FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 12

THE FIRE STARTERS EDITION 2023

SHINING A SPOTLIGHT ON THE NEXT GENS' BEST AND BRIGHTEST

INTRODUCTION

"You can't go back and change the beginning, but you can start where you are and change the ending."

C.S. Lewis

Our first issue of 2023 is here, and we are thrilled to present the FIRE Starters Edition 2023, in conjunction with the FIRE Starters Global Summit that recently took place in Dublin. In this topical edition, our practitioners delve into the domino effect of Crypto collapses, sanctions, APP fraud, and lessons from recent cases. Our issue also features a series of 60 seconds with interviews, where our FIRE Starters community give us insight into some of their thoughts around and beyond work.

As we gear up for another busy year in the FIRE community, we thank all of our partners, contributors and members for their support. We look forward to seeing many of you throughout the course of 2023!

The ThoughtLeaders4 FIRE Team

Paul Barford
Founder /
Managing Director
020 7101 4155
email Paul

Chris Leese
Founder / Chief
Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder / Chief
Operating Officer
020 7101 4191
email Danushka

Maddi Briggs
Strategic Partnership
Manager
email Maddi

Yoshi Montgomery
Strategic Partnership
Executive
email Yoshi

Dr. Jennifer White
Content & Production
07733 854996
email Jennifer

CONTRIBUTORS

Tristan Yelland, **Grant Thornton**
Paul Madden, **Harneys**
Anna-Rose Davies, **Cooke, Young & Keidan**
Natalie Todd, **Cooke, Young & Keidan**
Jon Felce, **Cooke, Young & Keidan**
Nicholas Brookes, **Ogier**
Hinesh Shah, **Pinsent Masons**
Mark Burrows, **Collas Crill**
Lucy Wicksteed, **Charles Russell Speechlys**
Darragh Connell, **Maitland Chambers**
Eoin MacLachlan, **Maitland Chambers**
Philip Gardner, **Peters & Peters**
Louise Keech, **Peters & Peters**
Bobby Friedman, **Wilberforce Chambers**
Stella Ko, **Chainalysis**
Daniel Smith, **Control Risks**
Sinead Harris, **Withers**
Thomas Mitty, **Gatehouse Chambers**
Jamie Rhodes, **Charles Russell Speechlys**
Alice Whyte, **Gatehouse Chambers**
Angelika Hellweger, **Rahman Ravelli**
Christopher Ahearne, **Mishcon de Reya**
Emma Armitage, **Mishcon de Reya**
Richard Duggleby, **Mishcon de Reya**
Kit Smith, **Keidan Harrison**
Daniel Saoul KC, **4 New Square**
Usman Roohani, **4 New Square**

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Kevin Hellard
Practice Leader
T +44 (0)20 7865 2478
E kevin.hellard@uk.gt.com

Amaechi Nsofor
Partner
T +44 (0)20 7865 2388
E amaechi.nsofor@uk.gt.com

Hannah Davie
Partner
Estates and Family Disputes
T +44 (0)20 7865 2849
E hannah.davie@uk.gt.com

Colin Diss
Partner
T +44 (0)20 7865 2511
E colin.diss@uk.gt.com

Hugh Dickson
Partner
T +1 345 769 7203
E hugh.dickson@uk.gt.com

Margot MacInnis
Partner
T +1 345 769 7203
E margot.macInnis@uk.gt.com

Nick Wood
Partner
T +44 (0)20 7728 2426
E nick.s.wood@uk.gt.com

David Bennet
Partner
T +1 284 346 9975
E david.bennett@uk.gt.com

Nick Nicholson
Partner
T +44 (0)20 7184 4352
E Nick.W.Nicholson@uk.gt.com

Prashan Patel
Partner
T +44 (0)20 7865 2328
E prashan.p.patel@uk.gt.com

John Skelton
Partner
T +44 (0)20 7728 2039
E John.G.Skelton@uk.gt.com

Robert Starkins
Partner
T +44 (0)20 7728 2132
E Robert.N.Starkins@uk.gt.com

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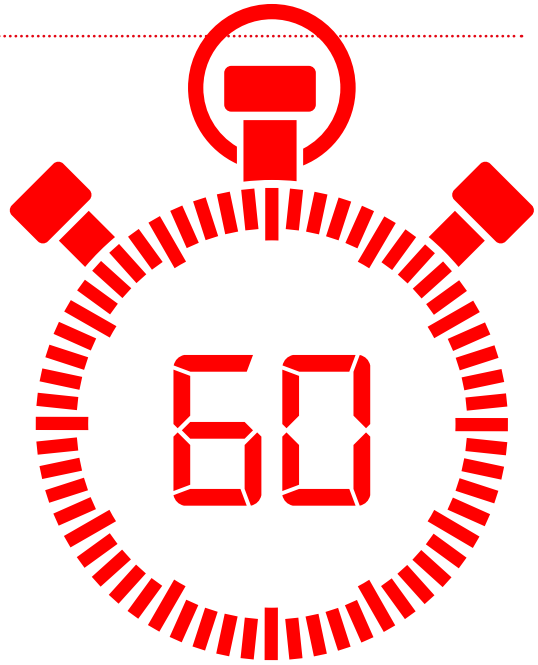
60-SECONDS WITH:

TRISTAN YELLAND DIRECTOR GRANT THORNTON



Q What do you like most about your job?

A The fact that no two projects are the same. Last year my three biggest assignments were a forensic audit of a large company in the energy sector, an investigation into a complex procurement fraud and an investigation into an entity's links to the 18th century slave trade – all completely different!

Q What motivated you to pursue this specialisation?

A I spent several years working in Grant Thornton's market leading insolvency and asset recovery team, where I found that I really enjoyed investigative work. I'm also quite a nosy person and love digging around for evidence, so forensics seemed like a natural fit.

Q What is the most rewarding thing about your work?

A There is nothing quite like the feeling of finding that "smoking gun" email or piece of evidence which breaks open a case. I also enjoy travelling and my work has taken me to many interesting places around the world. I have been lucky to share these experiences with some amazing colleagues from Grant Thornton.

Q Do you have any career aspirations, and have you achieved any of them so far?

A I have high expectations of myself – ultimately I would like to lead a team that works on the biggest and most interesting investigations.

Q What do you see as being the biggest trends of 2023 in your practice area?

A It's not particularly original but given the state of the economy I fully expect to see a lot of fraud investigations over the coming year. I also expect to see increasingly more ESG investigations.

Q What has been your most memorable experience during your career so far?

A On a recent assignment we were engaged to investigate an entity's links to the Transatlantic Slave Trade. This was a unique and sobering investigation, for which me and my team had to review 150 years' worth of original records (12,000 transactions) dating from the 18th and 19th centuries.

Q How do you deal with stress in your work life?

A I try to exercise as regularly as possible – I find that just sticking my headphones in and going for a run or going to the gym is a great way of clearing my head.

Q What is your ideal holiday?

A Something adventurous that involves either the mountains and / or the sea (and also a few mojitos for afterwards).

Q What was the last book you read?

A Shackleton by Ranulph Fiennes.

Q Do you have a favourite food?

A I really, really like cheese (the result of spending several years working in a cheese and wine shop). If ever you need a forensic analysis of ideal cheese and wine pairings, I am your man (spoiler alert – it all works).

Q What cause are you passionate about?

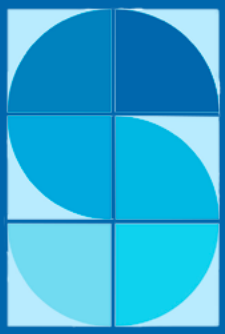
A The RNLI (Royal National Lifeboat Institution). This is the result of an ill-judged ocean swim, which ended when I had to be rescued by the RNLI. I probably wouldn't be here today without the volunteer lifeguards who were on duty that day.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A I don't really set New Year's Resolutions. However, I like trying new things so have decided to take up bouldering this year. I really enjoy it so hopefully I will keep it up (It might even come in handy on that adventurous holiday in the mountains).

Q What are you looking forward to in 2023?

A I will shortly be going to St Lucia for a few weeks and I can't wait!



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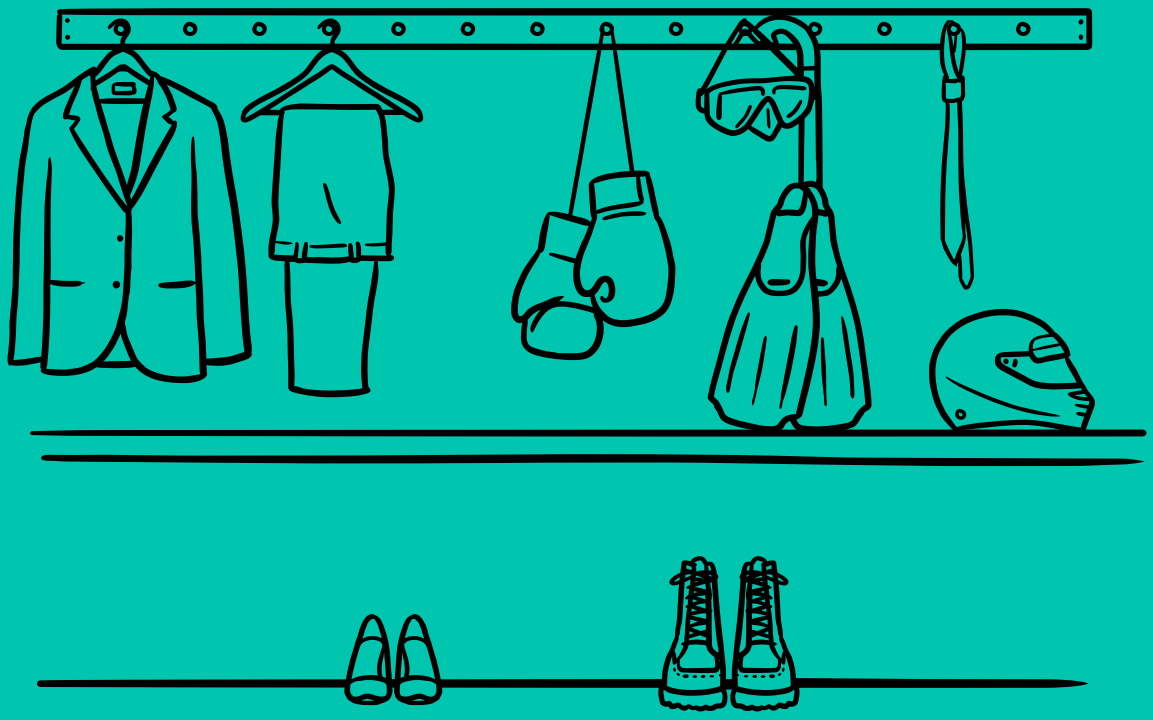

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HARNEYS

THE CRYPTO CONTAGION

AN OVERVIEW OF RECENT CASES

Authored by: Paul Madden (Partner) - Harneys Luxembourg

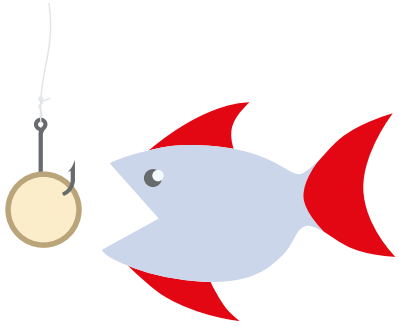
The digital assets world has seen a number of collapses of some of the market's key players, the most recent and notable being FTX, Three Arrows Capital, and Celsius which have all resulted in cross-border insolvency proceedings.

The domino effect of one collapse leading to another is no coincidence.

It has transpired that these failed entities were heavily investing in each other, either through equity investments, or buying each other's proprietary digital assets. This investment strategy had a number of effects to variously include the boosting of business volume and a potential increase in the book value of their assets and/or the value of their own proprietary cryptocurrencies (if they had any). It also meant investors were more likely to continue to make deposits. It also ensured investment practices of this nature created financial circles that initially led to exponential growth across the market but has resulted in similarly exponential collapse of some potential bad actors, the true extent of which we are learning in real time at pace.

These investment practices have resulted in insolvency proceedings for a number of digital asset funds, centralised lenders and centralised exchanges. It is anticipated that separate actions will be taken by law enforcement and regulators across the globe and there can be no doubt that the bad actors in this space have helped to create a distrust of centralised digital assets participants and platforms. It remains to be considered whether individual investors or groups of investors will seek to bring direct claims against participants, likely in the form of misselling, fraud or price manipulation, and how such claims could sit beside any related insolvency proceedings.

In this article we examine the fallout of three household crypto names and the legal proceedings that have ensued.



FTX

The lack of regulation or effective regulation in the industry has been felt most recently by the FTX fallout and allegations of a long-running scheme to misuse investor funds. As this scandal involved an exchange that was promoted and relied on by many participants as being among the safest in the market, it caused a strong ripple effect across the industry following FTX's bankruptcy filing and subsequent claims against its founder for fraudulent conduct. We have most recently seen

guilty pleas from FTX's top level of management in the Southern District of New York.

FTX was founded in 2019 and became the third-largest crypto exchange in the world by volume. Through the FTX exchange platform, investors could buy and sell a wide range of cryptocurrencies. FTX also created its own token (FTT), which facilitated lower trading fees on the FTX platform, insurance protection for leveraged transactions, and staking for validation transaction and various rewards. The FTX exchange was advertised as being a safe and easy option for investors; it was marketed by well-known celebrities and had received capital from high-profile investment firms. However, the success of FTX was short-lived and it filed for bankruptcy on 11 November 2022 in the US Bankruptcy Court for the District of Delaware.[1]

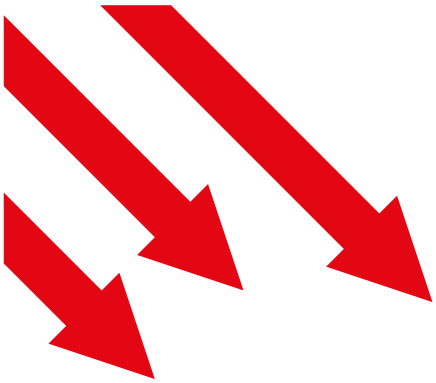
The founder of FTX, Sam Bankman-Fried (SBF), has since been accused of engineering "one of the biggest financial frauds in American history" and now faces criminal charges.[2] The allegations include misappropriation of customer funds. As part of the conspiracy, it is alleged that funds were also diverted to make undisclosed investments, real estate purchases, and even political donations.

The Supreme Court of the Bahamas (Bahamas being where FTX's non-US operation was headquartered and therefore its centre of main interests (COMI)) has appointed provisional liquidators (JPLs) to oversee the exchange's assets pursuant to the Companies (Winding Up Amendment) Act 2011. One of the steps taken since the appointment of liquidators has been to transfer FTX's crypto wallets to Bahamian government-controlled wallets in order to preserve assets.

The JPLs, appointed over FTX, filed a Chapter 15[3] suit in the Southern District of New York for FTX Digital Markets[4], one of the companies under the FTX umbrella and the name of the entity located in the Bahamas. These proceedings have since been transferred to Delaware, where FTX had already filed for bankruptcy protection. The Chapter 15 proceedings seek, amongst other relief, recognition of the Bahamian liquidation as a foreign main proceeding under Chapter 11 and appointment of the Bahamian appointed JPLs as FTX Digital's foreign representatives.

Chapter 15 promotes the interests of comity and cooperation between foreign courts by empowering the US court to recognise foreign insolvency proceedings, assist foreign appointed liquidators, and regulate ancillary US proceedings.

Where a company has assets, liabilities and claims in multiple countries including the US, Chapter 15 is a powerful tool for both the debtor (seeking to protect assets in the US) and for creditors (by maximising the value of the debtor's assets and regulating the claims process).



Three Arrows Capital (3AC)

3AC was the first major crypto firm to go into bankruptcy in 2022 albeit the collapse was triggered by the prior collapse of Terra Luna, which was the victim of a complex hack. The resulting difficulties caused a ripple effect and lead to the first major casualty being 3AC. This BVI incorporated investment firm filed bankruptcy proceedings in the BVI on 27 June 2022[5] followed by parallel New York proceedings pursuant to Chapter 15 in order to protect US assets[6]. Liquidators were appointed by the BVI Court[7] and continue to wind down the operations of the collapsed crypto fund and liquidate its assets.

While no mismanagement claims have been filed against the founders of 3AC thus far, they have been accused of failing to co-operate with the insolvency process.

The liquidators of 3AC have sought assistance from the courts, recently applying to the US Bankruptcy Court to authorise the service of subpoenas on the founders and investment managers of 3AC for provision of discovery necessary to preserve assets.[8]

One of the related casualties in the 3AC collapse is Voyager Digital, which filed for Chapter 11 bankruptcy protection after 3AC was unable to pay back funds totalling approximately US$670 million.

The most recent filing in the 3AC Chapter 15 proceedings gives notice of the assignment of the Honourable Chief Justice Margaret Ramsay-Hale in voluntary liquidation proceedings currently pending in the Cayman Islands for Much Wow Limited,[9] a Cayman Islands incorporated Company indebted to 3AC for approximately US€25.2m.[10]

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1 FTX Trading Ltd., a company incorporated in Antiqua and Barbuda, that filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on 11 November 2022: In re FTX Trading Ltd., Case No. 22-11068

2 US prosecutors filed criminal charges against Bankman-Fried in December 2022

3 11 US Code Chapter 15 - Ancillary and Other Cross-Border Cases

4 In the Matter of FTX Digital Markets LTD. Case 22-11217-JTD

5 In re Three Arrows Capital Limited, Case No. BVIHCOM2022/0119

6 In re Three Arrows Capital Limited, Case No. 22-10920-(mg)

7 Eastern Caribbean Supreme Court in the High Court of Justice Virgin Islands (Commercial Division)

8 Case No. 22-10920-(mg), document 75 at page 12

9 FSD 278 of 2022

10 Petition filed on 29 November 2022 at [14].

Celsius

In July 2022, Celsius Network, a crypto lender described as "one of the largest and most sophisticated cryptocurrency based finance platforms in the world",[11] filed for Chapter 11 bankruptcy protection due to a liquidity crisis. Celsius suspended withdrawals, swaps and transfers on its platform in June 2022 and hired a restructuring advisor before commencing the Chapter 11 process the following month.[12]

Chapter 11 of the Bankruptcy Code[13] facilitates the resolution of financial distress. Once proceedings are instigated, an automatic stay comes into effect which precludes creditors from taking action against the debtor or its property, such as enforcing pre-petition judgments or terminating contracts on account of pre-petition defaults.

This provides breathing room for the debtor to remedy operational problems and implement a reorganisation plan.

Similar to the FTX allegations, Celsius has been accused of misusing customer funds and effectively running "a Ponzi Scheme"[14]. A complaint was filed against Celsius by Jason Stone, the CEO and founder of KeyFi, Inc., which managed billions of dollars in digital asset investments for Celsius. In addition to allegations of disorganisation, mismanagement, and fraud,[15] Stone asserts that the lending platform was using customer funds to manipulate crypto-asset markets to their benefit.[16] Celsius responded by filing a claim against Stone and KeyFi, Inc in August alleging that it was in fact Stone who was misusing customer funds by stealing millions of dollars in coins from Celsius "wallets".[17] A motion by Stone and KeyFi to dismiss the causes of action brought by Celsius has recently been denied[18] and therefore both lawsuits continue to run alongside the Chapter 11 proceedings.

Conclusion

There is an expanding web of legal proceedings resulting from the current contagion in the digital assets sector, and while many of these proceedings are currently in the early stages, the far-reaching effects are already evident. As the above digital assets cross-border insolvencies run their courses, we expect that they will tackle some of the novel issues relating to the nature and location of assets, discovery and identification of relevant parties and we anticipate many more digital assets-related filings in the Cayman courts.

11 In legal documents filed in 1:2022bk10964

12 The Chapter 11 proceedings for all Celsius Network entities are now being jointly administrated under the case of Celsius Network LLC 1:2022bk10964

13 11 U.S. Code Chapter 11 - Reorganization

14 KeyFi Inc. v. Celsius Network Ltd. et al: Complaint dated 7 July 2022 at [4]

15 KeyFi Inc. v. Celsius Network Ltd. et al: Complaint dated 7 July 2022 at [13]

16 KeyFi Inc. v. Celsius Network Ltd. et al: Complaint dated 7 July 2022 at [7]

17 Celsius Network Limited et al v. Stone et al 22-01139-mg at [3].

18 Memorandum and Order dated 8 December 2022 (Doc 47)

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Anantara Hotel, Vilamoura, Portugal

For more details about the event, contact:

Danushka De Alwis, Founder/Director

danushka@thoughtleaders4.com

+44 2071 014191

For partnerships, contact:

Chris Leese, Founder/Director

chris@thoughtleaders4.com

+44 2071 014151

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Jon Felce
PARTNER

Founding Committee Member, FIREStarters nextgen community

Mob: +44 (0)7769 316 592
Email: jon.felce@cyklaw.com

CV here

Natalie Todd
PARTNER

Founding Committee Member, Disputes nextgen community

Mob: +44 (0)7879 018 014
Email: natalie.todd@cyklaw.com

CV here

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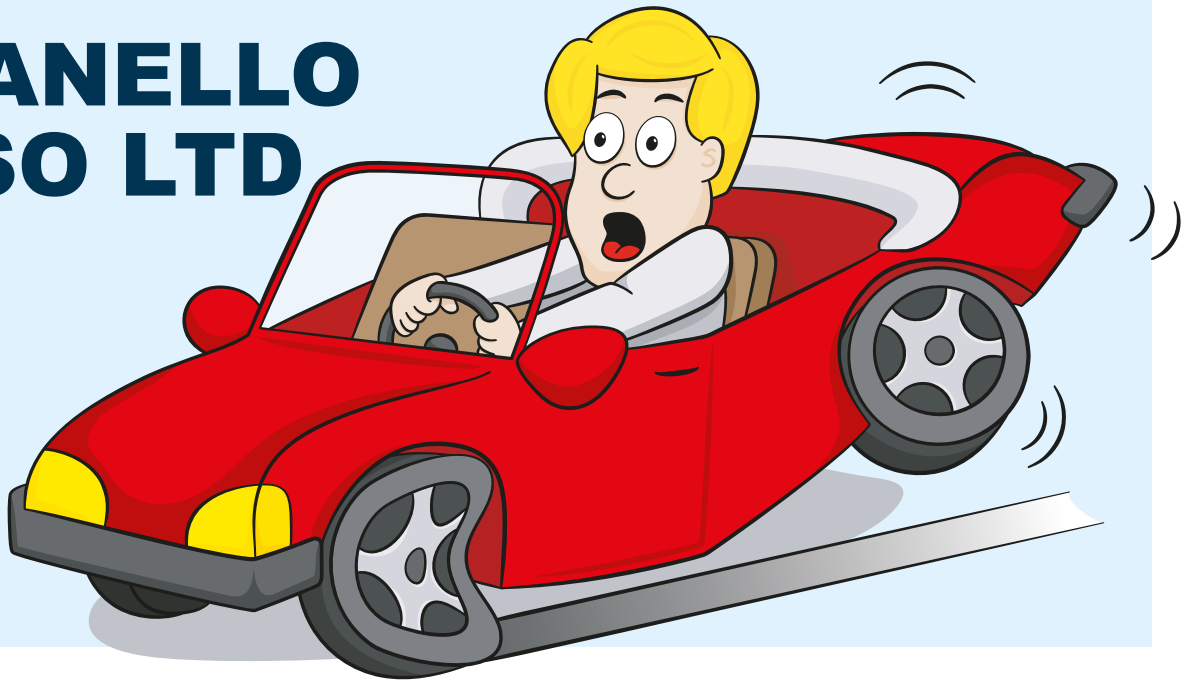

Authored by: Anna-Rose Davies (Associate), Natalie Todd (Partner) and Jon Felce (Partner) - Cooke Young & Keidan

Summary

The Court of Appeal has recently handed down its judgment in Maranello Rosso Ltd v Lohomij BV and Ors [2022] EWHC Civ 1667. The judgment addresses the interpretation of settlement agreements - in particular, whether a general release in a settlement agreement can release claims arising from fraud, dishonesty, and conspiracy, despite not expressly referring to such claims.

The Court of Appeal dismissed an appeal brought by Maranello Rosso Ltd ("MRL") against the decision of HH Judge Keyser QC ("the Judge") who dismissed MRL's claims in fraud, dishonesty and conspiracy brought against the six respondents. He held that in the context and circumstances of this case, the settlement agreement ("Settlement Agreement") the parties had entered into precluded these claims from being brought.

Facts

MRL was incorporated for the purpose of purchasing Stalabar SpA, a company that owned a collection of very valuable classic cars ("Collection") for €90m. MRL intended to onsell the cars at auction for as much as €150m. To do so, MRL negotiated with Bonhams, a well-known auction house in the UK. Bonhams suggested that MRL raise finance to purchase the Collection from the Louwman Group. MRL entered into a Facility Agreement directly with Lohomij ,a company in the Louwman Group. This was repayable in full within seven months. Soon after, Bonhams and Lohomij entered into a separate agreement regarding the manner of the sale of the Collection at auction in the US.

However, the car sales did not go as well as anticipated. The repayment date on the Facility Agreement was extended for a further five months. Shortly before the (extended) Facility Agreement fell due, MRL sent a letter before action to Bonhams. The letter intimated claims for "negligence and breach of contractual and common law duties" for Bonham's conduct of its auctions and the sales process of the rest of the cars. Additionally, the letter made broader assertions of duress, bad faith, illegality, and self-interest.

Following negotiation, the parties entered the Settlement Agreement, in which the parties agreed that the Settlement Agreement "constitute[d] full and final settlement, and irrevocable and unconditional waiver and release, for all and any Claims". "Claims" was defined extremely broadly in the Settlement Agreement.[1] However, the definition did not refer specifically to claims in fraud or conspiracy. MRL and Lohomij subsequently amended the Facility Agreement pursuant to which Lohomij advanced further funds, extended the repayment date, and waived the facility fee.

1 ement, and whether arising in contract, tort, under statute or otherwise), in any jurisdiction… which relate to, arise from, or are otherwise connected with, the initial acquisition of the Collection and its financing, the sale of the Collection… including all claims alleged in [the letter before action] and which in each case relate to the existence or occurrence of facts, matters or circumstances at or prior to the date of [the Settlement Agreement]".

High Court proceedings

MRL commenced proceedings against Lohomij, Bonham and others, alleging that they were party to a conspiracy to injure MRL by unlawful means.

The defendants brought summary judgment and strike out applications.

The Judge granted the summary judgment application in large part, finding that the Settlement Agreement effected a release of all of the claims brought by MRL, except for those based on freestanding causes of action arising after the Settlement Agreement.

The article focuses on the finding that all of MRL's claims in existence at the time of the Settlement Agreement were released by that Agreement.

Court of Appeal

MRL's appeal against the Judge's decision was dismissed by the Court of Appeal. Phillips LJ gave judgment for the Court.

After addressing the facts, his Lordship set out the relevant authorities addressing the scope of releases contained in settlement agreements. The primary authority is Bank of Credit and Commerce SA (In Liquidation) v Ali (No. 1)[2], in which the House of Lords considered the correct approach to the construction of contractual releases. The following two points are of particular importance:

First, the normal principles of contractual construction apply when interpreting general releases. There are no special rules of interpretation.

Second, the "cautionary principle", which is that in the absence of express words, the court will not readily conclude that the release will refer to fraud or dishonesty. In doing so, the Court will still apply normal principles of contractual construction.

MRL's argument was that, in the absence of express words releasing claims based on fraud or dishonesty, the release should not be taken to extend to any such claims. This argument was developed on appeal, namely that the Judge had taken an overly-literalist interpretation of the general release and had failed to apply the "cautionary principle".

The Court of Appeal disagreed and dismissed MRL's appeal. MRL did not have recourse outside of the Settlement Agreement for its claims against Lohomij, because it had signed the Settlement Agreement which released Lohomij from MRL bringing a claim against them in the context of the sale of the Collection.

His Lordship, on behalf of the Court, commented that:

The Judge had undertaken a detailed and careful consideration of the wording of the general release and the factual matrix. The Judge correctly had regard to the wording of the release in the Settlement Agreement which was clear, precise, wide-ranging, and comprehensive. The Judge had not been overly-literalist.

There is no rule of law requiring that express words referring to claims based on fraud or dishonesty be used in a release.

In the factual matrix including the letter before action, the Judge was correct to find that all the claims MRL was seeking to advance clearly fell within the scope of the general release contained in the Settlement Agreement.

Comments

The judgment serves as a reminder of a number of salient points.

First, the importance of precision in pre-action correspondence.

The letter before action sent here did not set out explicitly MRL's claims of fraud or conspiracy. However it did make claims in negligence, breach of duty, duress and bad faith. The letter before action acknowledged that the Facility Agreement entered into between MRL and Lohomij was entered into in good faith. These two factors served to detract from MRL's case before the High Court and Court of Appeal, as it looked as if MRL's case was continually changing.

Second, when entering a Settlement Agreement, parties should have regard to the context in which an agreement is being entered into.

If it is following a letter before action, then that letter may serve to inform the Court's interpretation of what the general release was intended to cover. Here, the letter before action demonstrated that the types of claims that MRL later brought were in contemplation at the time of entering the Settlement Agreement and therefore that the Settlement Agreement must have covered them.

Last, parties should carefully consider what claims they want to release and if possible, specify those in a release clause.

Express language may be used to deal with claims of fraud or dishonesty, and whether those can be included or excluded.

2 [2002] 1 AC 251; [2001] UKHL 8.

RPC

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60-SECONDS WITH:

NICHOLAS BROOKES PARTNER OGIER

Q What do you like most about your job?

A Strategic and technical problem solving for clients, followed very closely by my passion for the development of junior members of our firm. I am firmly behind the people first culture at Ogier both in terms of helping clients with problems and also helping colleagues to grow.

Q What motivated you to pursue this specialisation?

A It produces the most exciting cases. It has the thrill of a combat sport!

Q What is the most rewarding thing about your work?

A As a barrister, one might think it is winning a case. Yet, the most rewarding thing for me is where negotiated solutions produce positive outcomes for all of those involved. Litigation doesn't always have to be a zero sum game and good legal representation should help provide that objectivity.

Q Do you have any career aspirations, and have you achieved any of them so far?

A Becoming a partner with Ogier was a big aspiration for me, which I was delighted to achieve in 2020 (albeit mid-pandemic).
It's fair to say our firm has been, and is increasingly, more than merely a law firm to our clients. I would like the next 10 years of my career to involve becoming an increasing part of that development of our business.

Q What do you see as being the biggest trends of 2023 in your practice area?

A With monetary policies around the world limiting free capital, it's fair to say insolvency is already making its big splash. This is likely to have a double-effect on the crypto industry, as crypto winter ripples on from 3AC and FTX (two of Ogier BVI's matters) with scepticism about that industry already rife. I'd expect to see a substantial amount of insolvent trust related work. However, with the Ukraine conflict showing no signs of abating, Middle East work is likely to be where it's at.

Q What has been your most memorable experience during your career so far?

A Having to take a helicopter to get to the Court of Appeal in St Lucia.

Q How do you deal with stress in your work life?

A I try to embrace stress by starting the day very early with intense physical exercise. Once that's done, anything else the day throws up feels straightforward. That said, studies have shown that the way one frames stress, as either a positive driver or a negative tax, impacts how the stress affects you both physically and mentally. So keep a positive mindset!

Q What is your ideal holiday?

A My wife and I love going to vineyards. My favourite has been visiting Bordeaux in the summer. I would go back in a heartbeat.

Q What was the last book you read?

A The End of the World is Just the Beginning: Mapping the Collapse of Globalisation.
This fascinating book by Peter Zeihan charts the rise of the modern global structures and hypothesizes the end of globalisation owing to changes in geopolitical strategy, resources, demographics, and geographic constraints of nations. It does this all with an easy style and entertaining wit.

Q Do you have a favourite food?

A Almost any slow cooked Italian pasta dish.

Q What cause are you passionate about?

A I have a fascination with the human mind and feel passionate about mental health awareness. It's very often misunderstood, and it is a form of illness that is acutely compounded by that lack of awareness.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A I plan to get more and better sleep. The key is consistency! Setting one's circadian rhythm with early morning sunlight and a regular schedule of exercise sets you up for proper sleep. When I have done this the improvements to life feel like super powers.

Q What are you looking forward to in 2023?

A Challenging times tend to bring out the innovative spirit in people. So I look forward to a year of great and productive novelty…

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Alan Sheeley
Partner, Head of Civil Fraud
alan.sheeley@pinsentmasons.com
+44 (0)20 7054 2626

Gemma Kaplan
Partner
gemma.kaplan@pinsentmasons.com
+44 (0)20 7667 0266

Jennifer Craven
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CRYPTO 2023 – A LOOK AT INSOLVENCY, FINANCIAL CRIME AND REGULATORY TRENDS

Authored by: Hinesh Shah (Senior Associate Forensic Accountant) - Pinsent Masons

Introduction

The crypto industry had a catastrophic year in 2022. We witnessed several high-profile insolvencies (including FTX), plummeting cryptocurrency valuations (bitcoin fell by approximately 65%) and a myriad of frauds and scandals (the UK courts were extremely busy with cases dealing with crypto). Trust was eroded from the industry in 2022.

So how will the crypto community fare in 2023? From an insolvency, financial crime, and regulatory perspective, I will explore what to expect.

Insolvency

Globally, there were only one or two insolvencies a year between 2019 and 2021 in the crypto sector. Nine insolvencies occurred in 2022, including the collapse of FTX, whose impact on the crypto world is still being felt. We have already seen cryptocurrency lender Genesis file for Chapter 11 bankruptcy in the USA this year. There is no doubt that crypto contagion continues to be a significant issue facing crypto firms. Three Arrows Capital, whose demise last year was triggered by the crypto-token Luna's collapse, and Alameda Research, a trading company closely affiliated with FTX, had received significant loans from Genesis.

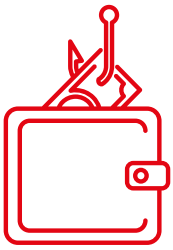
The continued fallout from 2022, coupled with a global economic recession, is likely to mean that markets will remain muted in 2023. Crypto firms have and continue to experience liquidity pressures and there have already been significant lay-offs in the sector. It is likely that the major players in the market will prosper and shore up market share from smaller competitors. M&A activity is also likely to increase, with a number of large banks such as Goldman Sachs expected to spend millions investing in crypto firms as company valuation appear more realistic or even undervalued.

You may be surprised to hear that at the time of authoring this article, bitcoin is currently the best-performing asset, up around 35% since the start of the year.

Whilst this may lead to increased trading in crypto markets, analysts believe that this rally is a bull trap, and will burn traders who mistake it as a mini-boom. Depending on how crypto participants react to the current uptick, the less cautious may also experience liquidity and insolvency issues if they have not contingency-planned for a potential crash.

I also anticipate that insolvency practitioners will upskill themselves in crypto technology and invest in the relevant people and relationships. We are seeing an increasing number of insolvencies where crypto comprises part of the estate and there are significant challenges in identifying, securing and realising cryptoassets for the benefit of creditors. There will also be new financial crime , compliance and risk factors that will need to be considered. Some insolvency practitioners have

already started adding crypto on to their checklists when investigating distressed estates and a small number have invested in crypto tracing technology to assess the risks of financial crime and sanctions potentially associated with wallet addresses. Those who invest in developing the right skills, platforms and partnerships now will be best placed to take advantage of future opportunities.



Financial Crime

The substantial number of frauds and scandals in 2022 will forever leave its mark in cryptocurrency history. A number of the collapses previously mentioned are linked to allegations of fraud, with retail investors ultimately paying the price through lost or stolen cryptoasset. This leads me to believe that we are likely to see a shift away from consumers using custodial wallets operated by crypto exchanges and an increase in use of cold wallets.

As cryptoasset prices continue their upward trend (following the market crash resulting from the crypto winter), retail investors are likely to invest more with the belief there are significant returns to be had. As we enter a global recession, retail investors are more likely to look for get rich quick schemes when they are feeling an economic pinch but this is also when customers are most vulnerable in falling prey to financial crime. The potential for significant returns are not without significant risks, and bad actors will take advantage. I expect we will see an increase in fraud, particularly whilst prices continue to rise as well with fraudsters developing new and innovative methods to entice victims.

Chainalysis identified that 44% of illicit transaction volume (around USD 8.8bln) in 2022 came from activity associated with sanctioned entities and so it is likely that law enforcement agencies will increase the crackdown on cryptoassets for sanction violations in 2023.

We saw this at the tail end of last year when OFAC settled with cryptocurrency exchange Kraken in November in relation to apparent violations of Iranian sanctions.

In a move away from targeting individuals, sanctions regimes are increasingly targeting cryptocurrency services that facilitate financial crime. However, both Russia and Iran (two countries who face a considerable number of international sanctions), will look to bypass this by developing a new cryptocurrency backed by gold which can be used in their bilateral trade deals, bypassing the international banking system and avoiding the use of US dollars. It will be interesting to see how this progresses and what subsequent actions law enforcement take to counter these measures.

There are also likely to be more money-laundering and terrorist financing stories becoming known in 2023. Binance is alleged to have processed around USD 346m in BTC for the Bitzlato digital currency exchange, whose founder was arrested for allegedly running a 'money laundering engine'. Crypto lender Nexo is currently being investigated by Bulgarian authorities on suspicion of money laundering and tax offenses. Anti-money laundering and KYC checks remain nascent in the crypto sector, with firms in the UK facing just their third year of AML supervision. As regulators start getting to grips with crypto, I expect crypto firms, in jurisdictions where regulation is forthcoming, to invest heavily in compliance tools, technology and people to demonstrate they are taking appropriate steps to mitigate financial crime risk.

Regulatory

We should expect to see the further development of the regulatory and legal framework around crypto in the UK. The Law Commission published a consultation paper last year on law reform proposals to ensure that the law recognises and protects digital assets (including crypto-tokens and other cryptoassets). A policy paper off the back of that consultation is expected in 2023, and its conclusion could result in changes to how the current law defines and recognises individual property rights so as to include digital assets.

On the regulatory front, with HM Treasury due to consult in Q1 2023 on its proposals for the regulation of a wider set of cryptoasset activities, and the Financial Services and Markets Bill looking to introduce the concept of digital settlement assets (I.e. stablecoins) and a broader definition of cryptoassets, we should expect to see increased regulation around cryptoassets in the not so distant future. Indeed, the introduction of the concept of digital settlement assets will help provide some of the legal and regulatory structure the Government needs to get its Central Bank Digital Currency of the ground. Looking to Europe, the Markets in Crypto-Assets (MiCA) Regulation is expected to be implemented in early 2023, closing gaps in EU financial services legislation by creating a unified set of rules for crypto-assets and related activities.

With the increase of the regulatory and legal framework of crypto, it should eventually translate into more legal rights which can be enforced; therefore, one would hope, providing more protection in insolvency and to victims of financial crime.

There is also likely to be greater focus around segregation of client deposits and proof of reserve requirements for crypto exchanges not dissimilar to the CASS rules and BASEL capital adequacy requirements which UK financial institutions have to abide by.

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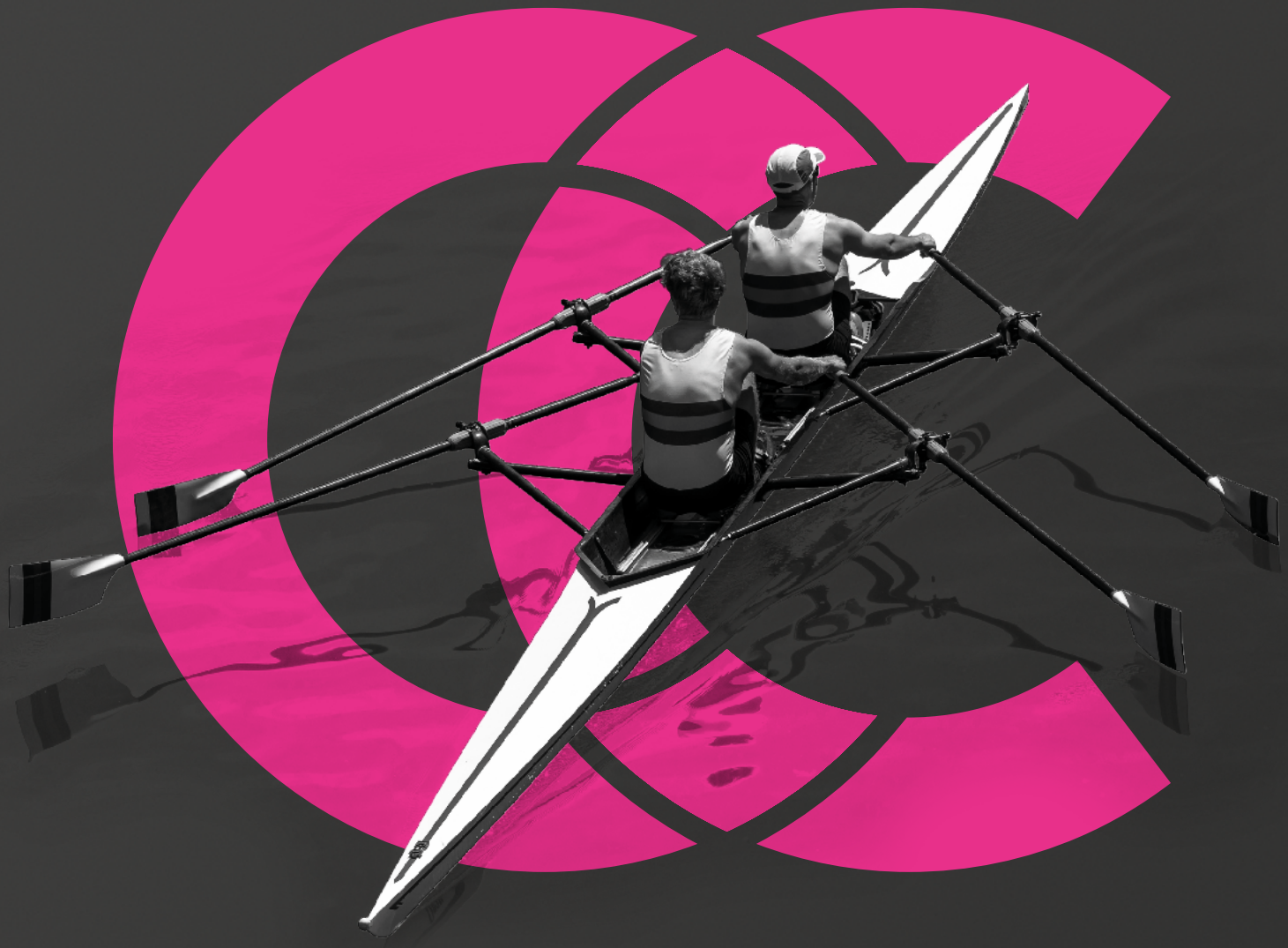

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THE NEXT GENERATION OF CORPORATE RESCUE IN THE CAYMAN ISLANDS

LESSONS FROM RE ORIENTE GROUP LIMITED

Authored by: Mark Burrows (Senior Associate) - Collas Crill Cayman Islands

On 31 August 2022 the Cayman Islands entered a new generation of corporate restructuring when the Companies (Amendment) Act 2021 came into effect.

The Amendment Act is significant in that it introduced a new regime for the restructuring of financially distressed companies. Prior to the Amendment Act, corporate restructurings were typically effected by way of a provisional liquidation coupled with a creditors and/or members scheme of arrangement (commonly known as 'soft touch' or 'light touch' provisional liquidation). Corporate restructurings are now effected under a new section of the Companies Act headed "Company Restructuring" which establishes a dedicated restructuring regime similar to US Chapter 11 or UK administration.

This article takes stock of the first judgment under the dedicated restructuring regime in Re Oriente Group Limited (unreported, 8 December 2022 Kawaley J).

Re Oriente Group Limited

The case concerned the parent company (the Company) of a corporate group that operates a large Asia-based financial technology platform providing microfinance and alternative sources of credit. The group's finances were significantly impacted by the COVID-19 pandemic and other global factors that caused a substantial increase in non-performing loans and other operating pressures. This caused the Company and various group members to default on a number of secured and unsecured loans.

On 29 August 2022 two creditors (the Petitioning Creditors) issued statutory demands against the Company. When those demands were not satisfied, the Petitioning Creditors presented a petition for the Company's winding up in the Grand Court of the Cayman Islands in September 2022 (the Cayman Petition). In response to the winding up petition, the Company filed its own petition under the new regime on 21 October 2022 seeking the appointment of restructuring officers (the RO Petition).

The RO Petition was listed for hearing on 11 November 2022. A day before

that, the Petitioning Creditors filed a separate, further petition for the Company's winding up in the High Court of Hong Kong (the Hong Kong Petition).

At the hearing of the RO Petition, the Petitioning Creditors sought to challenge the RO Petition on the grounds that:

(a) a petition for the appointment of restructuring officers could not be presented if a winding up petition was already afoot; and

(b) that the global moratorium on proceedings under the new regime did not apply to winding up proceedings such that the Cayman Petition and Hong Kong Petitions could be continued with, notwithstanding the RO Petition.

The Court rejected both arguments and appointed restructuring officers.

Similarities between Soft-Touch PL and Restructuring Officer Regimes

In doing so, the Court confirmed that in many ways the new regime will be the same as or similar to the old regime.

First, the Court confirmed that case law authorities under the soft-touch regime are both relevant and persuasive as they "record valuable judicial and legal experience in essentially the same commercial sphere"[1]. The Court further noted that authorities under the old regime are relevant because (a) the grounds upon which a restructuring officer can be appointed are expressed in the same terms as the grounds for appointing soft-touch provisional liquidators under the old regime (i.e. an intention to present a compromise or arrangement to creditors); and (b) the solvency test under the new regime is the same as for the former soft-touch regime (cash-flow insolvency).

Relying on previous authority, the Court went on to confirm that the exercise of the Court's discretion to appoint restructuring officers is the same as it was in respect of the discretion to appoint soft-touch provisional liquidators[2]; and that the Court's approach to evaluating evidence of a proposed restructuring will also be the same under the new regime[3].

The Court ultimately concluded that the jurisdiction to appoint restructuring officers (in keeping with the jurisdiction to appoint soft-touch provisional liquidators) is a broad discretion to be exercised if the Court is satisfied that:

1) the statutory precondition of insolvency (i.e. that the company is insolvent on the cash flow basis) is met by credible evidence;

2) the statutory precondition of an intention to present a restructuring proposal to creditors is met by credible evidence of a rational proposal with reasonable prospects of success; and

3) the restructuring proposal has or will potentially attract the support of a majority of creditors as a more favorable commercial alternative to a winding up.

Having determined that these criteria were satisfied, the Court appointed restructuring officers on terms, and with powers, substantially the same as those that were typically granted on the appointment of soft-touch provisional liquidators.

Moratorium on Claims against the Company a "significant innovation"

Notwithstanding the significant similarities between the two regimes, the Court did make clear that the new regime differs materially in the way the statutory moratorium preventing claims against the restructuring company operates.

In rejecting the Petitioning Creditors' arguments (referenced above), the Court held that (i) the moratorium plainly applies to winding up proceedings, and (ii) unlike the soft-touch provisional liquidation regime, the moratorium arises upon the filing of a petition for restructuring officers. Under the old regime, the moratorium would not kick in until provisional liquidators were appointed (which would inevitably be after the winding up petition was filed).

The Court described the automatic imposition of a moratorium upon filing as a "significant innovation" that "turbo-charge[s] the degree of protection…to the petitioning company in contrast with the former remedy of presenting a winding-up petition for restructuring purposes" (and described the filing of the Hong Kong Petition, a day before the appointment of restructuring officers, as a "flagrant breach" of the moratorium).

Conclusion

The judgment is a welcome indication that the new restructuring regime appears to have struck the right balance between retaining those aspects of the soft-touch regime that, for many years, worked well (both in the Cayman Islands and other common law jurisdictions) while remedying its admitted short-comings.

1 Paragraph 8.

2 Citing In re Sun Cheong Holdings [2020 (2) CILR 942] with approval.

3 Citing In re Midway Resources International (unreported, Segal J, 30 March 2021) with approval.

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Q What do you like most about your job?

A I really enjoy a puzzle, and working on a FIRE case inevitably means there's a good story to unpick and dive into. Getting to work on interesting cases alongside your colleagues, and having those discussions where you can really think around the problems facing your client together, is a great part of the job.

Q What motivated you to pursue this specialisation?

A It was what I had always thought "the law" was all about. It was the part of my job that I found the most interesting when I started my career and I enjoy the fast-paced nature of it.

Q What is the most rewarding thing about your work?

A Getting a good result for a client is the most rewarding part for me. All the hard work that goes into it from everyone across the team makes it all the more satisfying.

Q Do you have any career aspirations, and have you achieved any of them so far?

A I didn't come into the law with any specific aspirations, I wanted to find something that I enjoyed doing (at least most of the time!) and I was keen to find work that was international in scope. I've been lucky enough so far to have found my work really interesting and have worked on plenty of cases with international elements (many of which have meant I have had the chance to experience different parts of the world), and long may that continue!

Q What do you see as being the biggest trends of 2023 in your practice area?

A It's got to be between crypto and ESG – it's quite incredible how quickly they have become such a common part of our everyday language. Both crypto and the emerging ESG regulations will no doubt mean that the level of sophistication of frauds will go up another level.

Q What has been your most memorable experience during your career so far?

A Working on the AHAB v Saad year-long trial in the Cayman Islands. I have so many memories of working on the case in London and then working alongside my colleagues, counsel and the other parties out in Grand Cayman. It was a fascinating case, with plenty of curve balls, all set to the background of watching enormous cruise ships come right up to your window whilst you are having your morning cup of tea. It was a huge team effort and to be able to see it all come together felt like a very unique experience.

Q How do you deal with stress in your work life?

A I have been told that I come across as calm under pressure, even when I don't necessarily feel it. I think working with other people helps, and I am very lucky to have great and supportive colleagues. I also find a cup of tea takes the edge off most work challenges.

Q What is your ideal holiday?

A Skiing, it's my happy place. I worked in CRS' Geneva office over a winter season which was amazing.

Q What was the last book you read?

A Probably something by Oliver Jeffers, my daughter loves his books and they are a regular choice at bedtimes.

Q Do you have a favourite food?

A Anything Spanish/Canarian, it's where I grew up so it reminds me of home.

Q What cause are you passionate about?

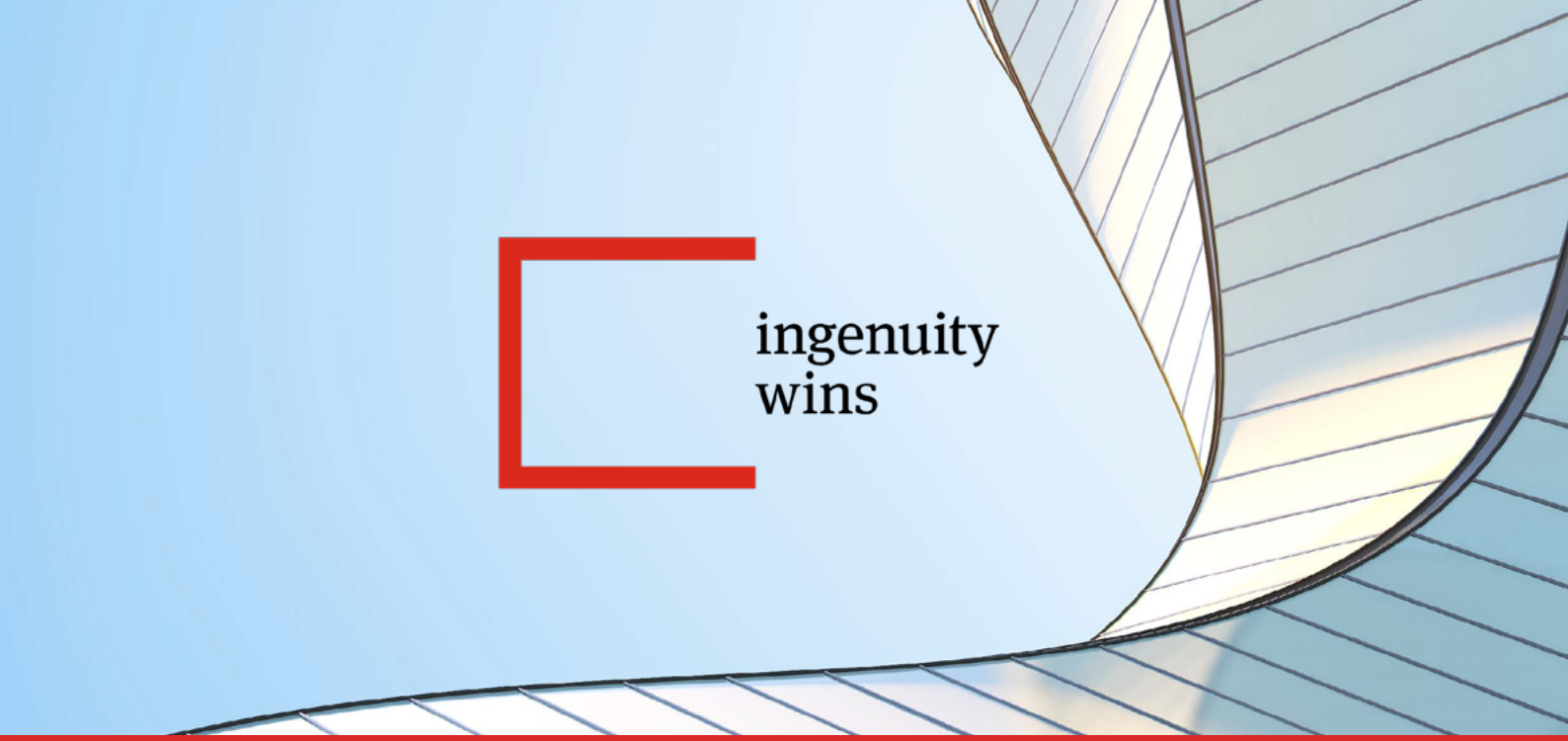
A Equality. It's frustrating that, whilst lots of things have improved, so many things haven't. We need to keep pushing and speaking up, and hopefully we will get there.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A I don't, but perhaps I should.

Q What are you looking forward to in 2023?

A Spending more time with people – I still feel that I am catching up after the last few years of restrictions!



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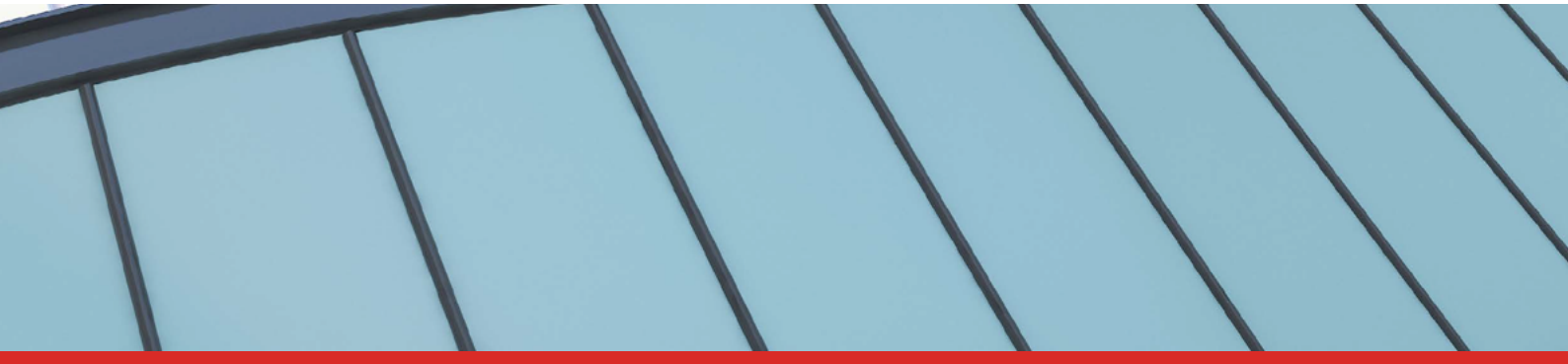

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CONTACT

For further information, please contact our Clerks using the details below:

John Wiggs - Senior Clerk
jwiggs@maitlandchambers.com
+44 (0)20 7406 1251

Robert Penson - Deputy Senior Clerk
rpenson@maitlandchambers.com
+44 (0)20 7406 1258

Luke Irons - Deputy Senior Clerk
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BIT BY BIT:

INFORMATION ORDERS IN CRYPTO FRAUD DISPUTE FLY THROUGH GATEWAY 25

ANALYSIS OF LMN V BITFLYER & ORS [2022] EWHC 2954 (COMM)

Authored by: Darragh Connell (Barrister) and Eoin MacLachlan (Barrister) - Maitland Chambers

In recent months, cryptocurrency exchanges have been seldom far from the news. The sudden collapse of FTX caught the world's attention, with the company filing for Chapter 11 bankruptcy protection in early November 2022. More recently, in January 2023, the Securities and Exchange Commission charged Genesis Global Capital, LLC and Gemini Trust Company, LLC for the unregistered offer and sale of securities to retail investors.[1]

Aside from the enhanced regulatory scrutiny likely to be faced by cryptocurrency exchanges, for practitioners acting in cases of crypto fraud, the information held by such exchanges can be vital in tracing misappropriated digital assets. It is for that reason that the recent decision of Mr Justice Butcher in LMN v Bitflyer and Ors [2022] EWHC 2954 (Comm) is particularly pertinent since, in the context of an application for information orders against six cryptocurrency exchanges, the High Court considered, for the first time, the new gateway for information orders pursuant to Practice Direction 6B para.3.1 (25).

In granting the relief sought by the Claimant, the judgment in LMN v Bitflyer and Ors [2022] EWHC 2954 (Comm) adds to an impressive body of case law which has emerged since AA v Persons Unknown [2019] EWHC 3556 (Comm) whereby the English courts have evinced a willingness and capacity to adapt to the challenges posed by digital assets, particularly in the context of crypto fraud.

What was in dispute?

The Claimant, LMN, is a cryptocurrency exchange incorporated in England and Wales. Approximately two years prior to the court proceedings, hackers breached its systems and removed cryptocurrencies including Bitcoin ("BTC") and Bitcoin Cash ("BCH"). The misappropriated cryptocurrencies were worth millions of dollars. A range of regulatory and law enforcement agencies worked with the exchange in their investigations but having failed to provide further assistance, civil proceedings were commenced.

Relying upon blockchain analysis, LMN identified 26 addresses on the BTC and BCH public blockchains to which the relevant BTC and/or BTC had been transferred by the hackers or those facilitating the fraud in question. These 26 addresses were distributed amongst the six crypto exchanges who, through various entities, were named defendants to the application.

Before the Court, LMN argued that its investigations could go no further without assistance of the relevant crypto exchanges. Accordingly, the Claimant sought information orders against the Defendants to assist in identifying the individuals behind the exchange addresses.

What did the Court decide?

The Claimant sought information orders against the exchanges coupled with permission to serve the Defendants out of the jurisdiction, and permission to serve by alternative means.

1 https://www.sec.gov/news/press-release/2023-7

The Court declined to hear the substantive application without notice being given to the Defendants and the substantive application was heard at a second hearing on 11 November 2022. The Court allowed both hearings to proceed in private (so as not to tip off the alleged fraudsters).

As to the question of service out of the jurisdiction, the Court followed the well-known approach found in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7 at [71] per Lord Collins:

(1) Was there a serious issue to be tried on the merits?

(2) Was there a good arguable case that the claim fell within one of the 'gateways' in CPR PD 6B §3.1?

(3) Was England and Wales the appropriate forum for the claim to be tried?

As to the merits under the Bankers Trust and Norwich Pharmacal jurisdictions, the Court concluded that there was a good arguable case that:

a. cryptocurrencies are a form of property as had been recognised by Bryan J. in AA v Persons Unknown [2019] EWHC 3556 (Comm);

b. cryptocurrencies could be subject to a constructive trust whereby the property is recoverable and traceable in equity; and

c. the transfer of digital assets such as BTC could be the subject of tracing on the basis of the relevant substituted asset.

The Court concluded that there was a good arguable case that the law of England and Wales was applicable law relying on the fact the Claimant was resident within the jurisdiction for the purposes of determining the lex situs of the assets notwithstanding the location of the Claimant's servers in Romania.

Having applied the five principles for the grant of a Bankers Trust order considered in various cases including Marc Rich v Krasner [1999] EWCA Civ 581, the Court concluded that there was a good arguable case to grant the relief sought.

As to Bankers Trust relief more generally, the Court also addressed a point raised by one of the Defendants who cited the authority of Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482 so as to contend that making a Bankers Trust order against foreign defendants was an infringement of the sovereignty of a foreign jurisdiction and should only be made in exceptional circumstances. Mr Justice Butcher concluded that the approach in Mackinnon was inapplicable given the location of the documents sought was unknown and may be of little significant. Irrespective and in any event, the circumstances of the present case were exceptional.

Given that there appeared to be no doubt that the defendant exchanges were, without any wrongdoing or fraud on their part, "mixed up" in the fraud, there was a good arguable case that relief could be granted under the Norwich Pharmacal jurisdiction as well.

The Court was then required to consider whether there was a good arguable case as to the availability of the new gateway in Practice Direction 6B section 3.1(25) ("Gateway 25") which provides as follows:

"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) the claim or application is made for the purpose of proceedings … which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or CPR rule 6.32, 6.33 or 6.36."

On the basis of the information available to the Court, England and Wales appeared to be the appropriate forum. The Court took a flexible approach, highlighting that LMN is an English company, that there were good grounds for considering the lex situs of the cryptocurrencies to be in England and Wales, that relevant documents were in the jurisdiction, and that there was an arguable case that the law of the England and Wales governed the proprietary claim.

As to the question of service by alternative means, the Court was satisfied that there was good reason to grant such permission, given the nature of the claim and the need to quickly identify the potential defendants and property.

Ultimately, the Court was content to make the relevant orders requiring provision of the information and documentation sought. Further, the Claimant was required to give undertakings to cover the Defendants' expenses and losses in the usual terms and an undertaking as to collateral use.

What does it mean for clients and for future cases?

The decision in LMN v Bitflyer & Ors provides a further welcome reminder of the flexibility shown by the courts in England and Wales to adapt legal principles to aid victims of crypto fraud.

Further, the Court provided helpful clarity as to the applicability of relief under the Bankers Trust jurisdiction in the context of information held by cryptocurrency exchanges.

Finally, and perhaps most significantly, the utility of the new Gateway 25 to obtain information from third parties as to the identities and whereabouts of those who perpetrate pernicious frauds is particularly welcome news for civil fraud lawyers and asset recovery professionals.

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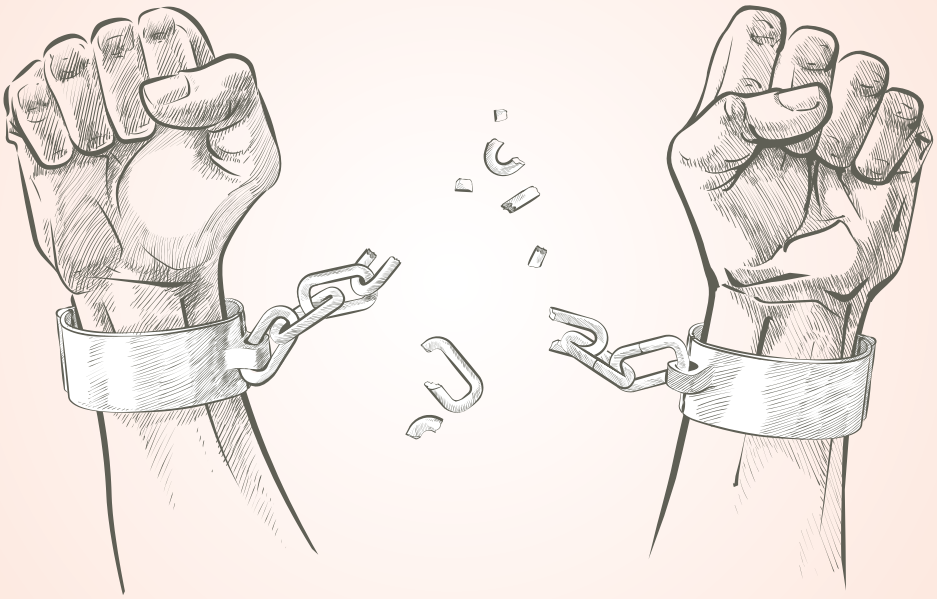
FIGHTING THE FRAUD EPIDEMIC



WAYS TO BREAK THE CHAIN

Authored by: Philip Gardner (Associate) and Louisa Keech (Trainee Solicitor) - Peters & Peters

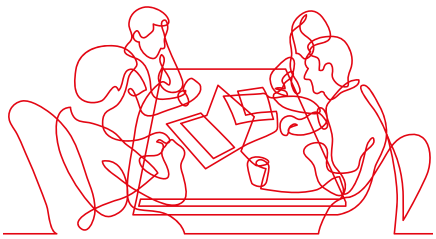
At the start of the new year, an unfortunate and dispiriting reality is starting to dawn: 2022 was the UK's 'Year of Fraud'. From headlines of the UK government having lost £16 billion to Covid 19 fraud, to the shocking truth that only one in every 1,000 criminal complaints for fraud results in a conviction, a financial crime wave has become an epidemic and risks, without urgent action, to become endemic.

Efforts are under way to address the problem. The House of Lords' Fraud Act 2006 and Digital Fraud Committee recently published a report into the fight on fraud. It is a fightback against the disturbing statistic that fraud is reportedly the most commonly experienced crime today, accounting for approximately 41% of all crime against individuals and, with those over 16 more likely to be a victim of fraud than any other individual type of crime.

The report noted, however, that this gargantuan problem was met with a lacklustre counter-fraud policy.

Only 1% of law enforcement focuses on fighting economic crime.

Responsibility for counter-fraud policy is also spread across multiple departments, allowing fraud to fall through the cracks. Underfunding of enforcement agencies and the sophisticated nature of criminal networks requires a new approach, and the Committee rightly advocated a government review of the use of civil remedies in the fight against fraud.



Civil Recovery Orders

The Committee advocates the increased use of Civil Recovery Orders, which enable the recovery of property under the Proceeds of Crime Act 2002 by enforcement agencies where it can be established, on the balance of probabilities, that the property was obtained unlawfully. This is particularly helpful when prosecutors fail to achieve a criminal standard of proof, but can still satisfy the court of the appropriateness of a civil recovery.

The Committee's encouragement is welcome: in 2020/2021, Civil Recovery Orders resulted in the recouping of only £12.7 million as against the losses of around £500 million to fraud for the same period. If, as Max Hill KC, Director of Public Prosecution, suggested to the Committee, civil recovery should be seen as one of the weapons in the authorities' arsenal, then more funding and training will be required by those authorities seeking to recover funds in this way. Partnerships with civil fraud and asset recovery specialists in the private sector are an obvious first step.

Civil proceedings – helping victims achieve their own justice

The Committee noted the need to address obstacles to using civil remedies to tackle fraud.

One such obstacle to bringing civil proceedings can be court fees.

With claims of over £200,000 requiring a £10,000 fee to be paid, it is no surprise that this may act as a dampener on small- and medium-value claims. Once application fees and trial fees are factored into the equation, the costs of pursuing a claim swiftly become prohibitive, particularly to illiquid victims.

Take, for example, Rachel, a victim of a Tinder Swindler-style romance fraud identified in the Committee's report. Rachel lost £113,000 after she fell victim to a fraudster on Facebook with whom she believed herself to be in a relationship (the consequence of highly effective social engineering). Rachel borrowed some £90,000 and paid over £20,000 in her own savings. Court fees alone in Rachel's case would likely be £5,650, before considering solicitors' fees, counsel's fees and other fees likely to be incurred such as investigators' fees in order to find the fraudster and recoverable assets.

A first step could be that the government considers waiving fees in respect of fraud cases. For example, barristers or solicitors could certify a claim as a fraud claim when it is filed with the court, with the consequence that the claim would then be auto-exempted from court fees. While auto-exemption from court fees could, of course, be open to abuse, the professional obligations of barristers and solicitors would act as a safeguard; claims would be certified as fraud claims only if genuine as to do otherwise would risk regulatory consequences.

Such certification would be at modest public cost and improve access to justice for individual victims of fraud.

Also at relatively modest public cost would be the introduction of a mechanism making corporates vulnerable to a class action. Such a mechanism already exists for private actions in competition law under the Consumer Rights Act 2015 and the regime has proven highly successful. As with the opt-out collective actions regime for competition claims, any such mechanism introduced in relation to fraud claims could be subject to similar safeguards to alleviate any concerns as to encouraging unmeritorious litigation. Passing greater responsibility to corporates provides the government with the opportunity to share the burden of the costs of fraud prevention while also offering victims additional means of redress.

Further, the government should revisit the ever returning and never settled debate as to the benefits of punitive damages, particularly on professionals that facilitate fraud either by deliberate actions or incompetence. The deterrence effect could be a significant one as the costs of both committing and failing to prevent fraud rise.

International co-ordination

A key problem in the fight against fraud is confronting this pernicious wrong's international and transnational characteristics. Money, including the proceeds of financial crime, crosses borders all too easily and neither enforcement agencies nor banking compliance is doing enough to stop it. To ease their burden, and help achieve redress for victims, the government should focus energies in two key boosts to civil remedies in the international sphere.

First, the government must redouble efforts to reduce the costs of and increase access to international recovery strategies. This can be achieved by increasing efforts to rejoin the Lugano Convention. The Lugano Convention, a treaty between the EU, Switzerland, Norway and Iceland, allows parties to have judgments recognised and enforced in the national courts of the parties to the treaty.

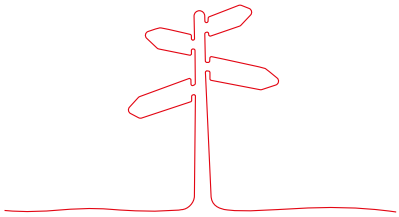
As such, the Lugano Convention provides certainty to those involved in disputes and, without being a member, cross-border disputes, recovery and enforcement will be more expensive.

The risk of throwing good money after bad if the trail runs cold abroad is a real one, and judgment recognition is key to solving this issue. While there have been some notable positive developments in this regard, with 2022 seeing the mainland Chinese courts enforcing an English judgment for the first time and the United Arab Emirates Ministry of Justice noting English judgments can now be enforced in its domestic courts, enforcement in Europe remains at risk. After Brexit, the UK applied to rejoin the Lugano Convention in the first half of 2020, but its accession is still pending. The government needs to reconsider this as an important step to take in its fight against fraud.

Second, the government should move beyond the trite suggestions of greater co-operation between law enforcement internationally.

While greater cooperation can only help when tackling international fraud, there is no reason that such co-operation should not extend to civil proceedings, for example, by increased judicial dialogue.

An example can be found in the Standing International Forum of Commercial Courts (SIFoCC), established in 2017, as a forum bringing together commercial courts around the globe. SIFoCC promotes collaboration and the just and effective resolution of commercial disputes. SIFoCC, and other international judicial forums, should be encouraged to consider how fraud might be tackled, and to encourage judicial co-operation in cases where fraud crosses borders. Fraud cases move quickly. Improved communication and a more joined-up approach can only assist to reduce costs and recover the assets of victims.



An avenue to be explored

Any public institution's report is likely to focus on public answers to the problems that it confronts. No one could deny more resourcing is needed for law enforcement to confront economic crime. However, in a time of economic challenge, civil proceedings and private litigation offer a viable way to tackle fraud that weighs less on the public purse. As per the Committee's report, civil proceedings are certainly an avenue that the government should explore, and do so with enthusiasm.

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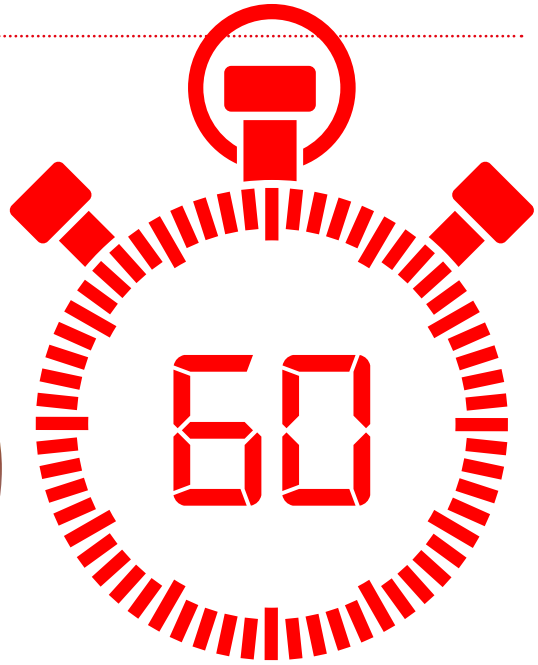

Q What do you like most about your job?

A Winning a case is always a great feeling, and I find that the most satisfying part of the job. On a day-to-day basis, though, it's the people I work with. I've been lucky to work alongside many great solicitor teams over the years – and particularly on longer running cases, you really get the chance to know each other and share the joys of the ups and downs of litigation.

Q What motivated you to pursue this specialisation?

A I specialise in fraud, commercial, insolvency and shareholder disputes. I really enjoy the fast-moving pace, the interesting facts, and getting to apply the law to those facts. I enjoy being intellectually challenged whilst also needing to think pragmatically and tactically.

Q What is the most rewarding thing about your work?

A Getting the right result for your client. Obviously that will often involve winning a contested hearing, but in other cases it will be setting the client up for a good settlement – or even managing to stave off a claim being pursued at all.

Q Do you have any career aspirations, and have you achieved any of them so far?

A I just want to be the best at my job I can be. I'm lucky to have worked on some great cases with some great people, and I want to continue doing that. To paraphrase a footballer on social media, it's about taking each case as it comes. There is always more to learn and I want to keep getting better.

Q What do you see as being the biggest trends of 2023 in your practice area?

A Fraud work will continue to be busy, and I think we are at last seeing the increase in insolvency-related disputes that has been talked about since Covid. There are still ongoing ramifications from the war in Ukraine, although the impact on the legal market obviously pales in significance compared to the situation in Ukraine itself.

Q What has been your most memorable experience during your career so far?

A On a personal note, acting for the Fans' Trust of my football club, Leyton Orient, when the club almost went out of business due to appalling mismanagement by the then owner. As anyone who has seen me play football can attest, this was by far the closest I would ever get to lining up for a professional football club.

Q How do you deal with stress in your work life?

A I use exercise as a way of letting off steam and am a regular at (/fully signed up cult member of) Barry's Bootcamp.

Q What is your ideal holiday?

A Somewhere hot, with a beach, and hopefully something interesting to see. My Caribbean practice is obviously entirely unrelated to this.

Q What was the last book you read?

A Traitor King, by my friend Andrew Lownie – a very engaging book about Edward VIII and Wallis Simpson.

Q Do you have a favourite food?

A I permanently lost my senses of smell and taste when I first had Covid three years ago, so the answer is, not anymore. I try to eat foods with plenty of texture – things like a crunchy salad. I still dream of the taste of a Domino's pizza - If the research scientists could get a shift on, so that I could go back to eating unhealthily, that would be much appreciated.

Q What cause are you passionate about?

A I am particularly invested in improving social mobility at the bar, where there is still a lot to be done.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A Every year I say that I should work less hard. Every year I do not work less hard.

Q What are you looking forward to in 2023?

A I've a busy year with a trial in Abu Dhabi, a long arbitration and then a Commercial Court trial, so there is plenty to keep me on my toes.

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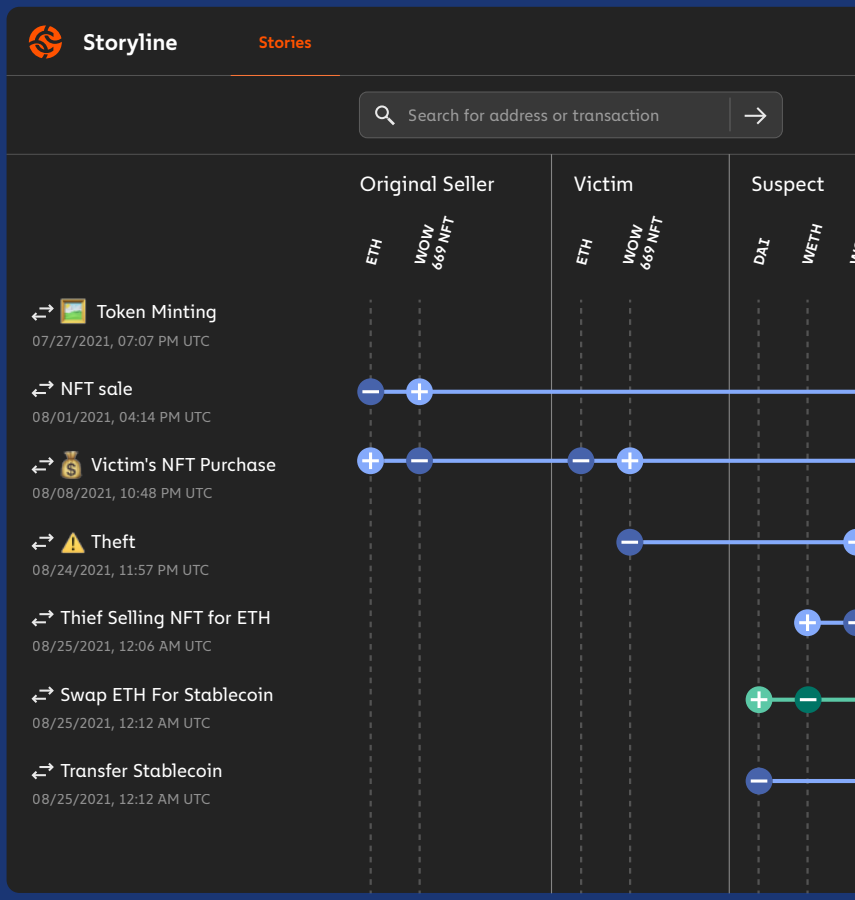

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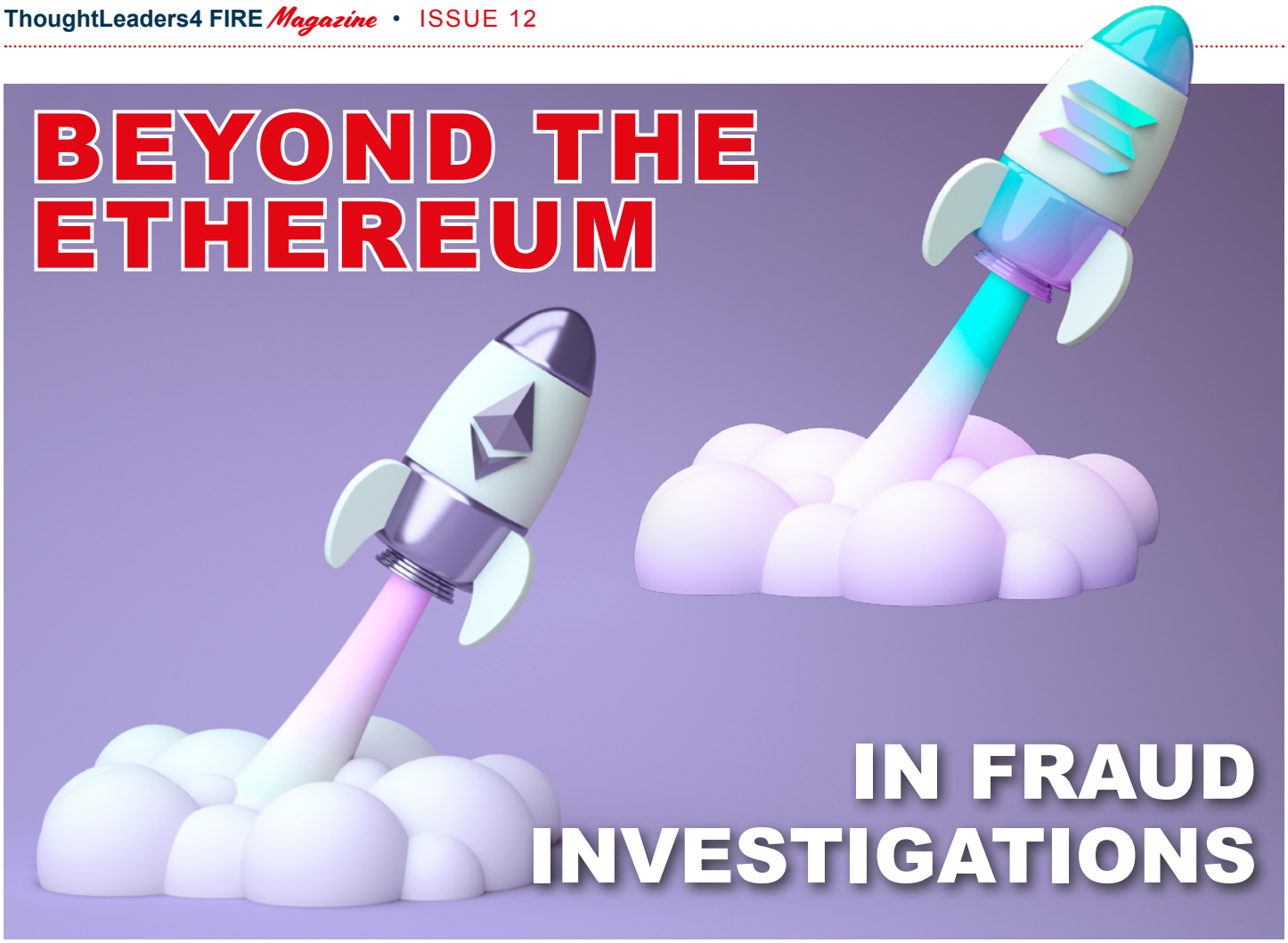

Authored by: Stella Ko (Training Specialist) - Chainalysis

As fraud investigators develop their crypto investigation capabilities, they generally start with Bitcoin, likely because it was the first cryptocurrency with the largest market cap.

The next stop on their journey is often Ethereum, which has the second-largest market cap of all cryptocurrencies.

The Ethereum Merge[1] in 2022 was a massive milestone for crypto: a $200 billion network ported over to an entirely new, scalable transaction ledger with a brand new security model.

But what might lay beyond Ethereum for FIRE starters who will be the key players in the blockchain ecosystem as the next generation and will be faced with investigations in more novel tokens?

Let us introduce Solana, which is relatively new to the DeFi ecosystem compared to Ethereum but is catching up quickly. Solana enables buyers to purchase NFTs with fewer congestion problems and almost no transaction fees.

Its origin story is suggested by its name, which comes from a small beach town North of San Diego called Solana Beach, where Anatoly Yakovenko, who wrote the Solana white paper[2], lived and surfed for three years when he worked for Qualcomm.

One catalyst in Solana gaining traction occurred in September 2020 when the popular stablecoin Tether announced the availability of USDT on the Solana blockchain. Tether was already a well-known asset with the third highest ranked market cap. Just a few months later in January 2021, Circle released USDC, another popular stablecoin, on Solana.

In addition to the above boosts to its reputation, Solana's usefulness when it comes to NFTs has assisted in its rapid growth.

Solana's NFT 24-hour trading volume has at times outperformed Ethereum's NFT trading volume for the same period.

On 26 May 2022, Solana NFT secondary market 24 hours total sales generated nearly $24.3 million, while Ethereum sales added up to $24 million across all of the marketplaces it tracks.

There are two factors which have been game changers for Solana.

1 https://blog.chainalysis.com/reports/ethereum-merge/
2 https://solana.com/solana-whitepaper.pdf

The first is fees. Nobody likes to pay transaction fees and Solana is well known for keeping these low. In simple terms, on Ethereum, if you were sending $100 in a transaction, depending on the network conditions at that time, it may cost you $50 making it incredibly expensive, while it costs around a cent on Solana.

The second is speed. Solana is one of the fastest blockchains in transaction processing thanks to its unique network architecture. It's possible to consider this at a very high level but we give a bit more depth in brackets for those who want some more technical insight.

Ethereum prioritized decentralization, while Solana focused on throughput which reduced transaction time (through speedier transaction-block verification). However, benefits for legitimate users benefit criminal users too.

Indeed, according to Chainalysis findings, services on Solana suffered some of the largest DeFi hacks in 2022 ($320m Wormhole[3], $100m Mango, $8.7m Crema Finance).

It follows that investigators in asset recovery, auditors, and insolvency practitioners will inevitably need to navigate a Solana investigation.

Criminals can send proceeds far more quickly, through many more transactions at a lower overall cost. Multiple transactions are often structured in a way that makes it much harder for investigators to follow via traditional blockchain explorers or tooling which don't account for the unique multi-level account structure and ownership-transfer mechanisms of Solana wallets. The next two paragraphs look at this from a technical perspective but we then use an example to illustrate less technically.

Solana uses proof of history (POH), which differs from Ethereum. In Solana, determining the encryption time between two events requires a series of computational steps. You can track the order of each transaction by adding a timestamp to the transaction. This timestamp allows 'fast sequencing validators,' which know their order without having to communicate back and forth.

In contrast, on the Ethereum blockchain, every node has to communicate until they all agree on time and this agreement should be done before submitting the block, preventing a speedier process.

To explain why ownership changes in Solana make it harder for investigators to track, let's take an example. Imagine:

- **You send 10 ETH to A.**
- **A sends the same amount of ETH to B.**

Block explorers show the ownership change from You to A to B i.e. the funds from your address move to A's address, then to B's address. This can be done manually; here the usefulness of blockchain analytics tools is more to help with understanding which entities funds can be tracked to and from (mapping real-world entities to addresses) and associated risks.

While the same method can be used for sending funds on Solana, there is another option where you can simply change the ownership of an account rather than moving funds at all. As a result investigators have a risk of incorrectly mapping historical transfers to the current owner, not to the person who owned the account at the time of the transfers. It might look like I sent the money to B, when actually I sent it to A, who changed ownership of that account to B. In other words, you can't properly trace historical criminals associated with the transaction. This leads to false investigative conclusions and risk calculations.

Of course, it's unrealistic to expect investigators in professional service firms to trace funds manually in that scenario. Therefore analysis tools need to evolve to cover the arguably more sophisticated nature of the Solana blockchain.

This is not to say the entire blockchain should be dismissed due to these attacks and complexities. As with every other popular currency, criminal activity is unavoidable for example in traditional finance we recently witnessed 'millions of dollars disappear[4]' from Olympic legend Usain Bolt's investment account. It is important that lawyers and financial investigators can handle each case regardless of the underlying currency stolen/used and continue to develop their technical knowledge and to have the right tools at their disposal.

The tech in this area exists and is improving and investigation experts, such as FIRE starters have the tools they need to build the skills required to support innovation, disrupt crime, and build trust.

3 https://blog.chainalysis.com/reports/wormhole-hack-february-2022/

4 https://www.mirror.co.uk/sport/other-sports/athletics/usain-bolt-millions-dollars-olympics-28950204

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HOW THE RISE IN DATA COMPLEXITY AND VOLUME IS DRIVING THE NEED FOR LEGAL TECHNOLOGY INNOVATION

Authored by: Daniel Smith (Director) - Control Risks

The world is constantly evolving. When was the last time you visited a library to undertake some research? What happened to those red telephone boxes that could be found in our town centres? In the last few decades improvements in technology that may have once seemed like science fiction have now become the norm. Our children have grown up in a connected world with the Internet, social media, and instant messaging. We are now constantly connected and the devices which we use daily are fundamental to our lives – whether to arrange a meeting, send an email, work or stay connected with friends and family. Long gone are the days when businesses were dependent on filing cabinets to store their critical business information.

Our use of technology in every facet of our lives results in exponentially growing data points making the importance of a good data governance strategy and approach to any legal compliance request of upmost importance to keep costs under control.

Collecting data from the multitude of end points which exist is a challenge. Traditionally forensics would involve connecting directly to target devices to perform forensic imaging but fast forward to present time – and, since the pandemic, remote collections have become much more normal. With the adoption of hybrid working, approaches to collecting data have changed as technology has evolved to support more frequent remote collections and data collection directly from cloud-based systems such as Microsoft 365, which can streamline the collection process and avoid the bottlenecks traditionally encountered with data transfers.

The costs of data processing which can seem substantial are often minimal in comparison to the costs of the document review exercise whether responding to a regulatory enquiry or any litigation matter. In litigation matters there can be some control as to the extent of what is relevant for review due to requirements of proportionality. In other cases, such as a cyber breach, there can be terabytes of exfiltrated data in scope for review in order to meet regulatory obligations to notify data subjects. This warrants a sophisticated approach and the use of technology to ensure that costs can be kept under control.

In a recent cyber breach response case Control Risks was engaged upon there was almost 1TB of data located on a server that had been compromised. The costs to physically review all the data could have reached millions.

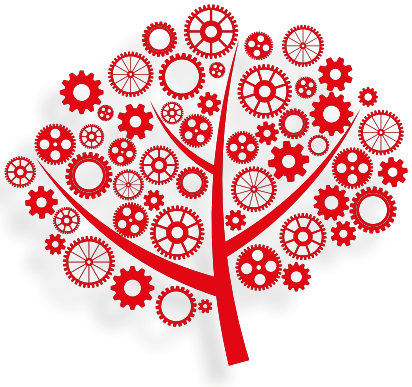
Using a combination of data analytics to perform detailed file listing analysis excluding non-PII files, deduplication and focussed PII searches as well as data subject mapping, we reduced the document population and associated review costs by 92%.

With review costs being the most expensive and difficult to predict part of typical eDiscovery matters, it is easy to see why the use of analytics has become a core component of document review exercises. Email threading, which ensures that only the most inclusive part of email threads are reviewed, is perhaps the simplest and most utilised method which has now almost become a de facto standard technique used on every case.

The types of data encountered is also evolving. The adoption of Microsoft Teams, Slack and other collaborative applications in many organisations, which has accelerated since the pandemic, requires different techniques to make the data reviewable. Understanding the context of thousands of one line chat messages is impossible unless you have a way to stitch them together. Fortunately, technology is continually evolving to handle these newer forms of communication and allow long conversations involving multiple participants to be easily focussed on specific time periods and key participants. Non-relevant parts of conversations can be filtered out allowing just the relevant material to be produced.

When approaching any investigation, the development of good keywords to focus the review is usually a sensible starting point. These can easily be applied to emails and Microsoft Office documents and image content once it has been OCR'd but advanced processing now allows non-textual content such as video and audio files to be searched in the same way with the addition of transcription now being an option during processing. Similar processing can be performed to perform machine translation of content to allow foreign language content to be searched and reviewed by non-native language speakers. Keyword searches are now also supplemented with sentiment searches to detect not just what is being said but how it is being said.

We are all aware of how widespread the use of CCTV is and people have easy access to technology from Ring doorbells to mobile telephones that generate videos and images that can also form part of a document review exercise. Innovations in technology mean that this content too can be processed and searched using object detection to avoid the necessity to perform a manual review of lengthy video recordings and thousands of irrelevant images.



Another challenge with the increasing digitisation and use of technology in all aspects of life is the amount of sensitive and PII data that becomes part of any document review exercise. This in itself poses challenges when it comes to disclosing documents to other parties during legal proceedings with the necessity to review the documents for PII and privileged material and redact any sensitive information before exchanging documents to the other parties. This process can be greatly streamlined using technology that can now automatically redact sensitive information.

Advanced platforms can redact thousands of instances of sensitive information in seconds and even apply inverse redactions to redact entire documents except for parts where someone is mentioned, a technique widely used in response to DSAR requests to keep costs under control.

The adoption of supervised learning is perhaps technology's best answer to increasing data volumes and keeping review costs under control. Using machine learning to develop intel from review team coding decisions and scoring the likely relevance of the not yet reviewed document population allows for review prioritisation and can give considerable insight into the likelihood of finding relevant content in the documents that have not yet been reviewed. This machine input can prove invaluable to ensure the proportionality of any document review exercise.

Where are we now and what is coming next? Technology is getting better all the time in helping us make decisions about the documents that we need to review. AI models are being developed which will enable profiling human behaviour possible from the outset before even applying any keywords. What we learn from one investigation can be applied to similar investigations, particularly within the same organisation, supplementing the experience of our investigations team with the machine equivalent of a veteran detective surfacing what is relevant without the need for lengthy investigations. It is difficult to imagine what data types we might see in 20 years' time, however I am confident our workflows and the associated technology will continue to innovate to ensure streamlined review processes.

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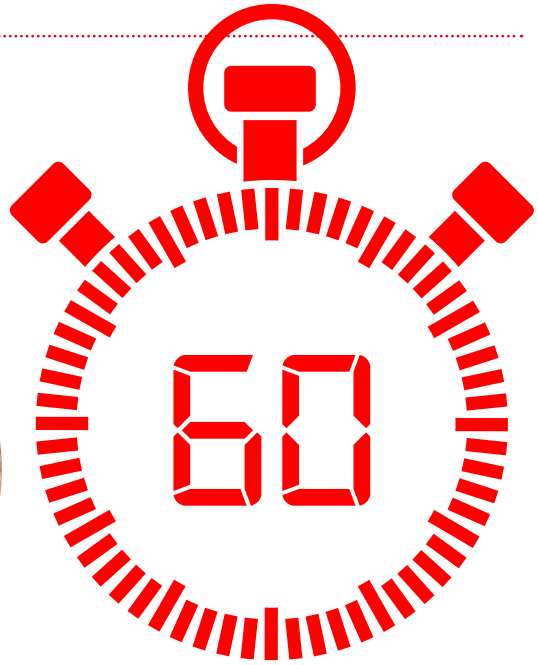

Q What do you like most about your job?

A I enjoy the fact that the work is demanding and intellectually challenging. In practice, my day to day enjoyment comes from the privilege of working with an enthusiastic, dedicated and often brilliant group of colleagues and fellow professionals.

Q What motivated you to pursue this specialisation?

A My early practice as a junior lawyer was in the aftermath of the 2009 financial crisis. After moving to the BVI, among other things, I cut my teeth working on the many strands of insolvency litigation arising from the Madoff Ponzi scheme. At the time, BVI jurisdiction was developing rapidly, following the opening of the Commercial Court in 2009. It felt like we were constantly pushing the boundaries and at the cutting edge of cross-border insolvency and asset recovery. It was (and still is) an exciting and constantly evolving specialisation.

Q What is the most rewarding thing about your work?

A I enjoy the fact that no two cases are the same. Each time I meet a client they have a unique problem which requires innovative and creative solutions. Sometimes it can be a long and painstaking process and something of a 'chess game'. The harder and more complex the case, the more satisfying when you are able to make a breakthrough for your client.

Q Do you have any career aspirations, and have you achieved any of them so far?

A There are many milestones of qualifications and promotions that I have achieved and hope to achieve - but my main aspirations are always to be a trusted advisor to clients and a valued colleague to my team. These aspirations are a constant work in progress, and I feel I am always learning.

Q What do you see as being the biggest trends of 2023 in your practice area?

A Anecdotally, it seems January has already seen an uptick in insolvency enquiries. Over the last few years businesses have struggled with huge economic uncertainty, while temporary government support through the pandemic and in the energy crisis has allowed tough decisions to be put off. I expect to see a long-expected increase insolvency work as businesses finally have to grapple with the 'new normal'. I also expect to see the courts examining thorny and novel issues arising from crypto- and digital asset related insolvency and fraud. It will be interesting to see how different courts approach questions of recognition and assistance to foreign courts and insolvency proceedings, when a cross-border consensus on questions such as situs of de-centralised assets has yet to be developed.

Q What has been your most memorable experience during your career so far?

A Obligations of confidentiality probably prevent me sharing some of the more memorable (and, certainly, most entertaining) experiences! One case that sticks in my mind from early in my career, was working on an appeal in the Second Circuit Court of Appeals in New York in a Chapter 15 proceeding. The submissions were time limited to 10 minutes, with a traffic light system counting down. It was unlike anything I have seen in practising in English common law-derived legal systems. The legal teams had to be prepared to answer, without any thinking time, any question that the panel might raise in a case which turned on a complex and novel issues of law. My client had instructed a former Solicitor General of the USA, Paul Clement, and it was fascinating to watch how he prepared for and approached the hearing.

Q How do you deal with stress in your work life?

A I am very fortunate to have a supportive and nurturing environment at my firm – there are always colleagues who are on hand to bounce ideas back and forth and offer support when work is particularly stressful. But it's important to have a good balance between work and personal time and to find time to 'switch off' and recharge. I make sure that time is scheduled in my diary for non-work priorities.

Q What is your ideal holiday?

A I love to travel to places I have never experienced before – sampling new cuisine and meeting new people. But my ideal holiday is still spending time in Ireland, where my family have a home on the south east coast, in Waterford. Nothing beats a cliff top walk on a 'soft day'.

Q What was the last book you read?

A I joined a book club last year as part of an effort to read more fiction. However, most recently I have read Taste by Stanley Tucci – a mouth-watering culinary memoir. It should come with a warning not to read on an empty stomach!

Q Do you have a favourite food?

A The answer changes depending on my mood and the last great meal I ate (which is invariably not my own cooking)! Given that the Stanley Tucci's book is fresh in my mind, I will say: all things Italian.

Q What cause are you passionate about?

A I believe passionately in collective political action to deliver a fairer and more equal society. I joined the Labour party in my teens and have worked for the party at various times since as an intern, volunteer, activist and canvasser.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A Having entered entirely speculatively, I unexpectedly won a place in this year's London Marathon through the ballot. Training for and (hopefully) finishing the marathon is my sole resolution. So far, I am sticking rigidly to my training plan, so fingers crossed!

Q What are you looking forward to in 2023?

A I will be an aunt for the fourth time this month – as my sister is expecting a little girl. I'm most looking forward to meeting my newest niece!

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BACCI & ORS V GREEN [2022] EWCA 1393

ENFORCING JUDGMENT DEBTS AGAINST PENSIONS

Authored by: Thomas Mitty (Barrister) - Gatehouse Chambers

The Court of Appeal in Bacci & Ors v Green [2022] EWCA Civ 1393 considered the rarely used Blight v Brewster order ([2012] EWHC 165 (Ch)). This is an order which allows a judgment debt to be enforced against a pension fund. It has so far only been granted in cases of fraud. It works by ordering an injunction pursuant to Section 37 of the Senior Courts Act 1981 ('Section 37') that the Defendant delegate its right to elect a pension draw down to the Claimant, and a third-party debt order over the debt which arises from that drawdown.

Blight v Brewster orders, and the Court of Appeal's consideration of them in Bacci v Green, therefore have important ramifications for both fraud litigation, and asset recovery.

1. Blight v Brewster [2012] EWHC 165 (Ch)

In this case, the Defendant persuaded the Claimants to part with their money in order to make investments on their behalf. It was found at a summary judgment hearing that this was done on the basis of fraud.

The question then arose as to how to enforce that judgment. The Defendant had a Canada Life pension, of which he could draw down 25% as a tax-free sum. The Claimants sought a third party debt order over this portion of the Defendant's pension.

This was discharged at first instance on the basis that the right to elect a drawdown was not a debt. The debt would only arise once the election was made.

On appeal, the Court ordered an injunction pursuant to Section 37 that the Defendant delegate its power to elect the draw down his pension. Moss QC (sitting as a Deputy High Court Judge) stated at [70] that:

'there appears to me to be a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw monies needed to pay their creditors.'

Section 37 also allows the appointment of an equitable receiver. Moss QC preferred an injunction to the appointment of an equitable receiver as it was simpler. However, he went on to state that if it were not possible to have ordered an injunction, he would also have ordered the appointment of an equitable receiver.

2. Bacci v Green [2022] EWCA Civ 1393

In this case, the Defendant obtained finance from a company ('FSL') by offering security over assets which he either did not own, or had contracted to sell. On the basis of this fraud, FSL obtained summary judgment of £3,233,625.76 against the Defendant.

Shortly after judgment, the Defendant was made bankrupt. Although the Defendant was discharged from the bankruptcy, the judgment debt survived by operation of Section 281(3) of the Insolvency Act 1986.

Again, the Defendant's principal asset was a pension. However, in order to draw down the pension, he needed to revoke a voluntary 'enhanced protection' option under the Finance Act 2004.

FSL assigned its rights to the Claimants, who brought the instant proceedings.

At first instance, the Judge made an order requiring the Defendant to delegate his power to revoke the enhanced voluntary protection to the Claimants' solicitors, and confer upon them authority to elect that the Defendant draw down his pension.

The Defendant appealed on three grounds, of which two are relevant to this article.

First, on the basis that the Defendant's power to revoke his enhanced voluntary protection was not 'property' nor 'tantamount to ownership'. The Defendant acknowledged that Blight v Brewster had been correctly decided; but argued that in that case, the right to election had been property. In this case, the power to revoke enhanced voluntary protection was not – exercising it would, argued the Defendant, effectively create new property. It was not open to the Court to appoint a receiver by way of equitable execution over a contingent right.

However, the Court found that the right did not have to be property, nor tantamount to it, in order for a receivership to be granted over it (at [19]), and so the Court had the power to make the order that it did.

In addition to the receivership, the Court also had the power to grant an injunction. Any doubt about its jurisdiction to do so was resolved by Broad Idea v Convoy Collateral [2021] UKPC 4. That case established that an injunction under Section 37 required: (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something. In addition, the category of cases in which injunctions could be deployed could be developed incrementally.

Second, the Defendant argued that the order was against public policy. On this ground, the Court endorsed Blight v Brewster. In particular, Newey LJ stated at [32] that when it came to enforcing a judgment against a pension, there was no analogy to be drawn with bankruptcy, for which parliament had specifically legislated to protect pensions.

The overriding consideration was that judgments must be enforced.

3. Practical impact

Blight v Brewster orders, now endorsed by the Court of Appeal, are clearly useful in extending the range of assets which judgments can be enforced against. However, a number of questions remain unanswered about this rare form of order.

1. Will it only be granted in cases of fraud? The Court has not explicitly said so, but in both Blight v Brewster and Bacci v Green, the fraud of the Defendant was a strong policy consideration in the Court's exercise of its discretion under Section 37.
2. Will it only be ordered in cases where the Court would otherwise appoint an equitable receiver? The Court made clear in both Blight v Brewster and Bacci v Green that an injunction was effectively a shortcut, and that the Court in both cases would have appointed a receiver in any event. The Court will normally require satisfaction to a higher degree of injustice against the Claimant before appointing a receiver than granting an injunction.
3. Will they only be granted in cases where the Defendant's pension is registered within the jurisdiction? Third party debt orders only take effect against assets within the jurisdiction, but surely this applies only to the lump sum once it has been drawn down.
4. Will they only be granted in cases where the Defendant's pension is the only means of satisfying the judgment debt? It is conceivable that there might be a case in which a Defendant has a number of other assets which are difficult to enforce against, meaning that a Blight v Brewster order is sought for tactical reasons. However, there are also strong policy reasons why a pension should be a 'last resort' when it comes to enforcing a judgment.

If the answer to all of those questions is yes, then Blight v Brewster orders, ostensibly a useful tool, may remain rare.

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ADMINISTRATIONS IN RUGBY UNION

A BREAKDOWN OF WASPS' AND WORCESTER'S DEMISE

Authored by: Jamie Rhodes (Associate) - Charles Russell Speechlys

Concern amongst sports aficionados around the financial integrity of the sports industry was raised in late 2022 when rugby union was the latest sport to be dragged into the insolvency conversation. Both Wasps RFC (Wasps) and Worcester RFC (Worcester, and together with Wasps, the Clubs), who can each trace their history back to the mid-19th century, appointed administrators after facing financial difficulties they attributed to the Covid-19 pandemic and resulting lockdowns.

Both Clubs have now been relegated from the top-flight of English rugby, the Gallagher Premiership (the Premiership), losing their all-important P-Shares, after the Rugby Football Union (RFU) rejected their no-fault insolvency appeals.

What industry specific rules did the administrators have to navigate and what is next for these Clubs?

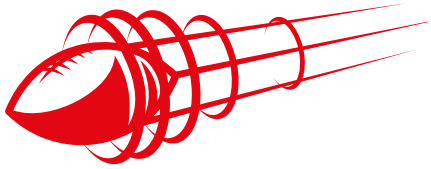
The Administrations

Wasps and Worcester entered administration under a month apart, with both coming under significant HMRC pressure:

1. HRMC issued a winding-up petition against Worcester on 15 August 2022 for tax arrears, including deferred liabilities from the Covid-19 pandemic. The directors sought a solvent sale of the club, but this ultimately fell through and thus they requested that the Department for Culture Media and Sport (DCMS) (being a fixed and floating charge-holder over Worcester's assets by way of security for a Covid loan) exercise its powers to appoint administrators, to circumvent HMRC's extant winding up petition. Julie Palmer, Julian Pitts and Andrew Hook of Begbies Traynor were appointed as joint administrators of the club on 27 September 2022. It should also be noted that the entity that employed the players, WRFC Players Limited, was wound up by Chief ICC Judge Briggs at a hearing lasting just 22 seconds on 5 October 2022.

2. Due to the imminent threat of an HMRC winding-up petition, Wasps filed Notices of Intention to Appoint Administrators ("NOIs") on 22 September 2022 with a view to concluding a pre-packaged sale of the club. A conditional offer was made to purchase the club as a going concern; however, this fell through due to the prospective purchaser being unable to reach agreement with the Premiership's board (the PRL) on the transfer of Wasps' P-Shares (discussed below). As such, at the expiry of the NOIs, the club appointed Andrew Sheridan and Rajnesh Mittal of FRP as joint administrators of the club on 17 October 2022.

The survival of both Clubs in looks likely, with a sale of Wasps to connected party, HALO22 Limited, completing in late 2022and a sale of Worcester to a consortium led by former chief executive Jim O'Toole being announced on 1 February 2023 However, their dalliances with the insolvency world have cost both clubs dear.



Relegation

RFU Regulation 5[1] deals with, inter alia, the insolvency of clubs within its jurisdiction. RFU Regulation 5.5.5 states that,

"where a club suffers an Insolvency Event... [its] most senior first XV team…shall in respect of the following Season be relegated to the League below."

As a result of the Clubs' respective administrations, in October 2022 the RFU suspended their involvement in this year's Premiership competition and relegated them to the second tier of the rugby union pyramid for the 2023/24 season.

However, now firmly in the last chance saloon, both Clubs (via their respective administrators) appealed the RFU's decision citing Regulation 5.5.9, aka, No Fault Insolvency Events. This regulation states that (emphasis added),

"the RFU may in its absolute discretion reduce or waive in its entirety any sanction that would otherwise apply to a Club where it is satisfied that the Insolvency Event would not have occurred but for an event or circumstance which was beyond the control and without the fault or negligence of the affected Club and which by the exercise of reasonable diligence the affected Club was unable to prevent including:…any epidemic or pandemic as categorised as such by the UK Government and/or the World Health Organisation to):".

The Clubs' appeals were based on the financial toll the Covid-19 pandemic had taken on them and that they considered this was the primary reason they each had entered administration. Begbies Traynor's Statement of Proposals neatly summarised their arguments:

"The Directors have advised that the start of the Company's financial substantive issues, and the root cause of the eventual failure, was the Covid-19 pandemic…With the cancellation of all sporting…events following Government-imposed restriction, the Company suffered cashflow issues during the pandemic and was unable to pay its debts as and when they fell due. Covid-19 and the related lockdowns placed an immense pressure on the business, draining it of all cash reserves and the build-up of a significant tax liability while the Company was unable to generate revenue from the stadium, whether Rugby related or otherwise".

However, on 6 December 2022, the RFU's Club Financial Viability Group rejected[2] both Clubs' No Fault Insolvency Appeals:

1. In respect of Wasps, the RFU considered there was 'insufficient evidence' provided to demonstrate there had been no fault by the club, noting its business plan lacked resilience which left it in a precarious position and the shock of an event, such as the pandemic, was more likely lead the club's insolvency; and

2. For Worcester, whilst the RFU accepted the Covid-19 pandemic had a serious impact on the club, it considered the club's business model, which appeared to be "perpetually funded by debt", was the key reason for its demise. It also drew negative inferences from the fact Worcester had failed to produce correspondence between it and HMRC (who had issued the original winding-up petition). It is worth noting that even Worcester's joint administrators, who had launched the appeal, noted in their statement of proposals that, ""The Club was loss making prior to the Covid-19 pandemic, and the funding provided by DCMS had not resolved the underlying issues at the club".

This decision condemns the Clubs to relegation for next season; however, the pain for the Clubs does not stop here.

P-Shares

Wasps and Worcester have also lost their P-Shares as a result of their administrations. These are 'perpetual shares' which entitle shareholders to a percentage of the central income of the Premiership and the right to vote on key issues. They were awarded to the thirteen established top-flight teams in 2005 (which included Wasps and Worcester).

Under RFU rules, in the event a team is relegated it can keep its P-Shares for at least one season giving them an opportunity to regain promotion to the Premiership. It is worth noting that Bristol Bears retained their P-Share money for the eight seasons they were in the second tier of rugby between 2009 and 2018.

Unfortunately for the Clubs, the PRL retain pre-emption rights over the P-Shares and, on 7 December 2022, it confirmed its intention to purchase both Wasps' and Worcester's P-Shares for £9.8 million apiece. Interestingly, Worcester's accounts showed a book-value for its P-Shares as £13,865,000.

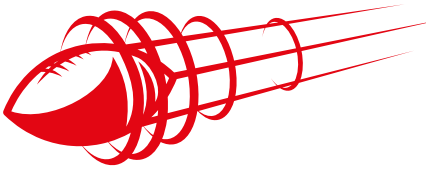
The seizure of the shares has been criticized by, inter alia, Worcester's joint administrator Julie Palmer who accused the PRL, representing the other eleven clubs, of having a conflict of interest and being able to acquire the P-Share "as cheaply as it suits them". The Clubs' P-Shares were one of the most attractive assets to potential purchasers and may have been the key to rescuing the Clubs as a going concern; as noted above, the pre-pack offer to save Wasps as a going concern only fell through because the potential purchaser and the PRL could not come to an agreement about the transfer of the P-Shares.

However, others consider the removal of P-Shares for clubs that have entered an insolvency process as imperative to act as a deterrent. Rob Baxter, Director of Rugby at Premiership team Exeter Chiefs, believes allowing Worcester and Wasps to keep their P-Shares could undermine confidence in the sport:

1 https://www.englandrugby.com/dxdam/b3/b3d4e4f4-d5c9-45c6-bcc7-4234d368c45a/Regulation%205.pdf

2 https://www.championshiprugby.co.uk/news/article/rfu-statement---wasps-and-worcester-warriors

"why doesn't every club in the Premiership that's got debts organise a pre-pack with an administrator, go into administration, keep their P-Shares, basically keep everything that's going to be of value to them and wipe the debts of everyone they owe money to?.... How can Premiership Rugby run a business that says it's OK to go into multiple administrations every time you run into debt?...We'd have no confidence in the business, we'd have no confidence in a TV deal. Why would a sponsor ever come in to sponsor a rugby club where, in theory, once you feel like it, you can just go into administration and wipe your debts?"



Rugby Creditors Rule

There is one further rugby specific rule the Clubs' new owners have to contend with to compete in the second tier of rugby next season.

Appendix 2[3] of RFU Regulation 5 sets out list of non-exhaustive considerations that the RFU want satisfied if either Wasps or Worcester wish to transfer its membership and / or league position to a new legal entity, defined as a Phoenix Entity (not to be confused with 'phoenixing' under s216 of the Insolvency Act 1986).

Whilst these are tailored to the circumstances of a particular club's insolvency, in both Wasps' and Worcester's cases they are likely to want evidence any 'Rugby Creditor' of the Clubs will be paid by the Phoenix Entities. Rugby Creditors are defined (in RFU Regulation 5.1[4]) as, inter alia, players, ex-players, coaches and other employees of a club. Claims can potentially include not just contractual liabilities, but also claims relating to the termination of those contracts (such as wrongful / unfair dismissal or redundancy payments).

Explicit reference to Rugby Creditors is made in FRP's Statement of Proposals; it notes that whilst FRP have received £3.4m of claims that fall within the RFU's definition of Rugby Creditors, they are not incurring the costs in the estate of adjudicating on these claims but understand Wasps' purchaser may be required to "settle such claims to meet eligibility requirements for participation in RFU competitions going forwards".

What's Next?

It is important not to consider the administrations of Wasps and Worcester in isolation; they are manifestations of wider problems facing rugby union.

Many in the rugby world see this as an opportunity to re-boot how top-flight domestic rugby is organised and release the commercial potential of a league with competitive, high-quality fixtures and good viewership.

Reforms being mooted to increase the financial viability of the Premiership include sticking to a £5m salary cap (which was due to rise to £6.4m next season) and a moratorium on relegation to protect clubs as they endeavour to recover from the financial harm caused by Covid-19. France's top-flight, the Top 14, is also being cited as a model for the Premiership to consider; French clubs have to fulfil a number of criteria to obtain a licence before the season to compete, including keeping 15% of their cost's projections in cash deposits and the requirement of a bank guarantee from any owner promising to bankroll financial shortfalls.

Whilst these reforms may be a step in the right direction, they are not going to address the fundamental issue of costs exceeding revenues. Until the RFU is able to address this basic business principle, rugby union's problems are likely to persist.

3 https://www.englandrugby.com/dxdam/7c/7c9084f4-5c11-4044-a696-0559bc3792f5/Regulation%205%20Appendix%202.pdf

4 https://www.englandrugby.com/dxdam/b3/b3d4e4f4-d5c9-45c6-bcc7-4234d368c45a/Regulation%205.pdf

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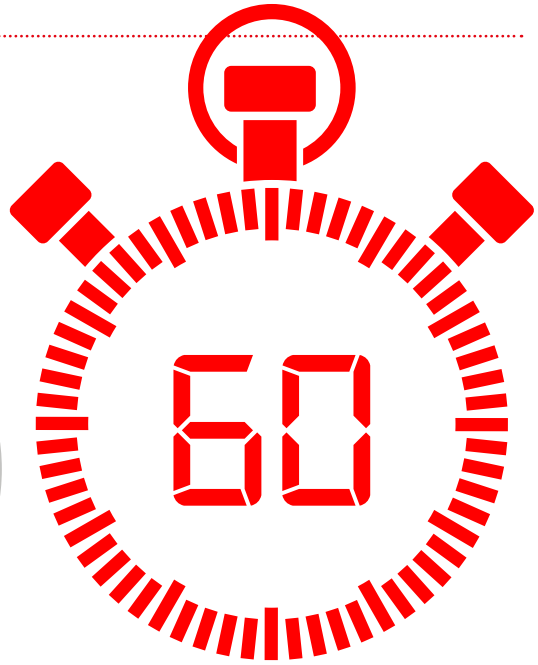

Q What do you like most about your job?

A I really enjoy being on my feet and am fortunate that my practice has me in court frequently. Fraud and insolvency in particular encompass a wide range of hearings so the variety keeps every day interesting.

Q What motivated you to pursue this specialisation?

A As a former accountant and unashamed number-nerd, fraud and insolvency were always going to be a natural fit when I changed career. They offer a really nice intersection of law with finance, and I enjoy the commercial context of the fraud and insolvency work that I see.

Q What is the most rewarding thing about your work?

A I'm sure all barristers are competitive people and like to be proved right. It is particularly gratifying to advise a client to take a particular course of action, for example a strike out application, and then to see it succeed in court.

Q Do you have any career aspirations, and have you achieved any of them so far?

A Moving to the Bar was itself my main career aspiration. Beyond that, I also wanted to take on pro bono work as my chambers has a fantastic pro bono track record. I managed to find one that matched my practice areas last year when I took on a cryptocurrency fraud case pro bono, which was incredibly interesting.

Q What do you see as being the biggest trends of 2023 in your practice area?

A I expect to see a surge in directors duties' claims following BTI v Sequana. Not only are claims against directors likely to be fertile ground following the surge of insolvencies since the pandemic, there were undoubtedly claimants who held off bringing claims until they could digest the judgment from the Supreme Court. Despite the Supreme Court guidance, the content of the creditors' interest duty is still somewhat nebulous and I expect we will see a wave of first instance decisions testing how it might manifest in the innumerable scenarios in which it could arise.

Q What has been your most memorable experience during your career so far?

A I'm sure no junior barrister forgets their first week on their feet in a hurry. Mine felt particularly momentous at the time as my first week on my feet included my first hearing in the High Court.

Q How do you deal with stress in your work life?

A I have to confess to having a sweet tooth and usually take out my stress out on Percy Pigs. 9/10 dentists would not recommend.

Q What is your ideal holiday?

A Somewhere cold and remote with nice walks and a cosy pub.

Q What was the last book you read?

A I started reading an Agatha Christie novel (Lord Edgeware Dies – that's the title, not a spoiler) at a cottage over Christmas. I ended up speed-reading the final few chapters to find out whodunnit before check-out.

Q What cause are you passionate about?

A I am sponsoring a guide dog called Kevin through guide-dog training school and love getting monthly 'pupdates' on his progress.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A I plan to do what I do every year – I will start the Couch to 5K running program and make it to around week 5 before deciding running is not for me.

Q What are you looking forward to in 2023?

A Week 5 of Couch to 5K.

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THE CHALLENGES OF FREEZING AND SEIZING RUSSIAN ASSETS

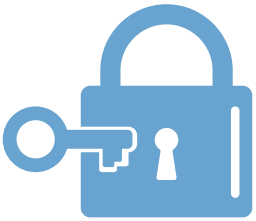
Authored by: Angelika Hellweger (Legal Director) - Rahman Ravelli

The reality of sanctions – and, more precisely, the limbo effect of sanctions freezes - is observable on a day-to-day level simply by walking along a number of roads in Central London.

One can see numerous Libyan properties that have been frozen since 2011. A brief view of such properties will often show that they are in need of extensive (and expensive) upkeep and upgrade work after such a long period of "freezing", in order for them to maintain their value.

However, to obtain a licence from OFSI (the Office of Financial Sanctions Implementation) to enable even simple maintenance work to be carried out on such frozen properties requires a process to be undertaken. This process is not likely to be completed swiftly, given the staffing and workload issues that OFSI is wrestling with in the wake of the 2022 sanctions imposed following Russia's invasion of Ukraine. Furthermore, the legal framework allows only for "necessary" maintenance work to be carried out. An applicant has also to explain in detail why the cost of this work can be considered reasonable – a task that may require the production of a huge amount of paperwork to be served as evidence. Given the fact that little is known officially about the maintenance works that were granted by OFSI in the past - or whether there were any judicial reviews in connection with maintenance works - applicants may be rather reluctant to start lengthy test cases.

The state of Libyan properties can be viewed as a sign of this situation. These properties can also be seen as an indicator of the future for many properties that have been frozen in the wake of sanctions imposed on Russia.



Freezing or unfreezing?

When it comes to frozen assets, the question that needs to be asked most often is "What's next?'' The answer may not be obvious. Assets cannot be frozen in eternity. They have to be either confiscated or unfrozen. There may be strong feeling against Russian activities in Ukraine but that does not make the legal situation any simpler. Politicians have proposed various "solutions" including seizing Russian oligarchs' properties and using them to temporarily house Ukrainian refugees. Such proposals might be popular with a large percentage of the general public, but it should always be remembered that any such course of action must not violate the rule of law.

It should also be pointed out that the use of the unexplained wealth orders (UWOs) in the UK to seize oligarchs' assets is not a fast and straightforward method.

Although their wealth might have been historically based on corruption, this wealth was acquired a substantial time ago and may have since become mixed with income from legitimate sources.

It can, therefore, be quite hard to prove that a specific villa in London or yacht was acquired with tainted monies years ago.

The EU has also worked on a legal framework on how to best freeze, seize and confiscate "private" Russian assets. Yet the EU legislation faces two specific hurdles:

* Many EU countries do not have the power to confiscate and liquidate these frozen assets unless they are the proceeds of crime

* The penalties for a breach of sanctions vary from member state to member state. Some see such breaches of sanctions as a criminal offence while others impose only an administrative fine. This has recently led the European Commission to propose making breaching sanctions a 'Euro Crime' – to ensure that all member states criminalise it and apply similar penalties.

Although the EU aims to confiscate private Russian and Belarusian assets, it will still be very difficult to use those assets for Ukraine's reconstruction. Usually, a confiscation of assets requires unlawful conduct. This will require an assessment of whether mere association with the Russian regime is sufficient to take such a course of action. A confiscation will often require criminal proceedings in which member state prosecutors will have to prove that either sanctions breaches occurred or that the assets were the proceeds of crime. And sanctions evasion offences are likely to have only limited reach as a starting point for asset seizure, given that they would only catch the specific proceeds of the sanctions evasion itself.

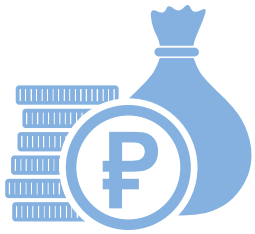
Challenges

The issue, therefore, is not as clear-cut as many would wish. Proving that assets were the proceeds of crime might be a far from straightforward procedure, as it is a route that will involve many challenges. Many of the so-called oligarchs bought assets in Europe more than twenty years ago, re-sold them and bought other assets, many of which now belong to family members and / or offshore companies. After so many years It will be hard to present convincing evidence that these assets were in fact proceeds of crime. Extensive legal challenges, legal proceedings lasting years and opposition by the respective sanctioned persons can be expected. Various yacht freezes and the legal challenges which French authorities are currently facing give a good insight into what is to be expected in the near future regarding other frozen assets.

When it comes to the freezing and seizure of an oligarch's assets based on allegations that the assets were proceeds of crime, one must also not forget the purpose of asset recovery. It is the process by which the proceeds of corruption transferred abroad are recovered and repatriated to the country from which they were taken or to their rightful owners.

However, in the case of the oligarchs' wealth, which was originally amassed decades ago, the rightful owners are in fact the Russian people and not the Ukrainians.

Thus, it is highly questionable how many "private" assets can in fact be seized and whether this amount will substantially contribute to the compensation of Ukraine.



Russian state assets

Nearly $300 billion of Russia's foreign reserves are held by seven sanction-imposing countries. The EU Commission recently made a proposal to start rebuilding Ukraine, whereby a structure would be set up to manage the frozen Russian state funds, invest them and use the proceeds in favour of Ukraine.

However, such a fund requires careful design, sound financial management to ensure its credibility and effectiveness, as well as procedures relating to oversight, monitoring, and accountability. What the decision-making process would look like, who would have ultimate decision-making power over such a fund, who oversees and audits the fund's investments (i.e., are transactions arms-length?) and who bears the ultimate responsibility and accountability would all be major issues that would have to be addressed and agreed upon.

The EU Commission further proposed that the return of the Central Bank assets to Russia should be linked to a peace agreement, which compensates Ukraine for the damages it has suffered. This may sound appealing and could prove popular with the general public. But there is the unanswered question of what happens if Russia does not voluntarily agree with this approach and Vladimir Putin demands that all types of sanctions measures - including the unfreezing of state reserves - are dropped as a condition for ending hostilities.

Ultimately, Russian state assets could be confiscated. Yet this comes with additional hurdles. The confiscation of state assets requires an even higher legal bar to be cleared than has to be for confiscating private assets. State assets are protected by international law and by state immunity. For example, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (although not in force yet) is regarded, at least in part, as customary international law. It clearly states that central bank property is covered by immunity from measures of constraint (see Articles 18, 19(c) and 21(1)(c)).

One should also not miss sight of the geopolitical implications of such a move. Should Russia's vast foreign dollar reserves be confiscated, those countries who are not allies of the US or EU may be less inclined to use the US dollar as the international reserve currency any longer, due to fear of future confiscations. The dollar as currency would then no longer be viewed as a safe haven, in particular by countries like China and other non-US / European allies. This may have a significant impact on financial markets – as the central role the US plays in the global economy would be minimised - and may even encourage China and others to establish an alternative system. Furthermore, non-US / EU allies might be incentivised to confiscate others' assets and to disregard property rights on a wider scale, which could put US / European investments in other parts of the world at greater risk.

Moreover, the US and European countries need to be careful that they are not seen to be disregarding the rule of law and principles of international law by implementing measures normally associated with autocratic regimes.

Conclusion

While there are many opinions being voiced about what could or should be done with frozen Russian assets, the situation may be one that takes years to be fully resolved. It is filled with legal challenges and is far from straightforward. And, as certain streets in London show, this may come to have an effect on the frozen assets themselves.

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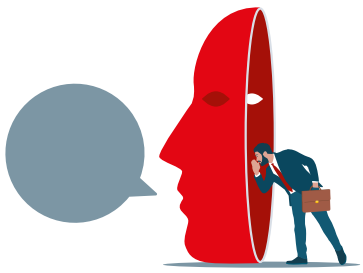
THE RISE OF APP FRAUD

Authored by: Christopher Ahearne (Managing Associate), Emma Armitage (Associate) and Richard Duggleby (Associate) - Mishcon de Reya

Authorised push payment (APP) fraud is nothing new. Every year, thousands of individuals and businesses fall victim to APP fraud and tricked into making a payment to a fraudster believing that it is going somewhere entirely legitimate. The monies are then transferred out to multiple accounts - often overseas, specifically to jurisdictions where recovery can be prohibitively expensive and time consuming.

APP fraud is on the rise – research from UK Finance shows that APP fraud had increased by over 30% in the first half of 2022 compared to the same period in 2020. It has been highlighted as one of the key fraud trends to watch out for in 2023 and reports suggest that APP fraud will double by 2026. There are several types of APP fraud, common examples include:

- Purchase scams - where victims are tricked into paying for goods that often do not exist. This is the most common type of scam accounting for 56% of all cases.
- Impersonation scams - where an individual poses as a member of bank staff or law enforcement who informs an individual that they have been the victim of a fraud. The individual is persuaded to transfer money to a "safe account" - which is in fact an account that the fraudster controls.
- Investment scams – where an individual transfers money to a fictitious investment, which is in fact merely an account controlled by the fraudster. This scam is often communicated via social media or email and can purport to be from a well-known bank or investment firm.



What routes of recovery do victims have?

Claim against the bank

Victims may be able to pursue a claim against the bank with whom they hold the account which was used to make

payment to the fraudster. The recent Court of Appeal decision in Philipp v Barclays Bank UK PLC [2022] EWCA Civ 318 confirmed that it was "arguable" that the Quincecare duty arises in the context of APP fraud. In this case, Dr and Mrs Philipp were tricked into transferring over £700,000 of their life savings to two accounts in the UAE. The fraud took place over several weeks. Dr and Mrs Philipp had received a fraudulent notification of a 'suspicious payment' on an account they held with Barclays. The fraudster convinced the couple through a series of phone calls that they were cooperating with the Financial Conduct Authority and the National Crime Agency to bring the fraudster to justice and the couple ultimately instructed Barclays to transfer £400,000 and £300,000 to separate bank accounts in the UAE where they believed their money would be safe. They lost all of it.

Mrs Philipp issued proceedings against Barclays relying on the Quincecare duty owed by it. Barclays argued that the Quincecare duty did not extend to a duty to protect Mrs Philipp against the consequences of her own decisions, where her payment instructions were valid and not in and of themselves fraudulently given. The Court of Appeal granted Mrs Philipp's permission to continue proceedings against Barclays, extending the Quincecare duty to the customers of a bank, and not just their agent.

Permission has been granted to appeal the Court of Appeal's decision in Philipp v Barclays Bank, in particular the court will consider whether the Quincecare duty applies when instructions given to the bank come directly from the customer and not through an agent. The appeal is due to be heard in the Supreme Court on 1 and 2 February 2023.

Financial Ombusdman Service

Victims may be able to seek limited recourse against the bank through a complaint to the Financial Ombudsman Service, although any award under that scheme is limited to a maximum amount of £375,000.

Claim against the fraudster

The main difficulty when pursuing claims against APP fraudsters is that, upon receipt of the victim's money, the funds are often swiftly transferred into multiple accounts across a number of jurisdictions. However, where the victim is able to act swiftly enough, injunctive relief such as worldwide freezing orders remain an extremely powerful tool.

Regulatory changes

As Philipp v Barclays Bank demonstrates, there is a lack of clarity on the duties owed by payment service providers (PSPs). The Payment Systems Regulator (PSR) has published proposals for a mandatory reimbursement and cost allocation for APP fraud.

In July 2022, the Financial Services and Markets Bill was published, setting out a new proposed power for the PSR to require mandatory reimbursement of APP fraud victims by PSPs. In September 2022, the PSR issued a further consultation paper setting out proposed changes including:

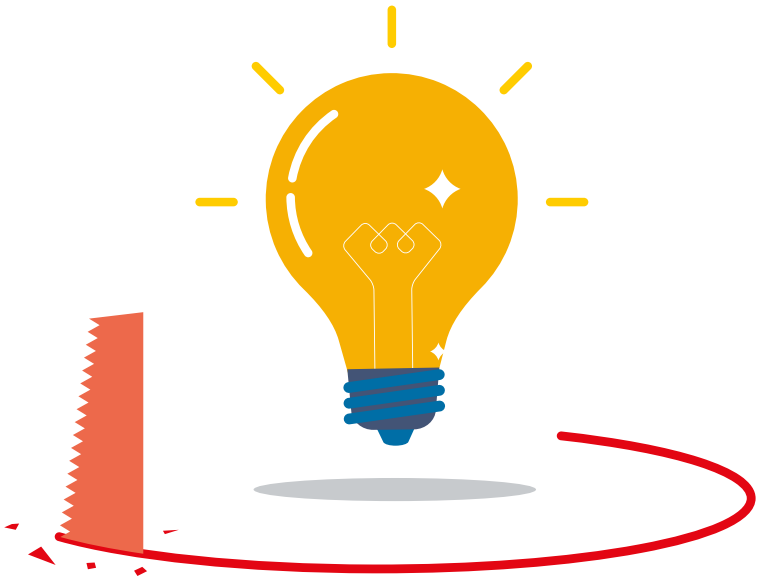
- The requirement for banks to publish data on their performance in relation to APP fraud (proposed to come into effect from 2023); and
- The requirement for banks to reimburse customers who are victims of APP fraud within 48 hours (proposed to come into effect from 2024), with "only limited exceptions" such as first party fraud or gross negligence, a de minimis threshold of no more than £100 for claims and a limitation period of 13 months.

The PSR intends to publish a policy statement on mandatory reimbursement early in 2023.

APP fraud in 2023

Individuals and businesses should be alert and also take extra care if investing in cryptocurrencies. The majority of cryptocurrencies are not regulated by the FCA, meaning they are not protected by the Financial Services Compensation Scheme ruling out one possible avenue of redress.

This is a rapidly developing area. Many will be watching for the outcome of Philipp v Barclays Bank, which will potentially widen the scope for claims by victims against their bank. In addition, it is clear from the regulatory changes set out above that both the Government and the PSR believe that banks should be at the forefront of the battle against fraud.



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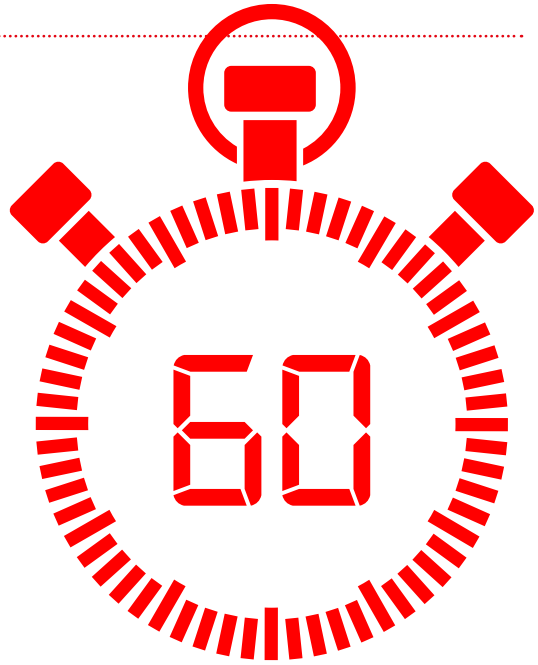


Q What do you like most about your job?

A Finding ways to defy the odds (or at least trying to!) when the facts are against our clients.

Q What motivated you to pursue this specialisation?

A It represented an attractive blend of rules, principles, strategy and competition. I am eternally grateful to my trainee supervisor, Adam Johnson, for bringing to life the joy of 4D chess!

Q What is the most rewarding thing about your work?

A Meeting and working with some of the finest legal and commercial minds.

Q Do you have any career aspirations, and have you achieved any of them so far?

A One was to appear in the Supreme Court, which I was fortunate enough to fulfil in 2019 in Marex v Sevilleja Garcia. As for the others – time will tell!

Q What do you see as being the biggest trends of 2023 in your practice area?

A The uncovering of ever more creative and complex frauds as economic conditions continue to harden and creditors (particularly HMRC following the return of the Crown preference) are emboldened to take a harder line with debtors leading to the appointment of sharp-eyed insolvency practitioners.
I think that 2023 will also be the year that we see an uptick in ESG litigation, but with the pervasive question lingering – who will really be the beneficiaries of such actions?

Q What has been your most memorable experience during your career so far?

A Changing the law on reflective loss following the decision from the Supreme Court in Marex v Sevilleja.

Q How do you deal with stress in your work life?

A It is a three stage process of escalation: (1) I explain the problem to my brilliant wife who then tells me to stop worrying; (2) if (1) does not succeed (a rarity) – a long run; and (3) if (1) and (2) fail – Malbec.

Q What is your ideal holiday?

A South Africa – Safari, phenomenal wines, stunning landscapes (desert, mountains, coastlines etc.) and the gastronomic riches of Cape Town.

Q What was the last book you read?

A Stanley Tucci - Taste

Q Do you have a favourite food?

A Italian, particularly Spaghetti alle vongole

Q What cause are you passionate about?

A The prevention of wildlife trafficking, particularly ivory poaching. I have been fortunate enough to be involved in some projects in this area via pro bono schemes.
There are some incredible charities operating in this space (Tusk Trust and the Big Life Project, to name but two) who are pulling together multi-disciplinary teams to tackle an ever growing and multi-jurisdictional issue.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A To run another marathon and to complete my WSET level 3. As to how to keep them – I think by keeping the two strictly separate!

Q What are you looking forward to in 2023?

A My son's first steps

COMMITTAL APPLICATIONS FOR CONTEMPT OF COURT:

RECENT DEVELOPMENTS AND PERSPECTIVES

Authored by: Daniel Saoul KC (Barrister) and Usman Roohani (Barrister) - 4 New Square

The Courts have recently heard a number of high-profile cases which shine a spotlight on applications for committal for contempt of court in civil litigation.

Such proceedings, where the defendant's liberty is at stake, carry a tension between the public interest in encouraging parties to comply with court orders and punishing contempt, on the one hand, and the need to deter claimants from pursuing such applications oppressively, on the other. In the fraud, insolvency and asset recovery arenas, a committal application will generally be made as an ancillary application to underlying proceedings. Such litigation is often hostile by nature. But the question of when a committal application can or should properly be brought, and when it should not, is one which has weighed heavily with the Courts recently.

The delicate nature of such applications is apparent from two significant decisions handed down over the last 18 months.

In Navigator Equities v Deripaska, a contempt application issued against Mr Deripaska was struck out at first instance. The Judge condemned the application as having been pursued in an "aggressive, partisan fashion, as if it were just the latest round in this long-running, 'no-holds barred', commercial litigation wrestling match".

The clear message was that a very high bar had been set: claimants were only to prosecute contempt applications dispassionately and as guardians of the public interest.

Mr Deripaska's victory was short-lived. The Court of Appeal dramatically reversed the outcome in November 2021, reasoning that the judge had overstated the restrictions on a claimant. Centrally, there was no requirement that a claimant in a civil contempt application act wholly impartially as a 'quasi-prosecutor'.

The Court of Appeal's judgment may well have encouraged the claimants in MBR Acres Ltd v McGivern to assert an 'entitlement' to bring contempt proceedings. However, this argument was given short shrift by Nicklin J who, by his judgment of August 2022, dismissed the application with significant criticism.

Navigator Equities v Deripaska

The backdrop is many years of hostile litigation between the protagonists Vladimir Chernukhin and Oleg Deripaska.

The contempt application concerned Mr Deripaska's undertakings to the effect that certain shares in a Jersey company would remain available for the enforcement of an arbitral award. By December 2018, the company's shareholders had approved a corporate redomiciliation to Russia. The redomiciliation took effect by August 2019 and, by October 2019, Mr Deripaska had paid the award.

Despite the fact that the award had been paid, in November 2019 Mr Chernukhin launched contempt proceedings, seeking an order that Mr

Deripaska be committed to prison for procuring the redomiciliation in breach of his undertakings.

A four-day trial before Andrew Baker J concluded at half time, with the judge finding the application to be abusive. Andrew Baker J's reasons included (i) his finding that the contempt application was motivated by personal animosity and a 'tit for tat' desire for revenge (following Mr Deripaska's refusal to drop a private prosecution against Mr Chernukhin), and (ii) his view that it was presented in a "heavy-handed, aggressively partisan fashion, that was inappropriate, vexatious and unfair to Mr Deripaska". Three central points emerged from the judgment:

(i) Contempt proceedings may be struck out as abusive if brought otherwise than for the legitimate purpose of seeking enforcement of an order or undertaking, or bringing a contempt to the court's attention. It is at least arguable that this starting point survives the Court of Appeal's subsequent judgment.

(ii) Contempt proceedings have a distinct character, bearing hallmarks of criminal proceedings. One consequence is the particular capacity for contempt applications to be used vexatiously to further private interests. As observations of tactical and strategic considerations of general application, these remarks may also survive the Court of Appeal's judgment.

(iii) In consequence of this 'quasi-criminal' character, a claimant pursuing a contempt application does so effectively as a quasi-prosecutor serving the public interest. A claimant must, therefore, act dispassionately. This requirement, while based on authority recounted by Andrew Baker J, no longer survives the Court of Appeal's judgment.

The Court of Appeal held that there is no requirement to act wholly impartially when pursuing civil contempt proceedings and that the claimant's subjective motives are irrelevant. In addition to two 'misapprehensions' concerning the shares and the redomiciliation, the Court of Appeal departed from the judge's reasoning in two key respects:

(i) The judge was wrong to treat the claimant's subjective motive as a ground for finding abuse. Where a contempt application is made in accordance with the procedural requirements, is properly arguable on the merits and has the effect of drawing an allegedly serious contempt to the court's attention, the fact that it may be motivated by a personal desire for revenge is not a valid basis for striking it out. The court recognised that there will nearly always be a degree of animus between the parties to a committal application.

(ii) The judge was wrong to require, effectively, that the application be prosecuted solely in the public interest. While deprecating undue aggression and hostility, the court recognised that applicants for contempt have a legitimate private interest in the outcome of the application, even where it was no longer necessary to seek enforcement of an order or undertaking. To suggest that such applicants should act as wholly disinterested parties would unduly discourage litigants from pursuing contempt applications.

MBR Acres Ltd v McGivern

In this case, the High Court dismissed a contempt application against a solicitor for allegedly breaching an injunction obtained against 'persons unknown'. Nicklin J found that the defendant solicitor had no notice of the injunction or its terms, the allegations of breach were trivial or wholly technical, and the contempt application itself was frivolous.

The court then considered the bold submission, itself likely based on the Court of Appeal's approach in Deripaska, that "the Claimants were "entitled" to bring the contempt application". Nicklin J dealt with this argument decisively, first by summarising the argument that the claimants contended to be:

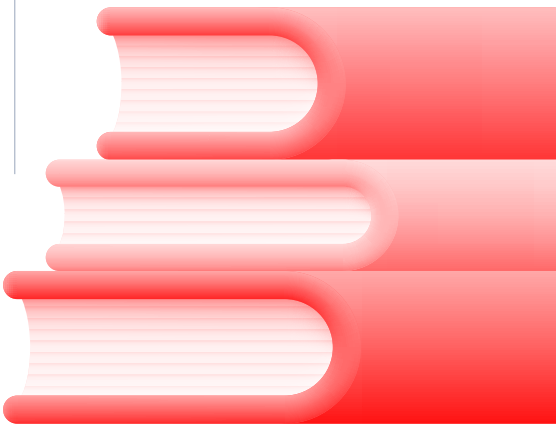
"entitled" to spend two days of Court time and resources pursuing an application that, on an objective assessment of the evidence, was only ever likely to end with the imposition of no penalty; and "entitled" to put a solicitor through the ordeal of a potentially career-ending contempt application and all the disruption that it has caused to Ms McGivern's work and the impact it has had on this litigation."

And then by concluding:

"There is no such "entitlement"."

Concluding remarks

Contempt applications remain a significant tool in the armoury of civil fraud litigators (for another example from 2022, see Ocado v McKeeve). But the decision as to whether to bring a committal application for contempt of Court remains a delicate one: whilst the Court of Appeal in Deripaska rejected the notion of an applicant being akin to a criminal prosecutor, care should still be taken in relation to the bringing of applications which are inevitably of real gravity, and are almost always time consuming and expensive to pursue. It appears clear that the courts will continue to police the jurisdiction to guard against its misuse, albeit that an applicant is not expected to act dispassionately nor to be motivated purely by the public interest. No doubt, how parties navigate these guiding principles in 2023 will be keenly watched by lawyers practising in this field.



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Paul Barford
Founder/Director
T: (+44) 20 7101 4155
E: paul@thoughtleaders4.com

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