FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 9

FIRE INTERNATIONAL 2022

Vilamoura Edition

Supplement: The International Law Book Facility Essay Competition

Celebrating 15 years of the ILBF that won an undergraduate student an internship at Brown Rudnick.

Looking back from 2030, what should be done to transform the legal profession to ensure access to justice for all.

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THE FLAGSHIP ASSET RECOVERY EVENT FOR THE GLOBAL FRAUD & INSOLVENCY COMMUNITY

INTRODUCTION

"One's destination is never a place, but a new way of seeing things."

Henry Miller

We are delighted to present Issue 9 of FIRE Magazine in conjunction with the flagship Asset Recovery event for 2022, FIRE International in Vilamoura, Portugal.

In this FIRE International edition, our authors provide insight from the UAE, UK, BVI, Switzerland, India, US, Cyprus and Australia on issues and updates affecting FIRE practitioners. We also hear from some of our speakers at FIRE International in our series of 60 seconds with interviews.

We are also delighted to feature a supplement for the **International Law Book Facility Essay Competition** where we hear from Jude D'Alesio of Bristol University, the winner of the competition and his insightful essay that earned him an internship at Brown Rudnick.

Thank you to all of our members and community partners for their continued support, we hope you enjoy this abounding FIRE issue.

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DEVELOPMENTS IN THE UAE

Authored by: Peter Smith - Charles Russell Speechlys Dubai

The rising strength of the United Arab Emirates as a commercial powerhouse has continued as the Covid-19 pandemic recedes. The UAE was a key business hub prior to 2020, but the flow of money and talent into the country has increased since then, driven by numerous factors including the UAE's business-friendly climate, its stable political regime, and the access to fair and transparent justice mechanisms.

Of particular interest to international fraud and insolvency practitioners has been the rise of the UAE as a cryptocurrency hotspot: the Emirate of Dubai issued its first law governing digital assets and formed a Virtual Asset Regulatory Authority in March 2022, which subsequently issued one of its first licences to Binance, reportedly the world's largest cryptocurrency exchange. The UAE has also been selected to lead the 'Agile Nations' network of seven countries (including the UK, Canada, Denmark, Italy, Singapore and Japan) with a declared focus on digital assets and their regulation, and the development of the metaverse.

Abraaj and NMC

The UAE's various insolvency schemes are being bedded down, following the introduction of the UAE Bankruptcy Law (Federal Decree Law No. 19 of 2016) and the UAE Insolvency Law (Federal Decree Law No. 19 of 2019) [1]. These 'onshore' laws supplement the civil and commercial laws applied in the financial free zones of the Abu Dhabi Global Market and the Dubai International Financial Centre, who have their own insolvency regimes drawn from the common law (the ADGM Insolvency Regulations 2015 and DIFC Law No. 1 of 2019 respectively).

Covid-19, supply and demand side shocks and changes in family enterprises (the bedrock of the GCC private economy) have kept insolvency practitioners busy. The most prominent contentious insolvency of recent years has been that of the Abraaj group, once believed to be the world's largest private equity group with over US$ 13 billion of assets and offices globally. In 2019, limited partners who had invested in Abraaj's funds, most notably the Bill and Melinda Gates Foundation, complained that their investments were being fraudulently deployed other than in accordance with their agreed terms. The group holding company and its investment management arm are being wound-up in the Cayman Islands, but the effects (and other insolvencies) have been felt in the UAE:

1 The UAE laws refer to 'corporate bankruptcy' and 'personal insolvency', a reversal of the usual terms.

in January 2022, the Dubai Financial Services Authority fined the former CEO, Arif Naqvi, a record US$ 135.6 million, and its former COO, Waqar Siddiqui, a further US$ 1.2 million over their roles in Abraaj's demise. Criminal proceedings are also underway in several jurisdictions.

The collapse, administration and recent exit from administration of the NMC group is also notable. In 2018, NMC – principally a collection of health-related businesses in the UAE – was worth over US$ 11 billion and was included in the FTSE 100 after listing on the London Stock Exchange in 2012. Syndicates of banks had fuelled NMC's growth and, following allegations of financial mismanagement including an understating of group debt by over US$ 4 billion, the group filed for bankruptcy. With the support of the management, owners and creditors, in late 2020, 36 group companies incorporated around the UAE were recognised as going concerns and were re-registered in the ADGM so that the ADGM Court could manage their administration under ADGM insolvency law. The ADGM was recognised as providing specialist and experienced legal and company administration services, rendering judgments and orders easily enforceable elsewhere in the UAE and abroad. After a debt restructuring, the companies attracted over US$ 325 million of investment and exceeded their annual revenue targets, following which, in March 2022, they left administration under the guise of a new holding company.

The KBBO litigation

Cross-border judicial co-operation on insolvency within the UAE has not all been plain sailing, however. The DIFC and ADGM insolvency laws sets out the assistance which their jurisdictional courts can give to "foreign" insolvency proceedings, including other proceedings within the UAE under the UAE Bankruptcy Law, with reference to the UNCITRAL Model Law on Cross-Border Insolvency. The UAE Federal laws do not, however, contain corresponding provisions and the UAE do not have a national version of the Model Law.

The DIFC Court of First Instance considered these issues in the case of *In the matter of an application by Salem Mohamed Ballama Altamimi and others* [2021] CFI 085, 4 March 2022, where Justice Sir Jeremy Cooke refused to stay claims worth hundreds of millions of US dollars in the DIFC Courts by inter alia a collection of banks against corporate debtors (known as the KBBO group) who had defaulted under various loans, and their personal and corporate guarantors.

The individual defendants had challenged the Courts' jurisdiction, alleging their signatures had been forged on loan agreements and guarantees, and sought relief from the Dubai Courts, thereby triggering a referral to the Joint Judicial Committee established by Dubai Decree 19 of 2016 to decide on intra-Dubai jurisdictional disputes, which delayed the DIFC debt claim proceedings. However, at the same time the KBBO group had entered a restructuring process under the Federal Bankruptcy Law, with an amin (akin to a trustee) appointed by the Abu Dhabi Courts.

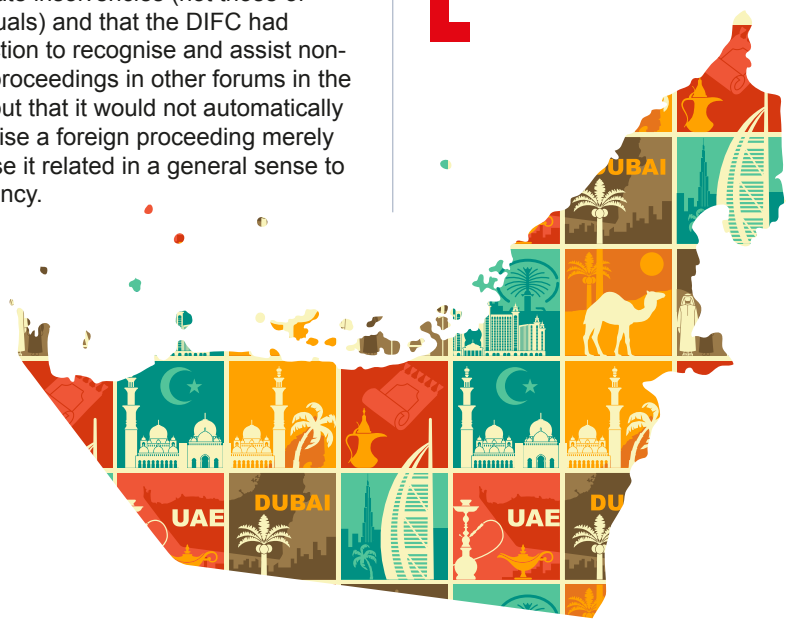
In declining an application (amongst others) by the amin to recognise the Abu Dhabi bankruptcy and insolvency proceedings as foreign proceedings under DIFC insolvency law and stay all proceedings in the DIFC against the debtors, Justice Cooke found that DIFC insolvency law only applied to corporate insolvencies (not those of individuals) and that the DIFC had jurisdiction to recognise and assist non-DIFC proceedings in other forums in the UAE, but that it would not automatically recognise a foreign proceeding merely because it related in a general sense to insolvency.

The abolition of the DIFC-LCIA and the growth of DIAC

There have been few developments of note for fraud litigators, save that the Dubai dispute resolution community has been dealing with the fall-out following the abolition of the DIFC-LCIA Arbitration Centre in September 2021 by Dubai Decree 34 of 2021, and the management of all arbitrations initiated since that date by the Dubai International Arbitration Centre ("**DIAC**").

In March 2022, new institutional rules for the conduct of DIAC arbitrations were released, coming into effect very shortly afterwards. The new rules were the first update since 2007 and the amendments largely brought the rules into line with international best practice, for instance allowing the consolidation of claims, the joinder of third parties, express provision for third party funding, providing an express procedure of expedited and emergency arbitration, and setting out the tribunal's powers to order interim measures.

Perhaps most interestingly to fraud practitioners, the default seat of arbitration under DIAC's rules was switched from the Dubai to the DIFC Courts, and the 2022 rules confirmed that tribunals had the power to award parties their legal fees, ending uncertainty under the 2007 rules.



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RECEIVERSHIP:

DRACONIAN OR NOW VERSATILE?

Authored by: Marcia McFarlane - Harneys

Introduction

Receivership; a draconian remedy of last resort. However, today, receivers are appointed to address a wide range of legal circumstances. This article summarises some features of the court appointed receiver. No attention is therefore given to the receiver who is appointed in the commercial context to enforce the security given over an asset by way of a mortgage or charge over shares.

A receiver is traditionally appointed to get in and hold or secure funds or other property for the benefit of those with an interest in the property. Receivership is primarily an enforcement procedure. It contrasts with liquidation in that it is not a collective insolvency procedure for the benefit of the general body of creditors or the company.

The primary sources of law regarding receiverships in the BVI are: (i) the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80, s24; (ii) Part IV of the Insolvency Act 2003 (**the 2003 Act**), (iii) Part VI of the Insolvency Rules 2005 (**the 2005 Rules**); and (iv) common law and equitable principles derived from English law.

Process and court considerations for appointment

The process for the appointment of a receiver commences with a notice of application to the court supported by affidavit evidence. To exercise its discretion, the court needs to be satisfied from the supporting evidence that it is just and convenient for a receiver to be appointed. The court will determine whether to attach conditions to an appointment. On a case-by-case basis, the court will determine whether the applicant is required to provide a cross undertaking in damages.

The law has evolved to accommodate a wide range of circumstances in which the court will exercise its discretion to appoint a receiver. Following decisions like *Parker v the London Borough Council of Camden* [1986] CH 162 and *Masri v Consolidated Contractors International (UK) Ltd No 2* [2009] QB 450, the BVI court has appointed receivers by way of equitable execution, to secure assets subject to a freezing injunction, or to protect and preserve assets pending litigation. The BVI Court will follow English law to appoint receivers in the context of a joint venture, where there has been a misappropriation of assets, fraud or bribes.

The types of assets over which a receiver may be appointed are as follows:

- Shares
- Bank accounts
- Reserved rights under a trust
- LLP interests
- Contractual rights
- Beneficiary entitlement

Effect of appointment

The appointment of a receiver over the assets of a company does not affect its corporate existence but it places in

abeyance, the company's powers to conduct its business. This therefore means that the company, acting by its directors, have no power to enter into business contracts, sell, pledge or otherwise dispose of any property that is in the receiver's possession or under his control. Otherwise, directors remain in office and their powers remain exercisable so far as they are not incompatible with the right of the receiver to exercise the powers conferred on him.

Duties

A court appointed receiver is an officer of the court who is to be nothing more than the hand of the court with only the power and authority given to him by the court.

The receiver's primary duty according to the 2003 Act, is to exercise his powers in good faith and for a proper purpose and in a manner he believes, on reasonable grounds, to be in the best interests of the person in whose interest he was appointed. To the extent consistent with his primary duty, the receiver is to have reasonable regard to the interests of: (i) the company; (ii) its creditors; (iii) sureties who may need to fulfil obligations to the company; and (iv) persons, claiming through the company, to having an interest in assets over which the receiver is appointed. The persons listed at (i) - (iv) are collectively referred to as ***Interested Parties***.

On appointment, the receiver is required "forthwith" to notify the company and the Registrar of Corporate Affairs of his appointment.

Powers

The receiver's powers come from the order appointing him. His express powers include the implied authority to do acts that are incidental to, or consequential upon the express power. Where the receiver needs to take steps to preserve an asset, but he does not have express or implied power to undertake the task, he will need to seek the court's permission.

Additionally, the 2003 Act gives the receiver statutory powers that will apply unless expressly dis-applied by the court's order. The receiver has power to: (i) demand and recover income generated by the secured asset, whether by action or otherwise; (ii) issue receipts for income recovered; (iii) manage, insure, repair and maintain the secured assets and (iv) exercise on the company's behalf, the right to inspect books or documents relating to the secured asset, which is held by someone other than the company.

Vesting of assets

The appointment of a receiver over a company does not automatically vest the assets of the company in the receiver. He is entitled to possession of the assets over which he is appointed and the parties hold the assets for him as custodians. Under BVI law, if a receiver is appointed over shares, he will need to have the shareholder execute a share transfer form to effect the transfer of shares to him. If he is to exercise voting powers to change control of a parent company or its subsidiary boards, this power must be expressly given as his appointment does not vest this right in the receiver. For property located in a foreign jurisdiction, the receiver would need to obtain possession of the foreign assets in accordance with the laws of that jurisdiction.

Liability of the receiver-sale of assets

When exercising a power of sale, the receiver owes duties to the Interested Parties to sell for the best price reasonably obtainable and to segregate the monies he receives from the secured asset from other monies under his control. The receiver will be in breach of his duties if, on selling an asset, he fails to obtain the best price reasonably obtainable and fails to have reasonable regard to the Interested Parties. He will not be able to assert the defence that he acted as an agent of the company or under a power of attorney. He will also not be entitled to compensation or indemnity from the company's assets for liabilities arising because of his breach of duty in relation to the secured asset. Subject to the receiver fulfilling his duties to Interested Parties, he is personally liable for contracts he enters into to secure the asset. He is however entitled to indemnification from the assets of the company.

Routes to challenging the receiver

Only specific categories of persons may apply to the court to seek the removal of the receiver provided they can justify the removal. The 2003 Act gives standing to the company, its directors, creditors or any person with a legitimate interest in his removal. In *JTrust Asia Pte v Mitsuji Konoshita and anor* Appeal No 31/2020, 31 May 2021, the Court of Appeal confirmed the guiding principles for challenging a receiver's decision in relation to the exercise of his powers. The threefold considerations are: (i) whether he has power to perform an act; (ii) whether he genuinely holds the view that the act will benefit the company and its creditors; and (iii) whether he is unconflicted and acting rationally.

Completion of receivership

The receiver is entitled to remuneration as agreed by the person appointing him or as may be fixed by the court. On completion of the receivership, the receiver should notify the company and file a notice of completion with the Registrar of Corporate Affairs.

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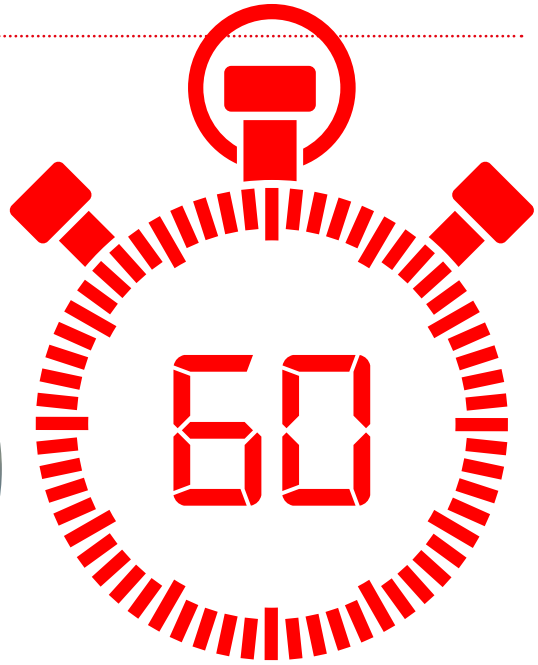

Q What do you like most about your job?

A The sheer pace and the sense of the unexpected. We work a great deal within rules and structures, but you never know quite what is coming next, and this also requires great discipline and speed of reaction. I absolutely love the crucible-effect of trial and cross-examination, an environment in which anything can happen despite (or maybe sometimes because of) the most careful and rigorous preparation.

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

A Who knows? Probably writing novels and living in the Yorkshire Dales, at least for a little while.

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

A Full disclosure is definitely impossible!! I have had some extraordinary conversations with extraordinary people. That exposure to complex personalities and narratives keeps this job endlessly interesting.

Q What has been the best piece of advice you have been given in your career?

A Always keep improving.

(Also, and this one I live by, invest in good help. Delegate anything whatsoever that makes your life easier and helps you to maximise your quality time. Time quickly becomes the ultimate luxury if you are ambitious and working hard).

Q What is the most significant trend in your practice today?

A An involvement in a series of large-scale fraud and conspiracy claims – these are immensely interesting and challenging and have shaped the last few years of my practice. I have built great experience managing teams able to take on and succeed in this type of litigation which requires very specific skills.

Q What personality trait do you most attribute to your success?

A Good judgment and confidence in it.

Q Who has been your biggest role model in the industry?

A No one single person, but several powerful influences including some marvellously talented and courageous women at the Bar who have pushed forward against all of the more and less obvious obstacles to womens' success in this profession and have inspired me to try to do the same.

Q What is something you think everyone should do at least once in their lives?

A Everyone is so different but, perhaps, take a great journey to somewhere unknown and to do so alone.

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

A In all seriousness, my three little girls are all that come to mind. Less seriously, coffee + Third Space (London's most brilliant gym).

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

A Maybe The Shadow and Evil in Fairy Tales, Marie-Louise von Franz. It is fascinating and full of truth about how people behave and react. Day to day, I read almost exclusively fiction however.

Q What would be your superpower and why?

A Some kind of healing power, I guess, and that needs no real explanation.

Q As a speaker at FIRE International, what are you most looking forward to at the event?

A A few glasses of rosé and a lot of excellent conversation. It is so wonderful to see people back together again.

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QUINCECARE: A PANACEA FOR VICTIMS OF APP FRAUD?

Authored by: Dipti Hunter and Kit Smith - Keidan Harrison

The Court of Appeal recently handed down judgment in the case of *Fiona Lorraine Philipp v Barclays Bank UK Plc*. It is a judgment that is likely to have far reaching ramifications as it potentially widens the scope of the *Quincecare* duty of care owed by banks to their customers, far beyond the previously understood confines of that duty.

The *Quincecare* duty was first established in the 1992 case of *Barclays Bank Plc v Quincecare Ltd.*[1] At the time, it was regarded as an extension of the duty of care that banks are said to owe to their customers (including compliance with their instructions), which was established in the preceding case of *Lipkin Gorman v Karpnale*[2]. In the *Quincecare* case, Mr Justice Steyn (as he then was) described the duty as one whereby[3]:

> "a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company."

In its recent decision, finding in favour of Mrs Philipp, the Court of Appeal agreed that the Judge at first instance had engaged in a "mini trial" of the facts and had wrongly ordered summary judgment in favour of Barclays Bank UK Plc ("**Barclays**"). Strikingly, rather than leaving the matter there, Lord Justice Birss (delivering the leading judgment) went further by commenting on the construction of the Quincecare duty of care, as regards individual customers (as opposed to corporate customers, which the duty had previously been understood to exclusively apply to).

Background

In 2018, Mrs Philipp and her husband were duped by a fraudster, who purported to act for the FCA. As a result, Mrs Philipp instructed Barclays to transfer over £700,000, in two payments, to separate bank accounts in the United Arab Emirates. Mrs Philipp believed what she was doing was moving the money into safe accounts to protect it from fraud. The accounts were no such thing and by the time the fraud

1 Barclays Bank plc -v- Quincecare Ltd [1992] 4 All ER 363
2 Lipkin Gorman -v- Karpnale [1989] 1 WLR 1340
3 Quincecare

was discovered, the money was gone. This type of deception and subsequent payment is commonly described as an authorised push payment ("**APP**") fraud.

Mrs Philipp's claim against Barclays is for breach of duty. The duty that is said to be owed to Mrs Philipp is characterised as a duty to observe reasonable care in and about executing her instructions, as such it was said to be a specie of the duty identified in *Quincecare*.

At first instance, Barclays argued that the *Quincecare* duty was irrelevant because it was Mrs Philipp that gave the instructions to make the transfers. Barclays position was that the *Quincecare* duty is only concerned with the proper ascertainment of instructions and arises when the instructions are being given by an agent, usually an agent of a company. If the agent's instructions are vitiated by fraud then the bank has no proper instructions at all, and that is how such a duty, to not do what the bank is apparently instructed to do, can arise. It followed that the first instance court agreed with Barclays and granted summary judgment in its favour.

Renewed scope for Quincecare

Departing from the first instance decision, the Court of Appeal rejected Barclays' submission that the *Quincecare* duty of care does not extend to cases such as Mrs Philipp's because she gave instructions to deal with her own funds. In rejecting this submission, Lord Justice Birss examined the relationship between the bank and its customer, making the following key findings:

1. In the context of an instruction to pay, the bank is the agent for the customer as principal;
2. If a banker executes instructions that they know are an attempt to misappropriate funds, then the bank would be liable for the losses flowing from that transaction;
3. What lesser state of knowledge will put the bank under a legal obligation to the principal? Following the reasoning in *Singularis* the Court held that "*if the circumstances were such that an ordinary prudent banker would be "on inquiry" then the duty arises*".
4. The duty of a banker is to not execute the order while on inquiry and to make inquiries. The purpose of this duty, the Court of Appeal held, is to protect the customer.

Crucially, the Court of Appeal found that as a matter of law the Quincecare duty:

> "*does not depend on whether the instruction is being given by an agent. It is capable of applying with equal force to a case in which the instruction to the bank is given by a customer themselves who is the unwitting victim of APP fraud provided the circumstances are such that the bank in on inquiry that executing the order would result in the customer's funds being misappropriated.*"

The Court of Appeal also rejected Barclay's submission that even if a bank actually knew that a customer's instruction to pay was a mistake arising from the customer having been deceived by a fraudster "*the bank's only duty to the customer would be to execute the order.*"

In rejecting this proposition, the Court of Appeal noted that the bank's duty of care to execute a customer's instruction (per the mandate) is "*not absolute*" but is subject to its duty of care owed to the customer when carrying out those instructions.

A bank's obligation to comply with its customer's instructions does not extend to "unthinkingly" executing each and every payment instruction given by that customer.

In essence, banks cannot close their eyes to instructions and the surrounding circumstances that would otherwise put them on notice.

As to Barclays' submission that such an expanded duty of care would represent an "*onerous and unworkable burden on banks*", the Court of Appeal disagreed and in doing so cited the existence of the voluntary codes of practice adopted by Barclays at the time of Mrs Philipp's losses, such as the Contingent Reimbursement Model.

Ultimately, the Court of Appeal found that the duty owed by banks to their customers (including individuals) may arise in the case of a customer directly instructing their bank to make a payment out of their personal account, when such an instruction has been induced as part of an APP fraud. This is to be contrasted with the previous line of decisions arising out of *Quincecare* claims, which followed the reasoning that a bank's duty was only engaged where an agent of a customer (typically a corporate entity) gave instructions to the bank that were fraudulent and in these circumstances should have put the bank on inquiry leading them to refuse to execute the payment instruction.

What comes next?

Barclays now faces a difficult decision – seek to appeal to the Supreme Court where (subject to permission being granted) the duty will be further clarified, or settle Mrs Philipp's claim and prevent further development of the law in this fast-developing area. In any event, it is clear that the courts expect banks to play an ever more proactive role in the fight against fraud and there was more than a hint of policy behind the Court of Appeal's decision in *Philipp*.

The proposition that banks, equipped with extensive and sophisticated software monitoring banking transactions and patterns, can simply avoid any liability by pointing to a strict compliance with payment instructions, was held to be unacceptable. No longer can banks simply say that their only obligation is to execute their client's instructions in order to discharge their duties.

Accordingly, there is a tension for banks between complying with the terms of the mandate in a timely fashion and investigating instructions potentially induced by fraud in order to protect its own position. Getting this balancing act wrong could be costly. With a reported 149,946 incidents of APP scams with gross losses of approximately £479 million in 2020 [4], the Philipp decision may mean banks are having dip into their own funds to cover the sums lost.

For now at least, there appears to be an emphasis on banks protecting their customers from themselves and in the age of such sophisticated automated security settings in the banking industry, this appears to be a modernised interpretation of the duty first set out by Lord Steyn in 1992.

4 https://www.ukfinance.org.uk/system/files/Fraud%20The%20Facts%202021-%20FINAL.pdf

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FREEZING OLIGARCHS' ASSETS: YES, BUT...

Authored by: Yannick Poivey - Swiss Forensic & Compliance Sàrl

As efforts to freeze the assets of Russian individuals under sanctions have made headlines, we wished to reflect on the operational difficulties caused by the complexity and opacity of the holding structures set up by their advisors. We are not alluding to offshore companies, although our experience with Russian subject persons is not short of examples of opaque entities established in the Seychelles or Marshall Islands. We are talking about situations in European jurisdictions in which we feel at home, such as Switzerland and France.

Let's take the example of a Swiss société anonyme registered in the Vaud canton: based on past investments in Russia and the presence of a previously identified nominee at the Board of directors, it was safe to assume that the company was linked to our subject individual (a Russian businessman). Unfortunately, no definite proof of the subject's involvement in the company could be found. We took the time to review the full hardcopy of the corporate filings, in the hope to find any relevant lead. Happily for us, a previous Board member had notified his resignation through a letter addressed to the subject person, and this letter was stored in the archives of the commerce registry. That was a strong indication that the subject person was the actual principal of the company. But any party bound to implement sanctions against the subject individual in question would have a hard time identifying this Swiss holding company in a straightforward way.

We faced a similar case where proving the ownership of an expensive property in France seemed nearly impossible. We knew for a fact that our subject individual (another Russian businessman) resided on a part-time basis in a large apartment in the West of Paris, and paid for various maintenance services there. However, searches at the land registry had identified the owner as the French branch of a company that was registered in Spain. Research in that country showed that the corporate documentation of the parent company had not been filed at all, over the last few years. There were indications of the past presence of the subject individual as a director, but current or decently recent information was missing. Again, anyone with the intent to freeze the assets of the individual in question would not be in a position to identify that apartment in a straightforward way.

In some cases, identifying a holding company or an asset management company associated with a subject individual is the result of a mix of luck and simple observations made on the ground.

Let's take the example of this Russian tycoon who had relocated to Switzerland, along with his family. A deep web search identified an address for him at a villa in an affluent suburb of Geneva. During a site visit at that address, a luxury sedan was observed in the parking area in front of the villa's garage. A reverse search showed that the holder of the license plate was a local asset management company, whose sole Board member was the head of a fiduciary firm. As it happens, this fiduciary firm was known to be well connected to a wealthy clientele originating from the CIS countries. Further research in the archives of the commerce registry did not bring any conclusive information about the company's shareholders. However, the founder of the company some years earlier was identified as a Serbian citizen. Further investigations in Serbia determined that this low-profile individual was employed by a company owned by the Russian subject individual. Again, circumstantial evidence made it likely that the latter was the beneficial owner of the company; but proving it was a long shot, and any party attempting to retrieve and freeze the assets of this individual in a straightforward manner would have missed this corporate entity.

A key takeaway of the above-mentioned cases is that the identification of certain assets is often indirect and coming as a result of multi-jurisdictional research.

These features do not sound promising in the perspective of freezing assets in a fast and decisive way. For instance, the existence of the above-mentioned apartment in Paris was determined through a lucky strike in the United States, where the subject individual had notified his French address in litigation filings that we had retrieved. These typical back-and-forth investigative steps obviously call for a close cooperation between countries involved in enacting sanctions against Russian individuals.

When it comes to corporate holdings (through which other asset classes can of course be controlled), one may put some hope in the emergence of UBO registers in many jurisdictions, especially in the EU. However, a number of countries still lag behind, not to mention Switzerland (even though banking institutions are expected to systematically collect UBO information, and cooperate with authorities upon request). In addition, as recent experience in Cyprus for instance has shown, the company shareholders listed in UBO registers may still be some nominees employed by local fiduciary firms. The business of evading transparency (and ultimately sanctions, when the day comes) is certainly not over, and creativity in that department is not expected to come to an end soon.

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PERSONAL AND CROSS-BORDER INSOLVENCY IN INDIA

Authored by: Prashan Patel - Grant Thornton UK, and Shefali Krishna - Grant Thornton India

India's insolvency regime, when compared to that of the UK or US, is still very much in its infancy. However, as it develops, the speed at which it fine-tunes and implements new regulation continues to impress. At its outset, the 2016 Insolvency and Bankruptcy Code in India (IBC) had no provisions for the insolvency of individuals (personal insolvency). For a country with approximately 1.4 billion people (one-sixth of the world's population) personal insolvency poses a difficult question on how the infrastructure and logistics (ie. Court resources, geographical spread of bankrupts, access to an electronic property registry, available number of insolvency practitioners) could support the potential increased volume of personal insolvency work.

The IBC has tackled this hurdle by implementing personal insolvency in stages, and therefore allowing itself to test the waters before looking at a much wider implementation. Provisions on insolvency and bankruptcy relating to personal guarantors to corporate debtors came into force on 1 December 2019 making personal insolvency possible, albeit limited to the personal guarantors (promoters in India) of corporates who have already entered IBC proceedings (corporate insolvency).

Liability of the guarantor under the IBC is co-extensive to that of the principal debtor; creditors should be allowed to proceed against the guarantor while also seeing remedies against the principal debtor. The Insolvency and Bankruptcy Board of India has said that the "resolution of insolvency of personal guarantors complements [the] corporate insolvency regime, particularly when there is high incidence of applications being filed in respect of preferential, fraudulent, undervalued and extortionate transactions. It also puts personal guarantors and corporate guarantors at the same level playing field".

The country's banking sector anticipates that this new revision will allow larger recoveries to be achieved against debts that have been generated through the corporate insolvency process. Moreover, it is hoped that personal guarantors will be motivated to come to the table and arrive at a settlement to protect their own credit profiles and reputation.

However, as of December 2021, applications filed against personal guarantors stood at 678, with even fewer applications being admitted due to legislative disputes. Unfortunately, there has been little progress on those admitted cases with many of these guarantors claiming to hold no significant assets available in India. For this revision of the IBC to be a success, it is key for petitioning creditors to ensure they are putting forward resolution professionals who are experienced and skilled at investigating fraud and who have access to a global network to unravel complex offshore asset holding vehicles to make recoveries.

As we are all aware, it is increasingly common for wealthy Indian promoters to hold their assets in foreign jurisdictions via corporate entities or in the names of family or close associates.

A remedy that may assist here is the imminent implementation of new cross-border insolvency law in India. The approved legislation proposes that liability can be applied to both the corporate debtor as well as the personal guarantor in line with the current IBC provisions, aligning India with best practices globally by adopting UNCITRAL Model Law with certain modifications to make it palatable to the India context.

We have seen how powerful cross-border assistance was in the resolution plan of India's Jet Airways, and the hope is that this new law will enable lenders to recover their dues from foreign assets for both corporate and personal cases.

No doubt the Indian insolvency story has many more chapters, but the speed at which amendments are made to perfect the process is encouraging, with recent developments giving the IBC additional bite to pursue those instances where fraud and asset dissipation have taken place.

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A Creativity.

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

A Chef. I will lead and maintain special restaurant with 16 chairs.

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

A Crossing the river Danube, by small fisherman boat, to serve clients on another side of river, in situation of bombing, when all bridges was destroyed and without any internet.

Q What has been the best piece of advice you have been given in your career?

A Never underestimate the problem, case, opponent and situation.

Q What is the most significant trend in your practice today?

A Client hires me as a supervisor or case manager in international cases, not related to my jurisdiction.

Q What personality trait do you most attribute to your success?

A Passion and loyalty.

Q Who has been your biggest role model in the industry?

A Mr. Monty Raphael QC.

Q What is something you think everyone should do at least once in their lives?

A Sail over Atlantic.

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

A My wonderful daughters Ana and Marija.

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

A The Grand Chessboard by Zbigniew Brzezinski because we currently living this book.

Q What would be your superpower and why?

A Energy and patient. I always have energy for next steps and actions and enough patient to wait proper moment to perform.

Q What are you most looking forward to this year?

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THE CASE OF THE MISSING DIAMONDS:
A BEST-PRACTICES PRIMER IN MULTIJURISDICTIONAL ASSET RECOVERY

Authored by: Ian Casewell - Mintz Group

The investigation had all the makings of a Hollywood thriller: hundreds of millions of dollars in missing diamonds, an investigation that hopscotched from Moscow to Antwerp to Dubai, and a crucial diagram sketched by a confidential informant on the back of a napkin. The various turning points in the case and its successful resolution help illustrate four key asset recovery principles that are particularly important in complex multijurisdictional recovery assignments.

A Surprise in the Seized Vault

The conflict began when one of the world's largest diamonds distributors repeatedly rescinded on its payment obligations for a $350 million line of credit with a major European bank. After repayment negotiations broke down, a European court froze the diamond firm's assets and authorities were sent to seize the bags of diamonds used as collateral for the credit line. But after the bags were discovered to hold nothing but worthless diamond dust, the Mintz Group was brought in by the bank to track down the missing gems.

The first step was to position the diamond firm within its industry and to map its value chain from end to end. After all, given that the diamond firm was in the business of moving diamonds, the mechanics of that business was likely to hold clues as to where the missing diamonds were. But because the bank knew little of the inner workings of its debtor, we were forced to model the structure of the diamond firm and its relationships from scratch.

Principle 1: Don't assume the client has perfect knowledge of the situation.

Given the risk borne by the lender in issuing such a large line of credit, one would expect its due diligence to provide a close read on the debtor. Too often, however, the fees the relationship generates causes even sophisticated lenders to taper their due diligence once compliance requirements are met. Client information thus is often incomplete, obsolete or based on faulty assumptions.

Building the Intelligence Team

We turned to our global network of sources to help fill in the blanks; those sources led us to others, ranging from the diamond company's competitors to informants used by law enforcement. In addition to mapping global diamond shipping routes and understanding each step involved in bringing diamonds from mines to consumers, we also learned that it was common knowledge in the industry that the company had purchased roughly $200 million worth of diamonds just prior to the freezing of the firm's assets. We also learned that Dubai—a jurisdiction whose fairly opaque reporting requirements would make it a plausible location to smuggle gems—was emerging as a global diamond trading hub. Finally, an industry insider with whom we spent weeks building a relationship sketched out how the diamond company could have acquired such a large stash of gems while circumventing the Kimberley Process, a global reporting procedure in place to combat trade in "blood diamonds" used to finance armed conflict.

Principle 2: Choose your sources the way you would make a key hire.

Just as an employee that combines the right experience with a visionary mindset can dramatically accelerate a company's innovation, a source with similar qualities can markedly reduce the amount of time an investigation requires—a critical consideration given that a creditor must assume it is a race against other creditors for recovery. And like successfully landing a key hire, developing a high-value source requires investing the time and energy necessary to form a person-to-person connection.

Connecting the Dots

The various pieces of information we gleaned from our research allowed us to form a hypothesis: Even as the company was balking at the bank's repayment demands, it was acquiring large amounts of diamonds; once negotiations with the bank broke down and legal action commenced, the company used couriers on commercial flights to smuggle the diamonds into Dubai, where they could be easily hidden or sold. This hypothesis led us to identify additional potential sourcing and sales channels in Russia, London and India. We then focused our efforts on these four areas, where we expanded and cross-corroborated our sources, and conducted reconnaissance and surveillance. One by one, the pieces fell into place. Import and export data confirmed the company had received significant diamond shipments from suppliers in Russia. Surveillance confirmed company representatives engaged in buying and selling rough diamonds at an industry trading hub in London. Confidential sources cultivated in Dubai and India confirmed the methods and routes of the company's smuggling operations.

Principle 3: Keep the investigation tethered to the hypothesis.

While this sounds straightforward in theory, it can be difficult to do in practice. A global client in a complex asset recovery case will have multiple constituencies—the board of directors, the general counsel, the asset recovery unit and the investigations and intelligence unit, as well as external legal counsel in various jurisdictions—each under pressure and with its own priorities and ideas about how the case should be run. In the face of this range of voices, the hypothesis needs to be the touchstone that focuses energy and resources, keeping the case from being pulled in different directions.

Striking at the Debtor's Pain Points

The fruits of the investigation gave us what we needed to file a convincing complaint with the judge whose asset freeze order was being violated by the diamond company's smuggling operation. The judge was predictably furious and appointed an administrator to oversee the company's books and records. This was a critical turning point in the case, forcing transparency of the company's machinations and limiting its freedom of movement going forward. Just as importantly, the appointment of an administrator meant that the company could no longer dismiss the conflict with the bank as a routine commercial dispute; the diamond company's credit ratings fell, other banks with whom the company had credit lines started asking pointed questions and the rest of the industry shied away from doing business with them.

These developments got the company's attention in a way that the bank's earlier legal actions failed to do; with its access to both capital and the diamond markets in jeopardy and its reputation blackened, the company was cornered. Faced with no other choice, the company sat down with the bank and negotiated repayment of its outstanding credit line.

Principle 4: Asset recovery isn't always about recovering the assets.

On the surface, the investigation's objective was simple: Find the missing diamonds. But our client's real goal wasn't the diamonds—it was getting the diamond company to honour its debt obligations. For that, it was enough to make the diamond company a pariah within its industry and to its financing sources. Throughout the asset recovery process, maintain a strategic mindset focused on both the client's larger objectives and the debtor's pain points.

Because they unfold over several geographies, cultures and legal and regulatory regimes, multijurisdictional asset recovery cases bring an extra level of complexity that can test even the most seasoned investigators. In these situations, it is all the more important to hew closely to best practices that will keep the investigation running efficiently and focused on its strategic goals.

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HAS THE TROUBLESOME ISSUE OF DETERMINING JURISDICTION FOR CLAIMS WHICH RELATE TO ECONOMIC LOSS FINALLY BEEN RESOLVED?

Authored by: Josh Oxley - PCB Byrne

In the matter of *Kwok Ho Wan and others v UBS AG (London Branch) [2022] EWHC 245 (Comm)*, Mrs Justice Cockerill has held that the English courts have jurisdiction to hear various claims which relate to economic loss because London was the place where the loss manifested itself from the relevant transaction. In doing so, she has helpfully confirmed that the place where the loss manifested is the crucial factor for the English courts when determining whether they have jurisdiction for claims which relate to economic loss.

Background

The parties were involved in a share purchase in a Chinese financial institution named Haitong for US$1.25 billion ("**the shares**"). The parties made various agreements to implement the share purchase which included a "Co-Investment Agreement" followed by a "Letter Agreement" in December 2014 (both of which were executed in Shenzhen, China).

The net-result was that in May 2015, the shares were purchased for US$1.25 billion by the third claimant, Dawn State Limited ("**Dawn State**"), which was owned by a third party, Haixia. The purchase was funded by the first claimant, Mr Kwok, through the second claimant, Ace Decade Holdings Limited ("**Ace Decade**"), providing US$500 million and the defendant, UBS AG (London Branch) ("UBS"), providing a loan facility of US$750 million. The shares allotted to Dawn State were assigned to UBS as security and then deposited in a secured account in London ("**the secured account**"). UBS is domiciled in Switzerland. Mr Wong of UBS advised the claimants on the structure of the investment.

Loss

In July 2015, there was a collapse in the Chinese stock market which meant that the value of the shares significantly declined. This triggered provisions in the various agreements which entitled UBS to enforce its security by liquidating the shares. UBS subsequently remitted US$4.7 million to Dawn State after paying its fees & charges.

Claims

The claimants allege that UBS breached its duty of care to them by making negligent misstatements about the various financial arrangements which Ace Decade relied upon when purchasing the shares. On 29 May 2020, the claimants issued proceedings against UBS in the English courts claiming the following losses:

i) The loss caused by Ace Decade's entry into the transaction less the amount recovered which equated to US$495 million.

ii) The loss caused by Ace Decade's failure to withdraw from the transaction which also equated to US$495 million minus the fees which would have been payable to Haixia.

iii) The lost returns which would have been achieved by Ace Decade if it had invested in the shares using a different structure.

Lugano Convention

The Lugano Convention applied to this matter, as under the UK-EU Withdrawal Agreement, the Lugano Convention applies to proceedings which have commenced before 31 December 2020.

The Lugano Convention and the Recast Brussels Regulation receive an autonomous interpretation. In relation to jurisdiction, the general rule under the Lugano-Brussels scheme is that a defendant should be sued in their state of domicile. The purpose of the exceptions in Article 5 of the Lugano Convention is to vest special jurisdiction on courts which have a particularly close connection to the dispute other than the courts of the defendant's domicile.

The parts of Article 5 that were relevant to this matter were:

i) Article 5(3) "the courts for the place where the harmful event occurred or may occur."

ii) Article 5(5) "arising out of the operations of a branch…"

UBS challenged the jurisdiction of the English courts in relation to the claims made by Mr Kwok & Ace Decade by relying on the general rule that the claims should be determined by the Swiss Courts. Mr Kwok & Ace Decade argued that the exceptions in Article 5(3) & Article 5(5) were applicable to the claims.

Decision

In her judgment, Mrs Justice Cockerill determined that both Article 5(3) & Article 5(5) were applicable to the claims which meant that the English courts had jurisdiction. This article has focused on the rationale for her findings concerning Article 5(3).

Mrs Justice Cockerill noted that the authorities for determining the jurisdiction of pure economic loss cases were "less than entirely clear".

UBS argued that there was a general rule in English law that in a case of negligent misstatement, the loss must occur at the place where the negligent misstatement was received and relied upon by the party suffering the loss. Mrs Justice Cockerill determined that the authorities which support this rule concerned cases of non-contingent loss which crystallised upon a party's immediate entering into of an agreement following the negligent misstatement. The authorities were therefore not applicable to this matter, as the value of the shares could have either increased or decreased at the time that the claimants relied upon the alleged negligent misstatements.

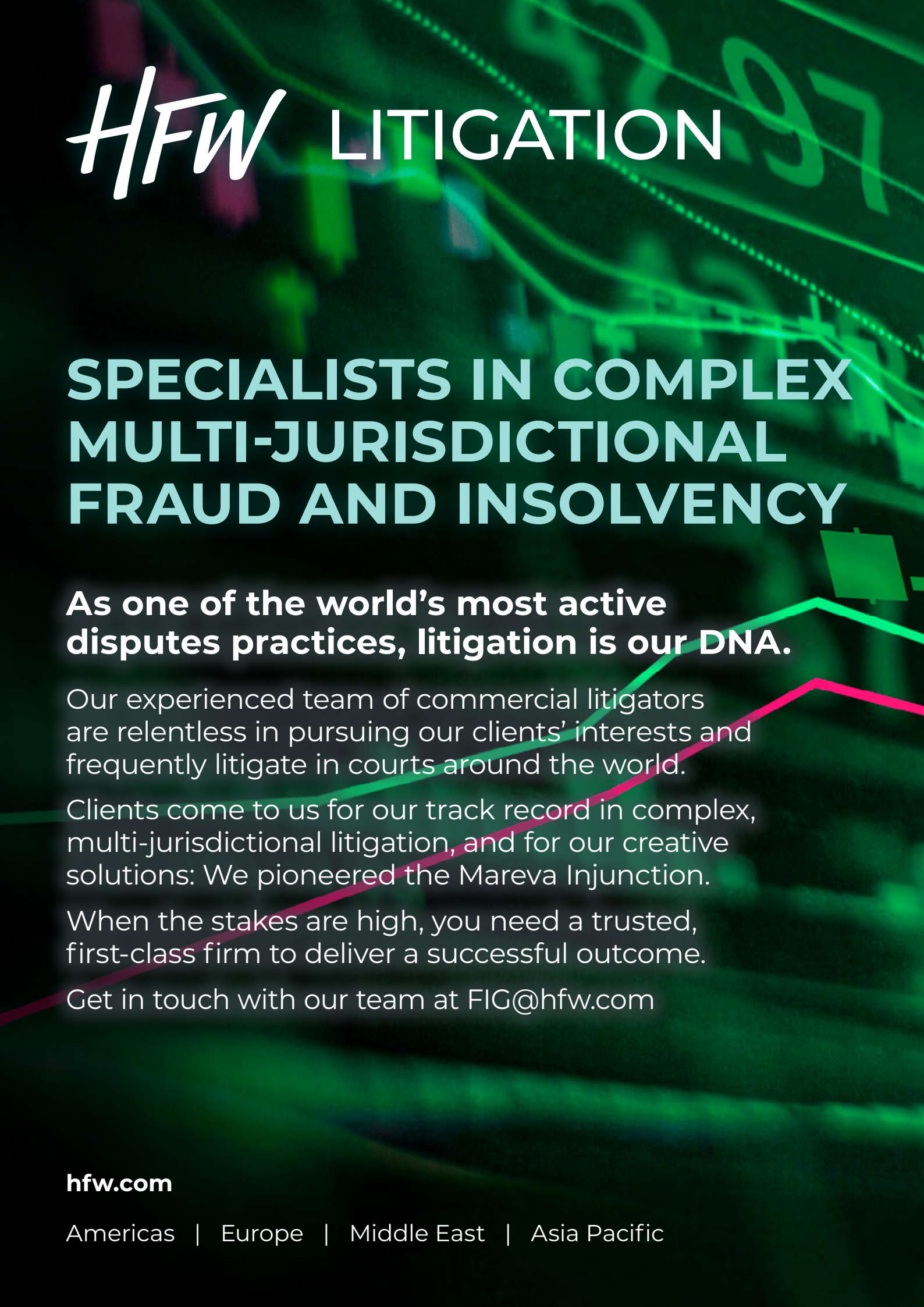
Mrs Justice Cockerill therefore reviewed the relevant European jurisprudence and summarised that where receipt, acting, and loss were not contemporaneous, it is difficult to provide a clear rule for determining jurisdiction. However, she considered that there were two clear points which the European jurisprudence had established:

i) It was the manifestation of loss from the transaction that was relevant to jurisdiction and not the transaction itself that ultimately led to the loss. Manifestation is more likely to be connected to crystallisation of the loss than the origins of the transaction, in cases where there is a difference. Together, this is the "manifestation test".

Applying the manifestation test to this matter, Mrs Justice Cockerill determined that the loss of Mr Kwok & Ace Decade was when the shares in the secured account reduced in value. This loss then manifested & crystallised in London when the shares were liquidated by UBS.

ii) When attributing jurisdiction, the courts must also consider the specific circumstances which demonstrate the proximity between the action and the jurisdiction, and the foreseeability of that jurisdiction for the parties. Those circumstances must include the factors that help facilitate the sound administration of justice, as well as the factors that may help the parties determine where they should institute proceedings or where they might be sued because of their actions. These are known as the "specific circumstances" which derive from the case of *Vereniging van Effectenbezitters v BP plc, Case C-709/19*).

Applying the specific circumstances to this matter, Mrs Justice Cockerill determined that the secured account was in London as this was the place where all the parties had agreed that the shares would be held. All the contractual documents that UBS had entered were in English and governed by English law. It was therefore completely foreseeable to all the parties, particularly UBS, that they might sue or be sued in the jurisdiction of England in relation to the shares.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THE IMPACT OF RUSSIA SANCTIONS ON BVI LEGAL AND INSOLVENCY PRACTITIONERS

Authored by: Helen Chen, Scott Cruickshank and Jonathan Child - HFW

Introduction

Following Russia's invasion of Ukraine, the UK government, along with other key global stakeholders, have issued a raft of sanctions targeting entities and individuals connected with the Russian state. Those subject to the sanctions would have had their UK assets frozen, be prohibited from travelling to and from the UK and no UK citizen or company may do business with them. The UK government has also imposed import duties on various Russian goods, as well as a ban on exports of a number of goods to Russia.[1]

The financial sanctions regime in the BVI

As a British Overseas Territory, the Virgin Islands implement all UK sanctions regulations which have been made and modified under the Sanctions and Anti-Money Laundering Act 2018. The sanctions imposed by the British Government have been extended to the Virgin Islands by virtue of new Overseas Territories Sanctions Orders.

To help businesses and individuals comply with the financial sanctions regime, the Office of Financial Sanctions Implementation, as part of Her Majesty's Treasury, maintains a consolidated list of all asset freeze targets listed under UK autonomous financial sanctions legislation and UN resolutions (the "**Consolidated List**"). The Consolidated List is endorsed and adopted by the BVI Financial Services

1 https://www.gov.uk/government/collections/uk-sanctions-on-russia

Commission and contains those persons and entities against whom a sanctions regime has bitten.

Once a designation for financial sanction is made, a relevant person carrying on relevant business (as defined in the Anti-Money Laundering Regulations 2008) is required to, amongst other things, refrain from dealing with funds or assets of a sanctioned person or entity, or to otherwise make themselves available to such persons or entities unless licensed by the Office of the Governor.

Recently, the BVI Courts have provided comments to how parties, officeholders and legal practitioners should act in circumstances where a sanctioned entity or person is involved. The guidance to which is summarised and set out below.

Acting for Russian clients under the current sanctions

In March 2022, Mr. Justice Jack handed down judgment on a BVI legal practitioner's application to come off record for reasons related to the sanctioning of its client. Justice Jack also considered whether a receivership order may be discharged for sanctions related reasons and how a receiver may carry out its powers under the receivership order in the circumstance. The judgment is a useful commentary on how legal and insolvency practitioners should approach the issue of sanctions.

The judgment was delivered following an application by legal practitioners, under rule 63.6 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000, to come off record as the legal representatives of JSC VTB Bank ("**VTB**") – a recently sanctioned party as a result of Russia's invasion of Ukraine[2]. The principal ground for seeking to come off the record was as a result of VTB having been sanctioned by the UK (which were applicable within the Virgin Islands for the reasons set out above), and any breach of those sanctions would be a criminal offence.

The Court refused the application - it was satisfied that obtaining appropriate licences from His Excellency the Governor should protect the firm from any risks of criminal offences being committed. It was possible to apply for a licence covering a whole year and no fee would be charged for such applications.

Responding to the concern about committing a criminal offence for extending credit to VTB by carrying out work without payment on account, Justice Jack's view was that given the large amount of work done so far for VTB, a short period during which the legal practitioners could not bill whilst obtaining the appropriate licence should not be overly onerous.

Whilst Counsel accepted that the firm's termination right under the terms of their retainer by VTB were not determinative of the Court's approach to its application, Justice Jack agreed that the Court should be slow to go behind the arm's length agreement of the parties if the terms permitted for the termination of the retainer. Having factored in commercial considerations, the Court attached greater weight to the legal practitioners' professional obligation and VTB's right to legal representation.

Justice Jack pointed out that the legal practitioners had a duty to continue to act – the varying degrees of unsavouriness manifested by defendants in criminal proceedings had never been a ground for withdrawing from a retainer, and in his view, the same standard should apply to civil proceedings. In fact, in the Judge's view, it was precisely because VTB had now been stigmatised by sanctions, that they needed the legal practitioners' best endeavours to advocate for them.

Counsel also relied on the guidance given by the Law Society of Jersey, which provided that "the Law Society considers that, in the current circumstances and specifically in relation to Russian or Belarusian clients, reputational concerns or issues may, additionally, be considered to represent 'just case' to justify termination of a relationship."

However, the Court took the view that the guidance did not confer a right to withdraw from representing a client in existing proceedings.

The Court acknowledged that there may be a need to release the legal practitioners from their professional obligation if they could not obtain the appropriate licence to legitimise payment to them by VTB. However, Justice Jack observed that it was too early in the sanctions regime to know fully what the practicalities of payment were.

2 JSC VTB Bank and (1) Sergey Taruta (2) Arrowcrest Ltd BVIHC (COM) 2014/0062 (17,22 March 2022)

The Court referred to the Code of Ethics in the Virgin Islands Legal Profession Act 2015, which stated: "A legal practitioner shall defend the interests of his or her clients without fear or judicial disfavour or public unpopularity and without regard to any unpleasant consequences to himself or herself or to any other person."[3]

In the end, the Court found that the legal practitioners' duties as officers of the Court outweighed other considerations and refused the firm's application to come off record as VTB's legal representatives.

Turning to the issue of whether a receivership order may be discharged without a financial sanctions licence, the Court confirmed that a licence would not be required if active measures were not being taken to ingather assets. Receivers were, however, required to apply for an appropriate licence before realising assets belonging to sanctioned individuals or entities. The Court made clear that not obtaining a licence did not automatically discharge a receivership order. This is because a receivership order in itself had a substantial value to a judgment creditor and discharging a receivership would have an impact on the value of a judgment debt.

The SRA perspective

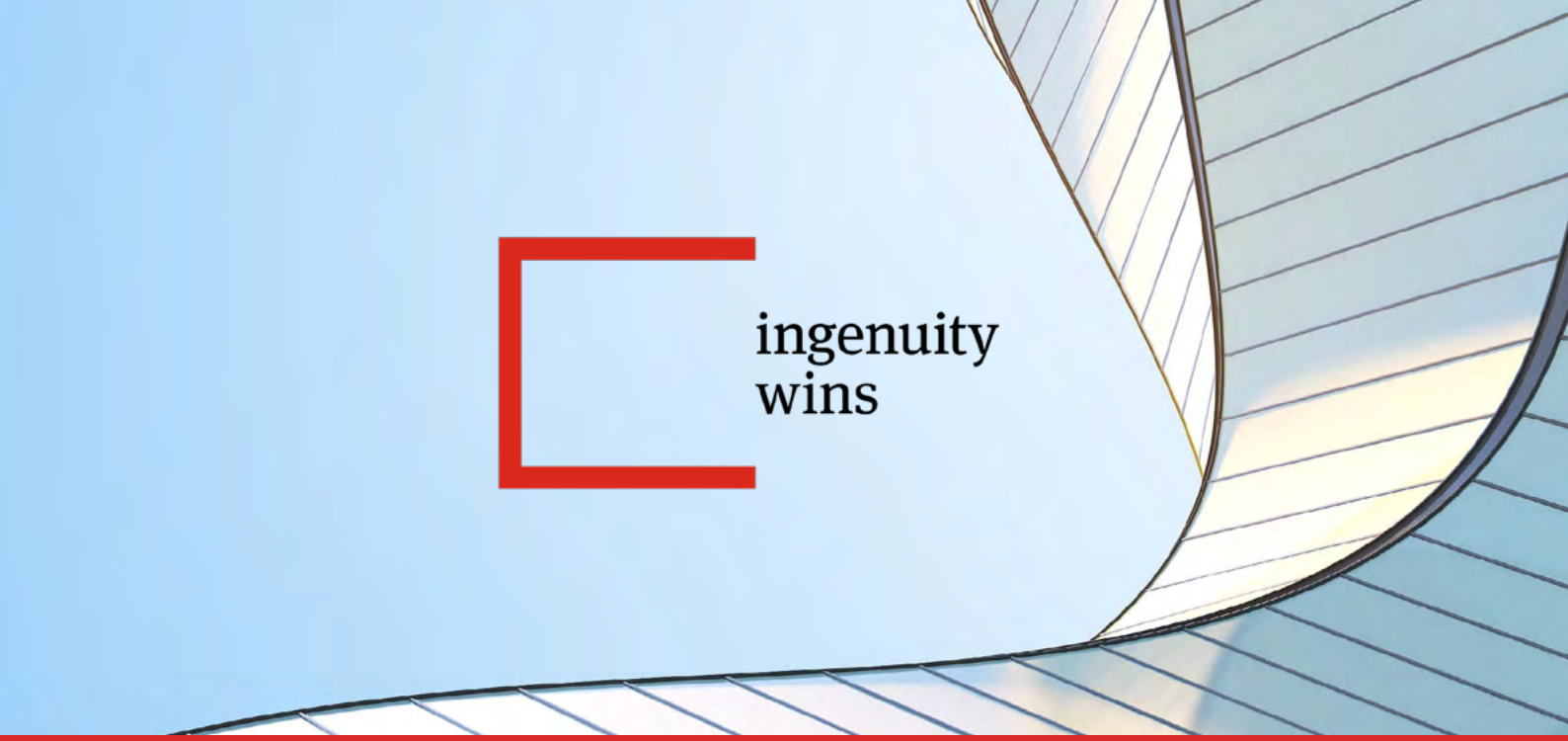
The SRA has issued its own guidance around this issue[4], noting that it is highly unlikely to be a regulatory matter and that where firms are considering terminating client retainers there is a common law requirement that there is a "good reason" for such a termination. The SRA has therefore indicated that, as in the BVI, it will be a matter for the English courts to determine on the facts of individual cases whether solicitors can terminate existing client retainers

Conclusion

In justifying its approach, the Court in *JSC VTB Bank* recognised that the sanctions regime was aimed exclusively at freezing assets, as opposed to confiscating assets. Provided their assets were frozen, sanctioned entities and individuals retained all their civic rights including full access to the Court and an entitlement to have their rights determined by the Court. In the context of international dispute resolution, not only does this judgment help the legal and insolvency profession navigate the complexities surrounding the sanctions regime, but it also serves as important reminder to legal practitioners and insolvency practitioners of their professional obligations.

3 Paragraph 5 of the Code of Ethics, Legal Profession Act 2015

4 www.sra.org.uk/sra/news/russian -conflict-and-sanctions/



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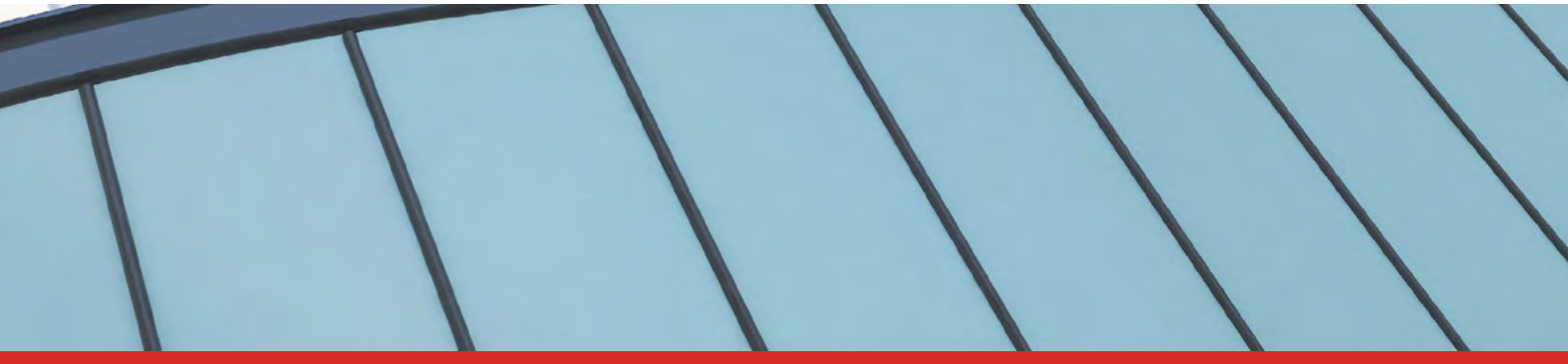

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The International Law Book Facility Essay Competition

JANE COLSTON
Partner at **Brown Rudnick** and trustee of the **International Law Book Facility ('ILBF')**

We all love and need books but emerging technologies such as artificial intelligence, machine learning, and blockchain are already transforming how the business of law and litigation is conducted. Lawyers of all generations (and not just those about to embark on a career in law) need to 'get with the programme' as the Master of the Rolls put it and skill up re the advancing technology. So, when the trustees of the ILBF, a legal book charity, were discussing the question we would pose for our first essay competition we thought this would fit the bill: 'Looking back from 2030 what should we do now to transform the legal profession (including by the use of machine learning technology) to ensure access to justice for all and that the profession is as diverse as the communities and businesses it serves'. We were thrilled that the inaugural ILBF law undergraduate competition was launched by the Lord Chief Justice, Lord Burnett of Maldon at our 15th anniversary celebration event on 25th November 2021. As one of the essay judges, I was delighted to read the range of ideas on this topic from the next generation of lawyers. The competition winner was ultimately chosen by Professor Richard Susskind OBE and The Rt Hon, the Lord Thomas of Cwmgiedd former Lord Chief Justice and ILBF founder and patron. I will let the ILBF CEO Katrina Crossley tell you more.

The response to our essay competition was excellent. We had entries from students at 17 universities, 55% of which were non-Russell group. Nearly half of all entries were from students in their second year of undergraduate study and were evenly split between male and female students from a diverse cohort.

Our rigorous judging process was assisted by a team of recent law graduates: Yasmin Hassan, Chiara Iorizzo, and James Yang. All three rounds of judging were carried out blind with the judges, which included Jane Colston, Clifford Chance's Ellen Lake and Emma Marshall, Morgan Stanley's Maryann McMahon and me, reading numbered essays with all identifiers removed. The final round of judging was carried out by Lord Thomas, and Professor Richard Susskind OBE and they announced the winner on: https://ilbf.org.uk/

We are very grateful to them both for their time and expertise in picking the winner. Jude D'Alesio of Bristol University wrote the winning essay and we are pleased to share it with you here.

The range of ideas and insights from all essayists was impressive, and we very much hope that students will continue the debate and get actively involved in shaping legal technology for the future to enhance its impact on access to justice and diversity in the profession. The prize includes a summer placement at Brown Rudnick and travel costs paid by Brown Rudnick. We hope that this will be an annual event with different law firms sponsoring the event each year to support the ILBF which is committed to access to justice for all through sharing legal knowledge. Books from the ILBF provide vital printed resources for judiciaries, law commissions, bar associations, law societies, universities, law reporters, prisons and pro bono organisations across the world. In nearly 17 years we've shipped over 75,000 books to 54 countries. Access to legal technology and printed resources are not a given across the world so our books are a vital bridge across the justice gap.

KATRINA CROSSLEY
CEO of **International Law Book Facility ('ILBF')**

The Judging Panel

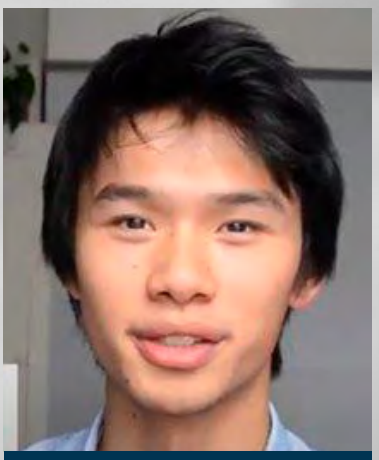
- **The Rt Hon. the Lord Thomas of Cwmgiedd,** former Lord Chief Justice of England and Wales, Patron of the ILBF
- **Professor Richard Susskind OBE,** President of the Society of Computers and Law
- **Katrina Crossley,** CEO of the ILBF
- **Maryann McMahon,** Morgan Stanley and ILBF Trustee
- **Jane Colston,** Brown Rudnick and ILBF Trustee
- **Ellen Lake,** Clifford Chance and ILBF Operating Committee
- **Emma Marshall,** Clifford Chance and ILBF Operating Committee
- **Yasmin Hassan,** Edmonds Marshall McMahon
- **Chiara Iorizzo,** McDermott Will & Emery
- **James Yang,** KCL Law Society

ILBF Essay Competition Launch

Left to right: Paul Lowenstein QC, Lord Burnett, Jane Colston, Professor Susskind, Lord Thomas and Maryann McMahon

Chiara Lorizzo, Analyst at McDermott Will & Emery and Yasmin Hassan, Paralegal at Edmonds Marshall McMahon, ILBF Volunteers.

Left to right: Paul Lowenstein QC, Jane Colston, Lord Thomas, Professor Susskind, Maryann McMahon and Lord Burnet



James Yang, former President of the King's College London Law Society, ILBF Volunteer

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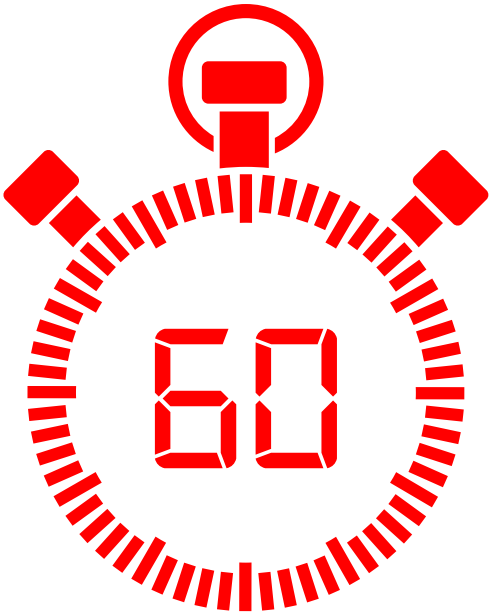
FIRE Starters

We speak with Jude D'Alesio, winner of the International Law Book Facility Essay Competition on why he entered, what he predicts for the future, and what he is most looking forward to during his internship at Brown Rudnick

60-SECONDS WITH:

JUDE D'ALESIO
STUDENT
BRISTOL UNIVERSITY



Q **Why did you choose to enter the International Law Book Facility (ILBF) Law Undergraduate Essay Competition?**

A I was intrigued by the competition's focus on machine learning as there are not many opportunities to explore the intersection of law and technology and in my Law degree. I already have a keen interest in artificial intelligence and blockchain, so I saw also this as an opportunity to put my knowledge to the test and persuade others of their benefits. There was an emphasis on access to justice and diversity in the competition which was also appealing, and I thought that I could contribute something different by placing a technology spin on these aspects too. For example, I talked about how 'smart contracts', which are self-executing contracts, can increase access to justice by allowing people to do more without the help of lawyers. The internship at Brown Rudnick was certainly an attraction too!

Q **The essay competition required you to "Look back from 2030" and discuss "what should we do now to transform the legal profession (including by the use of machine learning technology) to ensure access to justice for all and that the profession is as diverse as the communities and businesses it serves'. Reflecting on your essay, can you briefly predict what the legal profession may look like in 2030?**

A By 2030, I think that you will have numerous uses for 'narrow AI' in the legal profession, which is essentially AI only capable of doing specific and confined tasks like writing a contract or predicting the result of a case. Although this will certainly be useful, I see the real revolutions in AI and machine learning happening decades later. I also think that there will be an increase in STEM graduates in the profession. You see this already with some firms offering technology-focussed training contracts.

Q **How did you feel when the ILBF's CEO confirmed that Lord Thomas and Professor Susskind had picked your essay to be the winning one?**

A I was beyond shocked: I never thought that I would reach the final, let alone write the winning essay! On that note, I would like to extend a massive thank you to everyone at ILBF and on the judging panel for running such a great competition.

Q **The prize includes an internship at Brown Rudnick, London. What are you most looking forward to during your internship at Brown Rudnick which its litigation partner, Jane Colston will supervise and what do you hope to achieve from it?**

A I am very much looking forward to the internship and spending time in a busy litigation practice. I hope I will be able to roll up my sleeves and contribute in what I know will be a very exciting experience. Seeing how the firm uses technology in practice will also be interesting. I am also keen to meet more people in the profession and pick up tips on life as a lawyer. As someone who is not from London, the chance to live there for a week is also valuable and will hopefully prime me for a future move to the City.

Q **What led you to wanting a career in law?**

A Since as long as I can remember, I have always been an avid reader and writer so I was keen on a legal career from the beginning. The academic element of law, and the need for research and keeping abreast of issues is also important to me. I also like the idea of working for a variety of clients, learning about their individual needs or businesses, and tailoring your advice accordingly. As this essay competition demonstrated, law is incredibly dynamic and the profession is different from one decade to the next; this is also what makes it an attractive career.

Q **What has been your biggest achievement?**

A Aside from this competition, I became one of Britain's youngest councillors at 19 when I was elected to Long Ashton Parish Council in North Somerset. I am heavily involved in politics in my spare time, and love nothing more than solving problems for residents and finding ways to make positive change on a local level. I am also the youngest chairman of a council planning committee and this policy area is heavy on regulation, which is probably some people's worst nightmare but not for someone like me who enjoys the legal aspect.

Q **What is the best piece of advice you have been given?**

A I have always been taught the importance of being kind, hardworking, and presenting yourself well. Life is not always about who is the cleverest or loudest; sometimes, just being a nice person goes a long way!

Q **What is something you think everyone should do at least once in their lives?**

A Definitely running for election, no matter for what. Whether it is to be chair of a board, president of a society, or for a local council, it is such a confidence-building exercise and the thrill of a campaign is unparalleled. If you win it is great to contribute and make a difference, but even if you lose, the people you meet make it worthwhile and they will remember your efforts.

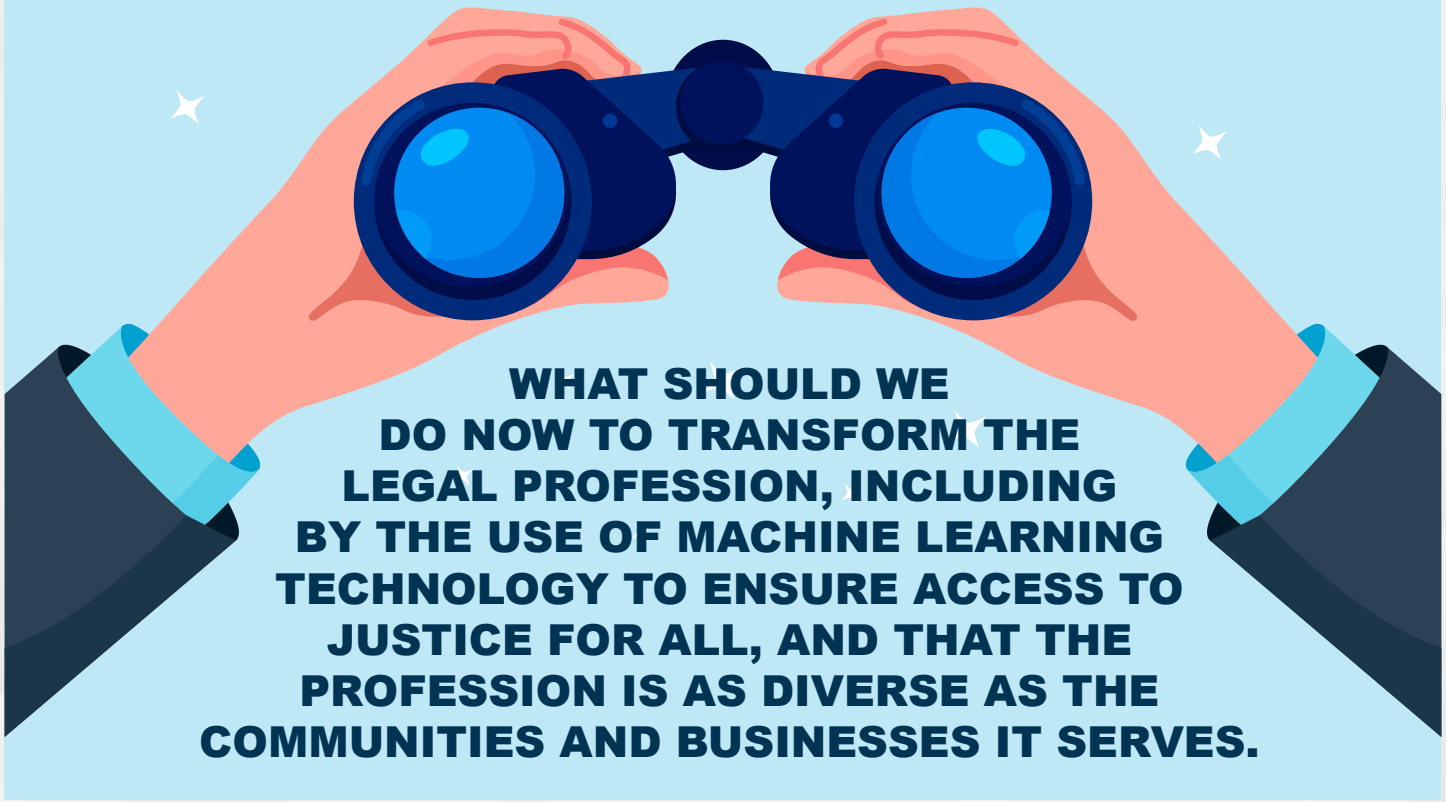
Q **What is the one thing you could not live without?**

A Hayfever is my kryptonite, so wherever I go I take hayfever tablets. If the pollen catches me off guard, I can end up looking like I have been in the ring with Mike Tyson!

Q **What book do you think everyone should read and why?**

A 'The Death of Ivan Ilyich' by Leo Tolstoy is a classic. It tells the story of a man nearing death who realises how artificial his life has become. It is very heavy and lurid at times, but what Tolstoy writes about living a good life is impeccable. On the non-fiction front, I have just finished reading 'Wired For War' by P.W. Singer, which is an excellent commentary on how robotics and AI are pervading the battlefield. Many of the associated issues also concern international law and its adaption to technology.

LOOKING BACK FROM 2030



WHAT SHOULD WE DO NOW TO TRANSFORM THE LEGAL PROFESSION, INCLUDING BY THE USE OF MACHINE LEARNING TECHNOLOGY TO ENSURE ACCESS TO JUSTICE FOR ALL, AND THAT THE PROFESSION IS AS DIVERSE AS THE COMMUNITIES AND BUSINESSES IT SERVES.

Authored by: Jude D'Alesio - Bristol University

Introduction

Moore's Law dictates that the speed and capability of our computers double every two years, which means that by 2030 we can expect computing power to be 16 times greater than it is today. To put it simply, technology will undergo profound change in the next eight years. In three ways, the legal profession must be transformed if it is to strengthen access to justice and diversity in the shadow of modern technology. Firstly, while machine learning presents innumerable opportunities for the profession, it potentially poses grave dangers for humanity and the legal profession should ensure that the necessary safeguards are established. Secondly, the benefits posed by blockchain technology will radically improve access to justice, and finally, the benefits of technology in the legal profession are contingent upon achieving greater cognitive diversity.

Protecting humanity from machine learning

The legal profession must place itself at the centre of the creation of machine learning (ML) regulation to safeguard humanity's interests. There exist numerous benefits from ML in the short term for the legal profession, such as automation of routine tasks and increased prediction accuracy. However, there is more scope for the legal profession to fundamentally influence the longer-term effects of ML. An important concept in the field of ML is artificial general intelligence (AGI), which is the hypothetical ability of ML technology to learn any intellectual task capable of being performed by a human. AGI has potentially exceptional consequences for the legal profession, in that it may simply 'solve' the problems of lack of access to justice and diversity owing to its superintelligence. However, coupled with the potential to solve problems is the inherent theoretical risk that ML with superhuman intelligence could lead to the destruction of humanity: as John von Neumann, regarded by many as the most intelligent man in history, said, 'the combination of physics and politics could render the surface of the earth uninhabitable' [1].

The alignment problem, then, asks how we can guarantee that ML is aligned with humanity's interests to avoid this situation.

1 Giorgio Israel, Ana Millan Gasca, The World as a Mathematical Game (2009th edition, Birkhäuser 2009) 78

Research is urgently needed on devising global norms, policies, and institutions to ensure the beneficial development and use of advanced AI, and it seems natural for the legal profession to shape the regulatory landscape in a manner which encourages safety and enterprise simultaneously. Without the legal profession helping to solve the alignment problem, there may be no such profession in the future, let alone access to justice and diversity.

Increasing access to justice through blockchain

Secondly, the legal profession must embrace the benefits of blockchain technology and its potential to increase access to justice in the next eight years. The prime contribution of blockchain to the legal industry will be through the medium of smart contracts, which are self-executing contracts able to automatically execute clauses without directly involving lawyers. Theoretically removing the necessity for lawyers to draft and enforce contracts creates a form of decentralised justice, where a consumer need not rely on lawyers to write their contract nor the courts to enforce it, radically expanding access to justice by reducing transaction costs[2]. However, the legal profession should advise and lobby for the creation of a law which confirms that all UK smart contracts must comply with UK contract law principles, ensuring consistency and the protection of rights. The second legal use of blockchain is litigious, as it can be used to authenticate submitted evidence online. Any data stored in the blockchain is immutable, thus users are alerted to the tiniest changes.

Only 46% of the population enjoy access to justice yet 59% have access to the internet [3], thus the online authentication of evidence via blockchain can leverage internet use to benefit those without access to justice.

As a result, blockchain is an excellent mechanism for victims to preserve evidence of e-business disputes or copyright infringements on the internet, allowing the evidence preserved by blockchain to be given judicial effect. The legal profession, specifically the judiciary, must therefore encourage the use of blockchain evidence authentication during litigation.

Achieving cognitive diversity

Finally, the legal profession must achieve greater cognitive diversity. In 2019, approximately 57% of trainee solicitors in the United Kingdom had studied a Law degree[4]. That such a high proportion of a single profession was dominated by a single course demonstrates a patent lack of cognitive diversity. The modern lawyer, however, must combine an appreciation and understanding of fields such as technology, computation, and physics to apply the benefits offered by innovation as outlined in previous paragraphs.

Therefore, to fully grasp the opportunity offered by technology, the legal profession must upskill in STEM subjects.

It is important to note that recruiting for the 'traditional' and 'STEM lawyer' is not mutually exclusive: Clifford Chance offers two concurrent training contracts, with one offering regular training and the other, 'IGNITE', recruiting those 'with an aptitude for tech' and places an 'emphasis on tech' during training[5]. The profession may also consider offering increased salary to STEM lawyers, recognising their lower supply in the industry and providing a stronger incentive to consider STEM as a route into the profession. As 'legal tech' becomes mainstream, the judiciary may also consider introducing a requirement in technology-related cases for each bench to include a judge with STEM credentials. This will provide the legal profession with the essential skillset to take it into 2030 and beyond.

Conclusion

To conclude, it is clear that the legal profession will undergo profound changes after 2030, and likely well before. It must lay the foundation of norms to control the development of ML, allowing its beneficial development while safeguarding humanity from its risks. Embracing blockchain technology will also increase access to justice and allow a democratisation of legal services where lawyers are unessential for an individual's understanding of their legal rights. Finally, greater cognitive diversity is essential for the benefits of technology to be realised in the legal profession, and this could take the form of alternative training contracts as well as increased focus on recruiting STEM graduates.

2 Michal Malkovský,'The Concept of Smart Contracts: Capable of Overturning Contract Law As We Know It?' (2015) <https://www.academia.edu/19842066/TheConceptofSmartContractsCapableofOverturningContractLawAsWeKnowIt> accessed 20 February 2022

3 International Law Book Facility (ILBF), 'ILBF 15th anniversary event Professor Richard Susskind OBE' (Youtube, 13 December 2021) 26:25 <https://www.youtube.com/watch?v=VNfsrEJ1j1k&list=WL&index=2> accessed 20 February 2022

4 Chambers Student, 'Law firms' preferred universities 2019' (Chambers Student, 5 July 2019) <https://www.chambersstudent.co.uk/where-to-start/newsletter/law-firms-preferred-universities-2019> accessed 20 February 2022

5 Clifford Chance Careers, 'Tech-focused Training Contracts for people who want to shape the future of law' (Clifford Chance, 25 November 2021) <https://careers.cliffordchance.com/london/what-we-offer/ignite.html> accessed 20 February 2022

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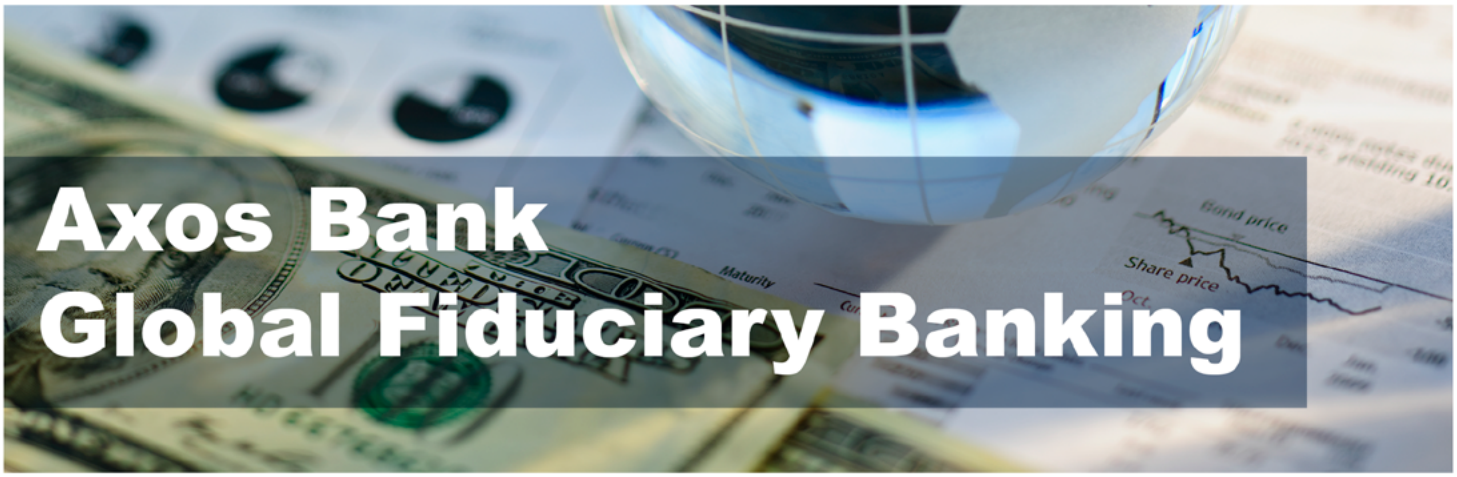

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SVP and Sr. Managing Director
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Global Fiduciary Banking
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Email: mboyd@axosbank.com

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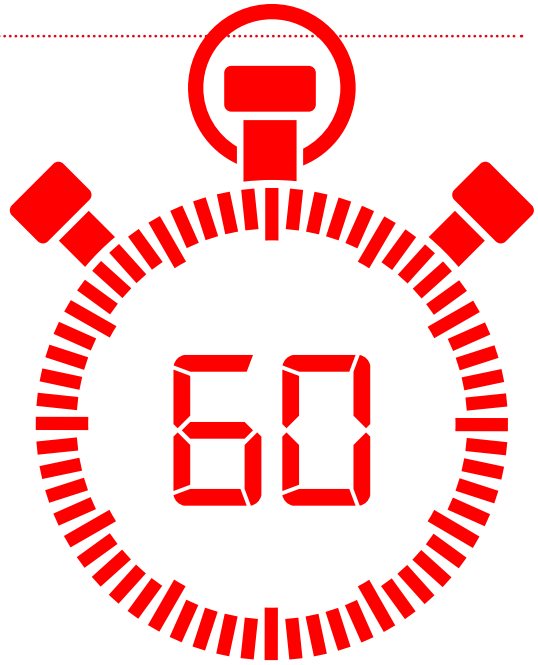

Q What do you like most about your job?

A The people and the intellectual challenges and psychological aspects of the law.

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

A Painting pictures.

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

A At less than a year qualified, representing a defendant who was subject to a search order and having to advise in relation to the numerous illegal items which were secreted about his house but outside the terms of the search order.

Q What has been the best piece of advice you have been given in your career?

A Get over yourself.

Q What is the most significant trend in your practice today?

A The increased use of insolvency procedures to tackle fraud claims, and the development of the responsibility of banks for protecting their clients against scams.

Q What personality trait do you most attribute to your success?

A Humour.

Q Who has been your biggest role model in the industry?

A I have learnt from everyone with whom I have worked.

Q What is something you think everyone should do at least once in their lives?

A Laugh until they cry.

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

A At home Marmite and at work a hard copy of the White Book.

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

A Dostoyevsky's "Crime and Punishment". A cracking good read and existential travail…but goes off a bit towards the end.

Q What would be your superpower and why?

A Flight. Useful without too much responsibility.

Q As a speaker at FIRE International, what are you most looking forward to at the event?

A Meeting up with chums I have not seen for ages and broadening my knowledge of developments in the legal area.

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SERVICE OF PROCESS ABROAD: NO INTERNATIONAL AGREEMENT?

NO PROBLEM. RELY ON FRCP 4(F)(2) & (3)

Authored by: Leyza Blanco, Juan Mendoza and Alejandro Rodriguez Vanzetti - Sequor Law

Long ago were the times when serving a lawsuit required plaintiffs to shout and speak their cause of action, [1] send mail carried by a steam ship, [2] or serve via telex. [3] Service of process in many countries has caught up with the times. A court in the United Kingdom, for example, allowed an injunction to be served via Twitter. [4] Even though U.S. courts have authorized service of this kind under special circumstances, [5] courts have lagged on implementing these alternative methods on a larger scale. In fact, the advisory committee of the Federal Rules of Civil Procedure (the "FRCP") has recognized that this aspect of litigation is in need of reform. [6]

Service of process on a defendant that is located abroad adds an extra layer of complexity.

Fortunately, courts are increasingly authorizing service of defendants abroad by new methods of service permitted by the statute and guided by due process principles. After all, a basic foundation of constitutional due process is the right to be heard, and the notice function protects a defendant's right not to be deprived of life, liberty, or property without due process of law. [7]

FRCP 4(f) provides the procedural framework to authorize service of process on defendants located abroad and sets forth a three ways to serve an individual in a foreign country:

(1) by any internationally agreed upon means that are reasonably calculated to give notice;

(2) if no such means exist, or if international agreement allows, by a method that is reasonably calculated to give notice; and

(3) by any other means not prohibited by international agreement, as ordered by the court. 8

1 See Adriana L. Shultz, Comment, Superpoked and Served: Service of Process Via Social Networking Sites, 43 U. RICH. L. REV. 1497, 1499, 1528 n.10 (2009) ("One of the earliest known legal codes, the Code of Eshnunna, required plaintiffs to 'shout' or 'speak' their cause of action.") (citing Revuen Yaron, THE LAWS OF ESHNUNNA 118-19 (Magnes Press 1988)).

2 See New England Merchants Nat. Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980).

3 See id.

4 John G. Browning, Served Without Ever Leaving the Computer: Service of Process via Social Media, 73 TEX. B.J. 180, 182 (2010).

5 See, e.g., WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817 (E.D. Va. Feb. 20, 2014) (authorizing service on an individual in Turkey by email and through Facebook and LinkedIn); see also FTC v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013) (authorizing service on individuals in India by email and through Facebook). In St. Francis Assisi v. Kuwait Finance House, the plaintiff was unable to determine the whereabouts of the individual defendant and the state of Kuwait was not a signatory to the Hague Convention, so the magistrate judge allowed service via Twitter to the individual defendant who "used the social-media platform to fundraise large sums of money for terrorist organizations by providing bank-account numbers to make donations," which was the subject of the lawsuit. No. 3:16-CIV-3240 LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016).

6 Jessica Klander, Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process-Shamrock Development v. Smith, 36 WM. MITCHELL L. REV. 241, 259 (2009).

7 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

8 FED. R. CIV. P. 4(f)(1)–(3).

Application of Rule 4(f)(1)

FRCP 4(f)(1) provides for internationally agreed service that is reasonably calculated to give notice. This form of service is typically based on international agreements like the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention").[9] The Hague Convention provides a uniform framework for serving process within member nations [10] and is considered to be the international equivalent of the Full Faith and Credit Clause, binding courts of member nations.[11] Countries also have the ability to serve by mail, courier, or through a judicial official under Article 10 so long as the country where service is sought does not opt out of these provisions. [12] As one may expect, some countries opted out of these provisions under Article 10 [13] while others declared no objection to them. [14]

Though international agreements like the Hague Convention govern service between member countries, how should a plaintiff proceed if no international agreement exists? Litigants who dread this scenario should consider that it poses a unique opportunity to effect service via alternative methods available under FRCP 4(f)(2) & (3). In fact, service under FRCP 4(f)(2) & (3) may be more effective and speedier than under an international agreement.

Application of Rules 4(f)(2) & (3)

There is no hierarchy of service methods under Rules 4(f)(2) & (3). [15] Though courts tend to construe these rules liberally in an effort to facilitate, and not hinder, service, [16] imperative to the analysis is whether the proposed service method is "reasonably calculated" to give notice as set forth in Mullane v. Central Hanover Bank & Trust Co. [17]

In Mullane, the Supreme Court held that due process is afforded so long as the form of service is "reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [18]

Rule 4(f)(2) provides that in the absence of international agreement, service may be effected by enumerated methods that are "reasonably calculated" to give notice.[19] These methods are service as prescribed by the foreign country's law, as directed in the foreign country in response to letter rogatory or letter of request, or, "unless prohibited by the foreign country's law," by personal service or using a form of mail that the clerk addresses and sends with signed receipt.

The majority of courts consider that a foreign country "prohibits" a form of service when the foreign law explicitly prohibits the proposed method of service. [20] Indeed, one Court held that "[a] form of service is not 'forbidden by authority' merely because it is not a form explicitly 'prescribed' by the laws of a foreign country." [21] In Polargrid LLC v. Videsh Sanchar Nigam Ltd., [22] the judge held that mailing the defendant located in India via Fedex satisfied subsection (f)(2)(C)(ii) even though India did not specifically permit service via FedEx. Compare this case to the view taken in Jung v. Neschis, [23] where the judge held that international registered mail to a defendant in Liechtenstein did not satisfy subsection (f)(2)(C)(ii) when Liechtenstein law only permitted foreign service by way of letters rogatory but did not expressly prohibit register mail. There, an administrative law judge and attorney licensed to practice law in Liechtenstein stated that "service of an international summons and complaint must be made" through letters rogatory. [24]The court relied on Resource Ventures, Inc. v. Resources Mgmt. Int'l, Inc., [25] which held that "subsection (f)(2)(C)(ii) limits the forms of service to those that do not violate the law of the country where service is attempted."

Rule 4(f)(3) is a catch-all provision, which allows service by other means as ordered by the court so long as it's not prohibited by an international

9 The United States is a signatory to the Hague Convention.

10 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361.

11 The Hague Convention is mandatory and applies when documents are to be served in a Convention country. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988). Yvonne A. Tamayo, Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad, 17 HARV. J.L. & TECH. 211, 214–16 (2003).

12 In Birmingham v. Doe, No. 21-CV-23472, 2022 WL 871910 (S.D. Fla. Mar. 24, 2022), the Court highlighted that among the countries that do not specifically object to Article 10(a) are Canada, Hong Kong, and the United Kingdom.
See, e.g., TracFone Wireless, Inc. v. Bitton, 278 F.R.D. 687, 690–91 (S.D. Fla. 2012) (finding that service upon a Canadian resident via FedEx is permissible pursuant to Rule 4(f)(2)(C)(ii) because Canada does not object to Article 10(a) of the Hague Convention); TracFone Wireless, Inc. v. Unlimited PCS Inc., 279 F.R.D. 626, 631 (S.D. Fla. 2012) (finding that FedEx service of summons and complaint to Hong Kong defendant was a permissible postal channel under Article 10(a)); Strax Americas, Inc. v. Tech 21 Licensing Ltd., 16-25369-CIV, 2017 WL 5953117, at *2 (S.D. Fla. Mar. 23, 2017) (holding that service via FedEx on the United Kingdom defendants was an acceptable form of alternative service, not prohibited by international agreement, and reasonably calculated to fulfill due process requirements).
Birmingham, 2022 WL 871910, at *6.

13 These countries include Argentina, Austria, India, China, Russia, Germany, Japan, Korea, and Switzerland, among others. See id.

14 These countries include Albania, Canada, France, Italy, Morocco, Netherlands, Portugal, Romania, and Spain, among others. Authorities, https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17 (last visited Apr.8, 2022).

15 See Swarna v. Al–Awadi, No. 06 Civ. 4880(PKC), 2007 WL 2815605, at *1–2 (S.D.N.Y. September 20, 2007). See also Nuance Commc'ns, Inc. v. Abbyy Software House, 626 F.3d 1222, 1239 (Fed.Cir.2010) ("Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing."

16 See, e.g. Caputo v. City of San Diego Police Dep't, No. 16-cv-00943-AJB-BLM, 2018 WL 4092010, at *4 (S.D. Cal. Aug. 28, 2018); United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)); Nowak v. XAPO, Inc., No. 20-CV-03643-BLF, 2020 WL 5877576, at *2 (N.D. Cal. Oct. 2, 2020); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1312 & n. 61 (D.C.Cir.1980).

17 See Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

18 Id.

19 FED. R. CIV. P. 4(f)(2); The Knit With v. Knitting Fever, Inc., No. CIV. A. 08-4221, 2010 WL 2788203, at *8 (E.D. Pa. July 13, 2010).

20 Dee–K Enters., Inc. v. Heveafil SDN Bhd., 174 F.R.D. 376, 379–80 (E.D. Va. 1997); Resource Ventures, Inc. v. Resources Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 430 (D. Del. 1999); Trueposition, Inc. v. Sunon, Inc., No. 05–3023, 2006 U.S. Dist. LEXIS 39681, at *12–14 (E.D. Pa. June 14, 2006); SEC v. Alexander, 248 F.R.D. 108, 112 (E.D.N.Y. 2007); Fujitsu Ltd. v. Belkin Int'l, Inc., 2011 U.S. Dist. LEXIS 99922 at *8–9; SignalQuest, Inc. v. Tien–Ming Chou & Oncque Corp., 284 F.R.D. 45, 48 (D.N.H. 2012); Taser Int'l, Inc. v. Phazzer Elecs., Inc., No. 616CV366ORL40KRS, 2016 WL 7137560, at *2 (M.D. Fla. July 14, 2016).

21 Dee–K Enters. Inc. v. Heveafil Sdn. Bhd., 174 F.R.D. 376, 380 (E.D.Va.1997).

22 No. 04–cv–9578 (TPG), 2006 WL 903184, at *2–3 (S.D.N.Y. Apr. 7, 2006).

23 No. 01 Civ. 6993(RMB), 2003 WL 1807202 (S.D.N.Y. Apr.7, 2003).

24 Id. at *2.

25 42 F.Supp.2d 423, 430 (D.Del.1999)

agreement. [26] Courts also consider whether the proposed method of service "minimizes offense to foreign law." [27] Though service under this rule must comport with constitutional notions of due process, [28] and the "reasonably calculated" standard still applies, this rule allows for broad flexibility to meet the needs of particularly difficult cases. [29] For instance, in adidas AG v. Individuals, [30] the court permitted Rule 4(f)(3) service via social media accounts, including private messaging applications. In Birmingham v. Doe, the court authorized service via email, social media messages, and publication on plaintiffs' websites for defendants located in Canada, Hong Kong, and the United Kingdom. [31]

In In re Zawawi, Plaintiffs made several attempts to serve fledging defendants in Oman, including at defendants' home and place of business. [32] Service became extremely difficult: In one instance, an employee of one defendant used force to retrieve a signed acknowledgement of service from the process server. [33] As a result, plaintiffs' attorneys sought an alternative means of service under FRCP (f)(2) & (3). The judge ultimately authorized all ten of plaintiffs' proposed methods of service, which included service via FedEx, email, and SMS message (including Whatsapp Messenger as an alternative). [34]

Hurdles

Rule 4(f)(2) & (3) provide powerful tools to assist counsel to serve defendants abroad. Counsel serving under these rules should tread carefully, however.

For one part, counsel should ensure that their motion or application establishes that the defendant is not located in the United States, whether the defendant is evading service and explain the efforts to locate the defendant. [35]

Courts have declined to authorize service when the plaintiff failed to establish these elements [36] or simply alleged the defendant's location is unknown. [37]

Counsel should also be aware of practical considerations that may hinder service efforts. In Birmingham v. Doe the court took into account the current conflict in Ukraine in declining to authorize the alternate means of service for defendants in Ukraine that it granted as to other defendants residing outside of Ukraine.[38] Notably, the court noted that the lack of food, water, power, internet, and other basic fundamental needs gave the court "no confidence that any of the alternative means of service proposed by Plaintiffs are currently reasonably calculated . . ." [39]

Even with the advent of modern technology and development of case law in the field, serving a foreign defendant has been depicted as "one of the most challenging [problems] that a court can be called upon to face." [40] Thus, becoming familiar with the tools available under Rule 4(f)(2) & (3) and its limitations is necessary, especially for plaintiffs who find themselves dealing with the challenges of serving a fledging defendant in foreign jurisdictions.

26 FED. R. CIV. P. 4(f)(3).

27 Prewitt Enterprises, Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916, 927 (11th Cir. 2003) (citing Advisory Committee Notes to Fed. R. Civ. P. 4(f)).

28 See, e.g., Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (requiring that service under Rule 4(f)(3) satisfy due process standards under Mullane); Secs. & Exch. Comm'n v. Anticevic, No. 05 CV 6991(KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (holding that "a Court may fashion means of service on an individual in a foreign country, so long as the ordered means of service (1) is not prohibited by international agreement . . . and (2) comports with constitutional notions of due process."); U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., No. 07 C 3598, 2008 WL 4299771, at *4 (N.D.Ill. Sept.17, 2008) (same).

29 In re Int'l Telemedia Assocs., Inc., 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000).

30 adidas AG v. Individuals, Partnerships, & Unincorporated Associations Identified on Schedule "A", No. 19-63109-CIV, 2019 WL 9595881, at *2 (S.D. Fla. Dec. 27, 2019).

31 Birmingham v. Doe, No. 21-CV-23472, 2022 WL 871910, at *6 (S.D. Fla. Mar. 24, 2022). See id.

32 See id.

33 See id.

34 See Order Granting Motion for Order Authorizing and Approving Alternative Methods of Service, In re Zawawi, No. 6:21-ap-00136 (Bankr. M.D. Fla. Mar. 10, 2022), ECF. No. 20.

35 American Veteran Enterprise Team, LLC, v. Silver Falcon, Inc., Holland Sales Team of NC, LLC, William L. Holland, William E. Holland, Khalid Shafique & Timothy Brumlik, No. 6:21-CV-647-CEM-EJK, 2021 WL 2435253, at *2 (M.D. Fla. Apr. 30, 2021).

36 See id.

37 Codigo Music, LLC v. Televisa S.A. de C.V., No. 15-CIV-21737, 2017 WL 4346968, at *9 (S.D. Fla. Sept. 29, 2017) (citing Rio Props., Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1015 (9th Cir. 2002) (holding that service under Rule 4(f)(3) is not a "last resort" or "extraordinary relief" and instead is one of several means for serving an international defendant)).

38 Birmingham v. Doe, No. 21-CV-23472, 2022 WL 871910, at *8 (S.D. Fla. Mar. 24, 2022).

39 See id. at *7.

40 Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 458 (S.D. Fla. 1998).

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AN INVESTIGATIVE APPROACH TO NON-PERFORMING LOAN RECOVERY:

THE WOOD, THE TREES AND THE LOW-HANGING FRUIT

Authored by: Chris Ives - Kroll

Across global markets, there is an ever-increasing focus on the need for financial institutions and debt issuers to both recognize the extent of their non-performing loan (NPL) exposure and to understand options for recovery. At the same time, the secondary market for NPL portfolios is presenting an increasingly attractive investment opportunity.

NPL portfolios are often seen as a sum of their parts. To take the old saying, "you can't see the wood for the trees," sometimes when considering recovery options for NPL portfolios, the problem can be the opposite. To run with the analogy, by focusing on the portfolio as a whole, or "the wood," it is easy to overlook the facts surrounding individual loans, or "the trees." By getting into the detail, a closer examination of individual loans can in the right circumstances yield valuable returns.

Not all NPL portfolios are created equal. There is a mature market and approach for the resolution and sale of unsecured debt, asset-backed and retail NPL portfolios. However, when it comes to NPLs issued to, or guaranteed by, high-net-worth individuals and cross-border business groupings, these NPLs can present a number of challenges when it comes to considering recovery options vs. portfolios of other NPLs.

Adopting an investigative approach to these classes of NPLs is becoming an increasingly attractive option for debt holders to develop an efficient and cost-effective recovery strategy, including by strengthening negotiation positions, and to enhance the potential sale value of a portfolio.

The Investigative Approach

At its core, an investigative approach looks beyond the immediate borrower to understand the international asset profile of related parties, ultimate beneficial owners (UBOs) and guarantors. It is a deep dive into the loan, the borrower and the related parties in order to identify viable routes for recovering value.

This approach utilizes all available sources of internal information within the lender combined with public record and open-source information gathering to efficiently establish the asset profile of subjects of interest in order to formulate an effective strategy for recovery.

The investigative approach typically involves the following phases:

- Defining the population of relevant loans, borrowers, guarantors and related parties
- Conducting a triage process to identify the highest priority loans for recovery. This is achieved through an enhanced review of internal and external information with a view to:
    - Identify jurisdictions in which the subjects have an asset profile, for example, where the subjects reside, are incorporated, operate or have other relevant connections

  - Identify likely assets and assets holding structures

- Developing a targeted recovery strategy focused on:
  - Assets with the greatest value
  - Assets with the greatest strategic significance for settlement or recovery
  - Jurisdictions where the likelihood of recovery is the highest

The first step in any approach is to identify the relevant population of loans, guarantors and related entities. What is often overlooked when taking a portfolio view is identifying connections between the guarantors and related entities. Analysis of internal datasets alongside public record searches can often help identify undeclared or previously unknown connections between subjects of interest. This often allows for further consolidation of loans and related parties and the streamlining of subsequent investigation and recovery efforts.

Low-Hanging Fruit to Fund the More Complex Work

One additional, and important, advantage of adopting an investigative approach to NPL portfolio management is the ability to create a self-funding model, whereby recovery of the "low-hanging fruit," those assets which are most easily recoverable, can fund more complex cases in the portfolio. By utilizing an efficient triage process, the minimum of resources can be deployed in the initial stage to fund recovery of the highest priority assets. This can create a win-win scenario for debt holders – a reduction in NPLs and the freeing up of capital for other uses.

Overcoming Internal Barriers

Knowledge of specific NPLs and related parties as well as the historical recovery efforts can be fragmented across various internal stakeholders and geographies within an organization. Bankers, credit committees, internal audit, general counsel and legal teams, and recovery teams amongst others can all be involved at some point in the NPL process. Commonly, each of these stakeholders approach the issue in a slightly different way, may have different priorities and utilize various internal and external data.

Adopting a centralized approach drawing upon all the existing information held by the various stakeholders and combining it with open-source analysis can prove immensely effective. Beyond the obvious, such as account statements, internal information such as know your customer (KYC) files, compliance records and customer communications across all accounts linked to the subject of interest can yield a tremendous amount of actionable intelligence. This intelligence can then inform an investigation strategy, harnessing open-source and public records to identify and trace assets of the subjects.

Identifying Worldwide Assets

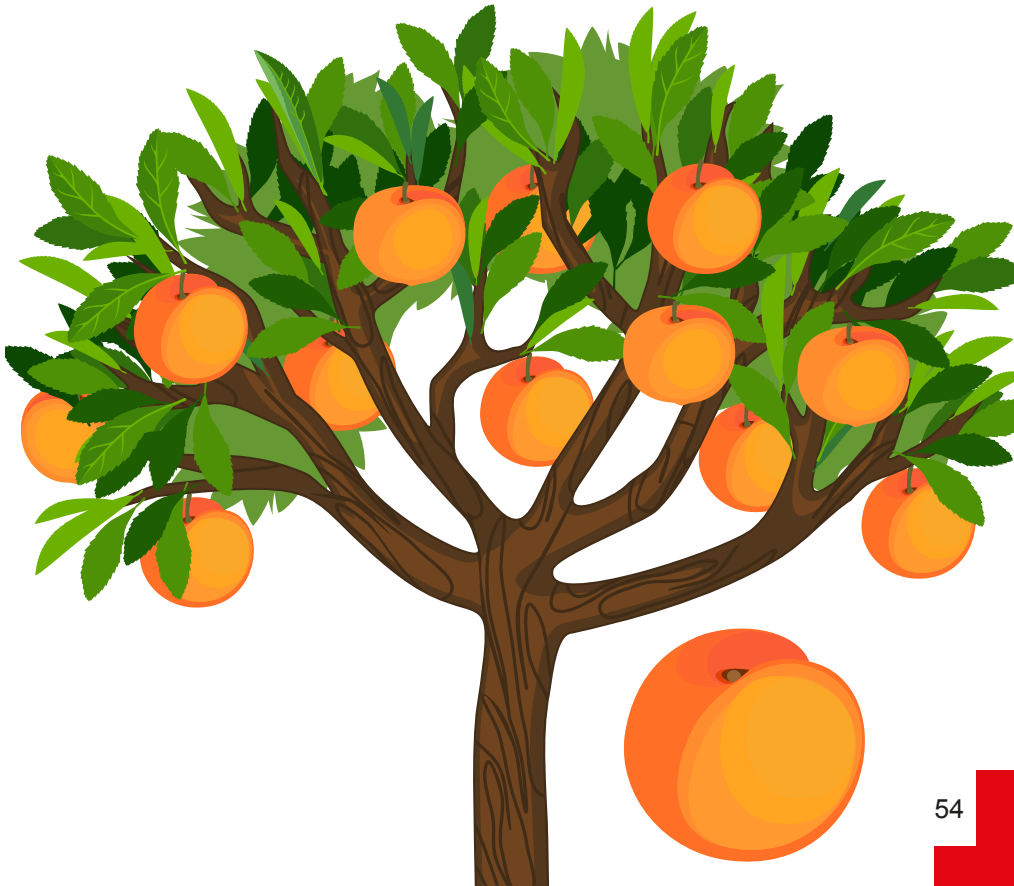
Taking a worldwide view when assessing the assets of guarantors and borrowers is critical for success in recovering NPLs of this nature. This process goes beyond identifying specific assets such as companies, real estate, financial assets and other liquid and illiquid assets; it is equally important to develop an understanding of how assets are held. Establishing a subject's asset-holding structure can reveal easier routes to recovery than may be apparent from an initial view of the loan. For example, real estate held through an offshore company can open up possibilities for enforcement against the shares in the offshore company rather than the underlying property asset.

Having established the asset classes, where they are located and, crucially, how and where the assets are owned, a legal strategy can be devised prioritizing those assets that are of most interest. This allows for a debt issuer's legal counsel to focus their efforts on those jurisdictions in which any debt judgments can be enforced. Decisions can then be made on the viability of pursuing other resolution methods where enforcement of the debt judgment is not possible. Subsequent investigations can then focus on assets and holding structures in the preferrable jurisdictions to gather admissible evidence to support the claims.

Fraud

No matter how robust a debt issuer's underwriting framework is, there will always be instances where loans are issued based on false or misleading information provided by the customer. By adopting an investigative approach, the likelihood of uncovering this activity is increased, and once the activity is identified, it opens up potential options for related fraud claims that move beyond enforcement of any debt order.

An investigative approach is not going to be the right option for all types of NPLs. But sometimes if you are lost in the woods, it can be worthwhile looking at the trees around you to find your way out.



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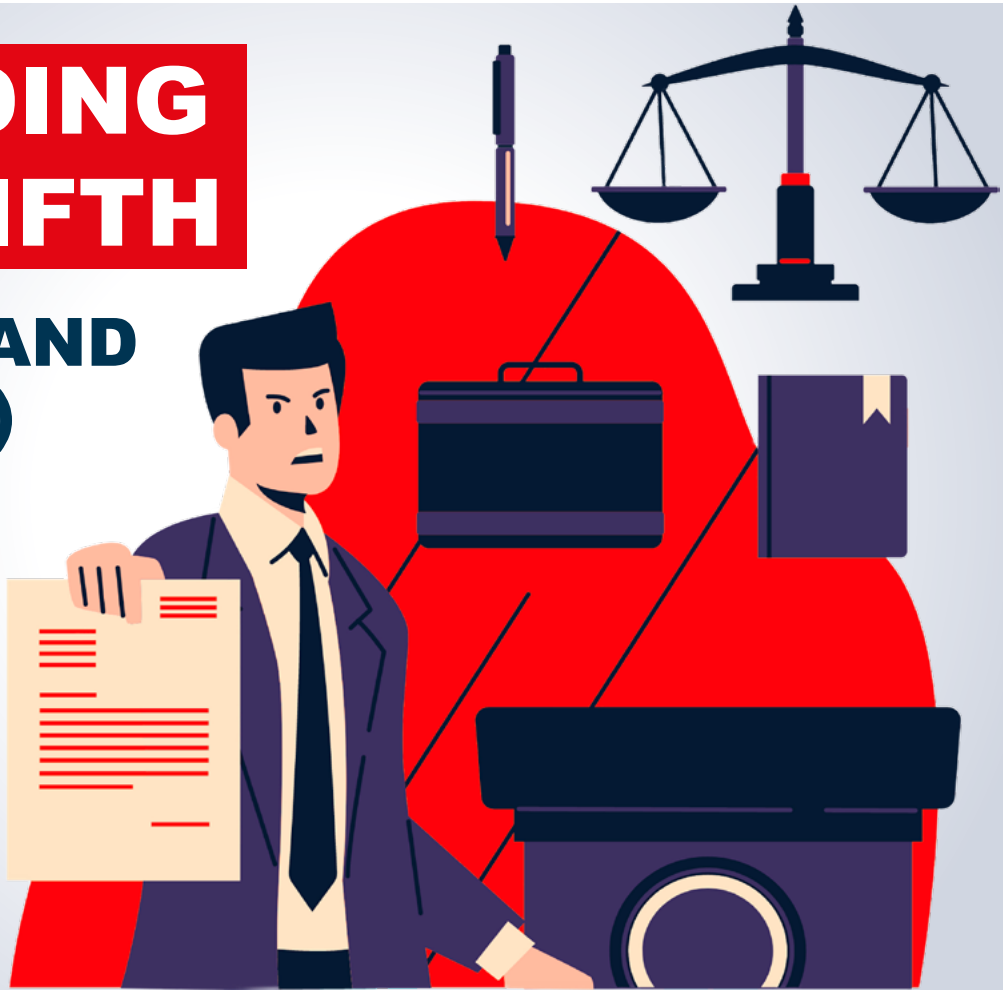

Authored by: Joshua Folkard - Twenty Essex

Introduction

The Fifth Amendment to the United States Constitution is famous. As fans of at least baseball [1] and Jay-Z[2] know, that amendment is concerned with the privilege against self-incrimination. Whilst the equivalent provisions in England & Wales are less well-known, they remain of significant importance to (civil) fraud lawyers. This article looks at: (A) the definition and scope of the privilege against self-incrimination; (B) statutory abrogation of the privilege; (C) practical matters arising from overlapping civil and criminal proceedings; and (D) the future of 'pleading the Fifth' in this jurisdiction.

The privilege against self-incrimination

In England & Wales, the privilege against self-incrimination has been described as a "very long and firmly established feature of the common law": *Phillips v News Group Newspapers Ltd* [2012] EWCA Civ 48; [2012] 2 All ER 74, at [14] (Master of the Rolls). That privilege was defined by Goddard LJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 as follows (at 257):

> "[T]he rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for".

(the "**Privilege**")

Statutory conferral (and abrogation) of the Privilege

Civil Evidence Act 1968

The Privilege in civil proceedings was expressly preserved by section 14(1) of the Civil Evidence Act 1968 (the "**Civil Evidence Act**"), which provides that:

> "The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty -
>
> **(a)** shall apply only as regards criminal offence under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> **(b)** shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty".

The Privilege has, however, been 'cut down' by a number of statutory provisions including: [3] (i) the Fraud Act 2006; and (ii) the Theft Act 1968.

1 https://www.nytimes.com/2005/03/18/sports/baseball/mcgwire-offers-no-denials-at-steroid-hearings.html.

2 Jay-Z, Never Change (Feat. Kanye West): "Plead the Fifth when it comes to the fam".

3 For a fuller list, see Phillips v News Group Newspapers Ltd [2012] EWCA Civ 48; [2012] 2 All ER 74, at [16].

Fraud Act 2006

Section 13(1) of the Fraud Act 2006 (the "**2006 Act**") abrogates the Privilege in the following terms:

> "A person is not to be excused from -
>
> **(a)** answering any question put to him in proceedings relating to property, or
>
> **(b)** complying with any order made in proceedings relating to property,
>
> on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related offence".

The term "proceedings relating to property" in section 13(1) is defined by section 13(3) of the 2006 Act to mean "any proceedings for (a) the recovery or administration of any property, (b) the execution of a trust, or (c) an account of any property or dealings with property, and 'property' means money or other property whether real or personal (including things in action and other intangible property)".

In *Kensington International v Republic of Congo* [2007] EWCA Civ 1128; [2008] 1 All ER (Comm) 934 the Court of Appeal held that statutory provisions abrogating the Privilege should not be strictly construed: at [36] (Moore-Bick LJ). Specifically, Moore Bick LJ held that:

> **1.** The definitions in section 13(3) did not require the subject matter of the civil proceedings to be the specific property of which the Claimant is said to have been deprived by criminal conduct: at [39]-[40].
>
> **2.** Consequently, the 2006 Act abrogated the Privilege in a civil claim brought in debt. Suing on a debt was held to be a "proceeding ... for … the recovery … of … property" within the meaning of section 13(3): at [49].
>
> **3.** Section 13(3) seems likely to encompass a claim in restitution or damages to 'recover' money or other property: at [48] (Moore-Bick LJ).[4]

The 'rider' "or a related offence" in section 13(1) casts the scope of abrogation widely, as applying to: "conspiracy to defraud" and "any other offence involving any form of fraudulent conduct or purpose": section 13(4) of the 2006 Act. The following have been held to amount to "related offence[s]" under that section:

A. Civil claim(s) in bribery: *Kensington*, at [63] (Moore-Bick LJ) & [90] (Carnwath LJ); and

B. The offence of acquisition, retention, use and/or control of criminal property in section 328(1) of the Proceeds of Crime Act 2002 ("**POCA**"): *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1124; [2010] 1 WLR 976, at [25] (Moses LJ). That section of POCA provides that:

> "A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person".

Theft Act 1968

In similar terms to the 2006 Act, the Theft Act 1968 (the "**Theft Act**") had provided (and still provides) that:

> "A person shall not be excused, by reason that to do so may incriminate that person or the spouse or civil partner of that person of an offence under this Act -
>
> **(a)** from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property …".

It should be noted, however, that the Privilege is disapplied in a narrower range of circumstances under the Theft Act than under the 2006 Act, since the Theft Act contains no provision for abrogation in the case of related offences. The Theft Act accordingly abrogates the Privilege only in relation to offences set out in that statute.

Practicalities & the future

Three practical points arise from the summary of the law above:

I. First, English civil judges will often rule on the applicability of the statutory provisions abrogating the Privilege at the beginning of the trial (or, at the latest, at the start of the cross-examination of the relevant witness). Cross-examining Counsel remains in principle entitled to put questions, the answers to which could lead to a witness incriminate him- or herself. The Judge and Counsel for the witness must therefore be astute to warn the witness or intervene sufficiently quickly before any answers are given!

II. Second, difficulties arise where the witness is not a party to the proceedings or is a party but unrepresented. The writer has been involved in a case in which a co-Defendant who expressed a wish to rely on the Privilege was unrepresented. In that case, the Judge sought submissions on the applicability of the Privilege from all represented parties before agreeing to 'police' the cross-examination by warning the unrepresented party during his questioning.

III. Third, increasing doubts have been heaped on the Privilege by Judges in England & Wales: see the collection of "judicial observations from authoritative sources" in Phillips, at [17]. In that case, the Master of the Rolls took the "opportunity to express [his Lordship's] support for the view that [the Privilege] has had its day": at [18]. Until the Civil Evidence Act is amended by Parliament, however, the Privilege (and its attendant difficulties) will remain with us. By virtue of the 2006 Act's relatively expansive exceptions to the Privilege, however, fewer civil fraud Defendants than before will be entitled in this jurisdiction to 'plead the Fifth'.

4 Where his Lordship described a submission that section 13(1) of the 2006 Act covers "only a claim to recover the very funds of which the claimant was deprived" as "difficult to accept".

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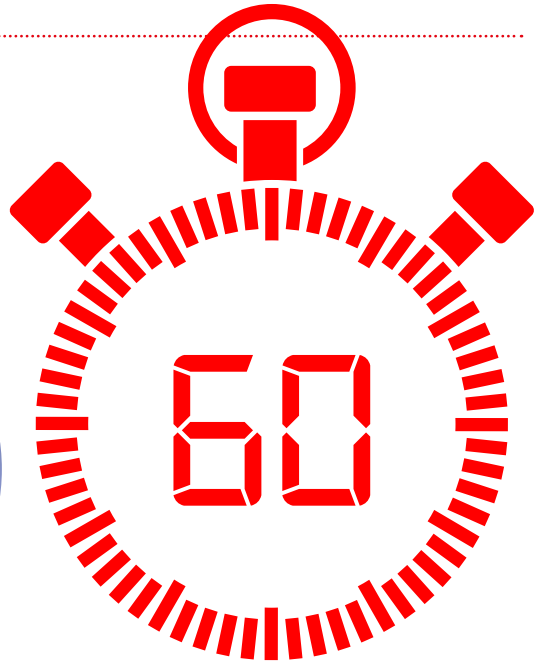

Q What do you like most about your job?

A It lets me occupy myself with interesting and difficult questions.

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

A Hunting for interesting and difficult problems to occupy me.

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

A Terrifying rather than exciting: as an outdoor clerk in the 90s successfully escaping a very large, angry, dog when serving a witness summons.

Q What has been the best piece of advice you have been given in your career?

A Never apologise, never explain, get the job done and let them howl.

Q What is the most significant trend in your practice today?

A Rising uncertainty due to war, sanctions and economic instability.

Q What personality trait do you most attribute to your success?

A Persistence

Q Who has been your biggest role model in the industry?

A I don't hold with role models.

Q What is something you think everyone should do at least once in their lives?

A Visit Cuba.

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

A Sleep, although I still try to do without from time to time.

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

A To Kill a Mocking Bird, because courage isn't a man with a gun.

Q What would be your superpower and why?

A Speaking all languages. It would give me more difficult and interesting questions.

Q As a speaker at FIRE International, what are you most looking forward to at the event?

A A good gossip.

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CRYPTO IN DISPUTES

29th June 2022 | London

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London Circuit Commercial Court
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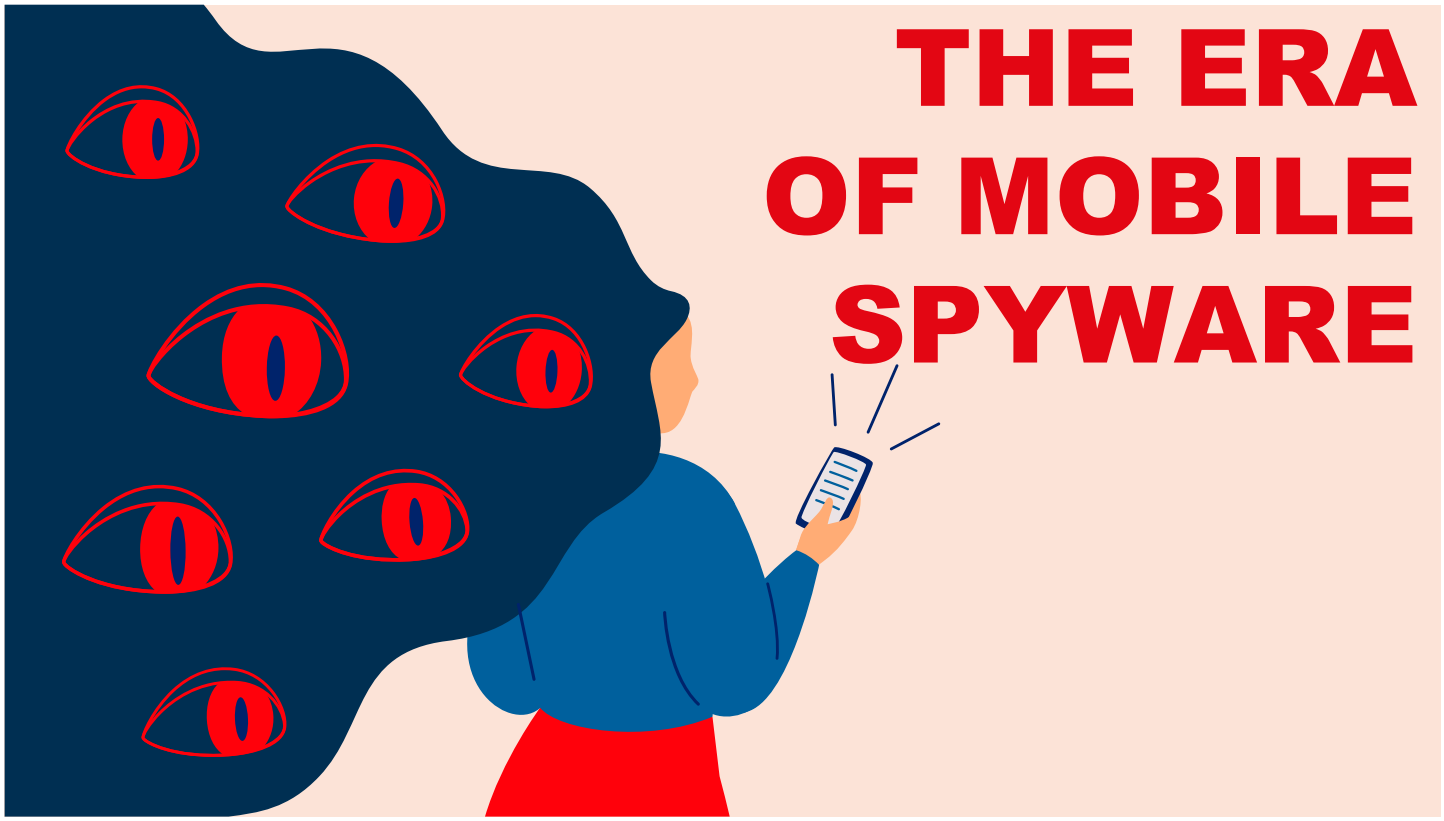

THE ERA OF MOBILE SPYWARE

Authored by: Nat Abramov - Crystal Vantage

In recent years a select group of specialised alumni from Israel's elite signals intelligence units have developed a globally game-changing cyber weapon: software capable of capturing virtually all data on a mobile device entirely undetected. It is hard to overstate the significance of this development on our societies. It has repercussions on the powers of law enforcement agencies, anti-terrorism and anti-fraud investigations, judicial authorities, the rule of law, right to privacy, and international diplomacy. Like with all new technology, there is a lag between breakout and a settled consensus on its use and limits. Recent events in Israel expose that gap vividly. This briefing draws on revelations of abuse of this technology in Israel, mobile spyware's maiden market, to reflect on wider questions around its impact on our private, professional and civic lives.

What is the latest mobile spyware?

Developed by a handful of Israeli cyber companies, the software exposes vulnerabilities in Apple's iOS operating system to grant an intruder access to a Subject's mobile device. Once a device has been penetrated, the software can collect passwords, location data, contacts, documents, photos and videos, audio and calls, emails, instant messages across all major platforms (including encrypted services), and a plethora of other stored data. This allows the intruder to harvest a device, and/or to monitor it live. Critically, most intrusions are zero-click, meaning no action is required on the part of the user in order to compromise their device.

The most high-profile developer of this type of mobile spyware is NSO Group, which was sanctioned by the US in November 2021 after it emerged that its platform Pegasus had been used to "maliciously target" journalists, activists, dissidents and government officials around the world. Several other lesser-known companies have developed similar tools, including the secretive Tel Aviv-based outfit Candiru.

Who authorises its sale?

Offensive mobile hacking software is considered in Israel a military product. Private companies wishing to sell these systems overseas require the authorisation of Israel's Defence Exports Control Agency (known colloquially as API), a unit of the Defence Ministry. The API committee includes representatives of Israel's main intelligence agencies and government officials. It is charged with determining whether the transfer of capabilities risks harming the state's interests, complies with its policies on arms exports, and/or risks falling into enemy hands.

In practice API has been willing to rubber stamp the sale of these systems to a wide group of clients overseas, including law enforcement and intelligence departments operating at the instructions of authoritarian leaders.

This unregulated system exposes a glaring inadequacy: a mobile phone belonging to an individual anywhere in the world can be hacked and harvested by an agency or police force of another country, so long as they have purchased a software licence from the Israeli private developer. The sole regulator of this technology is an opaque committee in the Israeli Defence Ministry. Neither the jurisdiction of the mobile phone user, nor the elected officials of the country where the law enforcement agency is operating, have the knowledge or power to prevent an intrusion in real time. Furthermore, states do not have the capability to disable the software from operating in their territories, or even to detect its use.

Who has the latest mobile hacking software?

Israeli providers of phone hacking technology predictably do not disclose their clients. Various leaks and forensic work by NGOs have exposed a partial list of law enforcement agencies, who are suspected of having acquired access. These include the CIA and FBI in the US; a series of European governments; the UAE, Saudi Arabia, Bahrain and Morocco; several Latin American governments, and other client states labelled high risk, such as Djibouti, Kazakhstan, Azerbaijan. Several of these states have been accused of dual use of Pegasus: to fight crime and to settle personal or political scores.

The list of countries whose agencies have phone hacking capabilities is constantly evolving and is being exposed periodically in piecemeal fashion. For a current snapshot, it is advisable to consult the latest available reports and Citizen Lab studies.

Can it be used against me and my clients?

If you have a smartphone and are involved in activities of potential interest to a law enforcement agency, the answer is yes. At present, there is no preventative way of avoiding abuse of the technology to target government opponents, personal or business rivals, their legal advisors, or individuals working on politically sensitive cases. The most prominent example of this is Fiona Shackleton and her legal team, who were targeted by Pegasus hacking from the UAE in August 2020. They were representing Princess Haya during her sensitive legal battle with former husband, Ruler of Dubai, Sheikh Mohammed bin Rashid Al Maktoum.

Following the Prince Haya case, NSO reportedly restricted the ability to hack UK numbers with a +44 prefix. Similar reports suggested it had barred hacking of numbers from the US, Israel and Five Eyes member states Canada, Australia and New Zealand. However, these claims are unverified, and it remains likely domestic agencies in these countries retain the ability to harvest devices in their jurisdictions. This raises a series of questions about the adequacy of laws and oversight processes in age of undetected mobile hacking and harvesting.

Who authorises the use of phone hacking?

Advanced phone hacking and harvesting can be commissioned by (a) a domestic law enforcement agency; or (b) an intelligence agency. Each country has its own rules on how these organisations gain permission to hack phones and under which circumstances.

In the UK, the police, NCA and intelligence agencies require a ‘double-lock’ warrant granted by the Home Secretary and approved by a Judicial Commissioner.

In the US, mobile wiretapping usually requires a prosecutor with Department of Justice to apply for a 30-day warrant from a federal judge. US intelligence agencies, however, have availed themselves of post-9/11 legislation, including FISA Amendments Act of 2008, to intercept communications overseas. As the Edward Snowden NSA leaks showed, warrantless wiretapping was not averted in real time.

In Israel, the police use phone hacking technology domestically based on warrants issued by a judge. Intelligence agencies deploy phone hacking technologies on overseas subjects using case-by-case orders signed off by the Prime Minister himself.

Are warrants fit for purpose or properly overseen?

Technology has moved far more quickly than the law in this regard. Countries around the world are using all-encompassing mobile phone harvesting and tracking technology on the basis of wiretapping warrants created at a time when agencies wished to listen to a phone conversation between two individuals. Some countries have created legal provisions for digital data interception, but neither the law nor its custodians are fit for the mobile hacking technology that state agencies currently possess.

Since the technology has only come into recent use, most law enforcement agencies have not yet faced scandals over the targets and methods of their phone hacking. There is little doubt these episodes will surface increasingly over time. In Israel, they are beginning to emerge.

Notably, Israeli police were recently found to have used mobile spyware beyond their permitted remit to harvest the mobile phone of Shlomo Filber, a key witness in the country’s high-profile corruption trial of former Prime Minister Netanyahu. The police’s wrongdoing may alter the trajectory of the most significant case in Israeli courts.

Israeli police been accused by the country’s leading business publication Calaclist of having used the technology improperly on mayors, politicians and other key figures. In one case, they allegedly discovered the homosexuality of a suspect who was married with children and used the revelation as leverage in his interrogation. These allegations were denied by Israeli police. A committee of intelligence experts assembled by the Attorney General recently cleared the police of material wrongdoing, save for small technical breaches of warrants. Many in Israel remain unconvinced that these tools are being used properly.

Anecdotal reports have emerged that some overseas law enforcement agencies turned to NSO informally to gather information from a suspect’s mobile. NSO is then said to have handed over incriminating material to support a local warrant application. The practice is a clear circumvention of the prohibition on “fishing expeditions”, a proud fixture of many legal systems around the world.

Fundamentally it is impossible to know how many agencies worldwide are overstepping their phone hacking powers. A component of the problem is the inadequacy of the warrant approval process. An Israeli judge who had previously granted hundreds of wiretap warrants was recently disclosed that judges in his position simply did not understand the capabilities of the new mobile hacking technologies whose use they were authorising. He alleged that requesting authorities would frequently fail to make it clear to judges that their warrant would be used to harvest a phone, to turn on its microphone and camera, to extract deleted WhatsApp messages, to gather emails, and to extract a huge range of other data that would "strip naked" the user of the phone.

A reality in which judges do not fully appreciate the application and purpose of their warrants encompasses a major vulnerability. This stands to be exploited by agencies keen to secure authorisation to use their tools unabated. There exists a clear risk that agencies withhold from judges the capabilities of their new tools, thereby avoiding any uncomfortable lines of questioning and preserving an "old world" perception of what wiretapping allows them to do.

Plainly, there does not exist in any jurisdiction at present an effective system to ensure an agency performs only what the judge intended to permit them to do with a mobile device.

In the UK, the tendency for agencies to over-interpret their powers was laid bare in a recent challenge to their use of hacking warrants. It took a High Court petition by an NGO in *Privacy International v. Investigatory Powers Tribunal* to establish that intelligence agencies could not use 'general warrants' allowing mass data hacking of a whole class of property to compromise the devices of specific people. Agencies had hitherto used these warrants, issued by the Secretary of State and not a judge, to hack individual devices. Until the successful High Court action, these agencies had also been backed to engage in this practice by the intelligence oversight body, the IPT.

In the US, there remains legal ambiguity around the permissibility of warrantless wiretapping on foreign nationals for national security purposes. This leaves open a lacuna for US agencies to hack the phones of individuals around the world without any judicial involvement or oversight.

What happens to data harvested from phones?

The materials recovered from a mobile device by a police force or agency are at the behest of the organisation that collected it. In ongoing investigations, or cases that reach prosecution, relevant data is naturally preserved as evidence. But the fate of the mountain of surrounding data that has been collected, particularly in cases that have been closed, remains an under-scrutinised topic.

In jurisdictions that have strict privacy laws, agencies are bound by the relevant local legislation and data regulators. In January 2022, the European Data Protection Supervisor made a landmark decision to order Europol to delete a large part of its big data ark, which was drawn from a range of sources including hacked mobile phones. Similar provisions may apply to agencies at a national level, in accordance with domestic laws and regulations.

However, most jurisdictions around the world where government phone hacking is used have neither strict data protection laws nor regulators with teeth to compel agencies to destroy data that is no longer relevant. There is good reason to believe that sensitive data is widely retained. The recent account of a former investigating police officer in Israel suggested that agencies kept troves of harvested mobile phone data on file as intelligence, available to be called upon if necessary in subsequent investigations.

This paints a sobering picture: our devices are vulnerable to hacking from agencies overseas, who may continue to hold our sensitive data indefinitely without our knowledge and without meaningful oversight.

That data may re-appear in the context of future investigations, or may simply sit as one of billions of other data points in government databases.

What can we do to protect ourselves?

In responding to the new reality of advanced phone hacking and harvesting, the first imperative is awareness. Given even encrypted communications can now be remotely intercepted, it is prudent for individuals working with sensitive data, and their clients, to take precautions to limit risk of compromise. Advisable steps include:

A. Keeping sensitive and confidential information off mobile devices. Matters that can be discussed in person, or on a secure video link, are better done through those mediums than via a recoverable message trail.

B. Periodically deleting non-essential data from communication platforms on a device, including email, WhatsApp, Signal, Telegram and Wire.

C. Wherever possible, applying the potential leak test: would you be prepared for the information exchanged to surface with a law enforcement agency, newspaper, or court of law. If that creates discomfort, an alternative means of secure information exchange is preferable.

Additionally, there is a pressing need to regulate the availability and use of phone hacking and harvesting tools. Below are initial suggestions:

A. Adoption of international standards and oversight mechanism to approve the agencies that are granted access, and to ensure their appropriate use of the technology.

B. Limitations on the operation of phone hacking and harvesting tools out of jurisdiction. Providing a kill switch to senior authorities, elected officials, or parliamentary oversight committees to disable access in the case of abuse.

C. A review in all relevant jurisdictions of the warrant process, including updated guidance to judges, and oversight of agency compliance.

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FORTIFICATION FOR DAMAGES IN FREEZING INJUNCTIONS: OUT WITH THE OLD, IN WITH THE NEW?

Authored by: Sian Mirchandani QC - 4 New Square

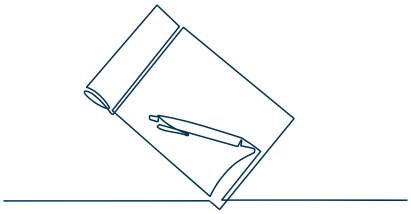
What is fortification?

Freezing injunctions or 'freezing orders' are commonplace in the Commercial Court of England and Wales, particularly when there has been conduct which is either potentially fraudulent or indicates the defendants may be putting their assets out of reach of creditors. Once in place freezing orders mean assets (including the contents of bank accounts) are protected pending the outcome of ensuing litigation – they are an effective mechanism to ensure there is a 'money pot' worth fighting over.

The Commercial Court's wide powers to grant such interim remedies is one of the reasons commercial parties elect in international agreements to have jurisdiction clauses that ensure disputes are heard exclusively before the courts of England and Wales. There are various stages which the courts must go through before this interim remedy is granted. For an applicant to obtain a freezing order, they will have to meet the requirement for providing a cross-undertaking in damages to the court (not the respondent). This is a form of protection for the respondent whose ability to function and trade may be severely affected by the asset freezing only for the ensuing litigation against it to fail.

The need to provide an undertaking in damages as a pre-condition to obtaining a freezing order sometimes causes problems for the applicant in showing that they have sufficient assets within the jurisdiction to give validity to the undertakings being offered (akin to provision of security – though this is a distinct procedure from the mechanism under CPR 25.12). It is at this point that fortification comes into play. The respondent to an application for a freezing order can make a counter application for fortification of the undertaking in damages proffered by the applicant. The court will then try and ascertain what harm a respondent may suffer, and how that harm might be offset by fortification. The fortification itself may be achieved by way of a parent company guarantee, a payment into court or to the applicant's solicitors (to be held by them as officers of the court pending further order), by means of a bond issued by an insurance company or a first demand guarantee or standby credit issued by a first-class bank (See Fortification of Undertakings: F15.4 of the Admiralty and Commercial Courts Guide).

Since these applications arise in the early stages of the proceedings, the amount of fortification initially ordered by the court may be far less than the loss a respondent anticipates suffering. In such circumstances a further application for fortification can be made by the respondent to protect itself.



What are the principles the court will apply when considering an application for fortification?

It is a matter of discretion for the court as to whether fortification of a party's undertaking in damages is appropriate. The starting point is that the party seeking fortification must show a good arguable case that it will suffer loss as a result of the injunction and must also demonstrate an evidential basis for the application.

The principles for the court to consider have been laid out by Popplewell J. in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at [14]:

(1) Can the applicant show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that effect?

(2) Can the applicant show (to the standard of a good arguable case) that the loss has been or is likely to be caused by the granting of the injunction?

(3) Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?

In order to justify fortification one must also establish causation of the loss, i.e. that the loss for which fortification is sought, is caused by the applicant's freezing injunction. That requires a respondent to disentangle losses which arise (or are likely to arise) from the litigation from the losses caused by the restraint to business activities caused by the freezing injunction itself. If this has not been shown, then fortification cannot be ordered (*Financiera Avenida v Shiblaq* [1994] 1 Lloyd's Rep 577).

The requirement for an evidential basis has been expressed in a number of authorities [1] – there must be real evidence capable of objectively establishing the risk of loss which is being asserted in the fortification application.

Recent Developments

Until recently, the law was fairly settled on whether fortification could be ordered: after it had been shown there was a good arguable case that a sufficient risk of loss to the respondent arose by reason of the freezing injunction, then some "real evidence" as to the potential loss would need to be shown before an application for fortification would be granted.

However, the recent High Court decision in *Claimants Listed in Schedule 1 v Spence [2021] EWHC 925 (Comm)* has cast some doubt upon this apparent consensus. The claimants had obtained a worldwide freezing order against two defendants: Mr Spence and Mr Kewley – and provided fortification of £500,000 via an insurance policy. The defendants applied to vary the level of fortification because one of them (Mr Spence) asserted that he faced a "very substantial risk" of suffering a loss of at least £2 million.

The risk of loss was claimed to arise because Mr Spence had borrowed circa $9.3 million from Coutts, (the dollar loan) which was secured against his sterling deposits in excess of £8 million also held with Coutts. This arrangement was put in place because Spence had moved to the United States of America when the exchange rate of pounds sterling against the US dollar was at a historic low. The benefit of the dollar loan arrangement was that it allowed Spence to spend US dollars without having to exchange his pounds sterling at a rate that he considered unfavourable.

As applicant to vary the level of fortification it was Spence's assertion that he intended to exchange his sterling deposits for dollars when the exchange rate reached £1: $1.55. In his application Spence asserted that due to the worldwide freezing order being granted, there was a substantial risk that Coutts would call in the dollar loan or enforce its security. That would lead to his having to accept whatever exchange rate pertained at the time Coutts made such a decision, which, Spence asserted, was likely to be less than £1:$1.55. Spence sought fortification for a resulting potential loss of, at least, £2m based on the lowest exchange rate that had arisen during the period of the loan.

Moulder J granted additional fortification of £800,000.00, (additional to the existing fortification of £500,000). So how did the applicants for fortification show on an objective basis that there was a "good arguable case of a risk of loss" and that this was caused by the injunction?

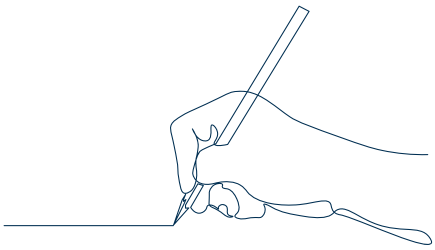
Three problems arise with this decision:

(1) Coutts, despite being aware of the freezing order, had not suggested that it would terminate the loan. The "Events of Default" clauses in the loan agreement had not been triggered by the freezing order having been made, and Coutts were in a comfortable position being fully secured and receiving interest on the loan, the payment of which was not prevented by the freezing order. In short, there was no evidence that the risk of recall on the loan was present, or that it was caused by the freezing order.

(2) No real or documentary evidence was adduced to support Mr Spence's assertion that his intention was to keep the dollar loan arrangement until the exchange rates recovered to a level of £1:$1.55. His proposed plan also lacked any commercial reasoning – as he was paying interest on the loan whilst waiting for the currency exchange rate to improve in his favour, he could not sensibly hold his position indefinitely. At some point the payment of interest to Coutts could make the dollar loan arrangement, as he described it, uncommercial.

(3) The estimate of loss was not an informed, intelligent or realistic estimate. Not only had Mr Spence's assertions of loss fluctuated from £800,000 to £2.6million, his calculations of loss failed to account for his ongoing liability to pay interest on the dollar loan facility.

1 JSC Mezhdunarodniy Bank v Pugachev [2015] EWCA Civ 139; Brainbox Digital Ltd v Backboard Media GMBH [2017] EWHC 2465 (QB); Phoenix Group Foundation v Cochrane [2018] EWHC 2179 (Comm); Create Financial Management LLP v Lee [2020] EWHC 1933 (QB).



Discussion

The existing authorities plainly highlight the need for real evidence to support an application for fortification, and further that the evidence should be capable of objectively establishing the risk. But in this case, there was a resounding lack of real evidence to establish such a risk actually arose, or that it was caused by the freezing injunction.

The judge in this case actually noted that there was an "*absence of any evidence to support*" Mr Spence's assertion that he intended to convert his dollars into sterling only when the exchange rate reached £1:$1.55. Having noted the absence of this evidence, the judge nevertheless elected to take Mr Spence's assertion at face value. It is difficult to see how, even accepting Mr Spence's assertion as to his intention, that there was a sufficient evidential foundation (when viewed objectively) that the claimed loss had been or would be suffered. There also appears to be no adequate basis for the conclusion that the risk of loss was caused by the freezing injunction. The decision in *Spence* has been appealed and the outcome is awaited.

In *PJSC National Bank Trust v Mints [2021] EWHC 1089 (Comm)*, a case decided shortly after the above case, Calver J stated that when one is considering an application for fortification: *"there does indeed have to be a solid, credible evidential foundation that the claimed loss has been or will be suffered"*.

Where are we now?

The contrasting decisions of Moulder J. and Calver J. handed down just two weeks apart has created uncertainty in an area of law that was previously notably consistent in approach. The admittedly low threshold for an application for fortification of showing a 'good arguable case' for the existence of a risk of loss was subject to a balancing, comparatively stringent requirement for an objective and credible evidential basis for the application, a supportable estimate of loss, and also required that the loss was shown (to the standard of a good arguable case) to have been due to the freezing order not the litigation itself.

It will be interesting to see whether the status quo will be restored by the Court of Appeal, or whether a new test will be applied in this area. If the decision in Spence is upheld on appeal, a possible effect will be that respondents will pursue fortification despite lacking a credible evidential basis that the claimed loss will be suffered. If applicants for freezing orders know they will face losing such evidentially weak fortification applications this may discourage them from pursuing freezing orders. It could stifle or severely reduce the use of this powerful and necessary interim remedy.

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TRACING CRYPTOCURRENCY AND THE ENGLISH COURT'S POWER TO COMPEL DISCLOSURE FROM FOREIGN RESPONDENTS

Authored by: Tom McKernan - PCB Byrne

Recent cases in the cutting-edge field of cryptocurrency illustrate the limits of the English court's powers to compel disclosure from parties outside the jurisdiction.

Often the proceeds of fraud can be traced into a cryptocurrency wallet account, but it is not possible to identify the wrongdoer without disclosure of information from the crypto exchange that is invariably held by an overseas company. In a recent line of cases the Court has ordered such disclosure, but the scope of this jurisdiction remains uncertain.

Norwich Pharmacal Orders (NPOs)

NPOs may be granted against innocent third parties mixed up in the arguable wrongdoing of another, so that they are more than a 'mere witness'. In such cases the court will order disclosure of information necessary to enable the substantive claims to be brought. Classically, this is the identity of the wrongdoer, but it can include information regarding proprietary assets.

Whether or not an NPO application can succeed against a foreign respondent effectively turns on whether it can satisfy one or more of the jurisdictional gateways in Practice Direction 6B. Relief was granted against US companies in two cases:

- *Lockton Companies International v Persons Unknown* [2009] EWHC 3423 (QB), where the Court held that Google was a necessary and proper party (Gateway 4) to a claim against unknown persons involving allegations of defamation, harassment and data protection infringement by email.
- *Bacon v Automatic Inc* [2011] EWHC 1072 (QB), where the Court held that the relief sought required the respondents to do an act within the jurisdiction (Gateway 2). This decision has been criticised by commentators on the basis that the place of compliance with an NPO is incidental, and that this aspect is not explained in the judgment.

In *AB Bank Limited v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082, Teare J declined to follow these authorities and concluded that there is no gateway applicable to an NPO, since:

- An NPO respondent is not a necessary and proper party (Gateway 4) where no substantive cause of action is advanced against them.
- As to Gateway 2, the steps required to disclose the information would take place in the respondent's local jurisdiction and the witness evidence could be provided there, as opposed to being provided to the Claimants' solicitors in England.

The Claimants also relied on Gateway 5, on the basis that the claim was for an interim remedy under section 25(1) of the Civil jurisdiction and Judgments Act 1982. The judge found that a NPO is a substantive rather than interim order, since it fully disposes of the relief sought against the respondent, who will play no further part in the proceedings.

Banker's Trust Orders (BTOs)

BTOs have developed into a separate but related category of equitable relief. They are available against entities who hold or have held the proceeds of arguable fraud where there is a real prospect that the information sought might lead to the location or preservation of proprietary assets.

The test for BTOs is expressed slightly differently from that applicable to NPOs, but they may be seen as a different application of the same jurisdiction. It is therefore perhaps surprising that the authorities below suggest that a BTO, unlike an NPO, may be available against a foreign respondent.

Ion Science Ltd v Persons Unknown and others (unreported), 21 December 2020 (Commercial Court)

Having traced the proceeds of a cryptocurrency Initial Coin Offering fraud to Bitcoin exchanges incorporated in Cayman and the US, the Claimants sought, *inter alia*, disclosure by means of a BTO. Mr Justice Butcher was satisfied that there was a good arguable case for service out of the jurisdiction of a claim for a BTO, applying the following reasoning:

- Gateway 4 permits service out where the respondent would be a necessary or proper party to the 'anchor' claim.
- The test for whether a party is a necessary or proper party is whether both the anchor and foreign defendants would have been proper parties had they both been in the jurisdiction (*Massey v Haynes* [1888] 21 QBD 330).
- That test was satisfied because CPR r7.3 permits the commencement of more than one claim in a claim form if they can be 'conveniently disposed of in the same proceedings'.

Butcher J declined to express a view on the correctness of AB Bank's treatment of Gateway 4 but said that case was arguably distinguishable as it related to an NPO rather than a BTO. He also noted that in *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482 it was envisaged that a BTO may be served out of the jurisdiction in exceptional circumstances, including in cases of 'hot pursuit'.

Subsequent cases

In the following subsequent cases, the Courts have followed the judgment of Butcher J in Ion Science by granting a BTO over a cryptocurrency exchange holding proprietary bitcoin:

- *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254, where HHJ Pelling QC expressed reservations as to the NPO/BTO distinction but felt obliged to follow *Ion Science* unless he considered that Butcher J was 'plainly wrong'.
- Most recently, *Sally Jayne Danisz v Persons Unknown and Huobi Global Limited* [2022] EWHC 280 (QB)., where Lane J made express reference to Butcher J's 'hot pursuit' criterion.

In *Mr Dollar Bill Limited v Persons Unknown* [2021] EWHC 2718, the Court went further and ordered an NPO as well as a BTO against the foreign exchanges holding proprietary bitcoin. This appears inconsistent with the authorities above, but it is not clear whether this was drawn to the Court's attention by the applicant at the *ex parte* hearing.

Conclusion

The Court has left the door open to BTOs against overseas respondents, even if Mr Dollar Bill is wrongly decided and NPOs are not available. As matters stand therefore, claimants can seek disclosure orders from crypto exchanges overseas that hold the proceeds of fraud.

This seems an odd result. It is not clear why banks, and quasi-banks (like crypto exchanges), should be more susceptible to such disclosure than other third parties that are innocently mixed up in wrongdoing.

All the decisions granting BTOs above were heard *ex parte*, as the judges were at pains to point out. By contrast, in AB Bank the represented respondent resisted the NPO. It may be that when Ion Science is tested in this context, extra-territorial BTOs will go the way of extra-territorial NPOs and the dodo.

Whatever the outcome, it would seem there is a real issue here for consideration by the Civil Procedure Rules Committee, which we understand is considering the gateways in PD6B. On the one hand, the English Court should be slow to exercise jurisdiction over third parties abroad against whom no substantive relief is sought. On the other, crypto assets illustrate the global challenges of asset recovery in the information age; in principle, fraudsters should not be able to maintain anonymity by parking traceable assets overseas. Perhaps it is time for a bespoke third-party disclosure gateway in 'hot pursuit' cases where there is a real need to identify proprietary assets or defendants subject to the English Court's jurisdiction

RPC

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WEAPONIZING THE FINANCIAL SYSTEM BRINGS MONEY LAUNDERING RISKS

Authored by: Nathan Shaheen - Bennett Jones

In response to Russia's invasion of Ukraine, Western countries and their allies have weaponized the global financial system to target the world-wide assets of Russia and its wealthy oligarchs. One of the consequences is likely to be enhanced money laundering risks, not just for traditional financial institutions, but for businesses in a wide range of industries worldwide. Such businesses would be well-served to take the steps required to understand the rapidly-evolving landscape and to mitigate the risks of facilitating money laundering and related financial misconduct.

The Weaponization of the Financial System

Russia's invasion of Ukraine is the largest conventional military attack in Europe since the Second World War. While the Ukrainian military and armed civilians have met force with force, Western countries and their allies have thus far steadfastly maintained that their troops will not directly engage in armed conflict. Instead, those countries have primarily responded to Russian aggression by utilizing a wide array of financial tools against Russia and its oligarchs, and against Russian leader Vladimir Putin himself.

The financial tools being utilized by Western countries and their allies are increasingly a strategy of first resort against both state and non-state actors. The September 11th attacks led to the immediate introduction of laws aimed at better intercepting the flows of illicit funds to terrorists. Iran remains subject to sanctions in response to its nuclear programs. The Canadian government recently, and controversially, responded to the so-called "Freedom Convoy" protests against Covid-19 mandates by freezing the bank accounts and certain other assets of the protestors.

The financial tools being utilized in response to Russia's invasion are nonetheless notable in their breadth and seriousness. In addition to prohibitions on importations of key Russian resources such as coal, Western countries have joined together in banning transactions with the Russian central bank, and banning key Russian banks from the international payment system (SWIFT). On April 6th, U.S. President Joe Biden issued an Executive Order [1] prohibiting U.S. citizens from making new investment in, or providing various services to, Russia. Sanctions have also been leveled against Putin, his adult daughters and an ever expanding list of Russian lawmakers and oligarchs, whose foreign assets have been targeted and in some cases seized

The nature and extent of the financial tools being deployed by Western countries and their allies have been understandable described as "weaponizing the financial and payments system [2]."

1 https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/06/prohibiting-new-investment-in-and-certain-services-to-the-russian-federation-in-response-to-continued-russian-federation-aggression/

2 https://www.brookings.edu/opinions/economic-warfare-is-hurting-russia-but-its-risky-for-the-us-too/

The Consequences of Financial Warfare

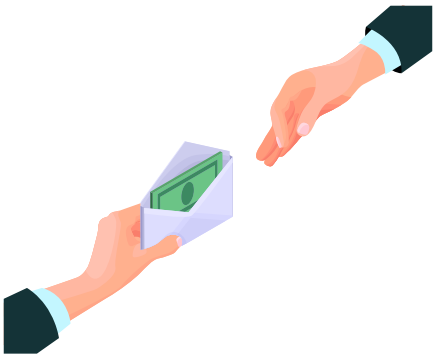
The use of financial tools in response to Russian aggression will naturally be felt most directly by Russians. This is true of average citizens living in Russia, but equally of the oligarchs who, whether physically within Russian or elsewhere, have long enjoyed their vast holdings of significant foreign assets. The impacted sums are staggering.

A 2018 study [3] estimates that, by 2015, the hidden assets of wealthy Russians amounted to 85% of Russia's GDP.

The impacts of the financial tools being employed by Western countries will also be felt more broadly. In addition to the broader economic fallout, there are obvious implications for businesses directly engaged in Russia or with Russian counterparts. Such activity has been increasingly restricted, whether as a matter of law, logistics or public relations. Such restrictions are likely to remain and even expand as the Russian aggression continues.

Notably, the risks are also likely to spread beyond those businesses directly engaged with Russia. The restrictions placed on the significant foreign assets of Russian oligarchs create the strong possibility that oligarchs will respond by engaging in creative and increasingly complex tactics in an attempt to maintain access to their global wealth and the lifestyles such wealth affords. In addition to constituting illegal sanctions evasion [4], such tactics would constitute money laundering or related financial misconduct under the laws of jurisdictions around the world, and may lead the price for laundering funds higher as demand for, and sophistication of, money laundering practices reach new heights.

In turn, the risks of inadvertently facilitating money laundering or similar financial misconduct is likely to be heightened, not just for traditional financial institutions, but for businesses in a variety of industries worldwide. For example, various forms of corporate financings, investments, capital-intensive projects or other transactions could inadvertently shelter the movement or use of assets subject to sanctions or similar restrictions. Consistent with widespread reports[5], such risks may be most acute for businesses engaged in the emerging cryptocurrency sector, although many business engaged in the movement or investment of funds could conceivably face similar issues, particularly where the funds may have been subject to underlying failures of due diligence or inadequate sanction adherence.



How Businesses Should Respond

In the face of the increased risks of facilitating money laundering or similar financial misconduct resulting from pressures arising from Russia's ongoing aggression, businesses in would be well served to ensure they are taking the steps required to understand and respond to the rapidly-evolving landscape in order to mitigate those risks.

In this context, risk mitigation includes implementing or maintaining sufficiently robust policies and procedures to respond to the heightened risks of money laundering, including with reference to the emerging global standards in respect of the transaction of cryptocurrencies [6]. Such standards are consistent with the growing attention being paid by legislators, including President Biden [7], to the potential for government intervention aimed at stemming the misuse of cryptocurrencies as a matter of financial stability and national security. Other countries will surely soon follow suit.

Such policies and procedures must then be applied in a manner that keeps up-to-date with and understands the rapidly-evolving landscape, and then the associated risks into account when undertaking transactional due diligence and otherwise evaluating appropriate business relationships.

This is particularly true where counterparties to those relationships are in higher risk industries or conduct business in jurisdictions where sanctions or other financial controls may not be sufficiently robust.

These forms of responses are relevant not only to mitigating the particular money laundering risks arising from the ongoing Russian aggression, but equally to a world where weaponizing the financial and payments system appears likely to remain a tool of first resort used by Western countries and their allies.

3 https://gabriel-zucman.eu/files/NPZ2018.pdf#page=17
4 https://www.justice.gov/opa/pr/russian-oligarch-charged-violating-us-sanctions
5 https://www.reuters.com/business/exclusive-russians-liquidating-crypto-uae-seek-safe-havens-2022-03-11/
6 https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets-2021.html
7 https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/

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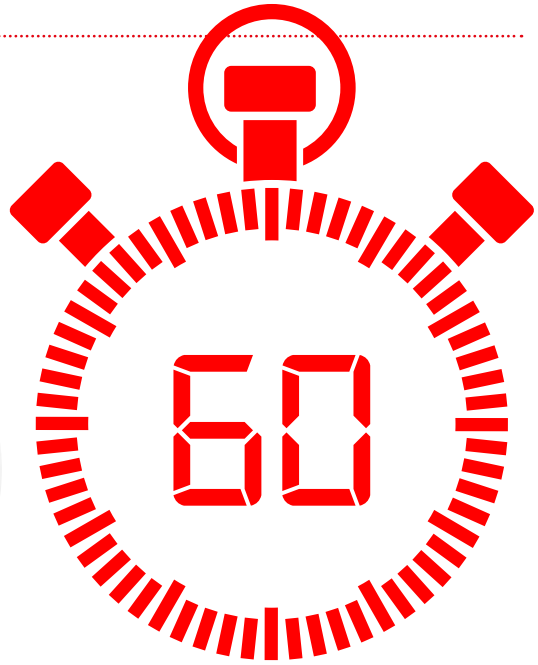

Q What do you like most about your job?

A Helping people at a stressful time in their lives; the challenge of a tricky legal problem, meeting a wide range of people and traveling.

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

A I would love to be a professor of philosophy or - if the constrains of reality were no object - a concert pianist.

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

A Speaking at the Rehoboth Fire Baptized Holiness Church in Brooklyn to convince the District Attorney to recommend to the Governor of New York that our client receive clemency.

Q What has been the best piece of advice you have been given in your career?

A Don't be afraid to ask questions - even if you think that they are stupid.

Q What is the most significant trend in your practice today?

A The different ways of providing access to justice either through finding novel ways of funding claims, be it through third party funding, insurance products, conditional fee arrangements, fixed fee arrangements and portfolio funding or the development of group actions.

Q What personality trait do you most attribute to your success?

A Resilience.

Q Who has been your biggest role model in the industry?

A Sue Prevezer QC, an inspirational female role model who seems to find 48 hours in every day.

Q What is something you think everyone should do at least once in their lives?

A Dance all night.

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

A Sleep.

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

A The Diving Bell and the Butterfly. It is a lovely book in itself and the source of great inspiration. The author, Jean-Dominique Bauby wrote the book using the only functioning muscle in his body- his left eye lid. He was able to overcome such tremendous obstacles, and we can all learn from his strength and determination.

Q What would be your superpower and why?

A The ability to teleport. I would get a lot more done if I did not have to travel from one place to another.

Q As a speaker at FIRE International, what are you most looking forward to at the event?

A I am looking forward to reconnecting with people after such a long break. That the conference will be held in Portugal is a bonus!

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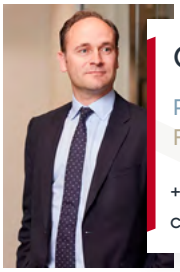

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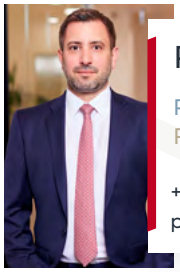

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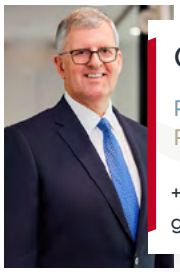

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SANCTIONS

AND THE PROBLEM WITH TRUSTS...

Authored by: David Hinrichsen - FRP

Thoughts by an insolvency practitioner on the issues caused by trusts in recovering assets in insolvency, their interaction with section 423 and a possible solution.

Following Russia's disgraceful invasion of Ukraine, the world's leaders have scrambled to condemn Vladimir Putin's actions and – in a rare but headlines-friendly show of unity – sought to impose a series of wide reaching and extreme-sounding sanctions against the oligarchy's riches across the globe. Pictures of (alleged) kleptocrats' superyachts, private planes and palatial estates as they were impounded and raided by government agencies quickly swept through the world's media.

UK parliament hastily passed the Economic Crime (Transparency and Enforcement) Act 2022, promising the establishment of the long-mooted register of overseas entities to provide transparency over the ownership of UK property assets through foreign entities.

Whilst a register of beneficial owners of opaque offshore entities sounds like a dream come true for FIRE practitioners, such as trustees in bankruptcy looking to recover assets for the benefit of creditors, the jury is out as to its likely effectiveness.

One immediately apparent flaw is the continued recognition of trusts: As regards trust-owned property, the registrable beneficial owner will be the person able to exercise "significant influence or control over the activities of that trust". In the case of the dreaded discretionary trust that sounds rather like a trustee, as opposed to the beneficiary?

Indeed, a mere seven days after the passing of the act, the BBC noted that Alisher Usmanov's assets had already been placed into irrevocable trusts, with his spokesperson reported to have confirmed that Usmanov no longer owned them, and that he was no longer "*able to manage them or deal with their sale, but could only use them on a rental basis*" [1].

So whilst Usmanov has found himself on the UK's sanctions list, and his Sutton Place estate with a restriction in favour of the Office of Financial Sanctions Implementation, it seems that the authorities are about to experience one of the usual frustrations of trustees in bankruptcy when dealing with (allegedly former) high net worth individuals: the Trust is arguably one of English law's proudest achievements, but in the context of an officeholder looking to recover assets for the benefit of creditors also probably one of the cleverest and most (ab)used gadgets in any financial Houdini's toolbox of scammery.

Picture being faced with this…

So it might look like I live in a 50-bedroom mansion with a private airport and a herd of unicorns, but in reality, I'm only renting it from the trust that I set up years ago, at the mercy of its (of course!) wholly independent trustees, who are continually charging me rent. If I pay the rent, I'm successfully swelling the trust's assets further, and if I don't then I accrue a huge loan account, which can either serve to control my bankruptcy if I find myself in a pickle or to reduce any inheritance tax I might have to pay if I die. Plus, I can tell the Sanctions Police to get off my manicured lawn, because I actually don't really own any of this.

So clever, so effective, but not at all revolutionary.

Despite the headline grabbing news of impending transparency of foreign ownership, it seems the register of beneficial owners also has no intention or requirement to make information about trusts publicly available, suggesting that the trust is to remain a protected species.

In the wake of the current public outrage against the permeation of our financial systems, property markets and service sectors by the oligarchy's allegedly unethically obtained riches, is it now time to acknowledge what many trusts for private benefit really are – namely nothing more than what the Insolvency Act has long codified in section 423 as a transaction for the purpose of "putting assets beyond the reach of a person who is making, or may at some time make, a claim against" them.

If Mr Clitheroe's attempt at protecting his home from potential future creditors by gifting his share of the house to his wife failed as it did in *Sands v Clitheroe* then why should the position be any different for an individual who happens to have sufficient funds or determination to pay for the privilege of opening offshore companies in opaque jurisdictions and the services of (of course!) wholly independent trustees?

In situations of individuals holding themselves out to be "high net worth" until it comes to paying back creditors in bankruptcy, when all assets of any note are suddenly purely discretionary, those creditors should not continue to suffer at the mercy and ability of a trustee in bankruptcy to challenge a complex, opaque and uncooperative trust structure (not to mention the trustee's ability to fund the cost of such an endeavour). This is especially so in situations where creditors' funds have been misappropriated and dissipated. Perhaps it is time for a wholesale overhaul of the recognition and legality of private benefit trusts, and for those to suffer the same fate as bearer shares and other relics.

On the flipside, it may also be time to recognise one of the understandable drivers of the trust and offshore secrecy industries, namely a desire to protect the fruits of one's labour from potential creditors in years to come. Ambition, hard work, entrepreneurship and responsible enterprise, along with the wealth it generates should not be discouraged. In a time of increasing focus on environmental, social and governance standards, those that create value and wealth through ethically responsible ways and with regard to ESG values should be applauded and celebrated. A focus on those values may leave little room for the historic examples of worship of extreme wealth and status (one wonders whether space tourism really is a priority for humanity?).

For those who conduct their business fairly, honestly and ethically, the introduction of a concept of limited personal liability as a default position may begin to dispel the attractions that the segregation of legal and beneficial ownership through trusts may have held.

Implementing a longstop lookback period for any assets or income generated before that point may encourage more transparent behaviour and structuring of affairs.

Clearly, there are other factors at play here, not least an overly convoluted, onerous and growing domestic tax code, as well as the global cooperation of jurisdictions that have historically had little incentive to work together. But the changes in the world's attitudes to the creation and preservation of wealth in the current climate should serve as a sufficient trigger to start a wider discussion in an area that will be familiar to most FIRE practitioners.

1 https://www.bbc.co.uk/news/business-60825983

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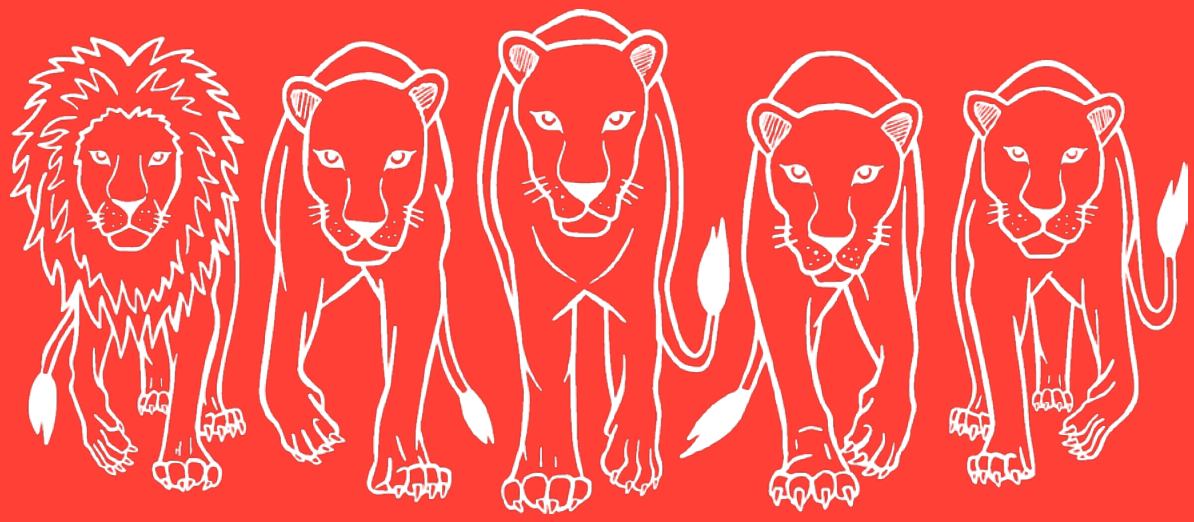

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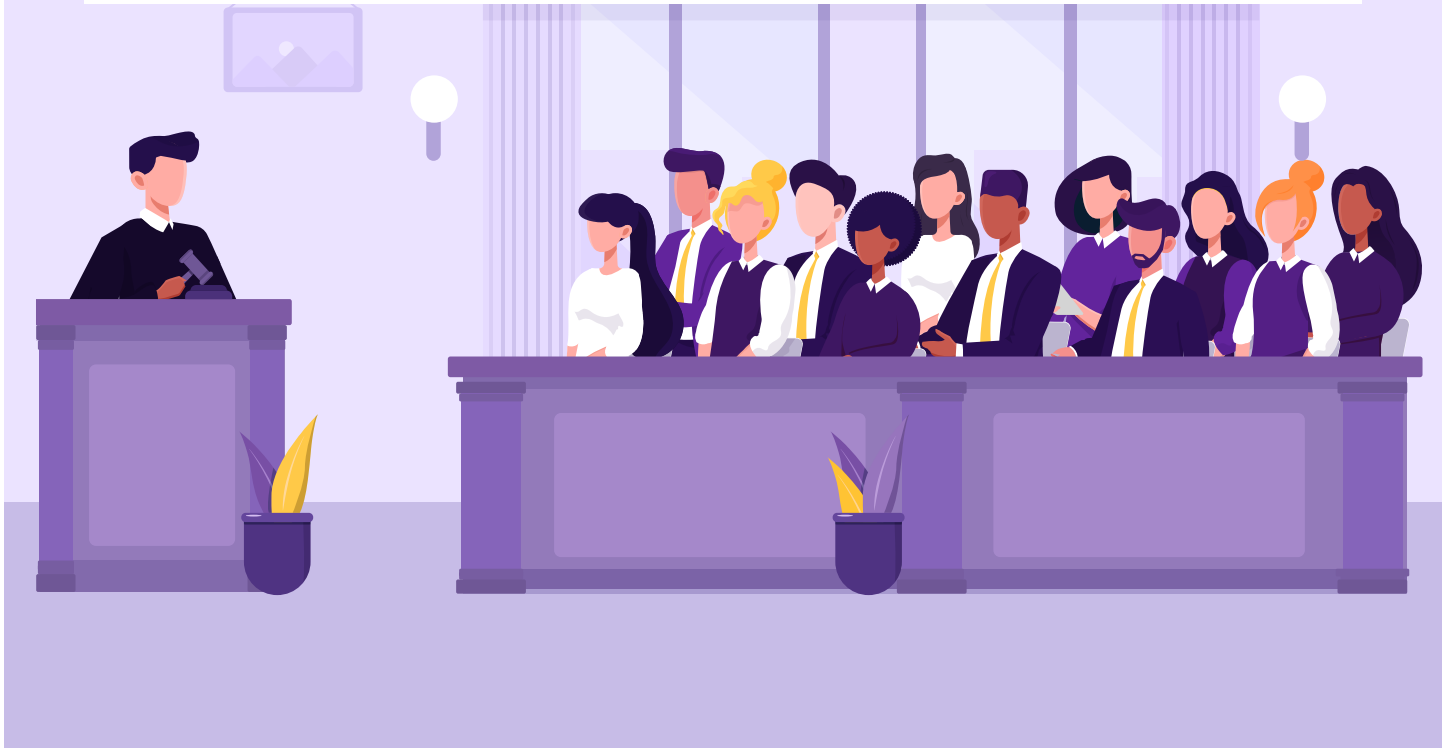
PRIVATE PROSECUTIONS & ECONOMIC CRIME:

A ROUTE TO JUSTICE FOR VICTIMS



Authored by: Gareth Minty and Owen Griffiths - Mishcon de Reya

Economic crime is widely reported to be on the increase, but with the limited resources of the state's agencies stretched widely across the full spectrum of criminal offending, victims of fraud and related crimes are too often denied justice and left without effective recourse.

Gareth Minty and Owen Griffiths consider how private prosecutions may help to fill the resulting gap and enable victims to obtain the justice they desire.

The current economic crime wave

Although many crime types have seen a reduction in offending during the COVID-19 pandemic and the ensuing lockdowns, economic crime has followed a markedly different pattern.

The Office of National Statistics' ('ONS') most recent year-end report [1] details that there were 5.1 million fraud offences in the year ending September 2021, a 36% increase compared with the year ending September 2019.

The ONS further notes that industry body UK Finance reported a 53% increase in remote banking fraud, reflecting fraudsters' attempts to adapt to lifestyles focused increasingly on mobile and internet use.

The ONS report also records an astonishing increase in computer misuse, with 1.9 million offences in the year ending September 2021, an 89% increase compared with the year ending September 2019.

The report emphasises that a significant part of this increase relates to large-scale data breaches, another key aspect of modern economic crime. Separately, the damaging impact to the UK economy from the growth in counterfeiting and intellectual property crime is also well established [2].

1 Crime in England and Wales - Office for National Statistics (ons.gov.uk)

2 Trade in counterfeit goods costs UK economy billions of euros - OECD

Set against this background of prolific offending, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services ('**HMICFRS**') reported in August 2021 that victims of fraud were often denied justice and that *'the amount of intelligence, investigation and prevention work that fraud requires is not matched by the resources allocated to it'* [3]. In November 2021, the Ministry of Justice separately published the latest edition of its Criminal Justice Statistics quarterly, which recorded that despite total prosecutions for indictable offences having increased overall, the latest year's data in fact saw a reduction in proceedings against defendants charged with fraud offences, down 7% to 5,500 [4].

Yet the impact on victims remains considerable, with the HMICFRS report emphasising that 'the suffering felt by fraud victims cannot be overstated' with the effects including 'serious psychological and emotional problems' which put 'a great strain on individuals, families and relationships'.

Private Criminal Prosecutions: A Solution

Despite this gloomy outlook, private prosecutions can nevertheless provide victims with a route to justice. The right of a person (natural or legal) to institute and conduct their own criminal prosecution [5] was expressly preserved by the same legislation that simultaneously created the Crown Prosecution Service [6]. A private prosecution is one that is started and funded by a private individual, company or other interested party (e.g. a charity), and therefore does not directly involve the police or any of the state prosecuting authorities. It nevertheless follows the same process and is subject to the same rules of evidence and procedure as a public prosecution, including ensuring a defendant's fundamental right to a fair trial.

Where a case concludes with a defendant's conviction – whether by a guilty plea or verdict (after a trial) – the court will impose the same punishment as it would with a public prosecution, which includes a sentence of imprisonment. Additionally, the court has the power to make an order for compensation in favour of the victim, where they have suffered a measurable loss as a direct result of the criminal conduct.

The punishment of wrongdoing by a criminal court, in proceedings conducted in public and therefore capable of being reported upon, can also serve as an effective deterrent against future offending, particularly for corporate victims who may be the target of repeated offences.

Additionally, under the Proceeds of Crime Act 2002 it is possible for a private prosecutor to apply for a financial restraint order, to prevent the dissipation of assets and to preserve the position in anticipation of a post-conviction confiscation order. The latter can entail the court confiscating not only a defendant's benefit from the conduct of which they have been convicted, but also – in most economic crime cases – any additional benefit arising from a defendant's wider 'criminal lifestyle'. This can therefore represent a further significant measure when it comes to targeting and disrupting criminal enterprises, both now and for the future.

Private Criminal Prosecutions: Case studies

In *R v Clements* [7], KDB Isolation S.A., which was a French company involved in manufacturing in the construction sector, brought a private prosecution at Southwark Crown Court against a shadow director of its former UK distributor for unauthorised use of a registered trademark, contrary to s.92(1) Trade Marks Act 1994,. The defendant, through the company's former distributor and later as a sole trader, was alleged to have applied infringing trademarks to approximately £300,000 worth of goods. He was convicted and sentenced to a period of two years' imprisonment, which was suspended for two years, and he was additionally disqualified from acting as a director for a period of five years. This is just one of many examples of rights holders bringing private criminal prosecutions as a means of both punishing an offender and deterring others from targeting the same victims on a repeated basis.

In *R v Sultana* [8] a private prosecution was brought by Allseas Group S.A., a company based in the Netherlands and Switzerland operating in the oil and gas industry. The company had been the victim of a complex €100m investment fraud that involved events – and

3 Spotlight report - A review of Fraud: Time to Choose (justiceinspectorates.gov.uk)
4 Criminal Justice Statistics quarterly (publishing.service.gov.uk)
5 Prosecution of Offences Act 1985, s.6(1)
6 About CPS | The Crown Prosecution Service
7 R. v Clements (James) | Westlaw UK
8 Private prosecution success over fraudster - BBC News

therefore also evidence – in a number of international jurisdictions, including the UK, the US, Canada, Hong Kong, the Netherlands, Switzerland, Vatican City, Liechtenstein and Malta.

Although the Crown Prosecution Service had concluded against prosecuting this UK-based defendant for his central role in the fraud, the private prosecution instigated by the company resulted in the defendant being convicted of conspiracy to defraud and sentenced to eight years' imprisonment.

What does the future hold?

Recent developments indicate that the Government may be seeking to increase its focus on supporting victims of this unprecedented wave of economic crime.

In July 2021, the Government's Beating Crime Plan[9] set out that a new Fraud Action Plan would be forthcoming and that Action Fraud would be replaced by an improved national fraud and cyber-crime reporting system.

It also stated that victims of economic crime will be better supported in future through the impact of the recently-launched National Cyber Security Centre and the proposed expansion of the National Economic Crime Victim Care Unit.

Separately, the House of Lords Committee on the Fraud Act 2006 and Digital Fraud has recently published a call for evidence [10] to examine whether the Act is in need of reform and what more needs to be done across the public and private sector to effectively detect, prevent and prosecute fraud.

These developments are of course welcome, although the success or otherwise of the Government's response will ultimately be measured by actions and any consequent results, rather than just words.

In the meantime, with overstretched law enforcement and public prosecution agencies facing difficult ongoing resourcing decisions, the immediate outlook for victims of economic crime remains extremely challenging. Against that backdrop, private prosecutions can play an important role by helping victims to secure access to justice that would otherwise be unavailable, as well as also forming a vital and effective part of businesses' strategies to counter economic crime.

9 Beating crime plan (publishing.service.gov.uk)

10 https://committees.parliament.uk/committee/582/fraud-act-2006-and-digital-fraud-committee/news/161575/fraud-act-2006-committee-publishes-call-for-evidence/

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September | London, UK

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FIRE Starters Global Summit: Dublin

22nd-24th February 2023 | Conrad Hotel, Dublin, Ireland

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A NEW SWISS §1782?

ARTICLE 185A PILA AND THE ASSISTANCE OF SWISS COURTS IN SUPPORT OF FOREIGN ARBITRAL EVIDENTIARY PROCEEDINGS

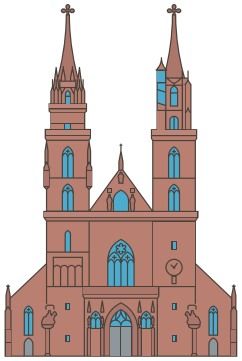
Authored by: Yves Klein and Evin Durmaz - Monfrini Bitton Klein

One difficulty of obtaining evidence in arbitration is the lack of coercive power of arbitral tribunals: without such coercive power, the evidence production in arbitration proceedings heavily relies on the voluntary production of the parties. However, if the evidence is in the hands of a third party or if a party is not cooperating, the arbitral tribunal has no direct coercive power to obtain the requested information. This is all the more so when the evidence is located in another jurisdiction.

Until 2020, a foreign arbitral tribunal seeking to obtain evidence in Switzerland would have to turn to its local state court or *juge d'appui* to send a request for mutual assistance in civil matter to Switzerland where it would be executed by a Swiss court. Given how cumbersome and slow mutual assistance proceedings may be, arbitration practitioners would rarely use this option.

This put Switzerland somewhat behind in terms of obtaining evidence of other countries, such as France, Germany, England, and the United States of America (in the districts where courts agree to grant an §1782 application in support of arbitration proceedings).

This has now been remedied with the changes incorporated in Article 185a of the Swiss Private International Law Act (**PILA**) in the context of the revision of its Chapter 12, that entered into force on 1 January 2021.



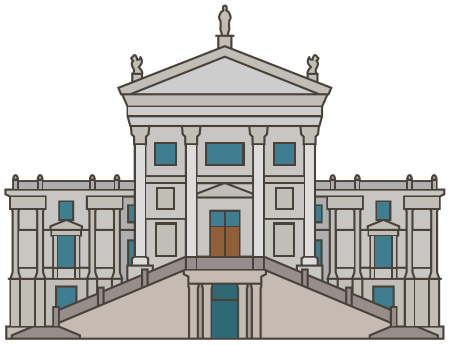
Whereas most of the changes brought to Chapter 12 were meant to codify court practice, during the consultation phase of the legislative process, arbitration academics and practitioners suggested to incorporate a new provision to provide foreign arbitral tribunals and parties with a better access to Swiss courts, both to grant interim measures and to provide evidence.

Article 185a para. 2 PILA, which deals with the obtaining of evidence, has the following content:

An arbitral tribunal seated abroad or a party to a foreign arbitral proceeding with the consent of the arbitral tribunal may request the assistance of the court at the place where evidence is to be taken. Article 184, paragraphs 2 and 3, applies by analogy.

Swiss courts may now thus act as juge d'appui to obtain evidence in support of proceedings pending before foreign arbitral tribunals.

In principle, Swiss courts apply Swiss law, namely the Swiss Code of Civil Procedure (**CCP**) in the taking of evidence for foreign or international arbitration tribunals.



However, another innovation was brought by the 2020 revision of Chapter 12 of PILA with the addition of a second sentence to Article 184 para. 3 PILA, according to which Swiss courts may "upon request adopt or take into consideration other forms of procedure".

This is similar to what is provided at Article 11a PILA regarding international judicial assistance to foreign proceedings. It is generally considered that "*other forms of procedure*" refer to the set of rules that the parties have agreed to apply in their arbitration proceeding or that the arbitral tribunal has decided to apply.

At the moment, there are no published appellate precedents on Articles 184 para. 3 or Article 185a para. 2 PILA. It is unlikely, however, that Swiss courts will agree to impose on Swiss third parties rules on the taking of evidence that would be radically different from those of the Swiss Code of Civil Procedure.

Admissible evidence under Swiss law (Article 168 CCP) is:

a. testimony;

b. physical records;

c. inspection;

d. expert opinion;

e. written information;

f. questioning and statements of the parties.

The evidence sought in Switzerland by arbitral tribunals will typically be testimony and physical records.

The taking of witness testimony in Switzerland is made by the court and the parties' counsels are not entitled to cross-examine witnesses.

In respect of physical records, such as paper or electronic documents, Swiss courts will in principle not issue discovery-type orders but rather orders targeting specific documents.

Under the Swiss law, third parties may under certain circumstances refuse to cooperate to the giving of evidence.

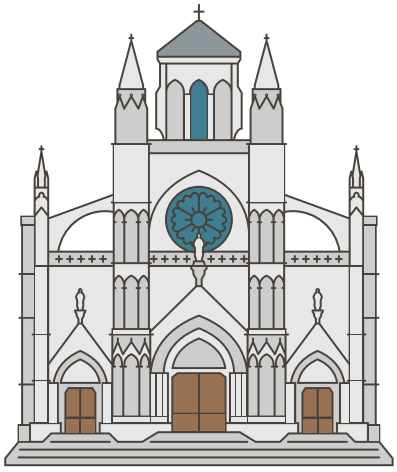
Under Article 165 CCP, spouses, partners and close relatives of the person from whom information is sought have an absolute right to refuse to cooperate.

Under Article 166 para. 1 CCP, other third parties have a limited right to refuse to cooperate:

- In establishing facts that would expose them or a close associate as defined in Article 165 CPP to criminal prosecution or civil liability.

- To the extent that the disclosure of a secret would be punishable under Article 321 of the Swiss Penal Code (SPC), auditors excepted: professional secrecy of ecclesiastics, lawyers (to the exclusion of atypical activities, such investment advice, financial intermediation or management of companies), notaries, medical doctors, and their auxiliaries. However, with the exception of lawyers and ecclesiastics, they must cooperate if they are subject to a disclosure duty or if they have been released from duty of secrecy, unless they show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.

- In establishing facts that have been confided in him or her in his or her official capacity as a public official as defined in Article 110 para. 3 SPC.



Holders of other legally protected secrets may refuse to cooperate if they can show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth (Article 166 para. 2 CCP).

Banking secrecy is a typical example of other legally protected secrets within the meaning of Article 166 para. 2 CCP. The judge weighs up the interests and decides on a case-by-case basis if the disclosure duty outweighs the right to privacy and if banking secrecy should be lifted. In principle, a bank is not allowed to refuse to cooperate when information protected by secrecy relates to data of an essentially economic nature.

In conclusion, Article 185a para. 2 PILA is a powerful tool for arbitration tribunals or parties authorized by arbitration tribunals to obtain evidence in Switzerland. Time will tell to what extent Swiss courts will agree to adopt or take into consideration other forms of procedure than Swiss law in taking evidence for arbitral tribunals.

60-SECONDS WITH:

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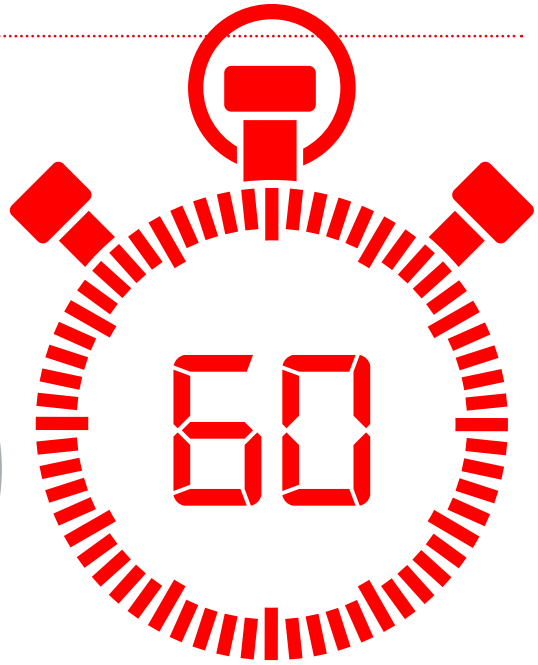
BARRISTER
TWENTY ESSEX



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

A Playing the trumpet.

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

A When I was still quite junior, receiving a call from my solicitor at late at night on a Thursday asking if I was free to go New York the next day to meet our client who couldn't come to the UK because of a freezing injunction. We didn't book tickets until 10am the next morning and were on the Friday lunchtime flight out of London. It led to as mad (professional) weekend in NYC.

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

A The easiest part of FIRE cases usually is working with the solicitors on the case. The hardest part can often be managing other work and personal commitments to accommodate the urgent and sometimes unexpected hearings that come up.

Q What is the best piece of advice anyone has given you in your career?

A Don't ask the question if you don't want the answer.

Q What has been the most interesting case you have seen so far in 2020/2021?

A Nokia v Oppo [2021] EWHC 2952 (Pat) on jurisdiction in which I act for Oppo. The case is all about which court should decide global license terms for technology patents. It raises some really interesting policy issues about forum conveniens in the post Brexit, post Brussels I, world – i.e. where UK companies can now contest jurisdiction again. It's due to be heard by the Court of Appeal this year.

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

A Parkour – jumping and somersaulting from place to place in the urban environment. I love the city and parkour would mean seeing it from a different perspective (while performing acrobatics).

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

A English cheeses.

Q What one positive has come out of COVID-19 for you?

A I was able to justify buying a whole truckle of cheddar cheese (my lockdown 'panic' buying).

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Visiting my friends in the USA and finally managing to visit some of Utah's amazing National Parks.

Q Who would you most like to invite to a dinner party?

A Rosalind Franklin so I could tell her that her contribution to the structure of DNA has now been recognized. My first degree was in science and I'd be really interested to talk about how much had changed since she did hers 60 years earlier.

Q What does the perfect weekend look like?

A Sleeper train to the Scottish Highlands, walk out, climb a couple of Munroes, camp (or stay in a bothy), watch the sun set while enjoying a single malt, climb a couple more Munroes the next day and get the sleeper train back to London. To make it perfect, there'd be no rain and no midges.

Q As chair/speaker at our upcoming FIRE UK: Welcome Back Summit, what are you most looking forward to at the event?

A This will be the first in person conference I've been to since COVID and so, although it's a cliché, the answer is meeting and chatting to everyone in real life.

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SUBSTITUTED SERVICE OF PROCEEDINGS UPON FOREIGN DEFENDANTS THROUGH THEIR LAWYERS WITHIN THE CYPRUS JURISDICTION

Authored by: Antonia Argyrou - N. Pirilides & Associates

Service of proceedings upon foreign defendants may turn from a straightforward process into a demanding marathon race, usually challenging and questioning the dynamics of both the bilateral treaties concluded between states, concerning the service of legal proceedings, as well as the national laws of each state relating to the matter of service. Such demanding - and frequently long outstanding – proceedings inevitably assist any wrongdoers, especially fraudsters, against whom legal proceedings are initiated in Cyprus, providing the said wrongdoers or fraudsters with sufficient time for the alienation of their assets or the dissipation of the proceeds of the fraud itself.

On the 24th of January 2022 the Supreme Court of Cyprus issued an unprecedented judgment in the case of CONTENT UNION SA v. CJSC "TV COMPANY STREAM" and others, Civil Appeals no. E96/2018 and E97/2018 on the matter of substituted service of an action upon Cypriot lawyers that used to represent various foreign defendants/respondents in the context of interlocutory proceedings for the issue of interim injunctions.

More particularly, the plaintiffs filed an action against, inter alia, 3 Russian defendants, as well as an interim application for interlocutory injunctions against the latter. The interlocutory injunctions were issued ex-parte and the Russian defendants/respondents, who got informed about the said injunctions issued against them, appeared before the District Court via Cyprus lawyers to defend themselves in the context of the aforesaid interim proceedings.

Upon the completion of the interim proceedings, the plaintiffs filed an ex-parte application and a Court Order was issued for the service of the Cyprus action upon the defendants through the diplomatic channels, on the basis of the provisions of the Treaty between the Republic of Cyprus and the Union of Soviet Socialist Republics on Legal Assistance in Civil and Criminal Matters

that was adopted in Cyprus by Law 172/1986. Three months after the issue of the aforesaid Court Order, the plaintiffs proceeded with the filing of a new ex-parte application requesting the issue of an Order allowing the service of the action to be effected through substituted service via the service of it upon the local/Cypriot lawyers who represented the Russian defendants in the context of the interim proceedings, alleging that the service through the diplomatic channels would delay the proceedings.

The said Court Order was issued ex-parte and thereafter dismissed upon hearing. The First Instance Court found that the Treaty between the Republic of Cyprus and the Union of Soviet Socialist Republics on Legal Assistance in Civil and Criminal Matters did not allow any room for service to be effected in any other manner rather than the methods described in the aforesaid Treaty.

The plaintiffs filed an appeal with the Supreme Court of Cyprus against the above decision of the First Instance Court, alleging that substituted service upon the Russian defendants through their local lawyers was legal and proper. Despite the English authorities supporting that a defendant is not submitted to the jurisdiction of the Court if he only appears in the context of interlocutory proceedings *(Esal (commodities) Ltd v. Mahendra Pujara (1989) 2 Lloyd's Rep.479 and Smay Investments Limited and other v. Sachdev and others (2003) EWCH 474)*, which are usually of an urgent nature, and the absence of any regulatory framework allowing such substituted service upon lawyers within the jurisdiction, the Supreme Court of Cyprus found that such substituted service upon the lawyers who represented the defendants in the interim proceedings was proper and legal and in accordance with the national laws of Cyprus.

In light of the above, the aforesaid judgment has led the way to a new era in the Cyprus litigation legal arena, allowing the service of proceedings upon lawyers within the jurisdiction who appeared in the said proceedings for the limited purpose of defending the respondents against whom an interim injunction was issued, essentially imposing further "duties" to Cyprus lawyers who appeared to defend their clients in the context of interim proceedings, namely being liable to chase their clients in order for the latter to get "officially" notified about the main proceedings.

Although disagreeing with the reasoning and conclusions of the Supreme Court in the case of *Content Union S.A.* (above), especially in light of the absence of any provision in the Civil Procedure Rules of Cyprus on the matter expressly allowing such method of substituted service, as well as the lack of imposition of any additional factors/requirements for the granting of such an order, one may argue that such an extension of substituted service upon lawyers will significantly expedite the legal proceedings in Cyprus and will operate as a deterrent to the further alienation of any fraud's proceeds and, concurrently, will increase the chances of a fraud victim to enjoy the fruits of any judgment may be issued in his favour at a later stage.

Nevertheless, in my view, special factors should be identified and be included in the Cyprus Civil Procedure Rules, following the example of the English Civil Procedure Rules (CPR 6.7) which provide for the ability of service upon solicitors only if (i) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the proceedings or (ii) the solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the proceedings on behalf of the defendant.

The imposition of such requirements will certainly operate for the protection of lawyers – who will otherwise be responsible of "officially" notifying the clients that they used to represent in the interim proceedings and may not continue to represent them in the main proceedings – and will considerably contribute to the speeding up of any pending proceedings before the Cyprus Courts, depriving at the same time the continuation of any fraudulent plan or dissipation of assets effected by any wrongdoers or fraudsters.

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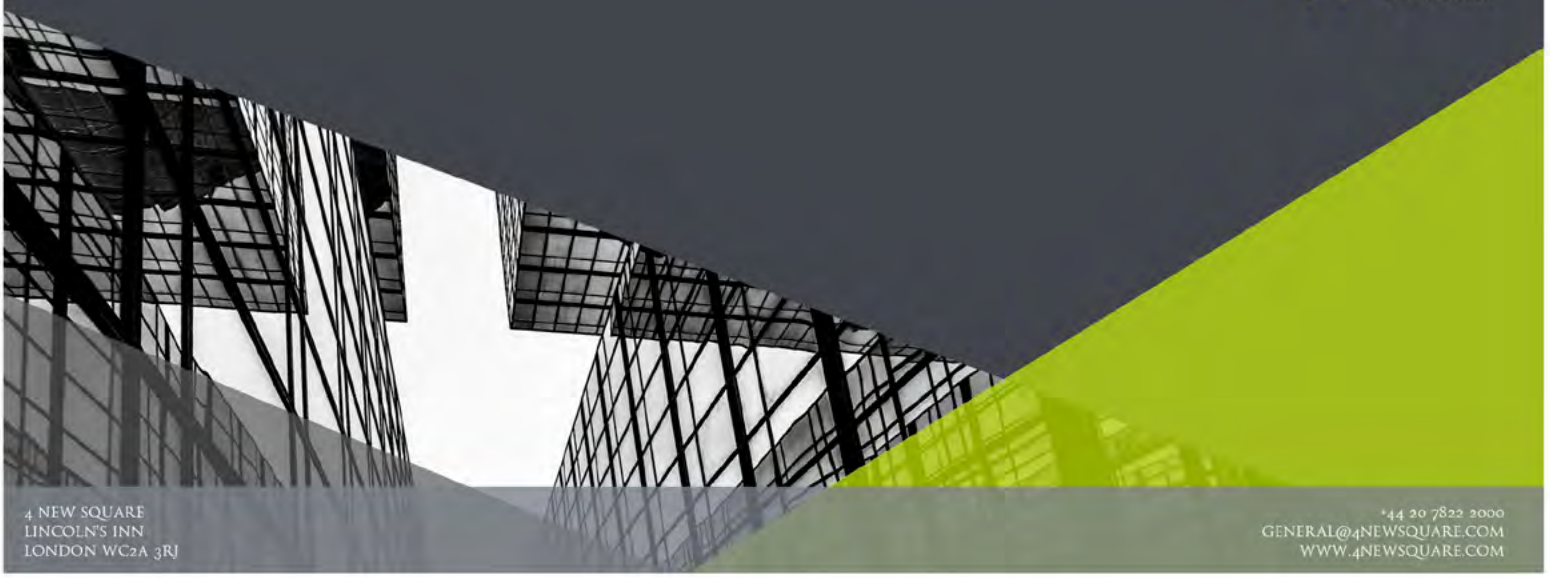

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REGULATING ANTHROPOGENIC CLIMATE CHANGE WITH TORT LAW

Authored by: Abdur-Razzaq Ahmed - Brown Rudnick

The conventional approach: The 2011 Queensland Floods case

The final chapter of the Australian '*Queensland Floods*' case[1] ended in early April 2022, 11 years after the devasting floods caused by rainfall of "*biblical proportions*" in early 2011. The floods claimed 35 lives, caused $2.38 billion damage, flooded 28,000 homes and left 100,000 people without power.

The extreme rainfall event was linked to the La Nina climate phase, which climate researchers say are only likely to increase because of global warming.[2] Linked to this, in 2015, U.S. and Australian scientists published research demonstrating that long-term warming of the Indian and Pacific oceans, primarily due to human activity, played an "important" role in the increased flooding risk to areas such as Queensland.[3] Three years after the floods, Mr. Rodriguez, the sole director of a sports store in the vicinity of Brisbane, commenced representative proceedings under Part 10 of the Civil Procedure Act 2005 (NSW) on behalf of a group damaged by the floods. The group of approximately 7,000 parties (primarily those with interest in the flooded land) brought a negligence and nuisance claim against three government organisations for the damage.

The defendants in the *Queensland Floods* case were all government organisations linked to the Somerset and Wivenhoe dams: Queensland Bulk Water Supply Authority (Seqwater), SunWater Limited and the State of Queensland. The plaintiffs argued the defendants were liable, either directly or vicariously through their flood engineers, having failed to use reasonable care in the conduct of flood operations to avoid the risk of harm to property.[4]

In referring to the Flood Operations Manual – a key document in respect of the expected standard of care – the plaintiffs argued the defendants were negligent on the basis they had breached the duty of care owed to over 200,000 people located downstream of the dams who would foreseeably be impacted by a failure to properly conduct flood operations. The plaintiffs alternatively argued the defendants' activities gave rise to liability in nuisance given the (preventable) floods caused interference with use and enjoyment of property.

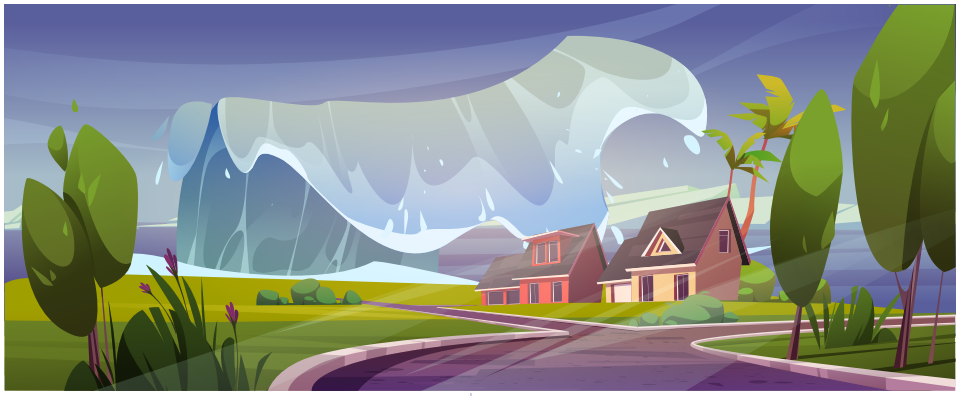
Despite being successful at first instance in 2019, Seqwater (deemed to be 50percent liable) successfully appealed on the basis that the standard of care was higher than the ordinary standard under Australian law. Despite that being the final word on Seqwater's liability, Sunwater and the State of Queensland paid an estimated AUD 440 million in compensation. The case serves as a historic example in which litigants have successfully held public infrastructure entities responsible for failing to adequately prevent and address the risks caused by climate change.

1 Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater (No 22) (2019) Aust Torts Reports 82-501; [2019] NSWSC 1657; [2021] NSWCA 206

2 Rhein, M., et al. (2013), Observations: Ocean, in Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, edited by T. F. Stocker et al., pp. 255–315, Cambridge Univ. Press, Cambridge, U. K.

3 Ummenhofer, C. C., A. Sen Gupta,M. H. England, A. S. Taschetto,P. R. Briggs, and M. R. Raupach (2015),How did ocean warming affect Australian rainfall extremes during the 2010/2011 La Niña event? Geophys. Res. Lett.,42, 9942–9951 doi:10.1002/2015GL065948

4 Fifth Amended Statement of Claim dated 29 September 2017



Barriers to tort liability

The *Queensland Floods* case was conventional in its approach and application of law, being a case against multiple parties for breaching duties of care in relation to systems or processes designed to *protect against* the effects of climate change. Such claims implicitly accept the ongoing effects of anthropogenic climate change and are primarily concerned with issues of scope, standard and breach of duty. In recent years however, judges in several jurisdictions have grappled with an increasing number of private law cases attempting to use tort law to contest the actions (past and future) of fossil fuel and energy companies directly:

A polycentric problem in New Zealand

The New Zealand case of *Smith v Fonterra* [2021] NZCA 552 served as the first appellate Commonwealth decision as to whether tort law could give rise to private law remedies for climate change issues. Mr. Smith, a climate change spokesperson for the Iwi Chairs' Forum (for indigenous Māori people), filed a case against seven high-emitting New Zealand companies in the agriculture and energy sectors, claiming that the defendants' actions constituted public nuisance, negligence, and breach of a duty to cease contributing to climate change. However, the Court of Appeal dismissed all of the causes of action and stated that "*every person in New Zealand — indeed, in the world — is (to varying degrees) both responsible for causing the relevant harm, and the victim of that harm".*[5] *In relation to the nuisance claim specifically, the Court observed there was "no identifiable group of defendants that can be brought before the Court to stop the pleaded harm*".[6] The decision indicated why a generalised tort claim against a few choice defendants is unlikely to succeed as a matter of policy given the difficulties in apportioning responsibility, and the vast number of people who were simultaneously the victims and the offenders of the alleged harm.

As French J said, it presented a "polycentric issue that is not amenable to judicial resolution."

Cumulative causation in Germany

Elsewhere in *Luciano Lliuya v. RWE AG* (Case No. 2 O 285/15), a German claim currently on appeal, a Peruvian farmer alleges that RWE, Germany's largest electricity producer, was a "*disturber by conduct*" who knowingly contributed to climate change by emitting greenhouse gases. The farmer alleges the defendants bear some responsibility for the melting of local glaciers and the consequential "adaptation" costs that are expected to be incurred in relation to flood protections. Whilst the case is brought pursuant to German Civil Code, the claimant's grounds of appeal noted the equivalence between the profile of greenhouse gas emissions and the concept of "multiple independent causes" of damage within tort law. The claimant argues that it is not appropriate to try and isolate the contributory emissions given there is a "*closed circle of causal agents*"[7] that gradually contributes to global warming. He further argues that despite that, each contributor therefore has its own causal impact based on the size of its contribution.

In formulating this argument, reference was made to two familiar English law cases: *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 and *McGhee v National Coal Board* [1973] 1 WLR 1, in which the House of Lords determined that a claimant need only demonstrate a particle attributable to a breach of duty (in this case a particle associated to greenhouse gases), made a material contribution to a harm. This test aligns with the "material increasing risk" test in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, though the difficulty claimants are likely to face is demonstrating a proximate relationship with the defendant so as to give rise to a duty of care (in order to meet the Caparo test). This "proximity" obstacle may explain why cases relying on tort arguments have been few and far between and pose a significant legal problem to claimants in common law jurisdictions (such as England and Wales).

Lord Carnwath CVO, a former judge of the Supreme Court of the United Kingdom between 2012 and 2020, noted that private law claims against greenhouse gas emitters and energy companies for loss are ambitious. In relation to the RWE case specifically, he notes that from a common law perspective, the claim seems "*surprisingly ambitious, not least the attempt to link activities apparently lawful under German law, with damaging consequences as far away as Peru*".[8] This is one perspective among international legal circles that all appear to reach the conclusion that causation and breach of duty are two major obstacles to litigants relying on tort law in 'generic emissions' claims against carbon majors.

A proactive regulation tool for anthropogenic climate change

Many consider that the need for "backward-looking" climate-related litigation can be prevented (or at least limited) in the long-term by proactively using litigation (against greenhouse gas emitters, underlying facilitators of climate change and governments) in a more "forward-looking" context. Lord Carnwath identified this contrasting

5 French J at [18]

6 French J at [92]

7 Grounds of Appeal at page 20. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170223_Case-No.-2-O-28515-Essen-Regional-Court_appeal-1.pdf

8 "Climate Change and the Rule of Law" Bucerius School– Luther Lecture - Hamburg 22 March 2021

usage of the law as a "*bridge between scientific knowledge and political action*"[9] though noted that such litigation can claim more success when it is aimed at specific targets to ensure orders are enforceable and lead to effective and practical action. In considering the role of tort law in this context:

Company/shareholder action

Environmental, Social and Governance (ESG) has had a significant impact on corporate conduct and shareholder expectations in recent years. This evolution has been recognised by the legal community, particularly in relation to climate-related risks. It is likely that courts would now construe climate-related risks as reasonably foreseeable, given the breadth of disclosure requirements, standards and the increased shareholder focus. Boards that fail to respond appropriately could be found to have breached their duty of care and diligence as these cases suggest:

- In October 2021, *Ewan McGaughey et al v Universities Superannuation Scheme Limited* was filed in the English High Court against the directors of the University Superannuation Scheme (USS), a private pension scheme for academic staff in the U.K. and the largest private pension scheme in the U.K. The particulars of claim, which named 13 current directors and 18 former directors, pleaded negligence on the part of the directors for allegedly failing to consider the terms and consequences of the 2016 Paris Agreement. This could have potentially significant consequences for similar schemes, public entities and their directors in the U.K.
- Even more recently, ClientEarth commenced a derivative action against Shell for failing to implement a climate strategy that aligns with the goals of the Paris Agreement, which it alleges has led to a breach of directors duties under sections 172 and 174 of the Companies Act 2006.

Rights-based action

Litigants have also had some success in seeking declaratory relief from international courts through creative applications of the law in order to hold government and corporate activity accountable by reference to emission targets, statements of intent and (most notably) the 2016 Paris Agreement.

The *Urgenda*[10] case in the Hague District Court in the Netherlands and the *Leghari*[11] case in the Lahore High Court in Pakistan are notable examples where national courts upheld challenges to their governments' failures to implement effective policies to counter climate change. Both these cases shared a common thread by utilising human rights law as a proxy in climate change cases. Of particular interest in the Dutch case, the Court found the Dutch government had contravened its duty of care (under Articles 2 and 8 of the ECHR) to mitigate greenhouse gas emissions and protect the ECHR rights from the threat of climate change.

The future: the relevance of collective redress mechanisms for mass climate-related torts and the incentive for derivative actions

Collective redress

The 2011 Queensland floods and the subsequent class action is unlikely to be the last climate-related mass tort litigation. Whilst a climate-related event may be beyond control, the legal consequences are not. Well-defined groups alleging climate-linked mass-tort events are candidates for collective redress schemes as an alternative to lengthy and expensive litigation. The recent refinement of collective redress schemes has been driven in response to the "inequality of arms" that exists in the litigation of mass torts (in the personal injury sphere) and which is directly applicable to the circumstances of likely claimants in climate-related mass-tort litigation.[12]

The developments in attribution science and a greater awareness of the effects of climate change will also assist the resolution of legal issues such as foreseeability, remoteness, causation and the duty of care. Even where there are issues of liability, recent guidance from the Supreme Court in *Lloyd v Google* [2021] UKSC 50 demonstrates that representative proceedings can have an important early-stage role in resolving factual or legal issues that may otherwise prevent a redress scheme being an attractive solution. Taken together, parties can be disincentivised from litigation and incentivised to resolve matters without the involvement of Courts to shorten the period of resolution – the *Queensland Floods* case, for example, took eight years to resolve.

Further, the costs of climate-related litigation – both in terms of litigation costs and damages – are likely to be substantial. Such claims would undoubtedly carry an insolvency risk to corporate defendants, which further reinforces the relevance of collective redress mechanisms.

Corporate and derivative actions

The difficulties associated with "backward-looking" litigation founded upon tortious causes of action perhaps explains why "forward-looking" litigation has become far more appealing to litigants in recent years. This type of litigation aspiringly aims to bring greenhouse gas emissions and pollutants under control.

Activist shareholders are – as noted above – already using the law of tort as a proxy to hold directors of investee companies accountable to their legal duties to ensure targets and standards are adhered to. Disclosure and reporting standards also create an important incentive for shareholders to take action. The Greenhouse Gas Protocol, which is split into 3 "scopes" is the most widely used greenhouse gas accounting standard. Scope '3' is a catch-all that includes all other indirect emissions that occur in a company's value chain and may account for anywhere up to 90 percent of a company's broader carbon impact.[13] The Financial Conduct Authority recently published its disclosure rules for asset managers and pension providers, which requires the disclosure of scope 3 emissions from 2024.[14] There is a very realistic possibility then, that large institutional investors may use tort-based legal arguments against boards of investee companies, much like McGaughey and ClientEarth, as a tool (either openly or confidentially) to apply downward pressure on emissions and reduce their own scope 3 emissions.

9 "Climate Change and the Rule of Law" Bucerius School– Luther Lecture - Hamburg 22 March 2021

10 Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment), First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court

11 Leghari v. Federation of Pakistan (2015) W.P. No. 25501/201

12 R Nayer and T McDonnell (2021). A New Normal: Instituting Redress Schemes to Resolve Mass-torts. Journal of Personal Injury Law 1-58

13 https://www.carbontrust.com/news-and-events/insights/make-business-sense-of-scope-3

14 Policy Statement 21/24

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CYK is delighted to welcome TL4 FIRE and Disputes founding committee members Jon Felce and Natalie Todd to its team of tenacious, innovative and personable lawyers

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