ISSUE 3

FIRE 2020 Year in Review

THE GLOBAL ASSET RECOVERY COMMUNITY IN A YEAR LIKE NO OTHER

INTRODUCTION

"2020 A year of repositioning. A year of change"

— **Charmaine J. Forde**

As this "unprecedented" year draws to a close and we prepare for new year that hopefully promises a whole new world, ThoughtLeaders4 FIRE would like to invite our readers to reflect on the tumultuous year that has been 2020.

Guest edited by Mary Young, Partner at Kingsley Napley and chair of our Year in Review event on 4th December 2020, our Year in Review authors asses the hot topics of the year.

See Event Here: **Year in Review: A Year Like No Other**

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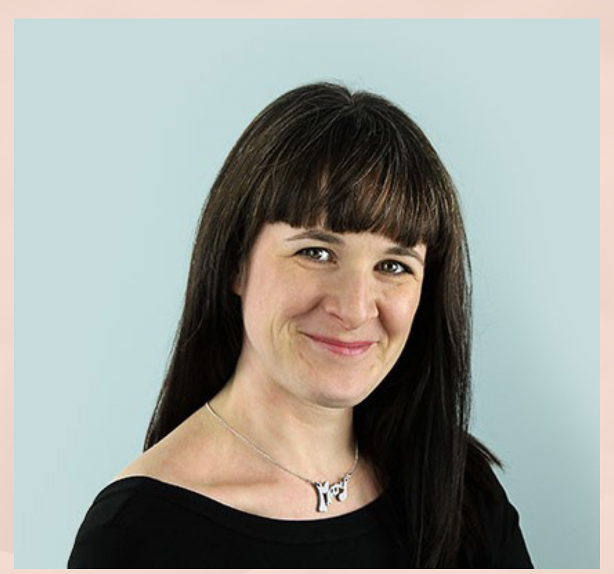
CONTENTS

Guest Editor - Mary Young 3
2020 Trends in fraud 4
Virtual hearings and trials: 7
Insolvency in 2020 10
Service under lockdown 13
The quincecare journey 16
Developments in the fight against crypto-fraud in 2020 19
Reflective loss 22
2020: SFO use of actions and powers 25
Search orders in the time of a pandemic 28
Developments in contempt proceedings 31
International arbitration: A year in review (2020) 34
Fire offshore update: Hot cases and jurisdictions 38
Unlocking financial information in the united states 40
Your recovery is mine: 43
Asset-tracing, corruption, and sanctions 43
Investments in Asia? 49
A new weapon in Ireland's law enforcement arsenal 52
Making the case for combining external investigations and it forensic reviews 55

Meet our GUEST EDITOR



MARY YOUNG

Mary Young is a partner in dispute resolution at Kingsley Napley LLP. Her practice covers a wide range of areas but her particular interests and expertise lie in civil fraud and asset tracing. Mary also regularly acts on insolvency cases which involve fraud or dishonesty. She is ranked in the legal directories for civil fraud and commercial litigation.

ThoughtLeaders4 FIRE is the global Asset Recovery Community bringing together key practitioners across contentious insolvency, fraud, litigation and international enforcement.

A review of the year in law is always quite a big ask, but a review of 2020, a year of upheavals, abnormals, new normals and the unprecedented is a mammoth task. So we've asked some of the best and brightest fraud, insolvency and asset tracing practitioners from a number of different jurisdictions to tell us about changes, events and what they saw as the most important developments of the year.

Join us on the 4th of December 2020 for a fast paced, light hearted seminar on the same topic at which presenters will try to persuade the audience that their topic is the most important or influential of 2020. Buzz-words positively encouraged!

2020 TRENDS IN FRAUD

Authored by: Hannah Fitzwilliam - Kingsley Napley LLP

It's not easy to summarise anything about 2020 in a short article. However, despite the crisis engulfing the world, we continue to see developments in fraud, and in particular in the search order and freezing injunction regimes.

Freezing Orders: Use of funds

Arguably this year's most significant development in freezing orders was the decision in the BVI that the landmark case of Black Swan Investment had been wrongly decided. However, closer to home, 2020 has seen a number of important decisions in the English courts on the use of frozen assets.

The courts have taken a strict approach to the use of frozen funds for legal costs. In North of England Coachworks Ltd v Khan, the court was asked to vary a freezing injunction to allow the Applicant to sell frozen assets to fund the cost of defending contempt proceedings. The court found that the Applicant had not discharged the "burden of persuasion" that there were no other assets available; the application was therefore refused.

In National Bank v Yurov & Another, the court decided that as the Second Defendant was no longer instructing lawyers, the allowance for legal expenses should be removed, and the overall living expenses allowance reduced as the Second Defendant had not been able to evidence recurring expenditure. Finally, in Kea Investments v Ivory Castle & Ors, the High Court considered the extent to which a Defendant can use frozen funds to pay legal expenses in circumstances where the Claimant asserts a quasi-proprietary claim. The High Court not only recognised the concept of a quasi-proprietary claim it also determined that the principles that apply to the issue of whether a defendant can use frozen funds to fund legal costs in such circumstances are those that apply in the context of proprietary injunctions, rather than those that apply in the context of ordinary freezing orders, thereby limiting the use of frozen assets.

However, the court has been more willing to permit dealings with frozen assets under the usual 'ordinary course of business' exception. In Organic Grape Spirit Ltd v Nueva IQT SL, the Court of Appeal reiterated that dealings in the ordinary course of business are permitted under freezing injunctions, even when those dealings involve a high degree of risk. The Appellant appealed an order that prevented it from spending money on developing a new business. The Court of Appeal noted that it was not for the court to decide whether a business transaction was reasonable or involved an acceptable degree of risk. The appeal was allowed and the Appellant was permitted to pursue its new business. Further, in Caroline Jill Crowther v Paul Anthony Crowther & Others, the Court of Appeal allowed the Defendant to sell or mortgage a frozen asset in order to invest in other business assets, which would preserve the overall value of the assets, under the ordinary course of business exception. These are useful decisions to confirm the extent of the exception.

Search Orders: A departure from tradition

The impact of Covid-19 on search orders was evident in the case of Calor Gas, but this year's other headline search order case, TBD (Owen Holland) Ltd v Simons, which made it to the Court of Appeal, demonstrates that the courts are evolving to reflect modern society and technology. The Court of Appeal recognised that most documentary evidence now exists in

digital form, and so the objectives of a search order should be capable of being met by an imaging order. The Court of Appeal noted that if the court makes an imaging order that devices and storage must be imaged, then in most cases a traditional search order is unnecessary. Even if the court is prepared to grant a search order at all, careful consideration should be given as to the scope of the order. The court was alive to the fact that, whilst imaging orders are relatively non-intrusive compared to a search order, the key disadvantage is that an image is incapable of separating relevant information from business/ personal/privileged information. Therefore, imaging can only ever be a preservation step and it must be followed by proper consideration of disclosure and inspection.

This decision will accelerate the move away from traditional search orders towards imaging orders that better reflect the evidential reality, and the court noted the urgent need for the Rules Committee to produce a standard form of imaging order for practitioners.

Covid-19: New opportunities for fraudsters

It would be remiss to discuss fraud trends of 2020 without reference to changes brought about by the Covid-19 pandemic. Inevitably, as with any global crisis, there are those looking to capitalise on weaknesses in the system and people's vulnerability. It is estimated that between £2 - 4 billion of the £39 billion paid out under the government's job retention scheme has been claimed fraudulently. Around half of this is believed to be attributable to organised crime, but the rest is likely to be improper claims by individual businesses. It remains to be seen how much of this will be recovered, but HMRC expects that around 10,000 'high risk' claims will be investigated.

At the other end of the scale, we have seen an explosion in pandemic-related small/medium scale fraud. Some fraudulent schemes are specifically targeted at new consumer demand, for example bulk sales of face masks and hand sanitiser at inflated prices that were never delivered. Other opportunities have presented themselves in coronavirus-themed fishing schemes, including fraudsters purporting to be from HMRC offering a tax refund for lockdown losses. We have also seen an increase in fraudulent investment schemes encouraging people to take advantage of the economic downturn. Whilst individual losses are often relatively small, and therefore disproportionate to pursue to trial, there remains the real possibility of claims being brought by groups of victims coming together to recover losses.

Finally, it's not all bad news. 2020 has seen a development in payment services providers taking more responsibility for protecting their customers. There has been adoption of the 'Confirmation of Payee' name checking service by banks to protect customers when paying new (or editing existing) payees. The introduction of the Banking Protocol means that bank branch staff can alert police to scams directly, saving customers an estimated £19m in the first half of 2020. A specialist police unit funded by the banking industry (the Dedicated Card and Payment Crime Unit) is finding success in targeting criminals involved in sending Covid-19 related phishing texts and emails. Therefore, whilst there are (as ever) emerging markets for fraudsters, there are also improved structures in place to prevent fraud and protect victims.

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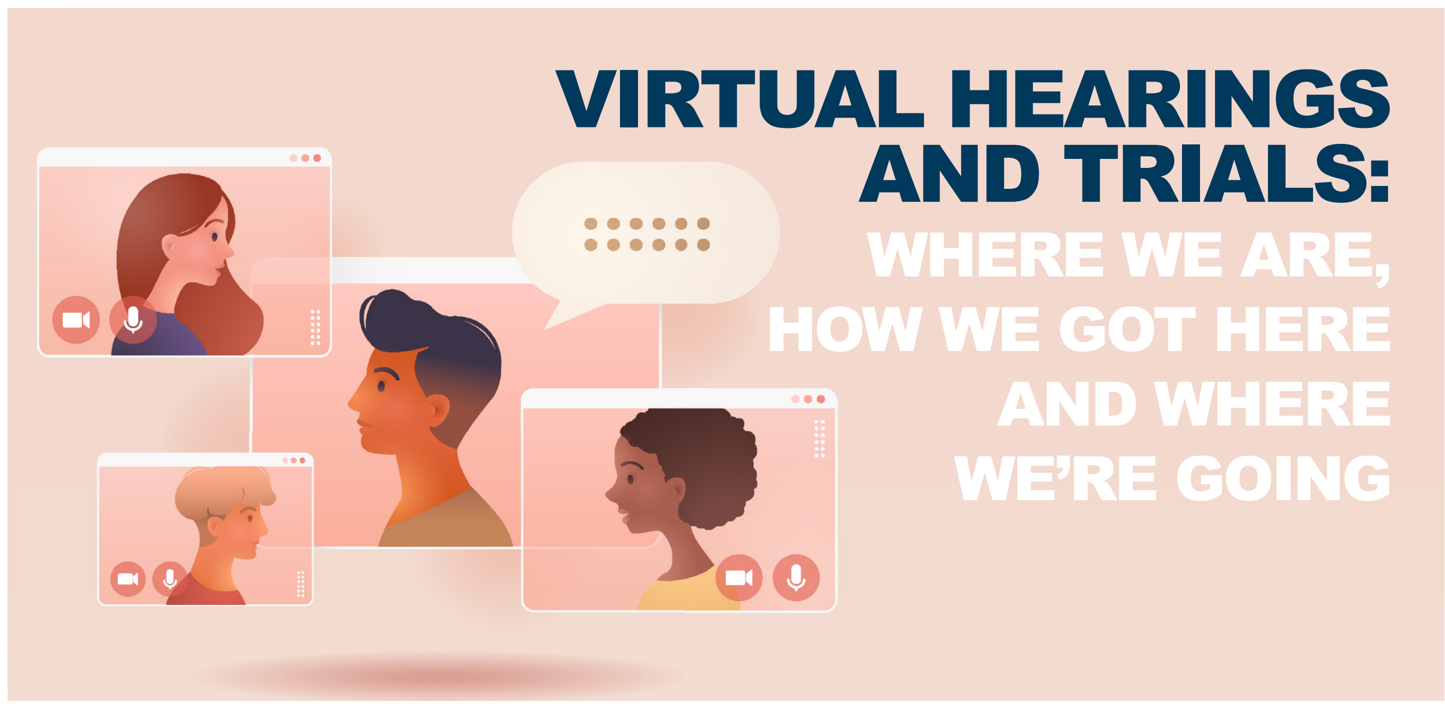

VIRTUAL HEARINGS AND TRIALS: WHERE WE ARE, HOW WE GOT HERE AND WHERE WE'RE GOING

Authored by: Aleks Valkov, Stewarts Law

When the UK went into lockdown in March, the English judiciary and civil courts showed an immediate willingness to adapt quickly to the situation by embracing virtual trials and hearings. This has cemented the English court's reputation as one of the leading international dispute resolution jurisdictions. In this article, we examine how these virtual hearings and trials have worked in practice and what we can expect going forward.

Boris Johnson famously said people "must" stay at home and certain business "must" close when he addressed the country on 23 March 2020. This heralded the lockdown in the UK. The lockdown forced the legal profession and the courts to face a raft of challenges that no one had contemplated meaningfully before.

The first virtual commercial trial

Just before lockdown, Stewarts was preparing to commence trial in the Commercial Court in the case of National Bank of Kazakhstan & anor v The Bank of New York Mellon & ors [2020] EWHC 916 (Comm). We acted for the claimants, the National Bank of Kazakhstan and the Republic of Kazakhstan, in proceedings in the Financial List of the Business and Property Courts. The dispute concerned the freezing of circa US$530m by the Bank of New York Mellon in response to an order of the Belgian court. The trial was listed for seven days starting on 23 March 2020.

Mr Justice Teare, conscious of the possibility of a lockdown, directed the parties to attend a hearing before him on 19 March 2020. Despite the submissions of some of the defendants that the trial should be adjourned, the court ordered the parties to prepare to move to a fully virtual trial and only allowed a short adjournment to facilitate the transition.

We believe this was a landmark decision, indicating the dedication of the courts of England and Wales to continue operating despite the novel and unprecedented challenges. Considering the number of virtual hearings that have taken place every day in 2020, there can be no doubt that both the courts and the legal profession have risen to the challenge. The courts and litigators now work on the assumption that hearings will be virtual unless there is a need to attend court. This is something that would have seemed impossible prior to March 2020.

The logistics of virtual hearings

There are a number of considerations for those involved in virtual hearings, especially longer ones such as trials. Best practice has evolved over the course of 2020 as the courts and users have become more familiar with the technology and have been able to test what works and what does not. In terms of implementation, the Kazakhstan trial had the following features:

1. The trial took place over Zoom. Due to historical security issues with Zoom, currently, the court seems to prefer using (i) Microsoft Teams; or (ii) Skype for Business, another Microsoft product. (However, note that as Microsoft is shifting their focus to Teams, and there is no real support for Skype, we understand some users experience technical issues on Skype); or (iii) Cloud Video Platform.
2. We relied on Sparq (www.sparq.live) to provide the necessary technical experience to assist, especially with setting up the live-stream of the trial on YouTube. A number of other legal providers (eg Opus 2 and Epiq Global) have begun offering a wide range of services to assist with virtual hearings and trials. However, we note that the court clerks have now had significant experience setting up virtual hearings without the assistance of an external party (though it seems to us prudent to make use of such parties for large trials with many participants).
3. The bundle used for the Kazakhstan trial was a simple e-bundle. Again, most providers who work on virtual hearings have begun offering some solution for an electronic bundle, with

varying degree of integration into their virtual hearing platform. For example, Opus 2's Magnum e-bundle offering seems to have been incorporated into their virtual hearings platform. It is worth noting that electronic bundles are not a novelty for the English courts. In fact, the High Court has published a detailed guide on its requirements for e-bundles.

4. It is a requirement of English law that the general public should be allowed access to proceedings in open court. To assist with this, the Coronavirus Act 2020 made provisions for the live broadcasting of court proceedings. In the Kazakhstan trial, we relied on Sparq to leverage Zoom and their technical capabilities to broadcast the trial on YouTube. This was a novel approach, but it seems that the court has since moved away from using platforms such as YouTube. Instead, the current approach, which seems to have been adopted across all divisions, allows for interested parties to contact a court clerk and receive an invite for the virtual hearing room.

Notably, many of the witnesses in the Kazakhstan trial were not within the UK and as such either faced travel restrictions or felt uncomfortable travelling. The trial being remote ensured that they could appear before the court. Moreover, it also allowed our clients (who faced similar restriction) to participate meaningfully and to provide us with instructions via telephone or instant messaging. With the UK now in its second lockdown (and with many other countries already in lockdown or likely to follow suit), virtual hearings will continue being the norm for at least the foreseeable future.

Virtual is the new normal

At a recent British Institute of International and Comparative Law (BIICL) webinar (https://www.youtube.com/watch?v=-I8Yn-vwbWw&feature=emb_logo), Mrs Justice Cockerill remarked how well and how quickly the court system has adjusted to virtual hearings. Notably, she also spoke about the court introducing the so-called hybrid hearings where certain parts of the trial (or some of the participants) attended court. These have been used in circumstances where advocates consider it necessary to cross-examine in person (for example, in fraud cases where evidence as to alleged dishonesty may be crucial).

In terms of the future, it seems that although the judiciary has embraced virtual hearings, some have expressed concern whether in a world without Covid-19, virtual hearings will continue to play such an important role (see Mrs Justice Cockerill's comments in the BIICL's webinar and Lord Sumption's remarks at the Leading Litigators Virtual Autumn Reception – https://www.youtube.com/watch?v=Eyprv5YrOww&t=1s). However, even if in-person hearings return in a post-Covid world, the courts will no doubt be more willing to use their experiences of virtual technology to overcome logistical challenges that international cases often face. This can only be a good thing for the efficient and effective administration of justice.

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INSOLVENCY IN 2020
THE YEAR OF UNINTENDED CONSEQUENCES?

Authored by: David Hinrichsen - FRP Advisory

The year of COVID has been a wild ride for everyone. Whilst those in the restructuring and insolvency space certainly have less reason to complain than the rest of the working population, 2020 has introduced some of the biggest changes and developments in the industry since 2016.

In largely non-pandemic related developments, April brought about the first increase of the maximum prescribed part in 17 years, rising from £600,000 to £800,000 for cases with floating charges created on or after 6 April 2020. Controversially, in another 17-year first, December will (at the time of writing) see the return of the Crown preference in respect of certain debts including VAT and PAYE/NIC and CIS deductions. Recent developments have also indicated renewed scrutiny on the much-vilified pre-pack sales with proposed regulations currently in draft format.

In any other year, those developments would have been enough to fuel entire conference agendas. But this is the year of the unprecedented. So, with the quick introduction of the Corporate Insolvency and Governance Act 2020 (CIGA) in June 2020 to deal with the effects of COVID, we were faced with:

- The Chapter-11 style standalone moratorium, allowing directors to maintain control of their company under the supervision of an IP "monitor" to work up viable rescue or restructuring plans;
- Restructuring Plans allowing for cross-class cram downs previously impossible under the rarely used, but structurally similar, scheme of arrangement; and
- A number of temporary measures including prohibitions on winding-up orders and termination of contracts and the suspension of the wrongful trading provisions. Further measures under the various Coronavirus acts and regulations provided commercial tenants with temporary protection from lease forfeiture and commercial rent arrears recovery.

In addition, the government introduced a number of unprecedented financial aid measures designed to protect the economy from instant COVID doom: notably the Coronavirus Job Retention Scheme at a run rate of c£14 billion per month, and various grant and loan schemes including the Coronavirus Business Interruption Loan Scheme for SMEs, its CLBILS equivalent for large companies and the Bounce Back Loan Scheme for loans up to £50,000. The government-backed schemes are reported to have resulted in UK companies borrowing more than £50 billion by the end of September 2020, including a staggering £35 billion of bounce back loans of up to £50,000 per company.

During lockdown we saw high streets shuttered and offices emptied, and whilst the year isn't over, we will not see a return to 2019 levels of commuting, office working and high street shopping anytime soon, or in some cases probably ever.

It seems 2020 is the year of apocalypse for countless industries and the UK high street, with reportedly one in five small businesses stating that they may not survive the pandemic, and many well-established names, such as Virgin Atlantic, Laura Ashley, and Debenhams having gone into a process.

Interestingly, it seems that so far at least, government measures are working. The number of administration and creditors' voluntary liquidation appointments for the first three quarters of 2020 are in line with the first three quarters of 2019 and about 11% down compared to the same period in 2018. Compulsory liquidations have remained steadily low and - according to the Insolvency Service's figures - at between 36% and 88% lower month on month compared to 2019.

The big question is how long this lifeline will last, and what the future will hold once a sense of old normality or new reality returns? And from a FIRE community perspective, what impact are we likely to see? Trying to give an accurate prediction is likely to be as successful as predicting any given day's new social distancing measures.

From an ongoing fraud and recovery perspective, the prohibition on winding-up petitions will have undoubtedly caused a degree of delay, while the temporary suspension of the wrongful trading provisions is unlikely to cause much consternation in the long run given the reality of their usefulness in practice.

More interestingly, it remains to be seen what action will be taken in respect of the estimated c£3.5 billion of furlough fraud, and what other frauds against government funds will be uncovered once the resourcing spotlight is able to turn away from COVID-related matters.

From a wider insolvency perspective, the aforementioned changes to HMRC's creditor status and the increase in the prescribed part are undoubtedly going to affect the recovery prospects for secured lenders in distressed situations. This could lead to higher borrowing costs, increasingly complex borrowing structures and a shift in focus towards fixed charge or ABL lending, potentially resulting in decreased flexibility and higher costs for debtors.

At a time when many corporates have experienced a dramatic year-on-year decrease in revenue and with no certainty for an upturn in sight, this combination could prove toxic for many – especially for those which may previously have fallen into the category of the last crisis's remnants of the turnover-hungry "zombie" economy.

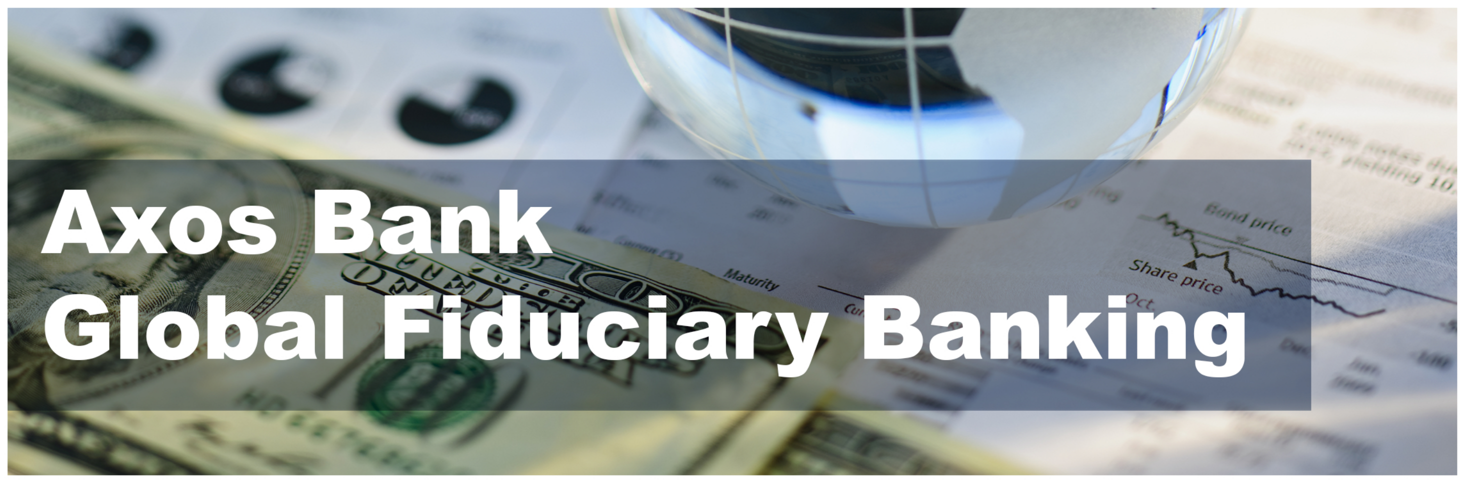
At the same time, bricks and mortar retail, hospitality and the travel and transport sectors have yet to properly emerge from COVID-induced hibernation and it seems unlikely that their starvation will be alleviated in the short or medium term. With the development towards agile/home working in office-based sectors having accelerated by at least a decade in the space of three months, the need for city centre and business park commercial and retail property has rapidly diminished, resulting in an expected drop in property values which is unlikely to recover in the absence of a wider change in approach.

As far as my personal favourite – the F in FIRE – is concerned, it seems likely that any company that is the victim of ongoing fraud or "deliberate mismanagement" is unlikely to weather the current crisis without detection and I suspect we will be seeing examples of such cases emerge in due course.

Early involvement of insolvency practitioners to formulate effective recovery strategies should remain a priority for any stakeholder, especially where the economic climate is rapidly changing. For example, an unexpectedly (and likely temporarily) lively residential property market could prove to be a valuable source for recovery following quick and robust enforcement actions through an insolvency with a fraudulent theme.

As a final thought, whether the new restructuring options introduced by CIGA will prove to be a useful tool or too complex to be of real value remains to be seen, but even without the benefit of a crystal ball it is clear that we have yet to see the full impact of 2020. The short term is likely to produce a number of victims to insolvency, with the inevitable impact on individuals which will require careful mitigation. However, a more positive long-term outlook on what could become a blank slate could prove to provide opportunity for restructuring, innovation and growth. Local high streets could become new social and economic hubs, whilst previously uninhabited commercial districts may see a longer-term return or arrival of residents changing our (sub)urban cityscapes beyond recognition.

And with that conclusion I realise that I have spent the last 1,000 words staring into the bottom of my pint wondering about the far-reaching consequences of a virus possibly passed on by a pangolin (whatever that is), and it occurs to me that I haven't thought about Brexit in a while…!



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

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SERVICE UNDER LOCKDOWN

Authored by: Belinda McRae, Twenty Essex

The early days of the UK's lockdown in March 2020 allowed many lawyers the opportunity to re-acquaint themselves with the sense of alarm that accompanied their first encounter with the White Book in its full-bodied physical form. This was particularly so for those of us whose cases required urgent service of proceedings in genuinely novel circumstances (e.g., where the relevant service agencies had closed their doors, both in the UK and abroad). As we embark on Lockdown 2.0, it is likely that some of these challenges will re-appear. This article addresses four service-related questions that FIRE practitioners may ask themselves in the weeks to come.

1. Is personal service possible?

There are several categories of case in which personal service is required to commence proceedings (CPR 6.5). In the context of FIRE-related proceedings, committal proceedings and bankruptcy petitions are good examples of these. When preparing to commence proceedings, you may fairly ask yourself whether personal service can be effected in a manner consistent with social distancing rules.

Unsurprisingly, you will need to consider the content of those rules as they apply at the time for a complete answer. But even if they do preclude the physical handing-over of the claim form, this does not rule out personal service altogether. It has long been recognised that informing a person of the contents of a document and placing it near him/her is an effective form of personal service: Kenneth Allison v AE Limehouse [1992] 2 AC 105. This principle was successfully invoked in a recent Commercial Court case: Gorbachev v Guriev [2019] EWHC 2684 (Comm).

If this option is not available, however, you may wish to consider whether an application for alternative service (CPR 6.15/6.27) or an application to dispense with service (CPR 6.16/6.28) is a better route. There is at least one reported example of the courts treating email service as good service under CPR 6.27 in the age of COVID-19: HC Trading v Savannah Cement [2020] EWHC 2144 (Comm).

2. Should I investigate whether an office remains operational before serving there?

The short answer is yes. If you are considering serving a claim form at the defendant's offices (e.g. CPR 6.8) or those of the defendant's solicitor (e.g. CPR 6.7), it pays to check whether those offices are open, using the most up-to-date information that is available (as opposed to relying on the position that applied under materially different lockdown restrictions).

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[1] *Bear in mind that from 1 January 2021, this Regulation will apply only to documents received before the end of the transition period: Withdrawal Agreement, Article 68.*

These points are borne out in the case of Stanley v LB Tower Hamlets [2020] EWHC 1622 (QB). In that case, the claimant's solicitor had posted the POC two days after the March lockdown was announced. The claimant obtained default judgment. The defendant succeeded in setting it aside under CPR 13.3(1)(a). The court was also satisfied that COVID-19 provided "good reason" for set-aside. In particular, it criticised the claimant's solicitor for posting documents to an office that he knew or should have known was closed (having failed to make any enquiries later than February). The court memorably described the solicitor's duty as follows: "The world shifted on its axis on 23 March 2020 and it was incumbent upon him as a responsible solicitor and an officer of the court to contact the [defendant] to acknowledge that the situation had changed and to discuss how proceedings could best and most effectively be served" (§34).

In practice, the situation is often resolved by the parties' representatives agreeing to service by email. Many firms have adopted email-friendly COVID-19 service policies, which should be your first port of call where solicitors are instructed.

3. How do I serve out of the jurisdiction if courts are closed?

You may find yourself facing the situation where you are required to serve under the EU Service Regulation[1] or Hague Convention, but the prescribed methods of service are not available to you – e.g., because the Foreign Process Section is not accepting requests for service under these instruments (as was the case until 28 July 2020).

If that situation arises again, the first step is to explore other service options available to you that do not involve the FPS or its foreign equivalent (see CPR 6.40(3)). If the EU regime applies, direct service under Article 15 of the Regulation is one such option. You will need local law advice to ascertain whether that method of service is permitted in the country concerned and whether there are local COVID-19 restrictions that render service impractical or impossible. Otherwise, you may be able to avail yourself of another method permitted by local law (CPR 6.40(3)(c)). If, however, there is no available route, your best bet is to seek alternative service.

4. What are my chances of obtaining an order for alternative service?

In my experience, the courts are receptive to such applications where COVID-19 presents a genuine impediment to service. However, as one recent case demonstrated, it is essential that you provide clear and compelling evidence of the impediments on which you rely.

In Celgard v Shenzhen Senior [2020] EWHC 2072 (Ch), the claimant sought an order under CPR 6.15 in place of service under the Hague Convention. The court described the evidence that delay that would be suffered due to COVID-19 as "far from compelling" (§120). Although the court accepted that there was a "distinct possibility" that the delay would be materially longer than usual (§121), the evidence did not satisfy the necessary threshold for an application involving the Hague Convention (i.e., proof of exceptional circumstances).

Depending on the timing of your application, you may wish to think about applying for an prospective extension of time for service, as well. The case of SFO v Karimova [2020] 6 WLUK 383 (ex tempore judgment only) provides a recent example of a successful application for a 6-month extension due to the impact of COVID-19 restrictions on service in Uzbekistan.

Whichever your precise situation, you will be well served by undertaking a close analysis of (i) the applicable CPR Part 6 regime and (ii) the precise impact of COVID-19 on the available service routes before formulating your plan of attack.

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THE QUINCECARE JOURNEY: – ONE YEAR ON SINCE THE SUPREME COURT'S DECISION IN SINGULARIS

Authored by: Chris Bushell and Ceri Morgan - Herbert Smith Freehills LLP

The Quincecare journey: one year on since the Supreme Court's decision in Singularis

This time last year, the Supreme Court upheld the first successful claim for breach of the so-called Quincecare duty of care in Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50.

Since Singularis, there has been a noticeable uptick in the trend of claims against financial institutions alleging breach of the Quincecare duty, both in terms of the number of judgments handed down and cases we are tracking as they progress through the courts of England & Wales. Recent decisions suggest a creep in the scope of the duty and the increasing risk it is presenting for financial institutions that process client payments.

What is the Quincecare duty?

As a reminder, the Quincecare duty arises where a bank or deposit holding financial institution must refrain from processing a payment mandate made by an authorised signatory of its customer. The duty arises and exists for as long as the bank is "put on enquiry" (i.e. it has reasonable grounds) for believing that the instruction is an attempt to misappropriate funds from the customer. It was first established in Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 343 (which gave the duty its name), although in Quincecare itself, the court found that the duty was not breached by the bank in question.

Singularis summarised

In Singularis itself, breach of the Quincecare duty was actually established at first instance and not appealed. The issue for the Supreme Court was whether the fraudulent state of mind of the authorised signatory could be attributed to the company which had been defrauded and, if so, whether the claim for breach of the Quincecare duty could be defeated by the defence of illegality (and certain other grounds of defence). The Supreme Court found against the bank in respect of both points.

The most important takeaway from Singularis, is that running a defence to a Quincecare duty claim – other than demonstrating that the duty was not owed in the first place or not breached – may present challenges. While this will always be a fact-specific question, Singularis tells us that a defence of illegality (in particular), may be difficult to prove. This is essentially for public policy reasons: it would undermine the public policy of relying on banks (and other financial institutions) to identify and prevent financial crime, if those institutions could escape liability from the consequences of failing to do so.

The scope of Quincecare and its exclusion

At the same time as Singularis, the Court of Appeal handed down its judgment in JPMorgan Chase Bank, N.A. v The Federal Republic of Nigeria [2019] EWCA Civ 1641, rejecting the bank's application for strike out / reverse summary judgment on a Quincecare duty claim. This decision put a little more flesh on the bones of the Quincecare duty, confirming that it comprises both a negative duty to refrain from making payment and a positive duty on the bank to proactively do "something more".

However, the Court of Appeal was reluctant to hypothesise in order to provide practical guidance for parties as to what that "something more" might

look like, saying that this will depend on the facts of the case. It is hoped that some more practical guidance will follow the trial judgment in this case. The Court of Appeal also confirmed that it is possible for parties to exclude the Quincecare duty by contract, although in reality this will be difficult to do, because the clear and express words required are unlikely to be commercially palatable.

Quincecare in novel contexts

The first decision to follow Singularis was the High Court's judgment in Gareth Hamblin and Marilyn Hamblin v World First Limited and Moorwand NL Limited [2020] EWHC 2383 (Comm). This considered a novel factual scenario not previously analysed by the court in the context of the Quincecare duty, namely whether such a claim could be brought against a financial institution (here, a payment services provider) where the customer was an insolvent shell company, without any directors, which had been hijacked by fraudulent individuals and used for the purpose of a fraud.

Even in these extreme circumstances, the court found that a Quincecare claim was realistically arguable. Following Singularis, the court emphasised that the Quincecare duty is owed to the company not to those in control of it, and as such it was possible for the shell company itself to be a "victim" of the fraud. Interestingly, the court refused to attribute the knowledge of the fraudsters to the shell company, arguably taking a conservative approach to the test for attribution in Singularis.

More recently, the High Court refused to strike out a Quincecare duty claim on the ground that the claimant had suffered no loss because it was an insolvent Ponzi scheme in Stanford International Bank Ltd v HSBC Bank plc [2020] EWHC 2232 (Ch). In this case, the court considered claims brought by the liquidators of the infamous Ponzi scheme masterminded by Robert Allen Stanford, against a correspondent bank that operated some of its accounts.

The bank argued that, even if the payments made were in breach of its Quincecare duty, those sums went to genuine investors who had invested in the Ponzi scheme and therefore the Ponzi scheme suffered no loss. This was on the basis that the monies paid out to investors reduced the Ponzi scheme's liabilities to those investors, so the net asset position of the Ponzi scheme remained the same. However, the High Court disagreed, finding that it was arguable that a loss had been suffered. The court focused on the fact that the Ponzi scheme was hopelessly and irredeemably insolvent, and so did not need to give credit for the fact that it had been saved liabilities by payments out to investors.

Mission creep?

Since the Supreme Court's decision in Singularis, Quincecare duty claims have presented an increasing risk for financial institutions that process client payments. It is apparent that there has been a creep in terms of which financial institutions are capable of owing the Quincecare duty. Quincecare itself considered the duty in the context of a current account, but it has since been extended to depository accounts (JPMorgan v Nigeria), investment banks (Singularis) and payment service providers (Hamblin). The scope of what the Quincecare duty requires a financial institution to do has also arguably been expanded, from the negative duty to refrain from making payment, to include a positive duty to proactively do "something more" (although to date, it is still unclear what that might encompass).

These recent decisions cast a spotlight on the prevalence of Quincecare duty claims progressing through the courts of England & Wales, and indicate how active these claims tend to be in terms of significant interlocutory applications. In addition to the reported decisions, a number of further claims have been issued in which there are live Quincecare duty elements (for example Robert v Royal Bank of Scotland plc). These ongoing actions should assist the legal landscape by providing further clarity on the scope of the duty and its factual application, but they also indicate that this is fertile ground for further claims and highlight this as a risk area for financial institutions.

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DEVELOPMENTS IN THE FIGHT AGAINST CRYPTO-FRAUD IN 2020

Authored by: Jennifer Craven & Jasmin Khalifa, Pinsent Masons

It is more than 10 years ago since the first bitcoin was mined. Since then, we have seen the rise of other cryptocurrencies in the form of Ethereum, Litecoin and Ripple, and the use of cryptoassets as a means of currency has developed exponentially. Yet, the use of cryptoassets continues to be synonymous with shady schemes and bad investments, and 2020 sees no let up: crypto scams are said to be skyrocketing. According to one report[1], 2020 is set to be one of the highest in cryptoasset fraud, with the first five months of 2020 recording that crypto-fraud already totalled USD $1.36 billion.

The likely impact of COVID-19 on these statistics cannot be underestimated. According to the US Federal Bureau of Investigations, cyber-criminals have leveraged increased fear and uncertainty during the pandemic to steal money and launder it through complex cryptocurrency ecosystems. They warned that fraudsters are on the verge of unleashing a massive wave of cryptoasset scams relating to coronavirus. Similar warnings were given by the UK's Financial Conduct Authority (FCA) and the City of London Police's National Fraud Intelligence Bureau. Several kinds of scams, orchestrated via cryptoassets are anticipated to become increasingly popular in the wake of the coronavirus, including "work from home scams," "blackmail attempts," and "investment scams". Many are executed by tricking victims off legitimate platforms into illicit chat rooms where cryptoasset payment is requested, paid and, in many cases, never seen again.

All of this will be disappointing news to financial crime enforcement agencies and market regulators. January 2020, saw new regulatory powers introduced to allow the FCA to supervise how cryptoasset businesses manage the risk of money laundering and counter-terrorist financing. However, there are gaps in their powers: they do not cover how cryptoasset businesses conduct their business with consumers and the FCA is not responsible for ensuring that cryptoasset businesses protect client assets. Recently, the response of Action Fraud, which partners the FCA and is overseen by the City of London police, has been strongly criticised: the national reporting service was thrust into the limelight last year when an undercover Times investigation revealed that victims were mocked by call handlers as "morons", and that call handlers were trained to mislead victims into thinking their cases would be investigated when most were never looked at again.

An arguably more effective area of development in the fight against crypto-fraud is that currently being routed in the UK Courts. In November 2019, the UK Jurisdiction Taskforce

[1] *2012 EWHC 1056 (Ch)*

(UKJT) published the Legal Statement on Cryptocurrency and Smart Contracts. The Legal Statement, which was that cryptoassets fell into the legal definition of "property", was fundamental in providing much wanted legal certainty: people who are defrauded of their cryptoassets, have them stolen by hackers, or are the victim of more 'traditional' frauds, the proceeds of which are then laundered through cryptocurrency exchanges, are less likely to be able to recover their losses if cryptoassets are not considered to be 'property'.

The Legal Statement provided authoritative, albeit not binding analysis but, subsequent UK cases have endorsed the definition of cryptoassets as "property". Earlier this year, in AA v Persons Unknown [2019] EWHC 3556 (Comm), Mr Justice Bryan specifically held, on a without notice application, that cryptoassets were "property" for the purposes of granting proprietary or freezing injunctive relief. In this case, the court in London issued an injunction requiring a bitcoin exchange to help an insurance company recover funds it paid to hackers. The proprietary injunction, among other things, required the exchange to disclose information that could help the insurer identify those responsible for carrying out a ransomware attack on one of its customers, and to prevent bitcoin traced from the ransom payment being moved from the exchange's account. The case demonstrates that businesses and individuals who have become a victim of fraud and malware attacks, and have paid ransom monies – whether in fiat currency or cryptocurrency – can seek to trace the payment of those monies even where the fraudsters are unknown, using various civil fraud and High Court remedies available.

More recently, on 29 July 2020, in Toma & True v Murray [2020] EWHC 2295 (Ch), in a case involving a bitcoin transaction that went wrong owing to a fraud, and which left the Claimants sans bitcoin, Mr Robin Vos, (although endorsing the test for a proprietary injunction as set out in AA v Unknown Persons) refused to continue the proprietary injunction. The Claimants, by their own admission, would have had difficulty satisfying any cross-undertaking to damages and the claim was one which was capable of being satisfied in monetary terms rather than relying on a proprietary remedy. In this regard, it was noted that (in contrast to the position in AA v Persons Unknown) the Defendant was identified, and had shown he held a significant unencumbered asset, so there was no reason to suppose that he would not be able to meet any award made against him.

In contrast, in the case of Blockchain Optimization S.A. and others v LFE Market Ltd and others [2020] EWHC 2027 (Comm), the Commercial Court continued a freezing injunction against Defendants who had allegedly fraudulently misrepresented investors to invest in a cryptocurrency platform, signalling the UK Court's tough approach to suspected investment fraud.

Both cases are further evidence of the upwards trend in crypto related litigation being fought in the UK Courts. A similar trend is seen in other common law jurisdictions. The Singapore International Commercial Court in B2C2 Ltd v Quoine PTC Ltd [2019] SGHC (I) 03, and which was followed on appeal [2020] SGCA(I) 02 at [144], held that that cryptocurrencies fulfilled Lord Wilberforce's classic definition, so as to amount to "property" in a generic sense. More recently, in Ruscoe v Cryptopia Ltd (in liq) [2020] NZHC 728, the High Court of New Zealand held that digital assets of a cryptocurrency exchange constituted "property" and were held on trusts for accountholders on that exchange.

Undoubtedly, the use of cryptocurrency is likely to remain a playground for fraud for the remainder of 2020 and beyond. That said, victims can take some comfort from recent developments in common law jurisdictions. In particular, the UK Court has so far shown itself to be an adaptable and effective forum in the fight against crypto-fraud. It is willing to use the application of traditional civil remedies which might assist in the tracing exercise such as injunctive relief in the form of freezing orders, even in circumstances where the victim cannot identify the fraudster, so as to prevent further dealing with the cryptoasset. A tough approach is to be welcomed.

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REFLECTIVE LOSS

Authored by: David Mohyuddin QC - Radcliffe Chambers

Sevilleja v Marex Financial Ltd [2020] UKSC 31

Marex Financial Limited sued Creative Finance Limited (a BVI company) for damages. After trial, a draft judgment was circulated: Marex was going to be awarded more than $5m. Between seeing the draft judgment and it being formally handed down, Creative's owner and controller, Mr Sevilleja, transferred almost all of Creative's money to offshore accounts in his personal control, leaving Creative unable to pay the judgment debt. Creative went into liquidation, but the liquidator took no action against Mr Sevilleja despite him having breached the duties he owed to Creative.

Marex sued Mr Sevilleja directly. It sought damages for inducing or procuring the violation of its rights under the judgment and for intentionally causing it loss by unlawful means. Mr Sevilleja said that Marex had no claim against him because the so-called rule against reflective loss meant that it had suffered no loss in its own right; the loss it alleged was Creative's loss.

At first instance, Mr Sevilleja's argument failed. The Court of Appeal allowed his appeal. The Supreme Court reversed the Court of Appeal's decision and held that the true rule against reflective loss did not apply to Marex's claim.

Legal analysis

There is a fundamental principle of company law that, subject to certain well-defined exceptions, where a company suffers a wrong which causes it loss and has a cause of action against the wrongdoer, the only proper claimant is the company itself. That is the known as the rule in Foss v Harbottle (1843) 2 Hare 461.

As a general proposition, that does not usually affect the rights of others with concurrent claims. But a highly specific exception to that general proposition comes from the Court of Appeal's decision in Prudential Assurance Co Ltd v Newman Industries (No 2) [1982] Ch 204. The rule in Prudential is that a shareholder cannot bring a claim in respect of a diminution in the value of their shareholding or a reduction in the distributions they receive by virtue of their shareholding which is merely the result of the loss suffered by the company even if the shareholder has their own claim against the wrongdoer and the company itself has taken no action. As established in Prudential, the rule established was one of company law applying specifically to companies and their shareholders and having no wider ambit. The rationale is that the shareholder suffers no loss which is recognised in law as having an existence distinct from that suffered by the company. Because it is the company which suffered the loss and because the company has a cause of action against the wrongdoer, the rule in Foss v Harbottle proscribes a claim by the shareholder. The shareholder is in a special position and can seek to bring a derivative action, present an unfair prejudice petition or present a just and equitable winding-up petition.

But then came the House of Lords' decision in Johnson v Gore Wood & Co [2002] 2 AC 1. On the face of it, the House of Lords followed Prudential. But, relying primarily on what Lord Millet said in Johnson, the rule against reflective loss has enjoyed nearly 20 years of controversial expansion. Whilst the principle expounded in Prudential was limited in application, it has, since the decision in Johnson, been applied to claims brought against a company by a creditor who was also a shareholder where the company had a concurrent claim. Then, in a startling development, the Court of Appeal held that the no-reflective loss rule applied to a claim brought by an ordinary creditor (Marex) who was not a shareholder where the company (Creative) had a concurrent claim against the wrongdoer (Mr Sevilleja). The Court of Appeal's decision extended the reflective loss principle way beyond what was said in Prudential:

a. It would have made the relationship between

shareholders and their company analogous to that between creditors and the company – when they are plainly very different. The rule in Foss v Harbottle cannot apply; a creditor who suffers loss in that capacity can bring their own claim even where the company has a concurrent claim, as the Supreme Court held.

b. **Another consequence would have been to prevent creditors whose loss was in reality caused by a third party (e.g. a director acting in breach of their fiduciary duties owed to the company) from bringing their own claim because the company had a theoretical concurrent claim against the director. Had the Supreme Court not reversed the Court of Appeal's decision, creditors would probably have been prevented from making use of some of the economic torts in their attempts to recover damages from those who stripped the company's assets, leaving the creditors unpaid.**

What next?

Notably, the minority in the Supreme Court was unconvinced that the "bright line" rule against reflective loss should continue. They would have permitted Marex's claim in principle, with the question of double recovery left to be resolved by case management.

Where there are concurrent claims, how will the court avoid double recovery (or, in an insolvency, double proof)? The need to do so does not operate to prevent a claim from being brought at all, leaving the court to find a solution.

Does the answer lie in how the case is managed – should one claim be given priority or should the potential claimant who has not started proceedings be invited to join in? It is doubtful that case management decisions alone will solve the problem. However, the answer might very well be found in the doctrine of subrogation. If Mr Sevilleja paid Marex what it was owed by Creative, then he would be subrogated to Marex's claim against Creative, preventing double recovery.

Conclusion

The no-reflective loss principle has been curtailed, and rightly so. That will be of comfort to creditors of asset-stripped companies who can look for compensation elsewhere. The bright line rule restricting the operation of the principle provides certainty and is the settled legal position – for now.

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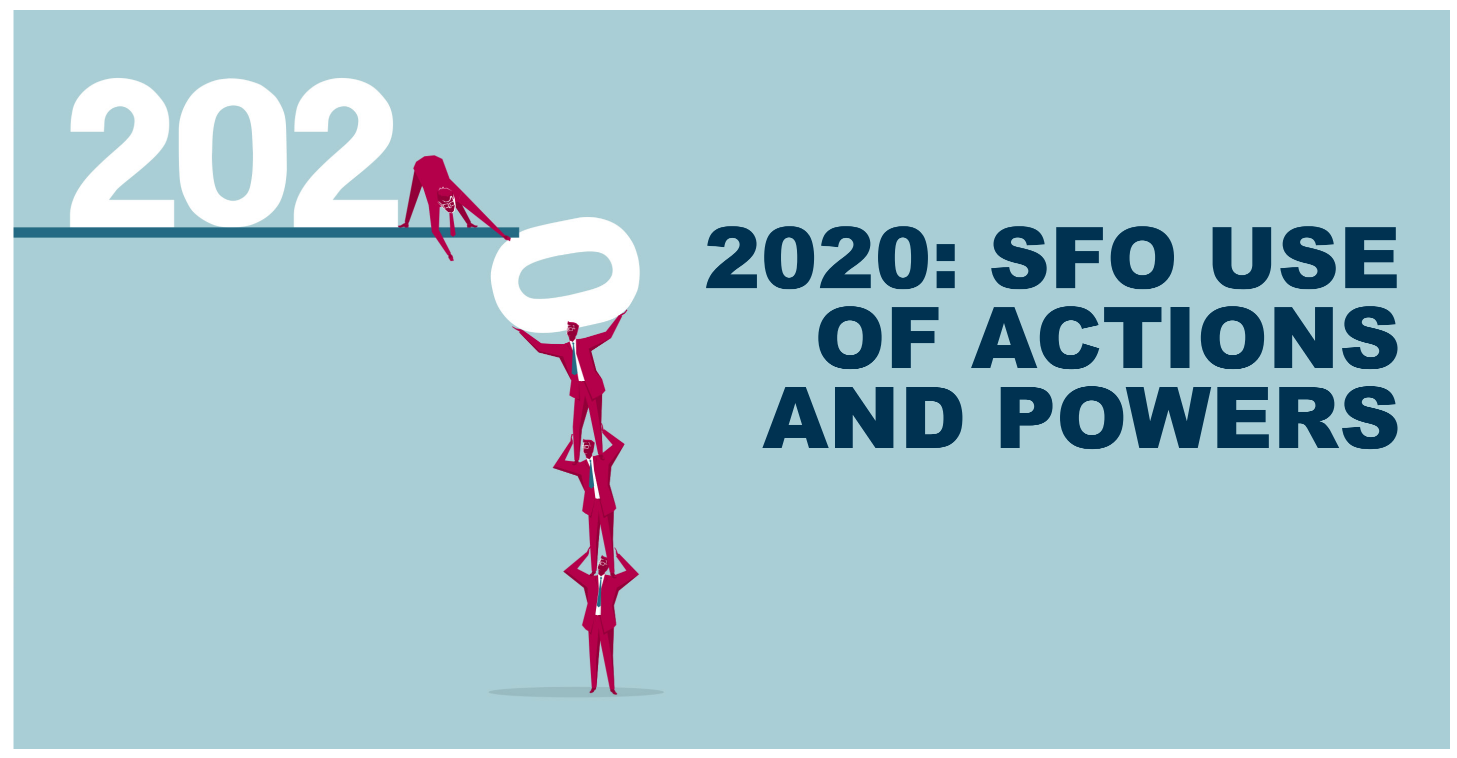


2020: SFO USE OF ACTIONS AND POWERS

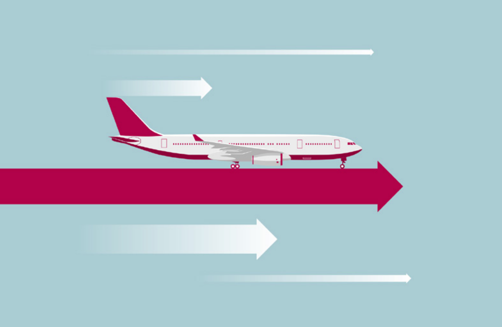
Authored by: Edmund Smyth - Kingsley Napley LLP

2020 will be remembered primarily for the coronavirus pandemic. The response to the disease affected every area of life and every sector of the economy, anti-fraud law enforcement included. This article considers some of the headline cases from this area of the legal world and illustrates how, despite the disruption caused by the lockdown and other restrictions, significant activity took place and the appetite of those tasked with combatting fraud, bribery and money laundering remains healthy.

The Serious Fraud Office (SFO), the UK's most high-profile financial crime agency, has had a mixed year, continuing a theme that has developed ever since the current director, Lisa Osofsky, took office just over two years ago. Those who would prefer the SFO to commit itself to large set-piece prosecutions – highly complex and with an international dimension - have criticised what they see as her over-readiness to close down cases and focus on reaching financial settlements with corporates.

The events of late 2019 and early 2020 would have given solace to those ascribing to the old school view: December saw the opening of an investigation into bribery and corruption by commodities trading giant Glencore, and in January the trial of three men charged following the Unaoil investigation started at Southwark Crown Court. Following a two-month hiatus due to the lockdown, two of the three were eventually convicted in July and a retrial of the third will take place in early 2021. Significant confiscation orders were made following earlier convictions in the Afren (£5.45m) and Euribor (£1.2m) cases.

Charges were brought against individuals in a number of SFO investigations: Balli Group, G4S (following a DPA with the corporate), Axiom Legal Financing Fund and GPT Special Project Management Ltd. Each of these investigations pre-dated Ms Osofsky's appointment - the oldest was opened in 2012 - illustrating a point she herself has made that the nature of SFO cases means that building a robust case (or indeed determining that there is insufficient evidence) takes considerable time.



On the corporate side, the SFO entered Deferred Prosecution Agreements with G4S Guralp, Airbus (a blockbusting $991m) and Airline Services Limited (a development announced on 22 October in a matter about which there had been no previous publicity). Following its conviction in 2018 for conspiracy to corrupt, Alstom Network UK Ltd was fined £15m at the end of 2019.

The debit column of the SFO's ledger also contains a number of notable entries: the acquittal in February of three former senior employees of Barclays Bank brought to an end one of the SFO's most high profile cases of the past decade and the only significant criminal case arising out of the 2008 financial crisis. The acquittals followed the earlier dismissal of the prosecution cases against the former chief executive and the bank respectively. Investigations into De La Rue Plc (banknote printing), ABB (engineering) and Euribor interest rate rigging were all closed.

More personally embarrassing for the Director was the trenchant criticism of her conduct by the judge in the Unaoil trial, concerning her text message exchanges with a private investigator for the prime suspects (who were not prosecuted) who in turn was said to have pressurised two defendants to plead guilty. The internal review of Ms Osofsky's conduct will be an unwelcome distraction from efforts to change the organisation's culture following the 2019 report by HM Crown Prosecution Inspectorate which identified "neglectful

approaches to management" and a toleration of "unacceptable behaviours".

The National Crime Agency (NCA) is probably best-known for its work tackling organised crime; kicking down the doors of drug importers, people traffickers and the like. However, it also has a very active role in "financial disruptions" - the pro-active targeting of suspected illicit assets – which has brought it into the civil courts on a number of occasions in 2020. The NCA has taken the lead – with mixed results - in deploying some of the tools introduced by the Criminal Finances Act 2017, most notably Unexplained Wealth Orders (UWOs) and Account Freezing Orders (AFOs). These orders ultimately allow the forfeiture of assets or cash in accounts is the subject fails to provide a sufficiently persuasive account of the legitimate origins of the assets or cash, and no parallel criminal investigations or proceedings are required.

In February the agency successfully contested an appeal by Zamira Hajieva against UWOs made against her on the basis that her unexplained wealth derived from her husband, who had been imprisoned in Azerbaijan for corruption and whose legitimate income was judged to be insufficient for her to have acquired the £30 million of assets – including two high-value properties - targeted by the UWOs. As a consequence of the failed appeal, Mrs Hajieva was required to provide an explanation for her acquisitions or face them being seized.

Shortly after the Hajieva case, the NCA had its first high profile UWO loss, in the appeal brought by family members of a late, allegedly corrupt, former Kazakh official. The orders in question targeted three properties with a combined value of £80 million, and the appellants were able to persuade the Court of Appeal that they had sufficient legitimate income to have acquired them. Moving beyond the evidence itself, however, the judgment of the court went on to criticise the NCA' conduct of its investigation: unjustifiably treating the use of complex and offshore corporate structures as inherently suspicious and failing to properly investigate "some obvious lines of inquiry" which should have allayed concerns about the appellants' sources of income.

While the criticism of its methods undoubtedly stung, predictions that the NCA's appetite for UWOs would diminish were confounded by the news in October that the target of another UWO, Mansoor 'Manni' Mahmood Hussain, had agreed to relinquish nearly £10 million in property and cash by way of a recovery order. Mr Hussain is suspected of being a money launderer for organised criminals across the North of England, although he has not been prosecuted for any offence.

Mansoor's case differed from the other UWOs described above in that it did not involve allegations of international corruption or Politically Exposed Persons (PEPs), but it is too early- and too small a sample size - to say that it signifies a shift to focus on disrupting the finances of domestic criminals. Taken together, and alongside the NCAs AFO activity (over £180 million frozen by 85 orders), and indeed the SFO's first steps onto this playing field (£500,000 of jewellery seized in September using a Listed Asset Order – another Criminal Finances Act tool) it can be said with some confidence that the targeting of assets will continue to be a growth area.

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SEARCH ORDERS IN THE TIME OF A PANDEMIC

Authored by: Nicola Sharp - Rahman Ravelli

Nicola Sharp of Rahman Ravelli details a case that outlines the impact COVID-19 has had on both the granting and carrying out of search orders.

A search order can be granted by the court so that evidence or property that is or may be the subject of court proceedings can be preserved. When the court makes a search order, under section 7 of the Civil Procedure Act 1997, the defendant (also known as the respondent) has to allow the applicant's (also known as the claimant's) solicitors to enter their premises to look for and remove items that are mentioned in the order.

For a court to grant an order, there must be a prima facie case and the activities of the defendant must be causing harm to the interests of the applicant. There also needs to be evidence that documents or other items relating to this are in the defendant's possession and may be destroyed before any application on notice can be made.

When a search order is made, the defendant has to allow anyone named in the order, such as the supervising solicitor – an independent solicitor appointed to supervise the search - and the applicant's solicitor to enter the premises. Unlike a search warrant, force cannot be used to gain entry to the premises under a search order.

The Effect of the Pandemic on Search Order Applications

The procedures for applying for search orders are firmly established, as are the consequences of non-compliance with an order and the ways to seek a variation or discharge of an order. But the COVID-19 pandemic has focused attention on the issue of how search orders can be acted upon when there is a risk of physical illness resulting from them.

The case of Calor Gas Ltd v Chorley Bottle Gas Ltd and others [2020] EWHC 2426 (QB) saw this issue considered by the court. As a result, the court laid down guidelines that recognise the risk associated with search orders during a pandemic.

This case saw Calor Gas Ltd (the applicant) make an application for a search order. Calor Gas was alleging that Chorley Bottle Gas Ltd (the respondent) had been refilling containers incorrectly. But with the case being heard in July 2020, Mr Justice Fordham had to take into account the COVID-19 pandemic and apply extra precautions when considering the application. Variations were made to both the usual mode of hearing and the terms of the order. The case can be viewed as an illustration of how courts will take the pandemic into account.

In this case, the applicant believed the respondent was filling up gas canisters in a back garden without taking proper steps to ensure safety or the level of quality that the applicant had expected and been promised. Under the business agreement between the two parties, the respondent was obliged to collect empty gas containers from the applicant, refill them safely and in accordance with official guidelines and then return them.

The order was applied for so that the applicant's team could identify and retrieve gas cylinders belonging to the applicant - for which ownership was disputed.

As a result of COVID-19, the hearing was heard remotely via a BT conference call. It was heard in private and was recorded, so that it could be made available if and when access to it was required. In these circumstances, the judge was satisfied that the open justice principle had been secured and that the decision to hear the application in this way was fully justifiable, necessary and proportionate given the circumstances.

Search Order Variations Prompted by the Pandemic

The search order that was sought by the applicant was subject to some interesting changes, as a direct result of pandemic-related social distancing requirements.

It allowed a search team to arrive at two premises; one business premises and one private residence. The order stated that only the back garden and exterior sheds at the private residence could be entered and searched. Also, unusually for a search order, there was no permission for the search team to search for or remove any documentation or computers. There was also no ‘doorstep’ requirement that questions had to be answered about the commercial dealings undertaken by the respondent. The only requirement for the providing of information during the search related to identification as to where the gas cylinders were located.

Significantly, the judge laid down rules that had to be followed for the search to be allowed to go ahead.

These were:

- **All members of the search party had to have a temperature test before entering the premises.**
- **Nobody present inside the premises could be going through the shielding process.**
- **Social distancing measures had to be taken, with people not being within one metre of each other where possible.**
- **Hand sanitiser, gloves and masks needed to be used by everyone who entered the premises.**
- **Spare plastic gloves and facemasks had to be brought and offered to the respondent and any other person at the premises**

These rules, which were referred to as ‘the COVID undertakings’, signalled the court’s awareness of the change in circumstances that the pandemic has caused and the effect this change has had in relation to search orders.

The judgment in the case clearly details the factors the court will consider during the pandemic when considering the proportionality of a proposed search order.

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DEVELOPMENTS IN CONTEMPT PROCEEDINGS
A GET OUT OF JAIL FREE CARD?

Authored by: Jon Felce, Partner - PCB Litigation LLP

"Go directly to jail. Do not pass go. Do not collect £200."

Whilst worldwide freezing orders and search orders often get the headlines, committal proceedings – or contempt proceedings as they are now to be known – are an increasingly frequent feature of litigation in the English courts. Designed to uphold and ensure the effective administration of justice, the contempt regime provides a remedy for various misdemeanours, including breaches of certain Court orders and injunctions and acts that interfere with the administration of justice (such as forgery and knowingly providing false evidence). The court's powers of punishment include ordering up to 2 years' imprisonment, an unlimited fine and the seizure of assets. Contempt proceedings can therefore be a very powerful incentive for parties to behave themselves during English litigation.

Whilst the Courts are keen to clamp down on any unacceptable conduct, pursuing proceedings for contempt of court should not be taken lightly given the seriousness of the potential remedies. During the last year, there have been a number of cases which reinforce this message, culminating in the introduction of new procedural rules on 1 October 2020.

Be clear and precise

The first message from recent caselaw perhaps goes without saying, but it is that the contempt application should be drafted carefully, clearly and precisely. There needs to be no doubt as to what allegations of breach are being made so that he or she has every opportunity to meet those allegations. This is illustrated by a recent case in the Court of Appeal , where it expressed concerns of its own motion about the drafting of the contempt application, identifying various defects including the omission of the date on which the alleged contemnor was supposed to have committed the contempt. Nevertheless, the court was prepared to waive these defects on the basis that no injustice had been caused to the respondent, but not without stating that the defects evidenced "an unfortunate degree of carelessness" in circumstances where "accuracy and clarity should be at a premium".

Procedural fairness

Once the application has been made, the courts are keen to ensure that the process is procedurally fair to the respondent. In one case , the judge (i) did not find out whether the respondent was content to proceed without any legal representation or inform him of his right to silence, and (ii) asked leading questions of, and extracted admissions from, the respondent. It was not apparent whether the judge had even considered a non-custodial sentence, or given the respondent any chance to make a plea in mitigation before

sentencing. The Court of Appeal found that the conduct of the hearing

“fell far short of the high standards expected in an application for the committal of a litigant in person”. Given the defendant’s liberty was at stake, procedural fairness was of “cardinal importance”.

Had the defects in the application been material such to render the process unfair or unjust, there would have been no option but to allow the appeal irrespective of the underlying merits. However, the court determined that the process was not unfair or unjust, and a properly conducted hearing would have led to the same result. Of particular note is that the judgment stated that the applicant’s counsel would have intervened had he thought there was any risk of unfairness or injustice. This is a useful reminder that it is important for the applicant’s legal team to seek to ensure that the process is conducted fairly and justly, to avoid the subsequent risk of an adjournment or appeal. For example, in one recent case , the court adjourned a contempt application because the respondent only learned of its right to legal aid at the committal hearing itself.

Abuse of process

It is apparent that respondents to contempt proceedings are increasingly seeking to counter-attack with allegations of abuse against the application.

In one case , the respondents argued that the contempt application should be struck out as an abuse of process, on the basis that it was being used as a threat improperly to obtain a more favourable settlement of the underlying dispute. Particular emphasis was placed upon an email concluding that

“The most reasonable solution is therefore to settle the matter and do so as soon as possible, before any arrest warrants are issued and further legal costs are incurred.”

The judge considered that the question of abuse had to be decided in the context of what was “permissible in hard fought commercial litigation”. In this case, whilst the reference to an arrest warrant was unwise, it did not make the otherwise temperate email abusive. Therefore, the court rejected the abuse allegation, ruling that contempt had been raised legitimately to encourage compliance by the respondents with the injunction against them.

In contrast, in another recent decision , the judge inferred that the applicant had a deep rooted personal animosity against the respondent and that the contempt proceedings were to vex and harass him, rather than draw serious misconduct to the court’s attention. As such the proceedings were struck out as an abuse of process.

New procedural rules

Many of the points considered in the aforementioned cases have been highlighted by the recent introduction of a new procedural code for contempt proceedings. The new rules seek to simplify the process and make it more intelligible for both the practitioner and, crucially, the parties, many of whom are litigants in person. The rules also seek to re-emphasise that contempt proceedings need to be conducted in a fair and proper manner. One of the key new rules is a shopping list of items that need to accompany the contempt application itself. This spells out that the respondent should be told clearly and precisely of not only the allegations against it, but also its rights during the process.

A get out of jail free card?

Notwithstanding that the courts are keen to ensure that contempt proceedings are conducted properly and fairly, as embodied in the new procedural rules, it is apparent that this is not a charter for miscreants to escape from the consequences of their misconduct. As a quasi-criminal process where people’s personal freedoms are potentially at stake, the role of the applicant’s legal team is akin to a quasi-prosecutor, whose function includes ensuring the integrity of the process and that respondents do not simply “go directly to jail”. That said, just as the process is taken seriously so is misconduct, and it is clear that in appropriate cases the courts will have no hesitation in ordering the most serious of consequences.

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INTERNATIONAL ARBITRATION: A YEAR IN REVIEW (2020)

Authored by: Jemma Brimblecombe & Mark Fallmann - Kingsley Napley LLP

This article looks at some key cases in 2020 relating to arbitration and the interplay with world-wide freezing injunctions ("WFO"), fraud and challenges to arbitration awards, enforcement proceedings and anti-suit injunctions.

World-Wide freezing injunctions

The ability for a party to obtain a WFO before or during arbitration to secure sufficient assets for its opponent to comply with an award can be of great significance, particularly in international arbitration where parties are often multi-national and have the ability to move assets across borders and jurisdictions to frustrate enforcement.

It is well-established through s.44 of the Arbitration Act 1996 and s.37(1) of the Senior Courts Act 1981 that the court has the power to grant a WFO in support of arbitration proceedings.

This was considered in the case of Petrochem v PSB Alpha in which the applicant obtained a WFO over shares of a Swiss Company. The Swiss shares were the subject of a share purchase agreement containing a Swiss governing law clause and a Swiss arbitration clause. The applicant sought to establish that there was a sufficient connection to the UK on the basis that (1) the individual controlling the shares was a British national and (2) the Swiss share purchase agreement was linked to a second share purchase agreement which contained an English arbitration clause.

The Commercial Court refused to continue the WFO on the basis that there was an insufficient connection with the English court as: (i) there were no assets in England & Wales; (ii) the seat of arbitration was in Switzerland; and (iii) the British national controlling the shares was not resident in England & Wales. Accordingly, the application to continue the WFO was dismissed.

The case reinforces the principle that whilst the courts in England & Wales may order the continuation of a WFO before or during an arbitration, the applicant must satisfy the court that there is a "sufficiently strong link" with the jurisdiction in order to exercise its discretion.

Enforcement

One of the advantages of arbitration over litigation is that enforcement of arbitral awards is generally considered to be easier than enforcement of judgments.

An interesting case on the issue of enforcement and illegality/corruption was looked at by the Commercial Court in the case of Alexander Brothers Limited v Alstom. The claimant ("ABL") was successful in ICC arbitration under Swiss law in Geneva. However, enforcement of the award was refused in France where it was held that it would be contrary to French public policy to grant ABL permission to enforce the award where it found "serious, precise and consistent indicia" of bribery, namely that monies paid by Alstom to ABL under consultancy agreements were allegedly used to pay Chinese officials.

In England, the Commercial Court took a different approach to the French court. The Commercial Court allowed enforcement of the arbitral award on the basis that the parties had contractually agreed to engage the ICC tribunal under Swiss law to resolve the dispute and

the arguments of alleged wrongdoing were deliberately not raised by Alstom in the ICC arbitration. In essence, the Court was looking for "overriding special circumstances" which would allow it to consider the bribery case which "could have and should have" been raised in the arbitration but was not.

This case demonstrates that to succeed in challenging enforcement of an arbitration award on the grounds of "public policy" there is a high threshold to be met and allegations of corruption and illegality must be very clearly and robustly pleaded, otherwise they will fail.

Extensions of time and Fraud

The case of the Federal Republic of Nigeria v Process & Industrial Developments Limited considered the issue of illegality in relation to finality of arbitral awards and time limits for mounting challenges against arbitral awards under the Arbitration Act.

The applicant ("Nigeria") sought extensions of time to bring challenges under s.67 and 68(2) of the Arbitration Act on the basis that the underlying contract, the arbitration clause and the arbitral awards were procured as a result of a significant fraud by P&ID, and that denying Nigeria the opportunity to challenge the award would involve the English court being a unwitting vehicle of fraud.

P&ID argued that the awards were made three to five years ago and it would be unprecedented to grant the extensions sought, and that speed and finality are essential features of London arbitration.

Whilst the Commercial Court found that the delay in the case had been "extraordinary", it granted the extensions on the basis that (1) Nigeria had established a strong prima facie case of fraud and (2) in all circumstances Nigeria had acted reasonably.

This case demonstrates that in exceptional circumstances and where a strong case of illegal conduct is established, the Court will be prepared to exercise its discretion to extend deadlines to challenge enforcement of arbitral awards by years

Anti-suit injunctions

One ever developing area of law is that of anti-suit injunctions. This is an important area in arbitration as it goes to the issue of what principles should be applied to determine the law governing an arbitration agreement.

This issue was considered by the Supreme Court in the case of Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb. The Appellant ("Chubb") was a Russian insurance company who had insured the owner of a power plant against damage by fire. The Respondent ("Enka") was a Turkish contractor involved in the construction of the plant. The construction contract failed to specify the governing law but did provide that all disputes should be referred to English arbitration. The plant was subsequently destroyed by fire and Chubb paid out under the policy and began Russian proceedings against Enka and others.

Enka began proceedings in England for an anti-suit injunction contending that the dispute was subject to an English arbitration agreement and sought an order that Chubb discontinue the Russian proceedings.

At first instance the application was refused but this was overturned by the Court of Appeal. Chubb appealed to the Supreme Court. By a majority of 3-2 the Supreme Court dismissed the Appellant's appeal. The Supreme Court concluded that in relation to the proper law of the arbitration agreement a three stage test should be applied: (i) was there an express choice of law? (ii) if not, was there an implied choice of law? (iii) if not, with what system of law did the arbitration agreement have its closest and most real connection? Applying those principles, the Court held that the proper law of the arbitration agreement was English law. This was on the basis that: (i) the governing law of the contract was Russian law but that was not by express or implied choice and (ii) the arbitration agreement was governed by the "seat" of the arbitration (i.e. London).

This case provides useful insight and guidance into how the law of an arbitration agreement will be determined, following various inconstant decisions on this issue and sets out the key factors to be considered.

Final thoughts

The above cases show that the Courts have taken a pragmatic and sensible approach to the use of injunctions, requests for extension of time and enforcement proceedings in the context of arbitration.

Covid-19 and national lockdowns have demonstrated the importance of the international commercial arbitration system, with its flexibility and familiarity with the use of technology in proceedings and it is anticipated that there may be an increase in the number of parties using arbitration as a means to resolve disputes.

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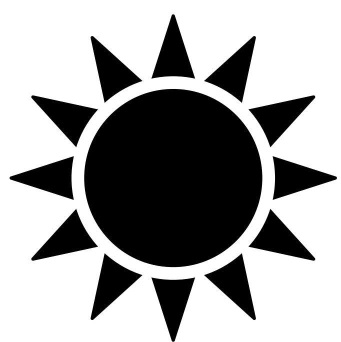
FIRE OFFSHORE UPDATE: HOT CASES AND JURISDICTIONS

Authored By: Oliver Passmore, Grant Carroll, Jennifer Fox, Alex Horsbrugh-Porter & Michael Snape - Ogier

In this whirlwind tour we identify the hot cases or key developments of 2020 across a number of our jurisdictions in which we practice.



BVI

During 2020 the BVI has seen a steady increase in financial restructuring work, no doubt hot on the heels of the successful restructuring of the Brazilian oil and gas group, Constellation Oil Services. In that case the first ever BVI 'soft touch' provisional liquidation was used to effect a scheme of arrangement (which is largely modelled on the English equivalent) pursuant to the BVI Business Companies Act, so that the relevant BVI subsidiary could participate in the wider and cross jurisdictional restructuring.

In a subsequent BVI provisional liquidation (Re Century Sunshine Group Holdings Limited), the BVI court has also recognised the need to provide a company with breathing space in which to explore and pursue a restructuring for the benefit of all stakeholders. Accordingly, an order was made whereby any claim made by an unsecured creditor against the company in provisional liquidation was automatically stayed, thereby providing an effective moratorium, of sorts. This order did not affect the rights of secured lenders, who remained free to enforce their security.

The well-known 'Black Swan' jurisdiction, used to grant injunctions in aid of foreign proceedings, was held to have no jurisdictional basis by the Court of Appeal in Broad Idea International Limited v Convoy Collateral Limited. However, there is currently pending legislation before the BVI House of Assembly which will provide a statutory footing for the BVI Court to grant an injunction in aid of foreign proceedings.

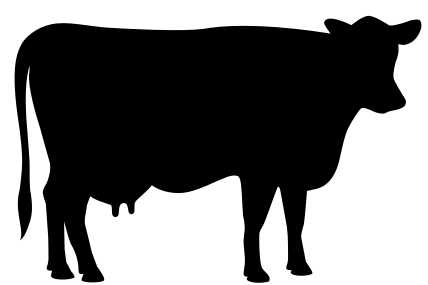
Cayman

Reform to the Cayman Islands insolvency framework has been brewing in 2020. In particular, it is proposed that a standalone restructuring proceeding is established (akin to a US chapter 11 reorganisation or the process of administration in the UK). This would involve the appointment of restructuring officers and an automatic moratorium on claims on the filing of the proceedings. Currently such protection can be obtained for restructurings (with numerous notable successes) but it is via the commencement of provisional liquidation proceedings commonly referred to as a "soft-touch provisional liquidation". Having a separate procedure outside an insolvency process will undoubtedly improve Cayman's offering of rescue options and, ultimately, returns for stakeholders.

Cayman insolvency jurisprudence has swelled during 2020. In particular, there have been numerous decisions on the circumstances in which a winding up petition will be struck out because it is bona fide disputed in good faith and on substantial grounds. The decisions, namely Adenium, Altair, Luckin Coffee and Sky Solar, have largely reaffirmed that each case will turn on its own facts, and we can therefore expect to see more decisions in 2021 as insolvency filings are likely to increase.

2020 also saw a rare decision considering Cayman's Fraudulent Disposition Law (Raiffeisen Bank). Pending treatment by the Court of Appeal, the decision may lead to greater clarity on the utility of this legislation for international asset stripping cases concerning Cayman structures.

Finally, irrespective of a lack of a statutory footing, but with a nod to modified universalism and plain pragmatism, the Grand Court approved a cross-border restructuring protocol between the Grand Court and the Bankruptcy Court in the SDNY to assist with the supervision of the restructuring of the LATAM Airlines group.



Guernsey

Substantial changes in Guernsey's Insolvency Law were approved by the island's government on 15 January 2020 and are due to come into force later this year.

Amendments to the island's 2008 Companies (Guernsey) Law will modernise Guernsey insolvency law, bringing the jurisdiction into line with not only the UK, but other leading offshore jurisdictions.

The changes will affect all new liquidations and administrations.

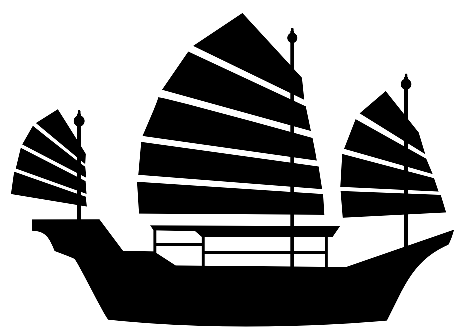
Key developments include changes to voluntary winding up by company members; granting liquidators the power to demand documents and interview individuals; the power to disclaim onerous assets; and provide for the winding up of non-Guernsey companies.

Former directors can no longer refuse to provide documents or answer questions from liquidators, and it will be easier for liquidators to recover diverted corporate assets from third parties under the new clawback provisions.

Administrations are also likely to be cheaper as administrators can now distribute assets to secured and preferential creditors and then place the company straight into dissolution if there no further assets to distribute and liquidators can now rid themselves of unwanted contracts and property.

Finally, the Guernsey court will be given the power to wind up foreign incorporated companies (as long as there is a connection to Guernsey) which will provide benefit to corporate service providers who administer non-Guernsey companies from the island.

All this will likely save money and preserve assets for creditors, and is a welcome and substantive change which brings Guernsey into line with many other Commonwealth jurisdictions.



Hong Kong

Cross-border co-operation between onshore jurisdictions in Asia and the Caribbean offshore jurisdictions in particular was strong in 2020. The BVI court set the tone at the start of the year, by recognising and enforcing for the first time a judgment delivered by a court in the People's Republic of China, in Industrial Bank Financial Leasing Co Ltd and Xing Libing. Judgment creditors in the PRC could find asset holding BVI companies are within reach on a more regular basis in the future.

In Hong Kong SAR, a regular stream of cases confirmed the willingness of the Hong Kong court to recognise the appointment of foreign provisional liquidators for the purposes of restructuring – despite HK having no equivalent provisions in its own insolvency laws that provide for corporate debt restructuring or rehabilitation. China Oil Gangran Energy Group Holdings Limited, which involved a Cayman company listed on the Hong Kong Stock Exchange, is just one example of many. A letter of request issued by the Cayman court ultimately led to recognition and assistance for Cayman-appointed restructuring provisional liquidators in HK. An absence of legislative reform in HK (although this is on the horizon) coupled with the current economic downturn will see these cases continue to link offshore with HK next year.

Jersey

In Jersey, in order to preserve property pending the final outcome of criminal proceedings (including registration of an external confiscation order), the Court may order a "saisie judiciaire" which has the effect of vesting the relevant property in the Court's enforcement officer (the Viscount).

In In re Tantular [2020] JRC058, the Royal Court confirmed that this power extends to foreign property which is held (directly or indirectly) by a Jersey based individual or entity – which in this case included foreign assets held through Jersey trust structures.

There had been a previous decision of the Royal Court to this effect, but new arguments were advanced based on English and Guernsey case law and also on treaty obligations and conflict of law principles. Those arguments were rejected.

In an earlier decision in this case (In re Tantular [2020] JCA013), the Jersey Court of Appeal held that saisie could not prevent a mortgagee from assigning its mortgage asset, because the mortgage was an asset of the Bank.

This decision was also interesting as the Court found that the overseas government which had asked the Jersey Attorney General to bring the proceedings was vicariously a party and could be liable for costs.

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UNLOCKING FINANCIAL INFORMATION IN THE UNITED STATES:

OBTAINING DISCOVERY FOR USE IN FOREIGN LAWSUITS

Authored by: Thomas Sullivan - Marks & Sokolov LLC.

The US offers a very powerful litigation tool to parties to foreign legal proceedings to obtain bank records, other documents and witness testimony from sources within the US, even if such evidence is unobtainable through the foreign forum's own discovery procedures. This process can be relatively quick, inexpensive, and efficient for obtaining crucial information to win a case.

I. What is 28 U.S.C. §1782?

Section 1782 is an American law designed to allow participants in pending or future foreign proceedings to ask a US federal court to authorize discovery of documents and testimony from sources located in the US, for use in those foreign proceedings. The applicant is not required to obtain Letters Rogatory or pursue discovery through the Hague Evidence Convention.

II. What Can Be Obtained?

New York banks are frequently targeted for production of information related to wire transactions. The information produced typically includes the dates and amounts of the wires, originating, intermediary and recipient banks, as well as the beneficiaries and related parties to the wire transaction. If the discovery target is a corporation, in addition to being required to produce documents, it may be required to designate someone to testify on its behalf. This may or may not be a corporate officer, but the person must be knowledgeable about the topic at hand. For example, in one matter, the CEO of The Bank of New York was ordered to produce documents and appear for a deposition for use in Russian litigation.

Section 1782 discovery has significant implications for foreign banks with registered branches in the US or that execute trades on US exchanges. In one recent case, the US court authorized discovery of Deutsche Bank, DZ Bank AG and the Commodity Exchange Inc. which executed trades in New York, regarding silver and silver derivatives transactions for use in a case pending in Germany. The requested discovery was allowed even though Deutsche Bank's traders worked in London and Singapore, not in New York.

In permitting discovery for use in foreign proceedings, US courts have found no per se bar to the extraterritorial reach of §1782. What this means is that a person or company located in the US can be compelled to produce documents located abroad if that person or company has sufficient control over the documents. In one matter, the US court authorized §1782 discovery from New York based Santander Investment Securities, Inc. for use in proceedings before the General Court of the Court of Justice of the European Union and in Spanish criminal proceedings, and rejected the argument that discovery should not be allowed because the information requested was located abroad. In another matter, the US court concluded that information being located in Switzerland is irrelevant to the §1782 analysis and allowed pre-litigation discovery for use in anticipated Swiss litigation against Credit Suisse based upon its failure to prevent and detect a fraudulent scheme perpetrated by its former Russia Desk manager. In general, whether the US discovery target must produce documents located overseas is dependent on the nature of its possession or ability to control those documents.

III. What A US Court Will Consider

In considering whether to grant a §1782 application, a US court will first look to see if the threshold statutory requirements are satisfied. These are (1) the person from whom discovery is sought must reside or be found in the district of the federal court to which the discovery request is made; (2) the information sought must be for use in a proceeding in a foreign or international tribunal; and (3) the application must be made by a foreign or international tribunal or an "interested person" with participation rights in a pending or contemplated proceeding. If these statutory requirements are satisfied, the US court will weigh the additional "discretionary factors."

The first discretionary factor examines whether the discovery target is a participant in a foreign proceeding or subject to the jurisdiction of the foreign tribunal. This factor weighs in favor of granting discovery when the discovery target is not a party to the foreign proceeding and the foreign tribunal has no jurisdiction over that party. In one matter, the court granted discovery because the target, the Chairman of The Bank of New York, was outside the reach of the Russian court's jurisdiction, and discovery from him would be unobtainable without the assistance of §1782. The second factor examines the foreign tribunal's receptivity to US judicial assistance. Typically, courts do not delve into a foreign tribunal's rules and legal traditions and instead look for affirmative "authoritative proof" that the foreign tribunal would reject the evidence. The discovery need not be admissible in the foreign action. Next, the court will consider whether the request seeks to circumvent foreign proof gathering restrictions or other policies of a foreign country or the US. That the foreign forum might limit discovery within its domain does not necessarily weigh against permitting discovery. Finally, a court will consider whether the requests are unduly intrusive or burdensome protecting against abusive or harassing discovery requests and protecting confidential information. Courts have rejected arguments that requested discovery is burdensome if documents merely require translation or are located abroad.

IV. Conclusion

Section 1782 is an increasingly important mechanism for obtaining evidence to prove or defend against foreign lawsuits, and, with continued globalization, its importance and utility will only grow.

The types of documentary and testimonial evidence that can be obtained include:

- International Wire Transaction Records (US Dollar wires typically transit the US)
- Emails, Correspondence, Phone and Travel Records
- Banking, Credit Card and Business Transaction Records
- Corporate Documents including Shareholder and Board Meeting Records
- Accounting, Employment and Intellectual Property Records
- Property and Real Estate Transaction Records
- Attorney Records (not subject to attorney-client privilege)
- Medical and Educational Records

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YOUR RECOVERY IS MINE: ENFORCEMENT OF JUDGMENTS VIA A JUDGMENT DEBTOR'S CLAIMS AGAINST THIRD PARTIES.

Authored By: Daniel M. Coyle - Sequor Law

Introduction.

Asset Recovery and Judgment Satisfaction demands access to broad remedies and creative thinking. A Judgment Creditors' efforts to enforce a judgment may be stymied by property exemptions, wage-garnishment exemptions, trusts, multi-member LLCs, and/or because the Judgment Debtor's property is held by a tenancy-by-the-entireties (if this manner of holding property is recognized in the state). Judgment Creditors and their counsel should look to other assets that are available, such as claims (also called choses in action) held by Judgment Debtors against others.

Black's Law Dictionary (rev. 4th Ed. 1968) defines a chose in action as:

A personal right not reduced into possession, but recoverable by a suit at law . . . A right to receive or recover a debt, demand, or damages on a cause of action ex contract or for a tort or omission of a duty

Seizure of Claims.

In Florida, for instance, a Judgment Creditor may reach such property via Florida's Proceedings Supplementary statute, Fla. Stat. §56.29. Subsection (6) of that statute provides that "a court may order any property of the judgment debtor, not exempt from execution, or any property, debt, or other obligation due to the judgment debtor, in the hands of or under the control of any person subject to the Notice to Appear, to be levied upon and applied toward the satisfaction of the judgment debt." Thus, if a Judgment Debtor has sued a third party, the Judgment Creditor may seize the claim under Fla. Stat. § 56.29. Myd Marine Distrib., Inc. v. Int'l Paint Ltd., 201 So. 3d 843, 845 (Fla. 4th DCA 2016). See also Gen. Guar. Ins. Co. of Fla. v. DaCosta, 190 So. 2d 211, 213–14 (Fla. 3d DCA 1966) (decided under predecessor statute). Other states also permit Judgment Creditors to execute and levy upon these types of assets. See, e.g., Holt v. Stollenwerck, 56 So. 912, 913 (Ala. 1911); Wittenauer v. Kaelin, 15 S.W.2d 461, 462-63 (Ky. Ct. App. 1929); Rucks-Brandt Const. Corp. v. Silver, 151 P.2d 399, 400 (Okla. 1944); Lynn v. Int'l Bhd. of Firemen & Oilers, 90 S.E.2d 204, 206 (S.C. 1955); Maranatha Faith Ctr., Inc. v. Colonial Tr. Co., 904 So. 2d 1004, 1010 (Miss. 2004); Reynolds v. Tufenkjian, 136 Nev. Adv. Op. 19 (2020).

Once the Judgment Creditor seizes or attaches the claim, the Judgment Creditor now becomes the plaintiff, or potential plaintiff, as if the claim had been voluntarily assigned to it. The Judgment Creditor thus has full discretion in how to manage litigation of the claim, including full settlement discretion, but also must fund litigation of the claim.

Seeking an Equitable Lien on Claims for Personal Torts.

However, in Florida, a Judgment Creditor may not levy and execute on a claim under section 56.29 if the claim is one for a "personal" tort or the claim is not assignable. Shaughnessy v. Klein, 687 So. 2d 43 (Fla. 2d DCA 1997). Personal torts are those claims that are personal to the plaintiff and that the plaintiff cannot assign, due to the personal relationship of the claim to the victim. Such torts include, but are not limited to, assault and battery, fraud, medical malpractice, (most) legal malpractice, intentional infliction of emotional distress, slander, and malicious prosecution. Forgione v. Dennis Pirtle Agency, Inc., 93 F.3d 758, 760 (11th Cir. 1996), certified question accepted, 689 So. 2d 1069 (Fla. 1997), and certified question answered, 701 So. 2d 557 (Fla. 1997); 21 C.J.S. Creditors' Suits s 29.

Other courts also recognize the same limitation. See, e.g., Certified Grocers of California, Ltd v. San Gabriel Valley Bank, 197 Cal. Rptr. 710, 715 (Ct. App. 1983); Blackmore v. Dunster, 274 P.3d 748, 752 (Mont. 2012); Reynolds v. Tufenkjian, 136 Nev. Adv. Op. 19 (2020).

While a Judgment Creditor may not levy and execute upon these types of claims, a Judgment Creditor may use proceedings supplementary to request the Court to craft alternative relief: awarding the Judgment Creditor an equitable lien on the Judgment Debtor's potential recovery. Although section 56.29 does not contain a specific provision addressing a Judgment Creditor's right to an equitable lien on a Judgment Debtor's claim, 56.29(6) states: The court may enter any orders, judgments, or writs required to carry out the purpose of this section, …".

Cases in Florida have already determined that a judgment creditor may obtain an equitable lien on a Judgment Debtor's homestead property. Zureikat v. Shaibani, 944 So. 2d 1019, 1022 (Fla. 5th DCA 2006); Whigham v. Muehl, 511 So. 2d 717, 718 (Fla. 1st DCA 1987). Moreover, the case law interpreting section 56.29 states that Proceedings Supplementary "are equitable in nature and should be liberally construed" to provide the broadest relief to the creditor. Ferguson v. State Exchange Bank, 264 So.2d 867, 868 (Fla. 1st DCA 1972); Regent Bank v. Woodcox, 636 So.2d 885, 886 (Fla. 4th DCA 1994). Trial courts also have discretion in crafting appropriate relief for the benefit of the creditor. Myd Marine Distrib., Inc. v. Int'l Paint Ltd., 201 So. 3d 843, 844 (Fla. 4th DCA 2016). Thus a Judgment Creditor's argument for an equitable lien on the proceeds of a lawsuit for a personal tort stands on solid ground. Other states have recognized similar concepts. See, e.g., Blackmore v. Dunster, 274 P.3d 748, 752 (Mont. 2012) ("Blackmore could petition the court to assign to Blackmore any proceeds from Dunster's tort action in satisfaction of the judgment debt.").

Once the Court awards the equitable lien, similarly to an attorney's charging lien, the Judgment Creditor must file the lien in the docket of the Judgment Debtor's lawsuit to provide notice to the Court presiding over the Judgment Debtor's lawsuit as well as the third party of the Judgment Creditor's interest in the potential recovery. In contrast to the Judgment Creditor's seizure of the claim, the filing of an equitable lien leaves the management of the claim, including the discretion on settlement decisions, with the Judgment Debtor. The Judgment Debtor also retains the obligation to fund the litigation. A potential drawback is that these factors, combined with the fact that some, most or all of the recovery will flow to the Judgment Creditor may result in the Judgment Debtor losing interest in pursuing the claim, and/or abandoning it entirely.

A potential alternative to the equitable lien would be to monitor the lawsuit, and to timely serve a writ of garnishment upon the third party after the verdict. However, this has the drawback of increased administrative costs due to the need to constantly monitor proceedings, the need to coordinate with a potentially a third party who has nothing to gain by such cooperation and whose interests are still adverse to the Judgment Creditor and the need to time the writ of garnishment (with potential service requirement issues as the writ must be served on the third party, not its attorney in the case).

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ASSET-TRACING, CORRUPTION, AND SANCTIONS: NATURAL BEDFELLOWS?

Authored By: John Binns - BCL Solicitors LLP

International sanctions have traditionally been a problematic means of targeting corruption. Will Brexit, and the introduction of Magnitsky sanctions in the UK, make a difference?

Brexit and Magnitsky sanctions: a pivotal moment?

Targeted financial sanctions are widely touted as an effective foreign policy tool, as part of a toolbox of measures aimed at achieving various foreign policy objectives. But when those objectives include targeting individuals and entities accused of corruption offences, how does the use of sanctions (including so-called 'Magnitsky sanctions') interact with other measures to trace and recover assets from those who have appropriated them? And what are the risks that they create collateral damage on those who are not in fact guilty of anything?

From a UK perspective, the issue of how sanctions are used is strongly associated with its membership of and departure from the EU. While a member of the EU, the UK played an important role in shaping EU sanctions policy. During the transition period agreed as part of its withdrawal agreement, the UK remains subject to the EU framework, including the process for identifying targets, and for bringing challenges. At the same time, it has introduced its own independent sanctions framework, under the Sanctions and Anti Money Laundering Act 2018 (SAMLA).

The use of sanctions to tackle corruption is also strongly associated in the UK and elsewhere with the concept of 'Magnitsky sanctions', whose namesake of course died in prison following his attempts to investigate allegations of public-sector corruption offences in Russia. The US' Global Magnitsky Act targets alleged perpetrators of both human rights abuses and corruption, while the UK's Global Human Rights Sanctions Regulations, enabled by SAMLA and passed earlier this year, concerns only the former. Nevertheless, there are calls to amend and expand Magnitsky sanctions in the UK to target corruption suspects.

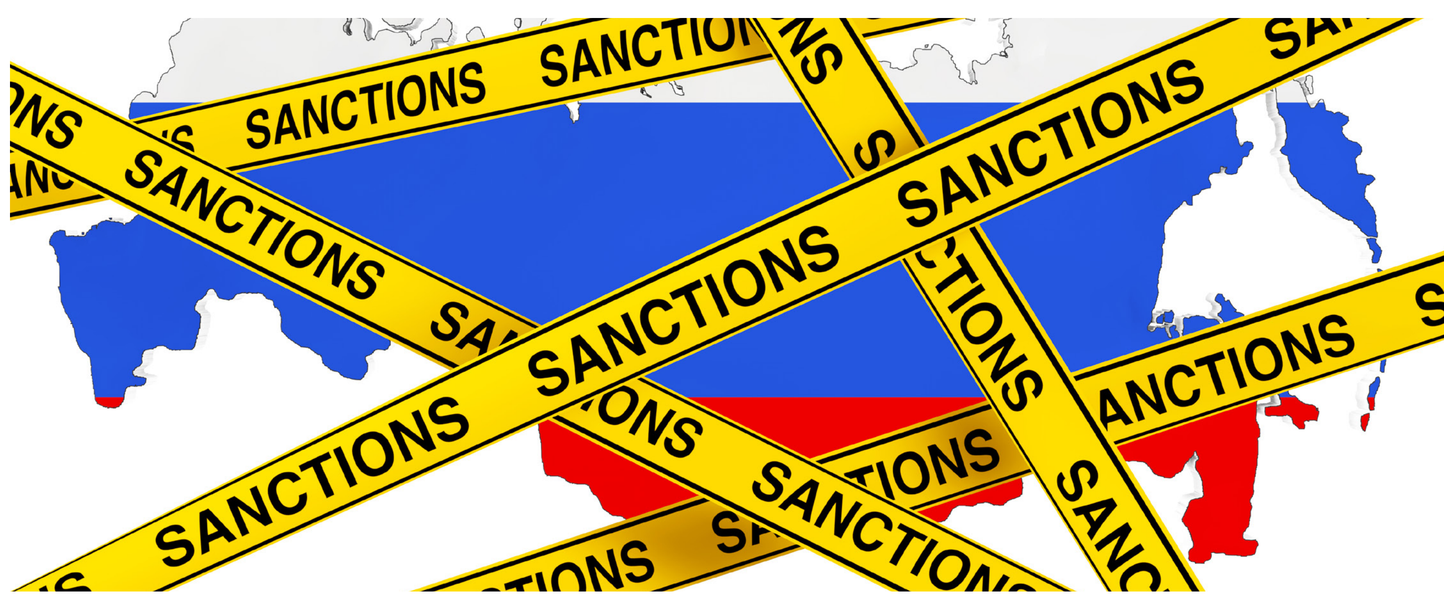
Issues with the EU framework

What, then, are the issues with using sanctions in this area? Notably, there are already precedents for their use within the EU framework, including a set of sanctions prompted by the so-called 'Arab spring', and affecting a set of targets associated with the former regimes of Egypt and Tunisia. In the case of Egypt, the UK government is on record (in the form of a written answer from a Foreign Office minister) as saying that the then Egyptian government had provided insufficient evidence to freeze assets through the UK courts, and so the UK had pushed for and secured a set of asset freezes through the EU sanctions system instead.

Thanks to a challenge brought by a set of targets of that regime, the Court of Justice of the European Union (the CJEU) confirmed that the EU Council does have the power to impose sanctions on non-state actors who are subject to criminal proceedings for corruption, and does not have an obligation to second-guess the quality of the allegations brought against them, notwithstanding the risk (a live one in this case, given that they were made against the predecessors and opponents of the post-Mubarak governments) that they may in fact be politically motivated.

Sanctions in corruption cases: perverse effects?

The use of sanctions in this context does have a number of perverse effects. In contrast to the various systems available for freezing and recovering assets through the courts, sanctions need pay no regard to the quantum of the alleged wrongdoing (indeed, some of the Egyptian examples were attempts, or offences where there was clear no loss and/or no benefit) or the potential costs of proceedings, and can result in all of a target's assets (albeit only within the jurisdiction of the



sanctions regime) being frozen.

In addition to the asset freeze itself, financial sanctions also impose a ban on third parties making funds on economic resources available to the target, which perversely prevents the value of the target's frozen assets from being increased. Travel bans are also possible but are a blunt instrument, effectively preventing targets from entering the jurisdiction.

The process for challenging and securing exemptions from sanctions, including licences for living and legal expenses, is also markedly different, with no formal role for the alleged victim, and no defined end point for the measures to end when the allegations are proven or not proven. In theory at least, sanctions could continue even after civil claims had definitively failed, and/or criminal proceedings had ended in acquittal, based on the rationale that they are designed in part as a deterrent against others who may be planning similar things. Absurdly, there may not even be a mechanism for allowing affected assets to be released to pay a court judgment (such a mechanism was absent from the EU's Egypt regime, though it was incorporated later).

The UK's post-Brexit framework: a fresh opportunity?

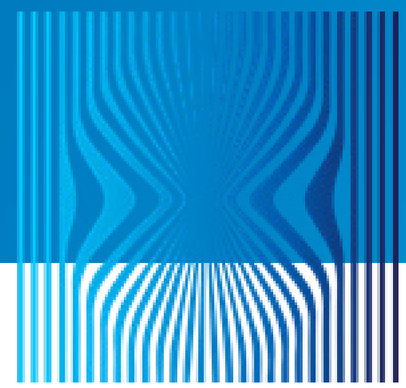
The UK's new framework, as set out in SAMLA, provides an opportunity to fix these problems. Unlike the EU Council, the UK government is obliged to set out a detailed rationale for each regime it introduces, in the form of written reports to Parliament, relating the stated purposes of the particular regime to one of a set of permitted statutory aims. Notably, the aim of tackling corruption or other financial crime is not specifically listed as one of these aims, so would have to be included within a more general aim of serving foreign policy objectives.

Each set of regulations must then set out the 'activities' by reference to which a person may be 'designated', because they are said to have either engaged in them directly, or (for example) provided financial assistance to someone who has, and spell out the measures that may be taken against targets of particular regime. As secondary legislation, these regulations may be challenged by way of judicial review, in terms of their legality and rationality.

Proportionality and due process

The process for challenging designations is more complex, including a request for ministerial review, opportunities to scrutinise the 'statement of reasons' for the designation, and to provide additional information and evidence, then a court challenge to the minister's decision. But by one means or another, any evidential difficulties or perverse aspects of sanctions imposed under SAMLA are at least in theory susceptible to a judge's scrutiny.

It remains to be seen whether and to what extent the UK will have an appetite (beyond, of course, whatever international obligations it continues to have, though in practice these are likely to be limited to implementing sanctions required by the UN) to use the SAMLA framework to tackle corruption suspects, either as an alternative to, or in conjunction with, criminal and civil proceedings. But once it leaves the EU system, and with its courts no longer obliged to follow CJEU rulings, is it to be hoped that any such use will no longer be a blunt instrument, but instead pay proper regard to principles of proportionality and due process.



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INVESTMENTS IN ASIA?

HOW TO BETTER USE BUSINESS INTELLIGENCE

Authored By: Ben Yeung & Stuart Witchell - BRG

Making investments or entering into an M&A deal can involve uncertainties and potential pitfalls. These can include financial and commercial issues, clashing business cultures, sudden changes in government regulation, poor strategic fit or simply bad timing, to name a few. Fortunately, shrewd investors and their advisors can identify many risk areas early by gaining a deep understanding of the company they will invest into and its surrounding business environment.

Uncovering Past Track Record and Existing Problems

Common pitfalls can be identified by performing proper investigative due diligence. Most firms know of the need for some due diligence prior to investment, but many limit those investigations to financial, commercial and legal dimensions, with the occasional 'background check' thrown in. These efforts are useful for obtaining a baseline as to the company's past performance, market conditions and other public information on the company and its key management.

These checks do not, however, address big-picture risks that could potentially undermine the longer-term viability of the deal. Many well-known examples demonstrate how 'routine' due diligence can be grossly ineffective, despite being audited by reputable global firms, especially in identifying debilitating cultural differences, intentional misreporting and—worse still—outright fraud. The potential 'traps' involving companies in emerging or frontier markets can be even more significant.

Another risk for investors is that processes may be rushed, with some management eager to reach a deal as quickly as possible. BRG professionals have uncovered deliberate, multiyear coordinated accounting misconduct by senior management in inflating revenues, leading to a significant overvaluation of companies. The turning of a blind eye to known issues in an attempt to reach a deal quickly is often commonplace.

Although truly robust financial due diligence might identify potential red flags prior to deal closing, questions about key management figures and relationships with customers and external vendors would require a more

in-depth exercise. Commercial due diligence and 'background checks' are necessary, but they are no substitute for deep-dive investigative due diligence to capture suspicions of wrongdoing, irregularities, regulatory transgressions or other reputational red flags to which prudent investors should pay heed. In many cases, the most troubling information is not a matter of public record and can be obtained only through systematic discreet inquiries with regulatory contacts, business partners and/or individuals who have insight into the company's actual track-record. Investors are often surprised by the volume of valuable information hidden from the public domain.

Assessing the Broader Business Environment

Factors beyond the direct control of a company also have a bearing as to the viability of any business. For example, a deal can be affected by government red tape, local opposition to the project, political conflict within local stakeholders, inconspicuous resistance by factions inside the company or other 'unwritten rules' of business. These factors affect companies both foreign and domestic.

Take Tata Motors, a subsidiary of the massive Indian conglomerate Tata Group, as an example. In 2006, it acquired 400 hectares of land in Singur, a small town in West Bengal, to build a factory for its low-cost Nano car, which has sometimes been called the world's 'cheapest car.' The site initially appeared promising, as the state of West Bengal had formulated an industrial policy to support the development of a local automobile industry to solve local unemployment problems. However, when displaced local farmers began to receive compensation checks from the local government following the sale of the site, they quickly grew angry with the low level of compensation offered. A series of protests erupted, which quickly turned violent. Once the first Nanos began rolling off the production line, other local figures began to demand that the bulk of the land be returned to the local farmers. After a lot of wrangling, Tata Motors realized how untenable the plant had become and ultimately decided to leave West Bengal. Unfortunately, its shift of location to Sanand, Gujarat, created a production delay of eighteen months, which coincided with a period of great hype for the innovative vehicles. The political and reputational fallout from the saga haunts Tata Motor's reputation to the present day.

The importance of properly assessing risks and developing a nuanced understanding of a local environment simply cannot be overstated. If a Tata Group subsidiary can get into such a quagmire in its native country, then a foreign firm hoping to break into a similar market would be wise to assess its prospective business environment diligently and intelligently. Tata Motors' experience in West Bengal shows that having a good understanding of not only the domestic legal system, but of the nexus between local power brokers, interest groups and political factions, and potential flashpoints is critical prior to making any major investment.

Specialized risk-advisory firms can provide invaluable support in this regard, because detailed insights pertaining to specific sectors and localities are simply not covered by strategy consulting studies, 'ease of doing business' reports, or 'background check' reports.

The Importance of Business Intelligence

Successful M&A, or indeed any investment, demands a thorough evaluation of all facets of risk surrounding an opportunity. The underlying commercial soundness of the deal, the broader business environment and the likelihood of potential changes to that environment are all important areas to be looked into. Unsurprisingly, the depth of research and level of due diligence demanded by sophisticated investors have expanded immensely in recent years. As we enter into the new decade, firms that continue to rely solely on traditional commercial, legal and financial due diligence will do so at their own peril.

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A NEW WEAPON IN IRELAND'S LAW ENFORCEMENT ARSENAL

Authored By: Clara Gleeson - A&L Goodbody

30 July last marked two years since Ireland's new corruption legislation, the Criminal Justice (Corruption Offences) Act 2018, came into effect. Introduced as part of a broader programme aimed at strengthening Ireland's response to fraud, corruption and other white-collar crime, the 2018 Act consolidated and modernised existing but archaic anti-corruption laws dating as far back as 1889. It also contained a number of welcome reforms. Most important among them, it added a new weapon to the Irish law enforcement arsenal: a strict liability corporate offence.

This is a significant change and one that has brought Ireland into line with other jurisdictions such as the UK. Formerly, any corporate prosecution would have needed to rely on one or more common law doctrines for imputing liability to companies, which were untested in the Irish courts and each of which posed their own evidential and practical difficulties. As a result, historically prosecutions for corruption have been rare. Though these mechanisms have not been replaced, now a company can be criminally liable where any of its officers, managers, employees, agents or subsidiaries commits a bribery or corruption offence under the Act with the intention of obtaining business or an advantage for the company.

The only defence available is if a company can prove that it took "all reasonable steps" and exercised "all due diligence" to avoid the commission of the offence. Though still untested, this would seem to be a high threshold to meet. Indeed, on an ordinary-meaning interpretation, it appears the Irish legislation could in theory be more exacting than its counterpart in the UK's Bribery Act 2010, which requires that companies have "adequate procedures" to avoid liability.

The 2018 Act has extra-territorial effect where the requisite connection with Ireland exists. However, this applies only where the conduct at issue is an offence both in Ireland and in the jurisdiction where the conduct occurred. Ireland has been criticised for imposing this 'dual criminality' requirement as it allows a loophole for acts of corruption committed in jurisdictions with weak anti-corruption laws.

Even so, this extra-territorial effect means that this new corporate offence has a potentially long reach. This is especially so given Ireland's position as a hub for a number of global industries, such as in the pharma / healthcare and tech sectors, and the fact Ireland punches above its weight in the financial services sector, a trend only likely to continue in the wake of Brexit. In that context, the new corporate offence is potentially relevant to many international practitioners – not only from a defence and compliance perspective, but also as regards bringing pressure to bear via a criminal complaint if acting for victims of fraud and corruption overseas.

A Change in the Wind?

Of course, this legislation only applies prospectively and will therefore take some time to fully bed in. Though it is still early days, all the signs are that Ireland's enforcement appetite is ramping up: a new designated police division, the Garda Anti-Corruption Unit, was set up in 2018 in parallel with the new Act and it appears to be active. A number of individuals have been arrested and charged with offences under the new Act, most recently in early August, and there have been reports of the Anti-Corruption Unit conducting search and seize operations. Most significantly, industry rumour has it that there are a number of significant investigations of corporate and / or overseas corruption in the pipeline, suggesting a focus on some of the 'bigger fish'.

Avoiding Falling Foul of the New Act

Companies within the remit of the Irish legislation are still adjusting to it – a task not made easier by the absence of any official guidance on what might constitute "all reasonable steps" or "all due diligence" within the meaning of the corporate defence. It had been hoped that a review group on anti-fraud and corruption measures due to report to Government last summer would recommend the introduction of formal guidance, but no recommendations

have yet been published.

Though there was a predictable flurry of compliance activity around the enactment of the 2018 Act, a look at many companies' compliance programmes demonstrates that they would likely be sitting ducks for prosecution in the event a corruption issue arose.

Until such time as formal guidance is forthcoming, the below key tips may assist practitioners in helping their corporate clients avoid or resist an enforcement scenario:

1. Risk assessments still appear to be the exception rather than the norm: few companies operating in Ireland seem to have conducted this critical first step, even in certain high risk sectors. A comprehensive risk assessment should be the bedrock of any anti-corruption framework. Any company that has not evaluated where its business is exposed to corruption risk will likely struggle to rely on the corporate defence. Practically, it's also extremely difficult for a business to combat corruption if it does not understand where it is exposed. The risk assessment should be conducted with input from different divisions within a business, where applicable, should assess and prioritise internal as well external risks, and should be documented appropriately.

2. Policies and procedures should be designed based on the output of the risk assessment. Many Irish businesses do have anti-corruption policies in place. However, these are often generic, off-the-shelf policies. There appears to be little understanding that policies and procedures may be of limited utility in an enforcement scenario if not designed and tailored to mitigate the specific risks to which a particular business is exposed, as identified in its risk assessment.

3. Mandatory training. A lot of businesses operating in Ireland still provide no anti-corruption training to their staff. It is hard to imagine that many businesses in this position could avoid liability if a corruption issue arose. While general training should be rolled out to all staff, tailored training is also advisable for staff in higher risk posts such as purchasing, contracting, distribution, etc. The provision of training also helps to promote and demonstrate an anti-corruption culture within a business.

4. Monitoring and review of a company's anti-corruption framework is essential. There appears to be a conspicuous absence of such ongoing oversight being conducted. Even amongst businesses that did overhaul their anti-corruption policies and procedures when the Act came into force, the majority have tended to leave them gathering dust in the interim. Review should be conducted periodically – at least annually or more frequently if there is a material change in circumstance such as entering a new market. It is important to document such even if the upshot of a review is that no change is considered necessary in order that such efforts can be demonstrated to the authorities if an issue ever arose.

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MAKING THE CASE FOR COMBINING EXTERNAL INVESTIGATIONS AND IT FORENSIC REVIEWS

Authored by: Yannick Poivey - Swiss Forensic & Compliance Sàrl

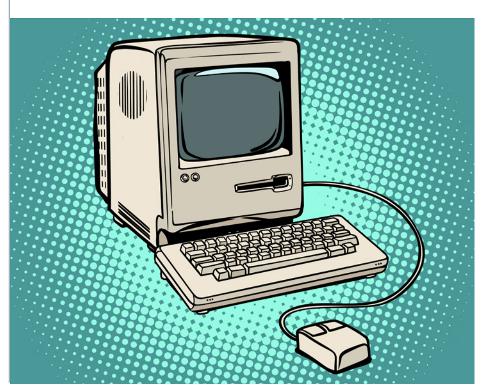
Quite often, external investigations remain strictly external and do not draw on the wealth of information available within the client's digital archives. Of course, it is understandable that clients may wish to share with the external investigator only the information that is strictly indispensable for kicking off the research. Various factors may influence this choice, including confidentiality concerns, or the fact that auditors already handled the internal aspects of the case.

However, by allowing a selective access to email archives or hard drives, clients might provide the external investigator with highly valuable starting points for their external research. Even more, external investigations might in turn help generate keywords that will unlock previously ignored information stored in the client's servers.

Let's take the example of a fraud case. A senior executive in a pharmaceutical group was suspected of receiving kickbacks from a supplier that he had favoured. The investigator was initially tasked with an asset tracing assignment that would draw solely on information available externally. The purpose was to assess whether the executive's assets were out of line with his regular income. After further discussions with the client, the investigator was also requested to review the executive's email archives. This strategy paid off, since it was revealed that the executive extensively used his professional email address for personal matters. For instance, the review of a first batch of emails led to the identification of a racehorse that the executive had recently bought. Further research online exposed names of other horses that shared the same stud farm. Using those horse names as keywords for additional email review enabled the discovery of a second horse owned by the senior executive.

In that same case, external research disclosed a property owned by the senior executive. The review of the deed of acquisition of the property led to the identification of a notary involved in the transaction. Running the name of the notary as a keyword uncovered several emails in which the executive discussed in detail the financing of the acquisition, including the conditions offered by his bank.

Initial access to a client's digital records may also have the significant advantage of saving considerable time and costs, in particular when it comes to unravelling complex shareholding structures, including the use of straw men. A case in point is a dispute between a company and its former CEO. The latter had borrowed large sums from his employer, had failed to repay and fled abroad without disclosing his new location. External research has helped identify the former CEO's current whereabouts but found very limited details on assets in his name. However, the review of emails and files on the former CEO's professional laptop exposed a recurrent pattern for holding assets through a lawyer used as a nominee. Drawing on these findings, external investigation finally uncovered several properties in Portugal in which



the former CEO had invested part of the diverted money, while not appearing officially as a beneficial owner.

Access to a client's digital records may also help the investigator make a quantum leap in the interviewing process, as illustrated by another fraud case. For years, a senior employee had diverted funds from his employer, a commodity trading company. The investigator was asked to trace the funds and locate the assets in which they had been invested. The review of the subject's emails and text messages contributed significantly in devising the interviewing strategy. For instance, an email thread revealed the name of an art dealer that had sold an expensive painting to the subject. The art dealer was subsequently interviewed and provided very useful insights into the subject's lifestyle. In the same case, external research led to the identification of a former neighbour of the subject, through the review of land registry records. Using the name of the neighbour as a keyword, a letter was retrieved from the subject's laptop, according to which the subject threatened to take legal action against the neighbour due to a disputed house extension project. The investigator approached the former neighbour confidently for an interview, being aware that the interviewee most likely held a grudge against the subject.

Additionally, the initial review of digital records may help focus the research on the most promising leads by discarding those that show less potential. In another corporate fraud case that involved the employee of a financial firm, one of the initial questions was whether his wife was complicit in holding some of the stolen assets. The client provided the investigator with archives of emails and text messages. Based on the tone and content of their correspondence, it appeared quite obvious that the wife was not involved along with her husband. She was therefore excluded from the scope of the external research.

Those few examples illustrate what is obviously an intuitive conclusion: a fraud or asset tracing investigation is a seamless process that pays little attention to the artificial distinction between internal investigation, external investigation and IT forensic. Smart lawyers and investigators should always consider all three options and find the right mix for every case.

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