHANDONG CHENMING V ARJOWIGGINS

HONG KONG'S TOP COURT RELAXES THE "BENEFIT" REQUIREMENT FOR WINDING UP A FOREIGN COMPANY

Authored by: Wilson Leung - Serle Court

This article reviews the Hong Kong Court of Final Appeal's recent judgment in Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd [2022] HKCFA 11, [2022] 5 HKC 318, where the court adopted a liberal approach to the second "core requirement" for the winding-up of a foreign company (that winding-up must be of "benefit" to the petitioner). The court held that commercial leverage created by the prospect of a winding-up order could amount to such benefit.

Introduction

In June 2022, the Hong Kong Court of Final Appeal ("HKCFA") handed down its decision in Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd [2022] HKCFA 11, [2022] 5 HKC 318. This is a notable case in which Hong Kong's apex court adopted a liberal approach to one of the core requirements for the court to wind up a foreign company, namely, that the petitioner would "benefit" from the winding-up order. This decision is of interest to other jurisdictions – including England and Wales – which follow the same core requirements.

In Hong Kong, the court has power to wind up a foreign-incorporated company, but will only exercise its discretion to do so if three "core requirements" are satisfied:[1]

(1) "Sufficient connection" between the company and the jurisdiction (i.e. Hong Kong).

(2) Reasonable possibility that the winding-up order would be of "benefit" to the petitioning party.

(3) At least one party interested in the distribution of the company's assets over whom the Hong Kong court can exercise jurisdiction.

In England, the court likewise will only wind up a foreign company where those three core requirements are satisfied[2].

In Shandong Chenming, the HKCFA grappled with the second requirement of "benefit". The court decided to take an expansive view of what could constitute the relevant benefit, and held that commercial pressure on the company to pay an undisputed debt could amount to such benefit.

Background

The appellant company (Shandong Chenming) ran a paper manufacturing business. The company was incorporated in Mainland China ("PRC"), but was also registered as an overseas company in Hong Kong. The company's shares were listed in both the PRC and Hong Kong.

1 Kam Leung Sui Kwan v Kam Kwan Lai (2015) 18 HKCFAR 501, at [20].

2 Banco Nacional de Cuba v Cosmos Trading Corp [2000] 1 BCLC 813, at 817.

The respondent ("Arjowiggins") was in a joint venture dispute with Shandong Chenming. Arjowiggins obtained an arbitral award against Shandong Chenming. After obtaining permission to enforce the award in Hong Kong, Arjowiggins served a statutory demand on Shandong Chenming. However, Shandong Chenming refused to make payment, and instead applied to the Hong Kong court for an injunction to prevent Arjowiggins from presenting a winding-up petition.

The application was dismissed at first instance and by the Court of Appeal. Shandong Chenming then appealed to the HKCFA.

It was common ground that the first and third core requirements were met. Shandong Chenming argued, however, that the second requirement was not satisfied because the company conducted no business in Hong Kong, had no assets in Hong Kong, and had no connections with Hong Kong other than its shares being listed there and being registered there as an overseas company. The company contended that, as a matter of law, the benefit must arise from the making of a winding-up order, and not from any pressure or leverage arising before such an order is made; thus, although its listed status in Hong Kong was threatened by the prospect of a winding-up order, the commercial pressure thereby created was not a legitimate form of benefit for the purpose of invoking the winding-up jurisdiction.

Judgment

The HKCFA rejected Shandong Chenming's argument that commercial pressure created by the prospect of a winding-up order could not be a benefit.

The court noted that, as established by the authorities, it was perfectly proper for a creditor to use a winding-up petition to apply commercial pressure to seek payment of an undisputed (or indisputable) debt: [34], [40], [42]-[43]. That being so, the court found it difficult to see any rational basis for excluding such commercial pressure as a benefit capable of satisfying the second requirement: [57].

The court also advanced the following general observations about the second requirement:

(1) The court adopts a "pragmatic" and flexible approach in assessing whether the second requirement is satisfied: [54], [83].

(2) The nature of the inquiry is to ascertain whether it would be appropriate to put into motion the winding-up machinery in respect of a particular overseas company: [83].

(3) The second requirement is set at a "low threshold": [56].

(4) The relevant benefit is not confined to potential distribution of assets by the liquidator. The benefit does not have to come from the company's assets, or indeed be monetary in nature: [54(1), (3), (5)].

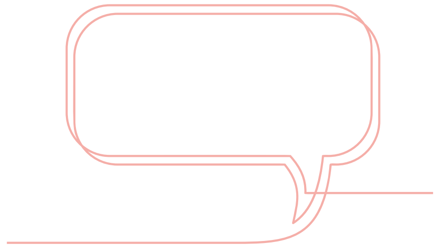
(5) Even where there are no assets for a liquidator to administer, the requirement is satisfied so long as there is "some useful purpose serving the legitimate interest of the petitioner": [54(4)].

(6) The benefit was not limited to consequences flowing from the making of a winding-up order; it could include a state of affairs arising from the presentation of a petition and setting in motion the winding-up process: [51], [59]-[61], [81].

(7) The fact that a similar result could be achieved by other means does not preclude a particular benefit from satisfying the requirement: [52], [54(6)].

(8) It is sufficient that the benefit would be enjoyed solely by the petitioner (as opposed to creditors generally): [54(2)].

On the facts of the case, the court held that the second requirement was satisfied by the leverage created by the prospect of a winding-up order, and particularly the potential impact on the company's listed status in Hong Kong: [66]-[67], [80]-[82]. It therefore dismissed Shandong Chenming's appeal.



Conclusion

The HKCFA's decision in Shandong Chenming is an illuminating exposition of the "benefit" requirement for winding up a foreign company. The judgment shows the court taking a pragmatic and relaxed approach to the requirement, which should make it easier for creditors of foreign-incorporated companies to enforce their debts by way of winding-up petition. Previous case law has tended to focus on potential benefit which would arise from the making of the winding-up order itself, and often on whether the petitioner would receive any monetary assets in the event of a liquidation.[3] Shandong Chenming makes it clear that the benefit criterion is not so restricted, that the threshold is relatively low, and that benefit can include commercial leverage created by the prospect of a winding-up order. More broadly, it signifies an increasing willingness by the Hong Kong courts (which could influence similar jurisdictions such as England) to accept winding-up jurisdiction over foreign companies, as long as there is a sufficient connection with Hong Kong.

3 e.g. In re Eloc Electro-Optieck and Communicatie BV [1982] 1 Ch 43, at 47-48

RESPECTING RECIPROCITY

MUTUAL ENFORCEMENT OF UAE JUDGMENTS IN ENGLAND AND WALES AND ENGLISH JUDGMENTS IN THE UAE

Authored by: Rick Brown, Nick Braganza and Missba Nizami - HFW

In the context of cross-border transactions and international business, the ability to enforce Court judgments overseas is of great importance. When a judgment debtor's assets are located abroad, the ability to enforce that court judgment in a foreign legal jurisdiction is key to making a recovery.

Enforcement of UAE judgments in England and Wales

Previous and existing regime

Historically, there have been significant challenges with enforcing foreign judgments in the UAE. The reverse was also true and UAE judgments were seldom enforced in England and Wales.

Currently, there is no mutual enforcement treaty between the England and Wales (or the wider UK) and the UAE, which would facilitate enforcement of their respective court judgments.

Consequently, due to the lack of an enforcement treaty, judgment creditors looking to enforce a UAE judgment in England are required to initiate enforcement proceedings under the English common law.

Generally, the English Courts must be satisfied that the UAE Court:

(i) had original jurisdiction to render its judgment;

(ii) issued a final and conclusive judgment; and

(iii) issued a judgment for a definite and calculable sum.[1]

That being said, enforcement of UAE judgments in England and Wales was relatively rare, for public policy and other reasons such as a perceived lack of reciprocity in the UAE Courts.

The Lenkor Decision

Following recent developments, the position may be changing.

In the case of Lenkor Energy Trading DMCC v Puri (2020) EWHC 75 (QB) (Lenkor), the English High Court enforced an onshore Dubai Court judgment on the basis that it was the final and conclusive judgment of a court of competent jurisdiction. On appeal, the appellant raised several public policy arguments to suggest that the judgment should not be enforced in England. The Court of Appeal dismissed the appellant's arguments and upheld the recognition and enforcement of the UAE judgment.

Importantly, the Court of Appeal held that the Dubai Court of Cassation had jurisdiction to hear the case and that the judgment was final and conclusive. Furthermore, the Court of Appeal stated that it was irrelevant that the laws of the UAE differed from English law or that the English courts may have approached the matters at hand in a different manner to the UAE courts.

The Lenkor[2] decision is significant as it demonstrates the English court's previously unseen willingness to enforce UAE judgments.

1 JSC VTB Bank v Pavel Valerjevich Skurikhin, Pikeville Investments LLP, Perchwell Holdings LLP [2014] EWHC 271 (Comm).

2 [2020] EWHC 1432 (QB).

This case will likely be used as authority for the English Courts to further enforce UAE judgments. Such enforcement would be subject to a judgment creditor proving that the UAE judgment is not contrary to English public policy.

Enforcement of English judgments in the UAE

Previous and existing regime

The enforcement of English Court judgments in onshore Dubai is subject to the provisions of UAE law. It should be noted that the financial freezones of the Abu Dhabi Global Markets and the Dubai International Financial Centre have separate and distinct legal regimes based on the English common law, and the provisions below will not apply there.

The relevant UAE legislative provisions are contained within Article 85 of the Cabinet Resolution No 57 of 2018 concerning the Executive Regulations of the UAE Civil Procedure Law (Federal Law No 11 of 1992, as amended) (Executive Regulations).

The Executive Regulations set out the conditions required for a foreign judgment to be enforced in the on-shore UAE Courts, namely:

(i) The foreign judgment and/or order being enforced must have been issued by the foreign court in accordance with the law of that foreign state;

(ii) The parties to the foreign judgment and/or order had been required to appear before the relevant foreign court and were properly represented;

(iii) The foreign judgment and/or order being enforced does not conflict with a judgment and/or order previously issued by the UAE courts; and

(iv) The foreign judgment and/or order being enforced does not involve anything that violates public order or morality.

There were therefore significant obstacles for the enforcement of English court judgments in the UAE. These included those on account of lack of jurisdiction and lack of reciprocity.

For example, in a 2006 case[3], a claimant attempted to enforce its English money judgment against the defendant who resided in Dubai. The Court of First Instance and the Dubai Court of Appeal both refused to enforce the judgment on the basis that the claimant had been unable to provide substantial evidence of a reciprocal enforcement regime between the UAE and England in respect of the recognition and enforcement of judgments. On appeal, the Court of Cassation also further refused to enforce the judgment on the same basis.

In circumstances where there is no mutual enforcement treaty between the two countries, the UAE Court will only enforce judgments where there is reciprocal recognition and enforcement between the legal jurisdiction in which the judgment was issued, and the UAE.

The Ministry of Justice Directive

Following the ground-breaking Lenkor decision in 2020, there remained unwillingness from the UAE Courts to enforce English judgments. It was still difficult to evidence reciprocity in enforcement proceedings. Enforcement happened only occasionally.

However, in September 2022, the UAE Ministry of Justice (UAE MoJ) issued a Directive addressed to the Director General of the Dubai Courts. This Directive stated that, as a result of the Lenkor decision, the reciprocity condition found in Article 85 of the Executive Regulations would be satisfied. The Directive further requested the Dubai Courts to take the relevant legal steps needed to recognise and enforce English judgments in the future.

Albeit there is still no mutual treaty or convention for recognising and enforcing court judgments between these jurisdictions, the UAE MoJ's Directive is sufficient to show that Lenkor has established the principle of reciprocity.

It is still the case that any English judgments being enforced in the UAE will need to comply with the other conditions set out in the Executive Regulations and follow the relevant procedures. Consequently, the Dubai Courts may still refuse to enforce English Court judgments where for example the English judgment conflicts with a judgment previously issued by the UAE Courts.

It is important also to note that the Directive is not legally binding on any of the UAE Courts and neither does it hold any legal status. However, it will be highly persuasive and together with the Lenkor decision will be used to demonstrate reciprocity.

Future enforcement

Judgment creditors seeking to enforce English Court judgments in the UAE should feel more confident as a result of the Directive. We are already aware of a number of cases where enforcement of English judgments has happened in the Dubai Courts.

Of equal importance is that the Directive was only addressed to the Directive General of the Dubai Courts and not the other six Emirates, meaning that the enforcement of English Court judgments may not extend to the rest of the UAE. We do anticipate that the Courts of the Emirates will follow suit in due course.

Mutual enforcement of Court judgments between the UAE and England and Wales will undoubtedly become more prevalent.

This is important in the context of fraud and asset recovery, where parties obtain judgments in their favour from foreign courts (such as those in England) but assets of the judgment debtors are in the UAE. Now it will be more straightforward to enforce those judgments, albeit it should be highlighted it will not be possible to enforce interim orders such as freezing injunctions, search orders and document production orders. Under the Executive Regulations, the Courts will only agree to enforce final orders from foreign courts.

Notwithstanding the above, we anticipate that enforcement of English judgments will become more common following publication of the Directive, although other grounds may now be raised in order to attempt to block enforcement.

3 Dubai Court of Cassation, Petition No 269 (civil) 26 February 2006.

FORTIFICATION FOR DAMAGES

A "GOOD ARGUABLE CASE OF A RISK OF LOSS" OR MERE SPECULATION?

Authored by: Natalie Todd - Cooke, Young & Keidan

In the decision earlier this year in Claimants Listed in Schedule 1 v Spence[1], the Court of Appeal has restored the status quo and clarified the law on fortification of damages in freezing injunctions.

Background

Mr Spence was the subject of a worldwide freezing order ("WFO") for which £500,000 had been provided by way of fortification. Mr Spence applied to increase the level of fortification. He had borrowed $9.3m from Coutts which was secured against his Coutts Sterling deposits of £8m. He was paying considerable interest for this arrangement: £120,000 per annum. Mr Spence had moved to the US when the exchange rate was not in his favour. In his application, he asserted that he intended to exchange his Sterling deposit once the exchange rate reached £1:$1.55. He argued that following the granting of the WFO, there was a substantial risk that Coutts would call in the Dollar loans or enforce its security leaving Mr Spence subject to whatever exchange rate existed at the time and that this could result in a potential loss of at least £2m based on the lowest exchange rate that had arisen during the period of the loans.

At first instance, Moulder J had granted the application and had ordered that further security of £800,000 (which she considered to be the likely amount of the loss) be provided despite i) the absence of any suggestion by Coutts that it would terminate the loans[2]; ii) no real or documentary evidence was adduced to support Mr Spence's assertion that he would keep the Dollar loans arrangement until the exchange rates reached a level of £1:$1.55; and iii) the estimate of loss was not informed, intelligent or realistic[3].

The principles to consider

The principles as to fortification are set out in Energy Venture Partners Ltd v Malabu Oil and Gas Ltd[4] and in Phoenix Group Foundation v Cochrane[5]:

1. Can the applicant show that there is a sufficient level of risk of loss to require fortification which involves showing that it has a good arguable case that it will suffer loss?
2. Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made? An intelligent estimate will be informed and realistic although it may not be entirely scientific.[6]
3. Can the applicant show (to the standard of a good arguable case) that the loss has been or is likely to be caused by the granting of the injunction as opposed to the underlying proceedings.[7]

1 [2022] EWCA Civ 500
2 Lord Justice Phillips found at [47] that there was insufficient evidence to justify the finding that there was a real (as opposed to fanciful) risk that Coutts would call in the loans.
3 Lord Justice Phillips at [50] described Moulder J's findings as to potential loss as "intelligent guesswork rather than intelligent estimation".
4 [2014] EWCA Civ 1295, [2015] 1 WLR 2309
5 [2018] EWHC 2179 (Comm) at [14]
6 Lord Justice Phillips at [20] did not consider this to be a separate requirement, but rather "an obvious aspect of the need for the applicant to demonstrate a good arguable case".
7 Likewise, Lord Justice Phillips at [21] regarded this as an important principle for the Court to bear in mind, but to be "no more than an aspect of the causation element".

Judgment

Lord Justice Phillips considered Moulder J's approach to be too narrow and that it had failed to take into account the nature and effect of Mr Spence's overall financial arrangements and planning. He considered that Mr Spence's arrangement with Coutts was to ensure that Sterling-Dollar exchange rate movements did not cause Mr Spence any net loss. If Sterling appreciated, the increased rate of the Sterling Deposit would match the diminution in value of his US assets, and vice versa. What Mr Spence would potentially lose would be the hedge that he had in place against the depreciation of the Dollar. He likened this to an insurance policy which can be easily reconstituted or replaced before the risk eventuates. In such circumstances, the loss suffered must be limited to the cost of putting in place an alternative arrangement (in this case, a replacement hedge or forward currency trades and/or one or more derivative products) and not the prospective loss which would be suffered if the risk materialises without protection in place.

Ahead of the hearing, the Court had asked Mr Spence to submit evidence as to the availability and cost of alternative arrangements, but he did not consider it reasonable to do so given the potential complexity of the transactions. Lord Justice Phillips disagreed and considered that it was reasonable to obtain this. Indeed, he said that adducing evidence that such replacement options were not reasonably available was a pre-requisite of inviting the Judge to embark on the assessment of highly speculative future losses. Overall, he found that Mr Spence had failed to adduce evidence demonstrating a good arguable case that he would suffer loss.

Mr Spence's claim was for entirely speculative losses in what was in any event an unlikely scenario and one which he could have easily protected himself.

Comment

Calver J also gave support to the requirement for "solid, credible [evidence]..that the claimed loss has been or will be suffered" in PJSC National Bank Trust v Mints [2021] EWHC 1089 (Comm).

These decisions will be of relief to claimant practitioners in making civil fraud claims more affordable for claimants.

If such evidently weak fortification applications were to be allowed, they could render the powerful interim remedy of a freezing order somewhat toothless.

The more speculative the loss, the more evidence will be needed to persuade the Court irrespective of how complex the financial transactions are. The Courts are expecting more of an open book approach with considerable detail as to losses and explanations as to how such losses might be mitigated. Typically respondents are evasive as to the extensive level of detail required in response to civil fraud claims and injunctions and have been prone to a bit of exaggeration (or complete speculation as in this case) when it comes to the losses they claim they will suffer as a result of a freezing order so this decision will be a welcome back to reality check for claimants.

QUINCECARE

WHERE WE ARE, AND WHERE WE ARE GOING

Authored by: Matthew McGhee and Maria Kennedy - Twenty Essex

Key Takeaways

- The Quincecare duty requires an entity providing payment services (usually a bank) to its customer to refrain from executing an order in relation to that customer's account if, and for so long as, the entity is "put on inquiry" that the order is an attempt to defraud the customer.
- The duty is both: (1) a passive duty not to execute a suspicious order; and (2) an active duty to make such inquiries as an honest and reasonable person would make to uncover any fraud.
- The next ten years will most likely see the duty being examined repeatedly given the proliferation of fraud and, in particular, Authorised Push Payment fraud, potentially also in the context of cryptocurrency exchanges carrying out quasi-payment functions.

What is the duty?

The duty was first described by Steyn J in Barclays Bank v Quincecare [1992] 4 All ER 363 as follows:

"a banker must 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 (although not necessarily proof) for believing that the order is an attempt to misappropriate funds of the company… And, the external standard of the likely perception of the ordinary prudent banker is the governing one."

In the only claim to hold that the duty was breached, Singularis Holdings v Daiwa Capital Markets Europe [2020] AC 1189, D paid out funds held for C on the instructions of C's chairman and sole shareholder. The payment was fraudulent, and C sought recovery from D for breach of the Quincecare duty and dishonest assistance. Lady Hale stated that the duty included both a passive duty not to execute an order, knowing it to be dishonestly given or shut one's eyes to the obvious fact of the dishonesty, and an active duty to make such inquiries as an honest and reasonable man would make to uncover any fraud. The Supreme Court affirmed the lower courts' decisions and held that C was a victim of D's negligence.

Where are we now?

The parameters of the duty have been explored this past year:

1. **Natural persons (as well as companies) can be beneficiaries:** In Philipp v Barclays Bank [2022] 2 WLR 872, an individual was persuaded to make a payment from her personal bank account at the direction of a fraudster. So deceived was she that she lied to the bank about the purpose of the transactions. Nevertheless, she argued that the bank ought to have recognised the risk of fraud and refused to execute the payments. At first instance, HHJ Russen QC held that the duty was only engaged when the bank was on notice that its customer's agent was attempting to misappropriate the customer's funds. It had no application where the customer was authorising the payment. This was reversed on appeal. Birss LJ stated that the involvement of an agent was not essential; the rationale did not justify treating transactions authorised by the customer any differently and the bank could owe a duty to a customer who is a natural person.

2. **What puts a bank on inquiry:** In Nigeria v JP Morgan Chase Bank [2019] 2 CLC 559, D received instructions from C's authorised signatory to make 3 transfers which were a fraud on C. D applied for summary judgment on the basis that the claim had no real prospect of success. The application failed at first instance.

The Court of Appeal affirmed this and stated that: "what a bank should do when it is put on inquiry…will vary according to the particular facts of the case…[i]n most cases, the reconciliation of conflicting duties will require something more from the bank than simply deciding not to comply with a payment instruction". Following trial ([2022] EWHC 1447 (Comm)), Cockerill J dismissed the claim, stressing that the matters of which the bank had to be on notice had to be specific to that transaction. Money laundering red flags concerning the customer generally do not necessarily trigger a Quincecare duty.

3 **Non-customers are not beneficiaries:** In RBS v JP SPC 4 [2022] UKPC 18, the Privy Council confirmed that the Quincecare duty is confined to D's customers. Given that the duty of the bank is to stop the payment and to take positive steps to investigate, there needs to be a sufficiently close prior relationship to justify that duty (see also Stanford International Bank v HSBC [2021] 1 WLR 3507, currently under appeal).

Where is the Quincecare duty going?

1 **Who owes it?** The question of who (if anyone) owes the duty beyond conventional banks has received very little attention. Most cases involve conventional banks, and the test is framed according to the prudent banker. However, in Hamblin v World First [2020] EWHC 2383 (Comm), D was an e-money institution providing international payment services. With the rise of cryptocurrency, the Quincecare duty could be recognised as applying to e.g. cryptocurrency exchanges.

2 **Who is the beneficiary?** While the appellate decision in Philipp confirmed that the duty can be owed to natural persons as well as companies, it is unlikely that this will be further broadened. In particular, in light of JP SPC 4 and Stanford, it is unlikely that the duty will be expanded to non-customers.

3 **What does the duty require?** This question has, naturally, attracted the most attention:

A In Singularis, the Court of Appeal stressed that the scope of the duty is "narrow and well-defined": "It is to protect a banker's customer from losing funds held in a bank account with that banker, whilst the circumstances put the banker on inquiry". Birss LJ added in Philipp that: "The key is the careful calibration of the Quincecare duty itself. It is a duty conditioned by whatever ordinary banking practice is at the relevant time." However, banks still lack a definitive statement of what will put them on notice. There is instead ample room for parties to dispute what prevailing banking practice was and how it ought to have been applied.

B As a result of Philipp, which confirmed that the duty may be engaged in respect of any payment instruction, it is now clear that the duty is not limited to the niche case of a corporate entity's funds being misappropriated by an authorised signatory.

C Given the likelihood (or at least possibility) of non-banks also owing the duty, regard should be had to the standard required of the duty-owing entity. Is a cryptocurrency exchange to be held to the prevailing "ordinary banking practice" or to the standard of an 'ordinary crypto exchange'? The former seems overly strict, given the difference in the entities. However, the latter option is open to a wide range of interpretations, given the nascent crypto-industry and the widely-discussed concerns about propriety within it. Incoming regulations on the crypto-industry may facilitate identification of the appropriate standard.

D Finally, pressure on a defendant bank can be relieved by making a deduction for any contributory negligence on the customer's part (e.g. in Singularis, a 25% deduction was made because the customer's directors had acted negligently). However, this leaves the bank in the position where it is prima facie 100% responsible for the losses and bears the burden of proof to justify a departure from this.

Conclusion

It remains to be seen how the recently-revitalised Quincecare duty will settle. One thing is clear: would-be claimants are alive to the prospects of seeking recovery against their banks, and the ongoing evolution of crypto-assets mean that the duty may be owed by a broader class of persons.

HOSPITALITY SECTOR DINES OUT ON BUSINESS INTERRUPTION COVID-19 VICTORIES

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

The COVID-19 pandemic caused the temporary closure of thousands of businesses - with the hospitality sector hit particularly hard. Many such businesses held business interruption insurance policies they had envisaged would provide them with coverage. In 2020, the FCA recognised that a huge number of insurance claims would be made and brought a test case aimed at clarifying a number of key issues surrounding which policies would and would not cover COVID-19 related claims (the Test Case).

The Supreme Court handed down its decision in the Test Case in January 2021. The FCA has since reported that approximately 120,000 business interruption claims have been accepted by insurers in line with the Supreme Court's findings.

However, the Supreme Court decision only considered the wording set out in certain standard policies issued by a handful of insurers leaving many policyholders with uncertainty as to whether their claims would and should be covered. A series of High Court decisions this year have helped to answer some of those queries - and we explore below a number of decisions which have largely been favourable to policyholders.

Corbin & King

In February 2022, restaurant group Corbin & King took their challenge to the High Court[1] and struck a blow for policyholders. In that case, the High Court considered how the Denial of Access (Non-Damage) (NDDA) clause in the policy should be interpreted.

The NDDA clause provided as follows:

"We will cover you for any loss insured by this section resulting from interruption or interference with the business where access to your business is restricted or hindered for more than [2 hours] … arising directly from:

1. the actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises."

Corbin & King's insurers had refused coverage arguing that the NDDA clause only provided a 'narrow and localised' form of cover, relying on the approach taken by the Divisional Court in the Test Case.

Finding in favour of policyholders, the High Court determined that the Supreme Court's approach to causation should be adopted and that COVID-19 is capable of being a danger within one mile of the insured premises which, coupled with other uninsured but not excluded dangers outside, led to the regulations which caused the closure of the businesses and caused the business interruption loss.

The judge further held that the NDDA cover provided a separate limit of £250,000 for each individual premises in respect of each claim (rather than a single limit of £250,000 in relation to all of the premises for any one claim). This meant that Corbin & King could collectively recover up to £2,750,000 under the policy as opposed to just one payment of £250,000.

1 Corbin & King Ltd and Others v Axa Insurance UK PLC [2022] EWHC 409 (Comm)

Stonegate & Ors

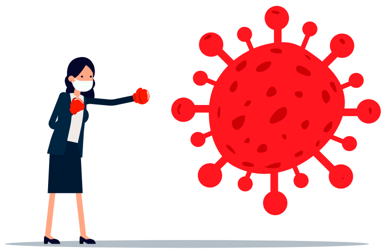
In the cases of Stonegate Pub Company Ltd[2], The Various Eateries Trading Limited[3], and Greggs Plc[4], handed down on 17 October 2022, the High Court made key decisions on the aggregation of losses.

A central issue to all three claims was whether the claimed COVID-19 business interruption losses "arise from, are attributable to or are in connection with a single occurrence". Insurers sought to argue that all of the policyholder's losses throughout the COVID-19 pandemic period were attributable to a "single occurrence" rooted in the origins of the pandemic (such as the coming into existence of the virus, or the initial outbreak of COVID-19 in humans), thereby limiting the policy holder to the "Limit of Liability" of £2.5m (the sum of which had already been paid).

However, rejecting the primary argument advanced by the insurers, Mr Justice Butcher determined that the proper assessment of 'occurrences' fell to be determined by reference to the Government's actions/interventions at different stages throughout the pandemic. The effect of this analysis was that policy limit applied per "occurrence". The policyholders could, therefore, recover the maximum policy limit of £2.5m for each identified "occurrence"

Further, Mr Justice Butcher widened the discussion on what may constitute a business interruption loss "in connection with a single occurrence". Mr Justice Butcher highlighted the broad nature of the term "in connection with" and noted that this could be multiple covered events, at multiple locations either driven by individual occurrences of COVID-19 within the vicinity, or the enforced closure of policyholder's premises.

The decision in Stonegate also considered the extent to which insurers were entitled to take account of the benefit of government intervention through furlough payments and business rates relief. Insurers sought to contend that, either as a matter of the policy wording, or as a matter of the application of the legal principles of subrogation, the insurers were entitled to receive such the benefit during the policy period.



In a finding that went against the interests and arguments of the policyholders (and indeed against guidance given by the Association of British Insurers), Mr Justice Butcher determined that furlough payments and business rates relief ought to be brought into account on a proper construction of the "savings clause". Mr Justice Butcher highlighted the applicability of the principles of the doctrine of subrogation in contracts of insurance noting that

"the [furlough] payments were ones which, prima facie, did diminish the insured loss. They were payments made in respect of employment costs which Stonegate would otherwise have borne itself, either as wages, if staff were kept on the payroll, or by way of redundancy payments, if staff had been let go. In either case, they would have contributed to the financial loss arising from the interruption or interference to Stonegate's business."

This ruling confirms that even if the particular policy mechanisms did not permit the insurers to take the benefit of the payments, the legal doctrine of subrogation would step in and the furlough payments and/or any business rate reductions would be held to the insurer's benefit.

Takeaway?

These cases demonstrate that the FCA Test Case was far from the final word on business interruption claims - and that policyholders who have had claims denied due to coverage issues should test those decisions where their policy does not fit squarely within the bounds of what was decided in the FCA Test Case. We expect the Courts to see further business interruption claims in 2023 as these decisions may well embolden policyholders to dispute insurers' decisions to refuse coverage. Policyholders (and indeed Insolvency Practitioners appointed over policyholders) should revisit their insurance policies and speak to experts as to whether there might be a chance of challenging any refusal of coverage.

2 [2022] EWHC 2548 (Comm)
3 [2022] EWHC 2549 (Comm)
4 [2022] EWHC 2545 (Comm)

KEY TAKEAWAYS FROM PRACTICE DIRECTION 57AD

HOW CAN YOU ENSURE COLLABORATION RESULTS IN THE BEST OUTCOME FOR EVERYONE?

Authored by: Harry Trick - FRP Advisory

The history of PD57AD

In January 2019, the Disclosure Pilot Scheme ("DPS") came into effect. One of its main purposes was to ensure that parties involved in litigation worked together to ensure a level of standardisation in their working methodologies on each case. Additionally, the DPS focused on maximising efficiencies and controlling costs wherever possible.

There was an emphasis put on parties to work together in the earliest stages of litigation including the filing of a joint Disclosure Review Document ("DRD") where several key points such as the data universe and approach for review and disclosure would be discussed and largely agreed on before it is heard in a Case Management Conference ("CMC"). Ideally this means that a consensus should be reached for the majority of disclosure issues at hand; any remaining issues where a consensus could not be reached could be heard by a judge and guidance given at that point.

The DPS became Practice Direction (PD) 57AD on 1st October 2022. During the 34 months of the DPS, there were changes and revisions made but at the point it became PD57AD, there were very few material changes made, mainly to add clarity to areas that needed it.

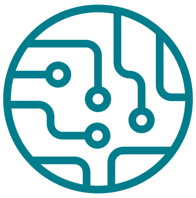
The challenges along the way

Both lawyers, investigators and technologists have faced numerous challenges as the new requirements of the DPS were navigated. There has been a far greater emphasis on the use of technology throughout the litigation process including the requirement to understand and assess which technology could be deemed relevant and of assistance to the case. For example, the growing emphasis on communications in daily life means that mobile devices have become prevalent in our experience, when assessing the applicable data universe.

The use of technology to refine datasets such as the application of email threading on top of the traditional date range and key word filtering very quickly became a key tool in getting reviewable documents to a sensible and proportionate level.

Most significantly though is the use of technology to maximise the efficiency of the document review process.

Tools such as Technology Assisted Review (TAR) or Continuous Active Learning (CAL) were embraced by eDiscovery professionals very early on in the DPS and as our confidence in and experience with the technology grew, so did our ability to advise our clients on how to get the best out of it.



Using technology in litigation in 2022

The DPS and now PD57AD has made it commonplace for eDiscovery professionals to be involved earlier in cases than they would have been before. Consultative roles have grown within the field and subsequently those of us who interact with our clients have been able to advise and assist in the completion of the DRD.

The largest area of change in terms of the adoption of technology in litigation is the use of CAL or TAR to improve the efficiency of the review. AI and machine learning has admittedly caused nervous ripples across the industry for those unfamiliar, however PD57AD specifically mentions and mandates the use of technology in the review process where it is disproportionate to not use it. In practice, this is typically for any review population greater than 50,000 documents. However that does not mean it should not also be considered on smaller populations.

As with any new technologies, there has been a period of adjustment, however the way in which it is used and the validations that are put in place by the eDiscovery professionals on these cases has added a level of comfort to the process and managed what the DPS and PD57AD set out to achieve.

The application of technology should be viewed as a tool to assist legal teams in refining the data set to ensure their time is spent on reviewing documents most likely to contain information of interest. While the use of Analytics, Early Case Assessment (ECA) workflows and the adoption of TAR grab the headlines, there are other areas of the DRD which an eDiscovery practitioner can add significant value. For example, mapping out the IT landscape to ensure all relevant data sources are considered, planning a defensible collection strategy, and providing an independent 3rd party who is better placed than the clients IT team to defend the collection strategy, if challenged by the other side.

It is important when planning litigation strategy to therefore consider not only the mandates of PD57AD, but also the additional benefits of utilising the technology beyond the minimum requirements, including taking advantage of technology consultant expertise.

Building the right case team is always important for litigation and now more than ever, thought should be given to including eDiscovery professionals in that team.

What's next?

We expect further amendments to be made to PD57AD to factor in issues like multi-party litigation for example but that is kind of the point of it. Standardising, to an extent, the processes both sides go through during a litigation can only be a good thing for everyone who enters this often lengthy and costly process. Focusing on ways to drive efficiency and cost controls means that more time can be spent resolving the actual issues at hand.

The use of technology in litigation is not going to "go away" and will only become more prevalent in time. Being an early embracer of the tools and techniques that are going to form the basis of almost every case in the future will make the transition smoother rather than being forced to change how you work, which is not a position many people relish being in.

The key to the transition will be the relationships that we all have. Knowing you may not fully understand something yet, but knowing that you can trust your colleague, vendor or consultant will mean that you are in a good position when the dust settles.

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SEARCHING FOR ASSETS IN CYBERSPACE

A NEW GATEWAY OPENS?

Authored by: Andrew James - PCB Byrne, and Hannah Daly - 4 New Square

In this article, Andrew James, solicitor at PCB Byrne LLP and Hannah Daly, barrister at 4 New Square examine the new gateway 25 in Practice Direction 6B.3.1 which came into force on 1 October 2022 and allows service out of information orders. They look at what problems the gateway is designed to solve and how much further it is likely to get victims of cryptocurrency fraud who want to get substantive proceedings off the ground.

Introduction

On 1 October 2022, a new gateway 25 was added to Practice Direction 6B. This was one of a larger set of amendments and additions to the gateways which have subtly expanded the scope of the English courts' jurisdiction in a number of areas. The purpose of this new gateway is to put on a firmer footing the court's jurisdiction to make orders against foreign non-parties to obtain information or documents. This should be of assistance to claimants with an urgent need to identify the correct defendant or trace misappropriated assets. The gateway was developed specifically with cryptocurrency fraud claims in mind.[1]

In this article, we examine the problems currently faced by victims of cryptocurrency frauds looking to obtain information or documents from non-parties who are out of the jurisdiction and consider the effectiveness of the new gateway in addressing those challenges.

Current problems in getting information from foreign non-parties

The typical fraud

Although difficulties with identifying potential defendants and tracing assets are not unique to cryptocurrency fraud cases, the nature of crypto assets – and the anonymity associated with them - makes these problems more acute.

In a typical cryptocurrency fraud case, a fraudster induces the victim to buy cryptocurrency on the promise of high investment returns. The fraudster then persuades the claimant to grant access to their cryptocurrency wallet by providing the private key on the premise that they will manage the assets as an investment on the victim's behalf. At first, the fraudster impresses the victim by evidencing apparently lucrative returns, and on the strength of that apparent evidence, the victim is persuaded to transfer further funds for the alleged investment. Usually at the point when the victim seeks to make a withdrawal, he discovers that the fraudster has depleted the wallet and has disappeared with the funds.

1 As explained in the speech given by HHJ Pelling QC at the Crypto Disputes Conference, "Issues in Crypto Currency Fraud Claims", 29 June 2022 (https://www.judiciary.uk/announcements/speech-by-judge-mark-pelling-qc-issues-in-crypto-currency-fraud-claims/).

The problems: who to sue, where to sue

Victims who turn to the law for assistance face serious obstacles since they may lack even the most basic information needed to bring a claim: identifying who to sue and where to sue them. All the victim may have to go on is the name of the fraudster's company, but they will likely soon discover that it is a sham entity or an empty shell if it exists at all. They might have an email or web address, but that alone is not enough to identify an individual. Nor does the victim have any means of knowing what has become of their investment.

A would-be claimant is therefore put in the position of obtaining the information they need from third parties. Who are those third parties likely to be? One of the most obvious targets for obtaining information are the cryptocurrency exchanges, such as Binance, Kraken or Coinbase, which administer or control accounts of users who trade through the exchange.[2] Another, less obvious, candidate might be individual software developers who maintain or develop the software on which cryptocurrency networks are based.[3]

What is the best way to get at this information where the relevant third-party refuses to volunteer it and is out of the jurisdiction? Absent their submission to the jurisdiction, or an applicable jurisdiction clause, the claimant will have to show that permission should be given to serve out in the normal way under the CPR.

The traditional approach to information sought from non-parties abroad

Where a claimant is pursuing proceedings in England, English civil procedure furnishes them with a number of tools to obtain documents or information. For example, applications can be made for pre-action disclosure under CPR r.31.16 (against a prospective party to the proceedings, if there are likely to be substantive claims against them); r.31.17 (against a non-party); for Norwich Pharmacal Orders ("NPOs") (which have the advantage of allowing for the recovery of information as well as documents); and Bankers Trust Orders ("BTOs").

While these applications are comparatively straightforward to make against third parties in the UK, traditionally, the courts have been very circumspect about making information or disclosure orders against parties outside of the jurisdiction[4] – which crypto currency exchanges frequently are.

Broadly, that is because:

a. As a matter of policy, the courts have tended to refrain from asserting jurisdiction over foreign parties where there is no substantive cause of action against them.[5]

b. There is already an established international regime, in the form of the 1970 Hague Convention on Taking of Evidence Abroad, for obtaining evidence and documents from other jurisdictions.[6]

In the absence of assistance from the English court, the solution for a claimant is to turn to the local courts where the third party is domiciled or incorporated. However, this requires the instruction of an additional legal team, increases costs and slows matters down. Moreover, it will only be of assistance if the foreign jurisdiction provides equivalent relief at all.

However, there has been a notable shift in the English courts' approach to granting disclosure and information orders against foreign defendants in recent years, driven in part by a recognition by the judiciary of the need to tackle the particular problems which arise in cyber and cryptocurrency frauds. As Sir Geoffrey Vos MR remarked in a speech earlier this year, "[i]n the world of crypto fraud, there are no national barriers"[7]. Accordingly, a number of judgments have emerged in which the High Court has granted permission for service of various kinds of disclosure applications against non-parties out of the jurisdiction using the existing gateways.

The problem for claimants is that this shift in approach has not been universally adopted and the result is a patchwork of inconsistent decisions.

Take, for example, decisions under the following gateways:

a) Gateway (2) – "claims for an injunction ordering a defendant to do or refrain from doing an act within the jurisdiction". Permission was granted under this gateway for service out of an NPO in Bacon v Automattic Inc [2011] EWHC 1072 (QB) where US companies were ordered to disclose the names, addresses, IP addresses and other information that would identify the wrongdoer. More recently, however, Teare J criticised that decision in AB Bank Ltd v Abu Dhabi Commercial Bank PJSC [2016] EWHC 2082 (Comm) ("AB Bank") and indicated that the gateway was not engaged where the information sought could be provided anywhere in the world – so that there was no need for permission to serve out.[8] Subsequent authorities provide a mixed reception for Teare J's view.[9]

b) Gateway (20) – "a claim is made under an enactment which allowed proceedings to be brought and those proceedings are not covered by any of the other [gateways]": In

2 Exchanges have accordingly already been the subject of a number of disclosure applications: see for example, Fetch.AI Limited and another v. Persons Unknown (categories A, B and C) [2021] EWHC 2254 (Comm); Ion Sciences Ltd v Persons Unknown and others (unreported), 21 December 2020 (Commercial Court); and D'Aloia v Persons Unknown and others [2022] EWHC 1723.

3 In Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch), the claimants argued that the core developers of four networks were able to implement a software patch which would enable the claimant to regain control of cypto assets lost following a computer hack. The core developers did not appear to dispute the proposition that they could implement such a patch, which at least raises the question whether developers might have information that could shed light on the identity of the hackers or the location of misappropriated assets.

4 Dicey Rule 23 sets out that, outside the letter of request regime (discussed below), "the court has no power to compel a third party who is outside the United Kingdom to provide documents which are outside the United Kingdom". Dicey, Morris & Collins on the Conflict of Laws, 15th ed.

5 The Siskina [1979] AC 210; more recently reviewed in Broad Idea International v Convoy Collateral Ltd [2021] UKPC 24

6 Used to deploy the letters of request or letters rogatory regime, which is the only recognised exception to the general rule in Dicey Rule 23. This was an important reason why Cockerill J would have declined to exercise the court's jurisdiction to make a disclosure order even if she had held the court had jurisdiction in Nix v Emerdata Ltd [2022] EWHC 718 (Comm).

7 "Contracts, just smarter. Seizing the opportunity of smarter contracts", speech by Sir Geoffrey Vos MR to Lawtech UK, 24 February 2022: https://www.judiciary.uk/wp-content/uploads/2022/02/Speech-MR-to-Smarter-Contracts-Report-Launch-Lawtech-UK-UKJT-Blockchain-Smart-Contracts.pdf.

8 At [17]-[18]. At issue in AB Bank was a mandatory injunction requiring the defendant to provide information verified by a responsible officer

9 It was endorsed in Koza Ltd v Koza Altin Isletmeleri AS [2021] EWHC 2131 (Ch) at [126], but other cases have hinted that the place where documents are located may still be a relevant factor: see comments of Jacob J in Gorbachev v Guriev [2022] EWHC 1907 (Comm) at [108].

ED&F Man Capital Markets LLP v Obex Securities LLC [2017] EWHC 2965 (Ch) ("Obex"), it was held that an application for pre-action disclosure under CPR 31.16 and s.33 of the Senior Courts Act 1981 could come within gateway (20), the applications being "claims" and constituting the bringing of "proceedings". However, this jurisdiction should be treated cautiously in light of the recent, conflicting first instance decisions of Nix v Emerdata Ltd [2022] EWHC 718 (Comm) (where Cockerill J doubted whether Obex had been correctly decided) and Gorbachev v Guriev [2022] EWHC 1907 (Comm) (in which Jacobs J came to the opposite view in relation to an application under r.31.17).

c) Gateway (3) – where the party is a "necessary and proper party" to an existing claim. The authorities are unclear as to whether the third party would need to be a necessary and proper party to the existing cause(s) of action as pleaded against the anchor defendant. In AB Bank, Teare J appeared to decide that it was necessary to show that the same causes of action would be advanced against a Norwich Pharmacal defendant in order for the gateway to bite.[10] On the other hand, in Ion Science Butcher J refused to apply Teare J's reasoning in AB Bank to a BTO (without expressly determining whether AB Bank was correctly decided). Instead, he distinguished AB Bank on the basis that it was applied to Norwich Pharmacal relief rather than BTO relief (which was the instant application before him), and that in any event there was power to grant permission for service out of a BTO where there was "hot pursuit", in reliance on Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation and Others [1986] 2 W.L.R. 453.[11] In Fetch.ai Ltd v Persons Unknown and others [2022] EWHC 2254 (Comm), HHJ Pelling QC recognised the apparent conflict between the approach to NPOs and BTOs in AB Bank and Ion Science but did not seek to resolve it, proceeding instead on the basis that the court had jurisdiction to grant permission for service out of a BTO order but not an NPO.[12]

These cases show that a conflicting body of authority had developed as to whether, when and how an English court will intervene to order a foreign non-party to provide information or documents in support of English proceedings.

The new gateway 25

The new gateway seeks to address these issues by providing an express basis on which permission to serve disclosure or information applications out of the jurisdiction may be granted. It provides that permission may be granted where:

Information orders against non-parties

(25) A claim or application is made for disclosure in order to obtain information:

(a) regarding:

(i) the true identity of a defendant or a potential defendant; and/or

(ii) what has become of the property of a claimant or applicant;

and

(b) for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR 6.32, CPR 6.33 or CPR 6.36.

Accordingly, it appears the gateway will be available:

a) For pre-action applications as well as applications after the issue of substantive proceedings where proceedings have been or will be commenced in the jurisdiction;

b) In a range of applications (or "claims"), which should include NPOs and BTOs, although there is nothing in the wording to suggest that the gateway is limited to these types of application; and

c) Specifically against non-parties, marking an express departure from the traditional position that injunctions against foreign non-parties was an affront to the sovereignty of the foreign state.

Of course, the fact that a gateway for these applications is now clearly available does not obviate the need for claimants to show:

a) That in any case an NPO, BTO or other order should be made. An NPO, for example, requires the threshold conditions in Mitsui & Co Ltd v Nexen Petroleum UK Ltd[13] to be satisfied in addition to a discretionary test; and

b) That the requirements for service out are all met, namely a serious issue on the merits, a good arguable case in relation to the relevant gateway(s) and that England is the appropriate place to try the claim.[14] However, the case law indicates that these requirements will not be difficult to surmount in a typical cryptocurrency fraud claim.

To take advantage of the gateway it appears that it will also be necessary for a claimant without ongoing proceedings in England to show a good arguable case that the English court will have jurisdiction over the substance of the matter – paragraph (b) of the gateway. The exact meaning of the words 'subject to the content of the information received' in this paragraph are not entirely clear. Presumably the intention is to show that a claimant is not bound to bring proceedings in England, if for example, information received pursuant to the application discloses another available forum which would be more advantageous or appropriate. For example, where the information discloses the domicile of the eventual defendant to the claim.

10 At [19]. In so doing, he expressly departed from earlier authority which held that the gateway was engaged where the information provided by a respondent to an NPO would lead to the identification of the defendants: Lockton Companies International and others v Persons Unknown and Google [2009] EWHC 3423 (QB).

11 A case which incidentally did not concern service out of the jurisdiction at all but dealt with the court's subject matter jurisdiction to make an order which although properly served on a defendant in the jurisdiction would require the defendant to produce the documents from outside of the jurisdiction through a foreign branch

12 At [30]. A similar approach was taken by Trower J in D'Aloia v Persons Unknown and others [2022] EWHC 1723 and Danisz v Persons Unknown and Huobi Global Ltd [2022] EWHC 280 (QB), where Ion Science was followed in relation to service out of a BTO against a cryptocurreny exchange

13 [2005] EWHC 625 (Ch) at [21], namely: (i) a wrong by an ultimate wrongdoer, (ii) the NPO is necessary to enable an action to be brought against the ultimate wrongdoer and (iii) the NPO defendant must have been "mixed up" in so as to have facilitated the wrongdoing and be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued

14 Per the requirements in VTB Capital v Nutritek International Corp & Ors [2012] EWCA Civ 808 at [99]-[101].

How much further is the new gateway likely to get claimants?

Undoubtedly gateway 25 brings advantages. It resolves the uncertainty created by recent, inconsistent authorities as to when disclosure or information orders could be served out. In this way, it will help to prevent genuine claims being stifled at the outset by technical jurisdictional rules.

However, we think there are at least three points that claimants should bear in mind.

First, as the case law develops it will be interesting to see how the court addresses the question of the appropriate forum for the granting of relief i.e. the third limb of the test for permission for service out. Will the court simply take the approach that where it is has determined it has jurisdiction over the substance of the matter, it is also the most appropriate forum to grant interim disclosure relief? Will it take a more nuanced approach considering factors such as the availability of an alternative forum, the enforceability of any order and the English court's ability to compel compliance? Where the same or equivalent relief is not available in the respondent's home jurisdiction does that automatically make England the most appropriate forum? The recent case law concerning the service out of BTOs has largely not dealt with the question of appropriate forum and appears to have taken the former approach although no doubt the position would be approached differently in a fully contested application.

Second, the new gateway is not a panacea for the problems faced by victims of cyber or cryptocurrency frauds. After all, even if a claimant has an NPO or BTO, what happens if the third party simply refuses to comply? Can they be compelled to produce information? This will depend on the local enforcement regime, although it is typically very difficult to enforce an interim or non-money judgment in the absence of a mutual recognition and enforcement treaty. If the order cannot be enforced, claimants may need to consider whether the foreign courts can be looked to for equivalent relief. Helpfully, NPOs in support of foreign proceedings are now available in the BVI[15] and the Cayman Islands.[16] There is also judicial support for the existence of the jurisdiction in Jersey[17], Guernsey[18], and the Isle of Man.[19] The US also provides a similar regime.[20]

Third, consider the limitations of the scope of the new gateway 25. It applies only to applications seeking information as to the identity of a defendant (so that a claim may be brought against them) or seeking information as to what has become of property (so that it may be traced). Broader disclosure applications will not come within the gateway and thus will either need to progress through the established regime for letters of request (which can be slow and technically cumbersome) or via the less certain route of service out of applications under CPR r.31.16 / s.33 SCA 1981. It is notable that the Civil Procedure Rules Committee rejected the introduction of a broader gateway allowing service of applications on non-parties to the litigation at the same time as they were considering gateway 25.[21]

In any case, the new gateway 25 is a welcome signal from the English courts that in the borderless world of cryptocurrency, it will not allow fraudsters to exploit the difficulties associated with international litigation to their advantage.

15 See, for example, K&S v Z&Z BVIHCM(COM) 2020/0016. The law has now been put on a statutory footing under s.3(5) of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020

16 See, for example, Essar Global Fund Ltd and Essar Capital Limited v Arcelormittal USA LLC (CICA, unreported, 3 May 2021).

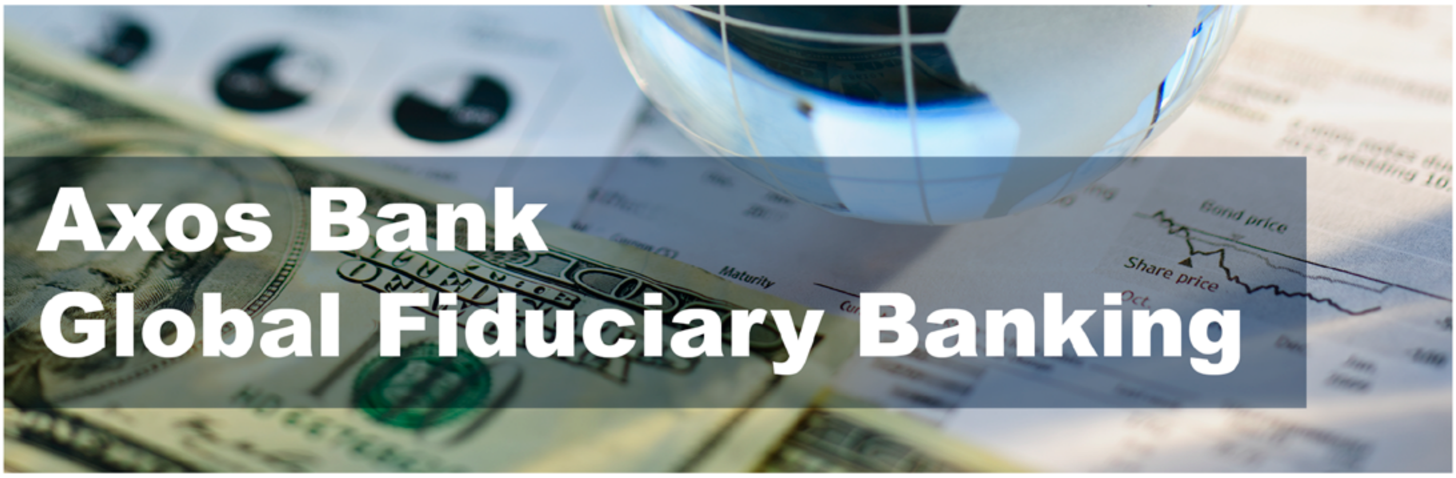
17 See New Media Holding Company LLC v Capita Fiduciary Group Limited [2010 JLR 272]

18 See Equatorial Guinea (President) v Royal Bank of Scotland International & Ors (Guernsey) [2006] UKPC 7 (27 February 2006).

19 See Templeton v Bradford & Bingley (ORD 2010/93 Judgment of Deemster Corlett) 21 January 2011

20 Under section 1782 of Title 28 United States Code

21 See the Minutes of the Civil Procedure Rule Committee: Annual Open Meeting, 13 May 2022, paragraph 69



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

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

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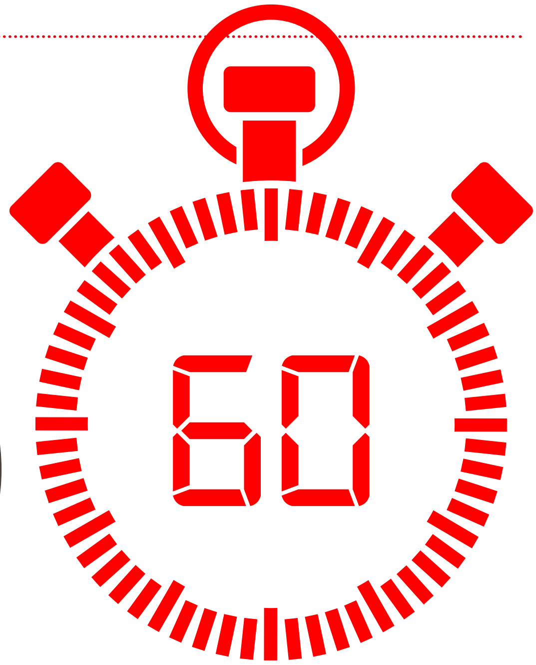

PHOEBE WATERS
DIRECTOR
J.S. HELD

Q What do you like most about your job?

A People! Whether this means managing and supporting our associates on an investigation, coaching team members, building relationships with clients, or meeting new contacts in the sector at networking events. I remain curious; I like understanding what makes people tick, listening to stories, and creating connections.

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

A Archaeologist by day, DJ by night.

Q As we approach the end of 2022, what has been the most interesting case or development in the industry you have seen this year?

A I have to name drop my friend Racheal Muldoon at 36 Commercial for this answer. Racheal was the barrister who represented the applicant in Osbourne v Persons Unknown – the world first reported case establishing that NFTs are capable of being legal property held on constructive trust and the subject of a proprietary injunction.

Q What do you see as the most significant trends in your practice in a year's time?

A Aside from crypto (watch this space for the CFAAR and Female Fraud Forum collaboration next year), the biggest trend I think will be the significance of sanctions in the context of international disputes – particularly related to the enforcement of judgments and arbitral awards.

Q What has been your greatest work-related achievement in 2022?

A Joining GPW, a part of J.S.Held, as a Director in the Disputes team.

Q Who has been your role model in the industry?

A I can't pick one alone! My role models in the industry are my fellow FFF committee teammates – and the women (and men - we have a grand total of 5 male paying members now) in our wider community.
These females are incredible - they are all so different in terms of specialities, personalities and backgrounds but each one of them is a phenomenal individual, strong woman and impressive practitioner.
I continue to feel hugely proud that I am Chair of the FFF (in case my LinkedIn followers hadn't noticed!?).
I would love to shout out all the names of the 17 committee members but seeing as I have 60 seconds (I am sure this answer is a minute alone) I will quickly mention the two I work with the most on a day-to-day basis: the exquisite Josie Welland, my Vice Chair and Education Sec, and; Diana Czugler, our wonderful Social Sec.
It is so fantastic how we are growing as an organisation, and our newly launched rebrand symbolises that we are more ready than ever to continue making waves in the fraud, AR and investigations industry.

Q What is something people do not know about you?

A I was asked to be a Hunter on the BBC series Hunted.

Q What is a book you think everyone should read and why?

A The Memoirs of Cleopatra by Margaret George. It is intensely brilliant. An addictive and intricate literary cocktail of ancient history, war, sensuality and the wearisome fight for equality.

Q If you could bring back a fashion trend, what would it be and why?

A The bright electric eyeshadows of the swinging 60s. I adore colour.

Q What item do you never travel without, and why?

A Ear pods. I listen to hours of house music a day – mostly deep house – whilst in any mood, and for pretty much whatever I am doing.

Q Reflecting on 2022, what three words would you use to sum up the year?

A Curiosity. Disruption. Progression.

Q What is one goal of yours for 2023?

A I want to be the best aunty I can be for my baby niece.

REMEDIES AVAILABLE IN CAYMAN FOR VICTIMS OF CRYPTOCURRENCY FRAUD

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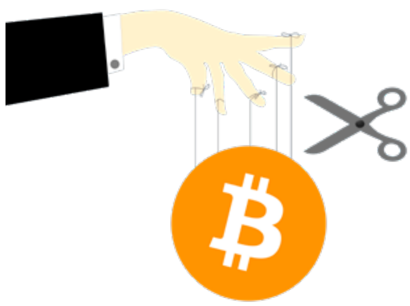
Cryptocurrencies, non-fungible tokens ("NFTs"), and utility tokens (collectively referred to as a "crypto asset" or "crypto assets") remain widely held and retain significant value, despite the recent volatility in cryptocurrency markets. It is anticipated that the use and management of digital assets will only continue to rise. In fact, some countries and businesses are now accepting payment of goods and services in cryptocurrency, in some cases as a means of withstanding the current inflationary period. However, the nature of crypto assets makes them attractive for fraudulent and other unlawful uses because they can be held and transferred anonymously. As the use of crypto assets becomes more mainstream, it is inevitable that crypto asset crimes and related litigation will increase[1].

The Cayman Islands court are well equipped to address crypto asset related claims. There are several traditional litigation tools available in the Cayman Islands court to claimants of crypto asset crimes and the courts are commercially attuned and willing to adapt the mechanisms available to combat fraud and enhance asset tracing. However, whilst there is existing legislative framework pertaining to the conduct of virtual assets business and the registration of persons providing virtual asset services[2] in the Cayman Islands, the body of local case authorities relating to crypto assets is developing.

Fortunately, an advantage of the legal system in the Cayman Islands is that it is based on the English common law on the doctrine of precedent, with the Judicial Committee of the Privy Council ("Privy Council") in the United Kingdom as the highest court of appeal. In recent years the English courts have considered some key and novel legal issues relating to cryptocurrencies. In the absence of relevant Cayman Islands binding authority, a Cayman Islands court will treat relevant decisions of the superior courts of record of England and Wales, and decisions of the Privy Council, as persuasive authority.

As such, when considering applications relating to crypto assets, it is anticipated that the Cayman court will take the same pragmatic and sensible approach taken in England and Wales.



The Cayman Islands court may be willing to grant restraint and freezing orders relating to crypto assets, including in aid of foreign proceedings.

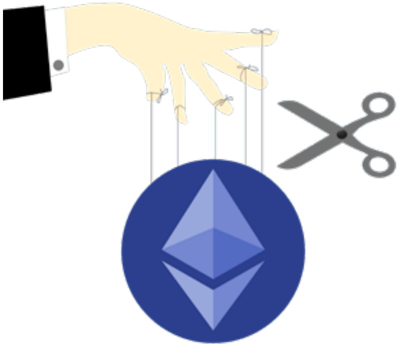
1 American blockchain analysis firm, Chainalysis, reported that as of 12 October 2022, the year 2022 was likely to be a record year for crypto hacks with the total value hacked exceeding US$3 billion.

2 Virtual Asset (Service Providers) Act (2022 Revision).

Worldwide freezing orders and proprietary injunctive relief against unknown fraudsters are also available. A claimant may apply for a freezing order in respect of cryptocurrency for the purpose of enforcing a judgment obtained against a defendant and it may be appropriate in some circumstances to grant a preservation order to obtain information about what assets were held, how, and where, so that claimants could decide what steps are to be taken to enforce the judgment in complicated circumstances. This is of particular assistance in claims involving crypto assets because the assets are intangible, and the field is unregulated.

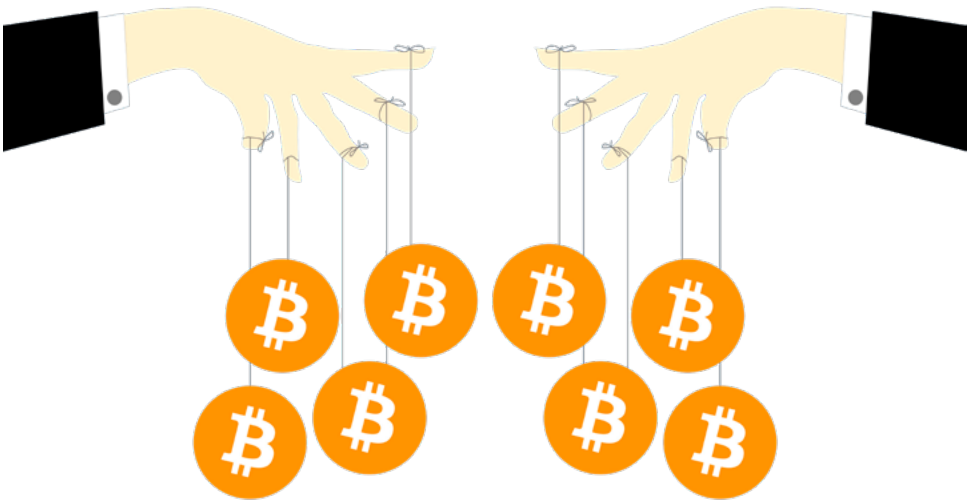
Traditionally, property could not be a chose in possession or a chose in action. However, as found in the legal statement on crypto assets and smart contracts published by the UK Jurisdictional Task Force, while a crypto asset might not be a thing in action on a narrow definition of the term, that does not mean it could not be treated as property. Crypto assets are property - they are definable, identifiable by third parties, capable of assumption by third parties and have some degree of permanence (AA v Persons Unknown [2019] EWHC 3556 (Comm)).

To satisfy the Cayman court that it is appropriate to grant an injunction restraining the dissipation of crypto assets, the claimant must show there is a serious issue to be tried as between the claimant and persons unknown, damages would not be an adequate remedy for the claimant, and the claimant can readily provide a cross-undertaking to meet any potential liability. Additionally, the balance of convenience must favour the granting of an injunction in that there must be a real risk that the crypto asset would be transferred in a way that would make it practically very difficult or even impossible to be traced and retrieved.



It may also be possible to serve proceedings out of the jurisdiction to the extent that the persons unknown are out of the jurisdiction. Again, it must be shown that there is a serious issue to be tried between the claimant and the persons unknown; the cause of action available to the claimant passed through one of the gateways provide in Order 11 rule 1(1) in the Cayman Islands Grand Court Rules 1995 ("GCR"); and the property obtained by fraud was impressed with a constructive trust (crypto assets removed from a claimants account are effectively held by the persons unknown on a constructive trust). It must also be shown that on balance, the Cayman Islands is the appropriate forum for the claim.

The Cayman court may also find it appropriate to direct service by alternative means including service via the transfer of a NFT on the blockchain[3].



For example, where a claimant alleges that persons unknown have stolen NFTs from his crypto asset account, the court may find it appropriate to grant an injunction to be served outside the jurisdiction by alternative means, to restrain the dissipation of the NFTs. In D'Aloia v Binance Holdings & Others [2022] EWHC 1723 (Ch), a case involving a claim for fraudulent misappropriation of cryptocurrency, the English court permitted service by airdrop of documents into the digital wallets in respect of which the claimant had transferred the cryptocurrency, thereby embedding service in the blockchain and making it more likely that the defendants would be put on notice of the proceedings.

Bankers Trust and Norwich Pharmacal Orders may also be available, enabling claimants to trace or identify the persons unknown who control the accounts to which the NFTs have been transferred and to receive information from third parties, including cryptocurrency exchanges and entities located outside or within the Cayman Islands[4].

The Cayman Islands court is likely to take a pragmatic and adaptable approach to claims involving crypto assets.

Victims will have at their disposal an arsenal of powerful tools to gather vital information to facilitate claims against wrongdoers relating to crypto asset fraud schemes and other offenses including rug-pulls, Ponzi schemes and crypto hacks. The Cayman Islands court regularly hears complex and multijurisdictional disputes and will be adaptable to the needs of litigants of crypto asset related fraud, including assisting foreign crypto asset recovery efforts.

3 In The Matter of Bridge Global Absolute Return Fund (SPC) (FSD 51 of 2022 (IKJ)) (Unreported, 10 May 2022), the Cayman court demonstrated its pragmatic approach to procedural issues such as substituted service and service out of the jurisdiction. In granting an order for substituted service by email, the Cayman court reiterated the findings of Mangatal J in Bush v. Baines that "The purpose of service of proceedings is to bring the proceedings to the notice of the defendant. It is not about playing technical games…"

4 In Mr Dollar Bill Limited v Persons Unknown [2021] EWHC 2718 the English court granted Bankers Trust and Norwich Pharmacal orders requiring cryptocurrency exchanges located outside of England and Wales to assist in determining what happened to the claimant's Bitcoin.

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ECONOMIC CRIME

A CALL TO ARMS?

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The word 'crisis' seems to be on the tip of every tongue at the moment: 'cost of living', 'mortgage rates', and 'energy bills' all frequently come before the word in the current political discourse. Consumers rightly view these problems by reference to the effects on their wallets. But perhaps surprisingly, one huge cost to the public, one additional area where the word 'crisis' is appropriate but perhaps under-used, appears to get less attention – economic crime.

The National Crime Agency currently estimates that money laundering costs the UK more than £100 billion annually.

To set that number in context that is two and a half times the current fiscal hole in the Chancellor's budget (£40bn) and more than one and a half times the cost of the Government's energy bill support package (£60bn).

There does, however, seem to be some political momentum for change in this area. Earlier this year, the Economic Crime (Transparency and Enforcement) Act was passed at pace after years of unwieldy proposals. The Act created a register of overseas entities (ROE) to help crack down on foreign criminals using UK property to launder money; tightened the UK's unexplained wealth order (UWO) regime; and allowed the government to move faster when imposing UK sanctions.

Then, as part of its ongoing campaign to crack down on economic crime, and, as with the earlier Act, likely catalysed by Russia's invasion of Ukraine, the government is now advancing a further Economic Crime and Corporate Transparency Bill, which at the time of writing has now had both its first and second readings in the House of Commons. This is a weighty piece of legislation and the language surrounding its introduction reveals the climbing prominence of economic crime on the government's agenda.

The Bill proposes to deliver a suite of wide-ranging reforms to tackle economic crime and improve transparency over corporate entities. It includes what the government calls 'historic' reforms of Companies House, significantly expanding its power to be a more effective gatekeeper of company creation and information. This includes powers to check, remove, or decline information submitted to (or already existing on) the Register.

Further, the Bill proposes: reforms to prevent the abuse of limited partnerships; additional powers to seize and recover suspected criminal crypto-assets; reforms to give businesses more confidence to share information in order to tackle money laundering and other economic crime; new intelligence gathering powers for law enforcement; and removal of unnecessary burdens on business.

Where do civil practitioners fit in?

Although there is a lot to be commended in this latest Bill, it perhaps inadvertently highlights the unmet expectations of the previous Act. Questions remain as to whether these legislative provisions will have the desired impact on financial crime and the UK's long-standing, often tumultuous relationship, with laundered money.

On their own it is possible (likely, even) that they will fall short. But the government is not working in a vacuum. There is much to be said for addressing this age-old problem in a new way: taking advantage of this renewed vigour of the state and enlisting the support of civil practitioners who are adept at using civil tools and remedies to trace, freeze and recover assets. A multi-faceted problem requires a multi-faceted solution, and both civil and criminal litigation are able to work hand-in-hand in this area to tackle the challenges root and branch.

Civil practitioners with the relevant specialist expertise can now play an increasingly effective role in tackling financial crime and recovering stolen assets.

This is especially apparent in cross-border economic crime where injunctive remedies and tracing processes utilised in the English courts can stretch across jurisdictional boundaries in ways which simply may not be available to state actors for political or diplomatic reasons. The tools available in civil law for investigating, gathering evidence and freezing assets are particularly powerful.

Specialists in civil law fraud are able to use the coercive powers of the High Court for obtaining at speed bespoke search orders, freezing orders, disclosure orders, travel restraint orders, and cross examination orders. Speed is essential in successful asset recovery and those that are able to act quickly often see the best results. It goes without saying that economic crime and laundering of stolen assets is very rarely a solo occupation; it almost always relies on a network of enablers at the heart of leading financial eco-systems. These might include banks and bankers, lawyers, accountants and real estate agents, as well as corporate vehicles where they are used to conceal or otherwise launder the proceeds of crime.

A paper by Professor Jason Sharman titled "Time for Change? The Practicalities of Public-Private Collaboration Against Financial Crime[1]" reports that one of the most notable failings of the current criminal system in countering cross-border financial crime is that these enablers are so rarely held accountable for their facilitative role. With the partial exception of banks in the United States, even when there is strong evidence that such intermediaries have been reckless, wilfully blind or complicit, the authorities have rarely moved against them.

Although there is something to be said for the prosecution of prominent wrongdoers, punishment is only one piece of the public policy jigsaw, and recovery of the stolen money is equally paramount. Failures in this respect in the current environment resonate deeply. As Professor Sharman notes, tools from the civil toolbox might be the perfect complement to criminal enforcement in this area, allowing a more promising and far-reaching strategy to attack the infrastructures and intermediaries that enable the principal perpetrators of such crimes, and to recover assets permeated through such systems by way of civil claims for damages.

In every crisis lies an opportunity; a chance to do better.

If the loss to the public purse in the UK from economic crime can reasonably be called a crisis, perhaps the opportunity here is for greater collaboration between the public and private sectors.

1 https://email.mishcon.com/email/firm/JS_Report_A5_DIGITAL.pdf

CIVIL FRAUD
TRENDS AND PREDICTIONS

Authored by: Emma Allen and Lorna Bramich - Taylor Wessing

In times of economic uncertainty, fraud typically increases. And these are certainly economically uncertain times. Fraud has been on the rise over recent years and that trend is set to continue. The motivation and opportunity to commit fraud increases as financial pressures loom over individuals and businesses. We are also set to see a continued increase in insolvencies as the impact of the pandemic and other global events set in. The appointment of insolvency practitioners means frauds which might have otherwise continued or remained concealed are more likely to be uncovered. With all of this in mind, a crystal ball is not required to predict that we are likely to see a significant uptick in fraud-based claims emerging over the next 12-24 months. In this article we consider some of the key trends and predictions for civil fraud.

1. Authorised push payment (APP) fraud

APP fraud has been a consistent feature of the civil fraud landscape for the past few years, and it isn't going away.

The Payment Systems Regulator recently reported that instances of APP fraud increased 39% between 2020 and 2021, making it the largest type of payment fraud and most prevalent crime in the UK.

Where businesses are targeted, APP frauds often involve a fraudster hacking into and monitoring an email account or server to identify regular payments (such as to a supplier or contractual counterparty) and accounts departments responsible for the receipt and processing of invoices. This is to identify transactions they can manipulate by replicating an invoice, replacing payee account details with their own fraudulent details, and sending the fake invoice from a genuine (hacked) email account or a fake domain name which resembles the genuine account such that recipients glancing at the sender address may not pick it up. These invoices are then paid with the organisation unknowingly sending its funds to fraudsters.

In our experience, fraudsters will go to great lengths to ensure the invoice gets paid, including forging KYC documentation to enable them to clear the innocent party's internal payment processes regarding account detail changes. Often, by the time the innocent party realises they have paid the wrong person (which sometimes isn't until the supplier starts chasing for payment of an outstanding invoice), several days or more have passed and the prospects of recovering the full amount are slim, although they improve if decisive action is taken as soon as the fraud is discovered.

Where individuals are concerned, tactics employed by fraudsters can include phishing emails and texts, creating fake or cloned websites or social media accounts purporting to provide investment opportunities or to sell products to consumers, or more elaborate ploys like in the well-known case of Phillip v Barclays where a group of fraudsters convinced Dr and Mrs Phillip that they worked for the Financial Conduct Authority and were acting in conjunction with the National Crime Agency to protect the Phillips's life savings by moving them to a safe account.

Victims of APP fraud are increasingly looking in the direction of banks for reimbursement – usually their own bank but also sometimes the receiving bank. The Quincecare duty has been something of a trending cause of action over the past few years, and will no doubt continue to be considered by claimants – after all, a bank is a much more attractive potential defendant than a fraudster. Cases such as Tecnimont Arabia Limited v National Westminster Bank PLC [2022] EWHC 1172 (Comm)) also demonstrate that claimants are prepared to make claims against the receiving bank (ie the alleged fraudster's bank) to recover their funds, albeit that such an approach remains challenging.

The Payment Systems Regulator is strongly encouraging banks to increase monitoring of inbound and outbound payments to address the need to reduce the impact of APP fraud. It is currently undertaking a consultation on APP fraud reimbursement and has proposed that there should be mandatory reimbursement unless it can be shown that the victim has been grossly negligent. The proposed starting point is that the reimbursement liability should be shared on a 50:50 basis between the sending and receiving banks. Watch this space.

2. Crypto fraud

Whilst the vast majority of crypto asset use is for legitimate purposes, crypto-related fraud continues to hit the headlines.

October 2022 was dubbed 'hacktober' in the crypto press following a Chainalysis report that US$718m had been stolen from DeFi protocols in 11 hacks by the middle of the month.

The majority related the US$570 Binance Bridge hack. Mango Markets, a defi platform, also suffered major losses when it was targeted by an attacker who exploited an 'economic design flaw' in the protocol to manipulate the price of the native token and then borrow against that inflated value from the Mango treasury, draining around $117m from the US$190m of deposits available on the platform.

DeFi bridges and protocol vulnerabilities will continue to present opportunities for fraud, and expect to continue to see rug pulls, pump and dump scams and wallet data breaches.

Crypto exchanges should prepare for an increase in claims being made directly against them where the proceeds of crypto fraud can be traced into that exchange. In D'Aloia v Persons Unknown and Others [2022] EWHC 1723 (Ch), the court held that the claimant, whose crypto assets had been fraudulently misappropriated, had a good arguable case in respect of a constructive trust claim as against the exchanges which were understood to be holding the proceeds of the fraud. The judge noted that once the relevant defendant exchanges (or their holding companies) were notified of the judgment, they were likely to "come under the duties of a constructive trustee for the claimant in respect of those crypto assets", potentially opening the door to a direct claim against the exchange and its controlling entities if it breaches its duties.

3. Investment fraud

During the COVID-19 pandemic, the SEC issued an investor alert warning that it had experienced a significant uptick in complaints and tips relating to investment fraud, such as Ponzi schemes. Action Fraud in the UK issued a similar warning.

Investment frauds are one of the oldest scams in the book and include companies persuading individuals to transfer their pension pots to their - often high-risk - investment products on the promise of high returns, only to see their life savings disappear. Often these frauds aren't uncovered until the scheme collapses into an insolvency process. Given the current macro-economic environment, we expect to see an increase in high profile litigation arising out of investment fraud, and those claims are likely to sit in the hands of an insolvency practitioner.

4. Supply chain fraud

Supply chain pressures have also been exacerbated by the pandemic and general economic outlook. The phrase 'supply chain fraud' covers a plethora of potential claims including bribery and corruption, inventory and warehouse fraud (where receipts for the same goods/commodities are used more than once to raise finance), asset misappropriation and falsifying sales.

In a global market, supply chains are increasingly international and that makes them much more difficult to oversee. There may be multiple third party subcontractors, suppliers and vendors involved in an international supply chain which increases the risk profile for fraud.

5. False accounting

Some of the largest frauds in recent years have been accounting frauds involving the inflation of assets and revenue and keeping debt off balance sheet – aka 'cooking the books'. Supply chain fraud and fraudulent accounting are often seen together, for example where procurement employees enter into arrangements with suppliers which are either improperly accounted for, circumvent internal systems and controls or result in some personal gain such as a kickback. With financial pressures increasing across the board, this type of fraud is set to continue and increase.

In the longer term, we also expect to see an increase in ESG related false reporting, specifically in relation to climate related financial disclosures. There is an ongoing formalisation of reporting requirements, with mandatory disclosure requirements now in place for certain types of business following the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 and amendments to certain sections of the Companies Act 2006 (sections 414C, 414CA and 414CB).

6. Insolvency claims

As company insolvencies rise, it is inevitable that there will be an increase in instances of fraud being unearthed which would otherwise have remained concealed. For example, fraud relating to the COVID-19 government support schemes is likely to become more apparent as insolvencies increase. At the end of last year, the Department of Business, Energy & Industrial Strategy estimated that £4.9 billion issued through the Bounce Back Loan Scheme alone was lost to fraud.

Fraud claims can be difficult to prove and costly to pursue, but the appointment of an insolvency practitioner is often advantageous where fraud has occurred because an additional set of tools becomes available for investigating and bringing claims. For example, insolvency practitioners have broad investigative powers (such as under s236 of the Insolvency Act 1986), and may be able to challenge transactions at an undervalue or as preferences, or where assets have been moved out of the reach of creditors, insolvency practitioners (or victims) may be able to bring a claim pursuant to section 423 of the Insolvency Act (transactions defrauding creditors) to recover their losses, which does not require any proof of any form of dishonesty and can therefore compare favourably to a fraud-based claim in terms of the evidential burden on the claimant.

The Economic Crime and Corporate Transparency Bill, which had its first parliamentary reading in September 2022, is another development to watch in both a fraud and insolvency context. The Association of Business Recovery Professionals, R3, recently commented on the Bill and recommended that the company dissolution process be changed so that before a company can be dissolved it must be placed into an insolvency process to allow appropriate investigations into the company's affairs to be undertaken. If these changes are implemented, this will increase the number of insolvencies which could in turn lead to an increase in the number of fraud-based claims brought by insolvency practitioners.

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