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Fraud • Insolvency • Recovery • Enforcement

ISSUE 6

CONTENTIOUS INSOLVENCY FOR THE ASSET RECOVERY COMMUNITY

INTRODUCTION

"Only when the tide goes out do you discover who's been swimming naked." - Warren Buffett

We are delighted to publish this issue of the FIRE Magazine post FIRE UK, our first in person Asset Recovery Event of 2021.

In this edition our authors focus on all things Contentious Insolvency; looking at recent jurisdictional trends, funding and the use of insolvency tools in Fraud and Asset Recovery proceedings. Additionally, we are diving deeper into our Community and finding out a little bit more about what fires up our members with a series of quickfire 60 Second interviews.

Thank you to all those who contributed we are inexpressibly proud of how strong our growing Community is and incredibly humbled by the support of our Partners and Members. Without further ado let's talk Contentious Insolvency.

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CURRENT THEMES IN CONTENTIOUS INSOLVENCY

Authored by: Tim Carter and Helen Martin - Stevens & Bolton

With restrictions on statutory demands and winding-up petitions finally due to be lifted at the end of September, those in the insolvency profession are anticipating a busy end to the year.

Even in advance of such relaxation, corporate insolvency statistics for the second quarter of 2021 show a significant increase of 31% on the first three months of the year.

The rise was driven by an increase in companies being put into creditors' voluntary liquidation (CVL), with other insolvency procedures remaining at low levels. No doubt this reflects the directors of such companies reaching the reluctant conclusion that a return to business viability, after such an extended period of interruption, is no longer a realistic prospect.

In the final months of the year, and assuming there is no extension to the current restrictions, there is little doubt that we will also see an increase in compulsory liquidations, as creditors seek to take action relating to mounting debts. With the prospect of a return to some sort of normality, this article takes a brief look at some recent developments and others to keep an eye out for over the next few months.

Wrongful trading and other potential claims against directors

It is surely not coincidental that the marked increase in CVLs over the second quarter immediately preceded, on 30 June 2021, the end of the suspension of personal liability for wrongful trading. With this protection being wound back, directors may have been well advised to seek the protection of an insolvency process rather than attempting to trade on.

However, even where wrongful trading claims cannot be pursued because trading occurred during the period of suspension, this does not offer directors a defence against other potential claims in the context of insolvency proceedings, including in relation to misfeasance/breach of duty, fraudulent trading or the setting aside of undervalue/preference transactions.

Insolvency practitioners will in particular be examining any coronavirus-related support which has been claimed by directors, both for potential fraudulent claims and subsequent misapplication of funds – for instance transferring funds claimed through the Bounce Bank Loans Scheme (BBLS) to their personal account. However, the circumstances of the past year and a half will, particularly in small and micro companies, no doubt have given rise to many grey areas – for instance where directors may have needed to use BBLS funds to pay themselves, if they had no other source of income. Recent guidance issued by insolvency trade body R3, in conjunction with the British Business Bank, the Insolvency Service and UK Finance, indicates that there may be some leniency towards honest directors in such circumstances. A case-by-case approach will be taken – in particular it is noted that

"If a director has no other income at all… and they used the BBLS loan monies to draw funds for reasonable living expenses… then it would be difficult to justify taking action against the director..."

Expansion of directors' disqualification regime

Directors of insolvent companies also face scrutiny of their actions by the Secretary of State, acting through the Insolvency Service. There is a strong public policy imperative for the Insolvency Service to pursue the winding up of companies involved in abusing government-backed loans or coronavirus support, and the disqualification of directors guilty of such actions.

However, there is currently a lacuna in the legislation which enables unscrupulous directors to avoid investigation by the Insolvency Service, and the risk of disqualification and compensation orders, through using the voluntary strike-off procedure to dissolve their company. If a dissolution is not objected to by creditors before the company is struck off, the company would have to be restored to the register (a time-consuming process involving a court application) before any action could be taken against its directors.

A significant increase in the numbers of companies dissolved in the first quarter of 2021 has led to concerns that the voluntary strike-off procedure is being abused to avoid repayment of covid-related support. This loophole will be closed by the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill (the "Bill") which is currently making its way through parliament. When it comes into force, the Bill will have retrospective effect and enable the Insolvency Service to investigate and seek disqualification and compensation orders against (or accept equivalent undertakings from) directors of companies which have been dissolved without first going into insolvency proceedings.

Immunity for section 236 examinees

Moving away from covid-related wrongdoing, it is worth noting the recent Court of Appeal decision in Al Jaber v Mitchell [2021] EWCA Civ 1190, which expands the principle of "witness immunity" to examinees under section 236 of the Insolvency Act 1986. This case related to claims by the liquidators of a BVI company, against a director who had made incorrect statements of

fact during a section 236 examination. The liquidators argued that by providing false information under examination, and in witness statements, the director was in breach of his ongoing fiduciary duty, causing loss to the company.

At first instance, the court found that the director was not entitled to witness immunity in relation to statements made in the section 236 examination, as it did not constitute a "judicial proceeding". The Court of Appeal overturned this judgment to find in favour of the director, holding that the section 236 proceeding had to be viewed in the wider context of the compulsory winding up procedure, which was a "judicial proceeding", and therefore immunity would attach.

The circumstances arising in this case were unusual, and it will be rare for a claim to arise solely out of a statement made under a section 236 examination. However, the judgment does raise the question of whether company officers would be better protected when providing information following a section 236 order, than if they were to do so voluntarily in response to a section 235 request. Whether immunity would apply in relation to the latter remains uncertain. The judge was however at pains to note that individuals were still under an obligation to comply with information requests prior to the making of a section 236 order, and failure to do so would put them at risk of costs in relation to any subsequent section 236 application and examination.

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PRIVY COUNCIL REFUSES TO EXTEND THE REFLECTIVE LOSS RULE IN CLAIM ARISING OUT OF THE MADOFF PONZI SCHEME

Authored by: Luke Harrison and Kit Smith - Keidan Harrison

Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd [2021] UKPC 22 ("Primeo").

The reflective loss rule operates to prevent recovery by a shareholder for the diminution in share value in a company, where that company has suffered loss arising from an actionable wrong committed against it (save for very limited exceptions). It was recently determined by the majority in *Marex -v- Sevilleja*[1] ("**Marex**") that the rule against reflective loss should be paired back such that it does not extend to creditors of a company, who have not subscribed (as a shareholder is held to) to partake in the future rise and fall of the company's fortunes. The parties in Primeo, which was a dispute subject to Cayman law, agreed that the position under Cayman law mirrored that under English law.

Primeo was a Cayman company which carried on business, since 1994, as an open-ended investment fund. It was promoted as a fund of funds by the Bank Austria AG. The respondents to the appeal, R1 and R2, were professional services providers. R1 and R2 acted as Primeo administrator and custodian under agreements entered into in the mid-1990s. Pursuant to a further agreement R1 delegated most of its duties to R2.

From the outset Primeo invested a proportion of its funds in Bernard L Madoff Investment Securities LLC ("**BLMIS**"). BLMIS has subsequently been found to be a well-known Ponzi scheme operated by the late Mr Madoff. In addition to Primeo's direct investments into BLMIS it also made indirect investments in BLMIS via feeder funds Herald Fund SPC ("**Herald**") and Alpha Prime Fund Limited ("**Alpha**") by obtaining shares in Herald and Alpha in return for funds that they invested into BLMIS.

Herald had a contractual relationship with R2 who was its custodian and administrator but no contractual relationship with R1. Alpha entered into a custodian agreement with Bank

1 Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening) [2020] UKSC 31; [2021] AC 39

of Bermuda Ltd ("**BOBL**") in 2003 and R2 became a sub-custodian to BOBL. Alpha had no direct contractual relationship with R1. Further in 2007 Primeo's direct investments in BLMIS were restricted such that it swapped that interest for a shareholding of what it believed to be equivalent value in Herald ("**the Herald Transfer**").

The question on appeal was whether Primeo could claim against R1 and R2 for losses which it says it suffered by making direct investments with BLMIS before the Herald Transfer. The Board summarised the issues it need to determine as follows [38]: -

1. **The timing issue – whether or not the reflective loss rule was a rule of substantive law or a procedural rule. In particular whether, for the rule to operate, it was a question of when the cause of action arose to Primeo or when it brought its claim.**

2. **The Herald Transfer issue – if the timing issue were decided in favour of the latter, i.e. the rule was a procedural rule, then did Primeo loose its right to bring a claim after the Herald Transfer?**

3. **The common wrongdoer issue – Herald had no claim of its own against R1 but R2 had a contribution and/or indemnity claim against R1 in respect of losses Herald claimed against it. Did this level of overlap mean the rule was engaged?**

4. **The indirect claims issue – Is R1 to be regarded as a common wrongdoer vis-à-vis Primeo and Herald and is R2 to be regarded as a common wrongdoer vis-à-vis Primeo and Alpha so as to preclude Primeo from suing in respect of its indirect investments in BLMIS via Herald and Alpha.**

5. **The merits issue – is the rule engaged where the company has a realistic prospect of success rather than is likely to succeed on the balance of probabilities.**

The Board considered that the issues ought to be considered together due to their connection. The Board applied the two types of cases distinguished by Lord Reed in *Marex.* In particular [79]:-

> ***"… cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss."***

The timing issue

Without hesitation the Board held that Primeo's losses suffered as a result of its direct investments in BLMIS were suffered each time it made a direct investment in BLMIS. It was not a shareholder at the time and the reflective loss rule had no application. The Board also held that the fact Primeo made some indirect investments also into BLMIS did not affect its claim in respect of direct investments. The Board was influenced by the fact that Primeo's losses were suffered by it immediately and in its own capacity and had nothing to do with Herald.

The Board went on to make it clear [55] that the reflective loss rule was a substantive rule of law and not a procedural rule concerned only with the avoidance of double recovery. It followed that whether the rule was engaged fell to be assessed as at the point in time the loss arose from a relevant breach of the wrongdoer and not at the point the claim was brought. The test involved looking at the nature of the loss at the time it arose. Crucially Primeo, when it suffered each loss, had not agreed to "follow the fortunes" of any company let alone Herald [57]. The principal applied similarly to other losses Primeo claimed including the loss of opportunity to disinvest from BLMIS by redeeming investments for their full apparent value [58].

The Board considered the recent decision of the Court of Appeal in *Nectrus v UCP*[2] ("**Nectrus**") in which Flaux LJ, sitting as a single judge of the Court of Appeal, held that the rule should be assessed when the claim is made, at a time when the loss claimed has crystallised. Its view was that Nectrus was wrongly decided in that it would produce an odd result whereby a shareholder who suffered loss which was not recoverable as a result of the reflective loss rule would be able to convert that loss into a claim that was recoverable simply by selling its shareholding. Further if a shareholder brought an action before a company had appreciated that it had a claim then it would be able to circumvent the rule.

The Herald Transfer issue

The Board held that the "follow the fortunes" of the company principle was forward-looking not backward-looking. The rule was directed to limiting the ability of the shareholder to acquire a right of action from the point it became a shareholder. It considered that it was unwarranted to extend the rule to preclude a shareholder from enforcing its rights of action pre-dating becoming a shareholder merely be reason of it having acquired shares in a company [67]. Accordingly, the Herald Transfer did not have the effect of removing Primeo's rights to claim against R1 and R2 in respect of its direct investments in BLMIS. Further in acquiring shares in Herald, Primeo had exchanged its chose in action in the form of the BLMIS investments for shares in Herald. It hadn't transferred to Herald its chose in action in the form of claims against R1 and R2.

2 Nectrus Ltd v UCP Plc [2021] EWCA Civ 57

The common wrongdoer and indirect claims issues

The Board considered that R1 and R2 were not to be conflated as common wrongdoers in view of R1 having a contribution and indemnity claim against R2. The onward claim by R1 against R2 was not arising from the company's loss. The Board accepted the submission that R1, R2, BOBL and possibly others were separate legal entities and each of them may have funds of assets available to meet claims. Extension of the rule in this sort of case would potentially magnify the scope for injustice.

Primeo was equally successfully in respect of its appeal on the indirect claims issue. It had good claims against R1 in in respect of indirect investments it made in BLMIS via its purchase of shares in Herald and Alpha prior to the Herald Transfer because Herald itself did not have claims against R1. By contrast Primeo accepted that it had no claim against R2 in view of Herald's claims against it. The Board applied the same reasoning as in the common wrongdoer issue.

The merits issue

As Primeo had succeeded on it's appeal the Court decided not to decide the merits issue which it felt was best to be left to decide in another case. This leaves open for argument whether the test in respect of a company's claims is that they should have a reasonable prospect of success or are likely to succeed on the balance of probabilities. It is conceivable that a shareholder, creditor or some other party may have stronger claims against a wrongdoer than the company they are shareholder in. This may arise out of contractual relationships or other factual circumstances of a case such as representations made by the wrongdoer. In such circumstances a shareholder may be minded to attack the merits of the company's own claim and argue that it's prospects, in order to engage the reflective loss rule, should be assessed on the balance of probabilities. Drawing analogies from the summary judgment test and considerations on case management applications such as security for costs a court is unlikely, in the view of the writers, to want to conduct a mini trial on merits and in their view would likely set the bar at "reasonable prospects" albeit the matter remains undecided an present.

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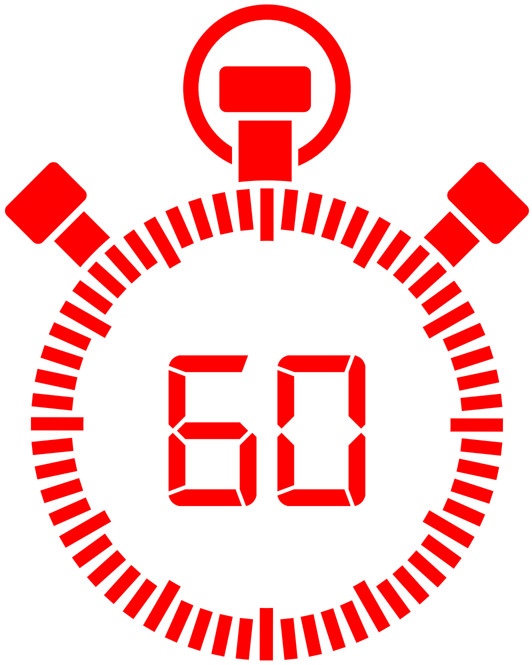
We have been speaking to a diverse range of members and speakers behind the FIRE Community about dinner parties, perfect weekends and what their strangest career experience is. Rick Brown of HFW, Kristina Kicks of Interpath Advisory and Hannah Davie, Steve Holt & Amaechi Nsofor of Grant Thornton talk FIRE and beyond.



60-SECONDS WITH:

RICK BROWN, PARTNER, HFW

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

A I would like to think I would do something completely different like owning and running a scuba diving centre on a beautiful beach somewhere. But the reality is likely to be a little less exotic.

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

A The strangest would have to either be eating horse on a business trip to Kazakhstan or looking for documents that had been accidentally thrown out by the office cleaners in a rubbish dump in a place called Mucking in Essex (I kid you not). The most exciting thing was my first overseas business trip. I have never been so excited. And although the excitement wears off, I still do (or did!) enjoy business travel and have been lucky enough to go to some amazing places.

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

A The easiest aspect is getting enthused about working on FIRE cases. I genuinely enjoy the type and variety of work I do as well as the excellent team we have at HFW. The hardest aspect is some of the time commitment needed to do this job and some of the personal sacrifices which are necessary as a result.

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

A A bit of a cliché but that life is short so enjoy it (including your job).

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

A At the start of the first lockdown, and witnessing the impact Covid had on global trade, we had a really interesting insolvency matter involving a significant Middle East based commodity trading company.

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

A To fly planes or, preferably, fighter jets.

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

A Again, it sounds a bit of a cliché, but my wife and children. That and a good dose of fun and laughter. Not that they are mutually exclusive!

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

A Having a more structured work life balance and spending time with my family as well as learning to work productively at home (which, pre Covid, I struggled to do).

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

A Seeing friends and family, re-engaging with work colleagues and clients and a little bit of travel to get off this island from time to time.

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

A Interesting question. I would say each of my four grandparents when they were my age as I think that would be fascinating. And perhaps the Queen as well for good measure.

Q What does the perfect weekend look like?

A This is almost too difficult to answer! I would have to say as many of: having a lie in (assuming possible), taking my kids for a swim, having a Sunday roast, going for a run by the river, going out for cocktails and dinner with my wife and watching sport with friends on a Sunday afternoon.

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

A I'm really looking forward to the buzz of a physical event and seeing people's faces rather than having to look at yet another virtual event (which TL4 do very well by the way!). I look forward to seeing you all there.

RECENT TRENDS:

PROVISIONAL LIQUIDATION IN THE CAYMAN ISLANDS

Authored by: Gemma Lardner, Marc Kish, Oliver Payne and Jeremy Snead - Ogier

Introduction

Provisional liquidators (**PLs**) may be appointed in the Cayman Islands under the Companies Act (2021 Revision) (the **Companies Act**), following the presentation of a winding up petition and before the making of a winding up order pursuant to a "full powers" PL appointment (section 104(2)) or pursuant to a "restructuring" or "light touch"[1] PL appointment (section 104(3)).

The Court's approach to the grant of relief under each section, demonstrating the need to balance the interests of both creditors and companies, is demonstrated by a number of recent cases in the Grand Court.

Full powers PL appointments

Pursuant to section 104(2) of the Companies Act, a creditor, contributory or the Cayman Islands Monetary Authority, CIMA, may make an application for the appointment of a PL on the grounds that: (a) there is a prima facie case for making a winding up order; and (b) the appointment is necessary in order to prevent: the dissipation or misuse of the company's assets; the oppression of minority shareholders; or mismanagement or misconduct by the company's directors.

In order to establish whether a good prima facie case has been made out for a winding up order under the first limb of the section 104(2) test, an applicant need only show that the allegations in the winding up petition are supported by evidence and have not been disproved, with conflicts of evidence to be resolved at a substantive hearing (*Re Asia Strategic Capital Fund LP*).

The satisfaction of the second limb of the test under section 104(2) was described as a "heavy burden" to discharge by Parker J in *CW Group Holdings Limited*, in which his Lordship emphasised the importance of demonstrating the **necessity** of the appointment with "clear or strong evidence". Such evidence might include:

a. **that the assets of the company are being or are likely to be dissipated to the detriment of the petitioners (*Re Asia Strategic Capital Fund LP*);**

b. **the risk that records may be lost or destroyed (*Re Rochdale Drinks*); or**

c. **mismanagement amounting to "culpable behaviour involving breach of duty" or "improper behaviour" (*Re Asia Strategic Capital Fund LP*).**

If the Court is satisfied that the appointment of PLs is appropriate, the Court has a discretion to "grant the provisional liquidators such powers as the Court considers necessary and appropriate". This includes the discretion to adjust and extend the powers of the PLs according to the needs of the PLs and changing circumstances." (*Natural Dairy (NZ) Holdings Limited*).

The difficulty in satisfying the Court of both limbs of the test under section 104(2) is demonstrated by the recent decisions of the Grand Court in *China Resources and Transportation Group Limited* and *Grand State Investments Limited*. In both instances the Court found that the "heavy burden" of establishing a serious risk of dissipation and necessity of the appointment had not been discharged on the evidence before it.

Accordingly, while the Grand Court is able to grant PLs extensive and adaptable powers, the two limbed test under section 104(2) remains a high bar to overcome.

1 Segal J recently pleaded with practitioners to adopt the term "light touch" instead of "soft touch" as the former "has always seemed to bring with it associations of someone being duped and defrauded!" (Midway Resources International).

Restructuring light touch PL appointments

The Court has demonstrated in recent years an increased willingness to allow companies an opportunity to restructure under section 104(3) of the Companies Act, which provides that an application for the appointment of a PL may be made by the company ex parte on the grounds that the company: (a) is or is likely to become insolvent; and (b) intends to present a compromise or arrangement to its creditors.

This provision gives the Court a broad and flexible discretion to step in and "rescue" a company where there is a "real prospect" of a refinancing which would be more beneficial than a winding up, and in the best interests of the creditors (Fruit of the Loom).

Additional factors that the Court may consider on an application under section 104(3) include:

a. **The viability of any restructuring plan, although it is not necessary for the company to present a formulated plan (*Sun Cheong Creative Development Holdings Ltd*) and the Court has appointed PLs to explore the viability of a restructuring (*ACL Asean Towers Holdco*);**
b. **The wishes of creditors, without necessarily "count[ing] up the claims of supporting and opposing creditors" (*Grand TG Gold Holdings Limited,* Unreported, Segal J, 21 August 2016);**
c. **The nature of the creditors supporting or opposing the application, including whether they are secured or unsecured (*G3 Exploration Limited,* Unreported, McMillan J, 24 July 2020); and**
d. **The considered views of the board (*CW Group Holdings*).**

Notwithstanding the Court's willingness to assist in the rescue of Cayman Islands companies, in the recent decision of *Midway Resources International*, Segal J was emphasised the Court's ongoing interest in safeguarding the interests of creditors. He declined to grant the relief sought in that case until the company had filed further evidence as to the viability of the restructuring and notified creditors who may have wished to be heard on the application.

Conclusion

The development of Cayman Islands law demonstrates the Court's flexibility and ongoing ability to balance the interests of both creditors and companies around the appointment of PLs. Where a creditor can show "strong and clear evidence" that it is **necessary** to appoint PLs to prevent dissipation or mismanagement, the Court may appoint PLs under section 104(2), but will only do so if this heavy burden is discharged. Similarly, the Court has demonstrated its willingness to give companies the necessary breathing space to present a restructuring plan where appropriate, provided that there is some prospect of a viable plan and that creditors are given sufficient opportunity to consider and be heard on the proposal.

Ogier has appeared on behalf of both petitioners and defendant companies in numerous applications in respect of the appointment of PLs including, but not limited to, CW Group Holdings, Grand State Investments, G3 Exploration Limited and Sun Cheong Creative Development Holdings Ltd.

LEVERAGING INVESTIGATIONS IN THE CONTEXT OF CONTENTIOUS INSOLVENCY PROCEEDINGS

Authored by: Yannick Poivey - Swiss Forensic & Compliance

Creditors sometimes fight the wrong battle: they focus recovery action on the tip of the iceberg, because the debtor has made arrangements to divulge only a minor part of their assets and business interests.

Creditor's frustration can become intense, as the debtor declares limited income and assets while consistently displaying obvious signs of a lavish lifestyle, not to speak about the hefty fees paid to a top lawyer. Taking a wider perspective by investigating the debtor may help open up valuable new leads in terms of asset identification, as well as extending the recovery proceedings to other jurisdictions.

First, even only at a domestic level, simple investigative steps may give new momentum to the case. Let's take the example of this Swiss creditor who had become increasingly frustrated, as proceedings against a shrewd debtor were not making any progress. During interviews conducted by the Zug office of financial claims, the debtor grossly underestimated his financial situation. He explained that he was earning only a minimal salary from one his companies, while the other ones were dormant; he also listed in his incompressible monthly expenses a hefty amount for the rent of his villa. A quick research commissioned by the creditor's lawyer showed that the ownership of the villa in question had been recently transferred to the debtor's son. It also appeared that one of the reportedly dormant companies was leasing a brand new Range Rover used by the debtor on a daily basis.

Second, initiating some investigative efforts may help unlock a case by extending the proceedings abroad, as shown by the example of this Italian debtor who had been residing in Switzerland for more than ten years. He had raised large amounts of financing to help launch a company in the biotech sector, and was portrayed in the media as a rising star of the entrepreneurship scene. However, it quickly emerged that he had oversold the technology on which the company's business model was built. In addition, he diverted some company funds for his own use. As a result, creditors initiated proceedings against him but could only take note of his low creditworthiness and lack of assets in Switzerland. At a later stage, investigations in Italy showed that the debtor owned several valuable properties in the Milan area, both inherited and purchased during his previous career as an investment banker. This piece of information convinced one of the creditors to pursue the proceedings in Italy.

Beyond failing to declare some assets and claiming poverty, some debtors design discreet strategies to grow some business interests while remaining under the radar of the creditors.

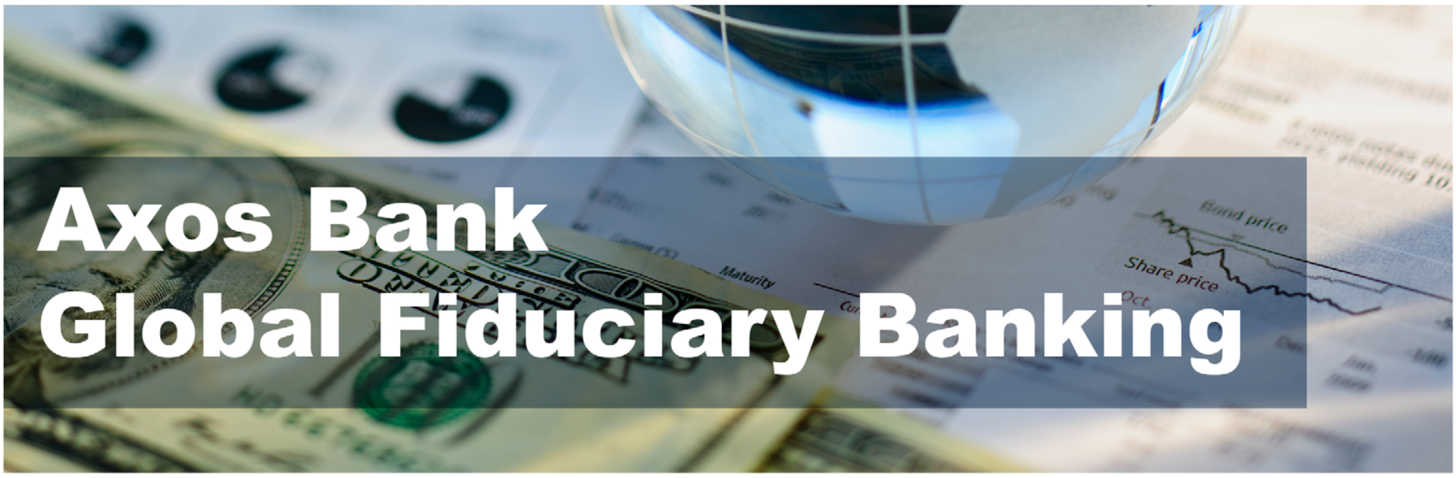
Such as in the case of this French businessman who had incurred heavy debts in his home country and relocated to Geneva. From the perspective of creditors, legal proceedings in France were not making any progress and were bound to fail. Investigative efforts in Switzerland showed that the debtor was the mastermind behind the launch of a franchise in the fitness sector. He had been careful enough not to appear in any holding or operational company, as only relatives and two close business associates were officially involved. But he was present in the fitness centres on a daily basis and was spotted on pictures of inaugural events. Not even an employee of the franchise, he had arranged a contract where he received only minimal fees as an external consultant.

That said, all contentious insolvency cases are not that straightforward. It might well be the case that a debtor is actually penniless, in spite of investigative efforts to come up with a different diagnosis. Research in alternate jurisdictions that looks promising in the beginning may yield little or no result. In the case of sophisticated debtors, thorough research may for instance provide subtle indications of beneficial ownership of a company, while failing to provide clear evidence.

Creditors often worry about throwing good money after bad. In some cases, in the absence of strong leads at the start, extending an investigation to other jurisdictions is comparable to casting a net with no certainty that schools of fish are swimming out there.

Happily enough, the bet may be successful, even in the absence of substantial leads prior to launching an investigation. Such as in the case of this Kazakh debtor, with a known residence in London. Random initial research identified legal proceedings in the United States. The review of the related litigation records showed that the debtor had provided an address in the South of France. Further research showed that this villa was ultimately owned by the debtor, through a complex web of foreign companies controlling a French real estate entity (SCI). No other creditor until then had attempted to attach the villa in question. As a result, the proceedings were successfully extended to France. In that case, taking a wider look by implementing an asset search strategy had proved cost-effective.

As shown by many live cases and according to the principle of serendipity, investigative efforts may support contentious insolvency proceedings by establishing facts in unexpected jurisdictions or of an unexpected nature.



Axos Bank Global Fiduciary Banking

Axos Bank is pleased to announce the formation of the specialized Global Fiduciary Banking team. Leading the team will be Marchand Boyd, SVP & Sr. Managing Director. Marchand is an industry veteran who brings over 25 years of Fiduciary management experience in international and domestic markets.

The breadth of Marchand's expertise is both distinctive and extensive, having enabled him to easily cultivate meaningful cross-border client partnerships. Marchand's Global Fiduciary Banking team will maintain a comprehensive understanding of the nuanced banking needs unique to each international engagement. Marchand's business unit has been specifically created to accommodate the ever-evolving global market conditions and act as a trusted banking partner to our international fiduciary clients. Marchand is a member numerous international insolvency and asset recovery organizations and currently sits on several industry committees.

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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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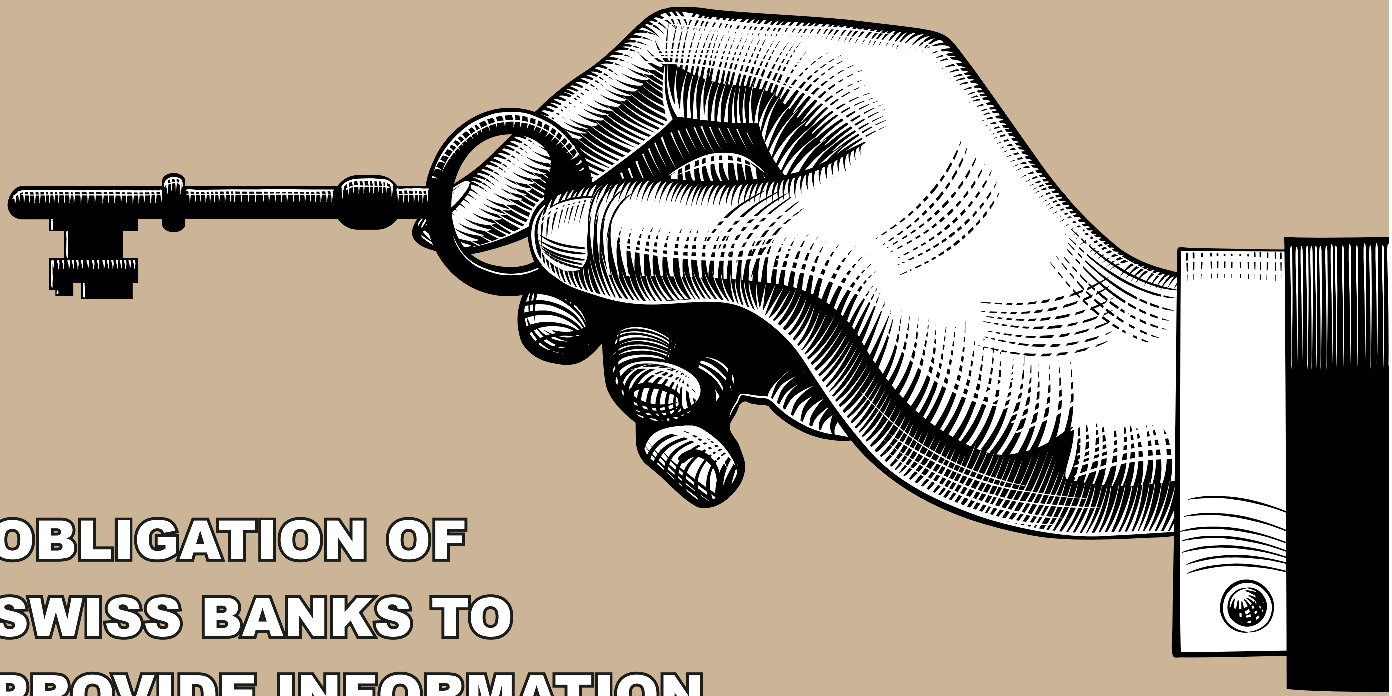

OBLIGATION OF SWISS BANKS TO PROVIDE INFORMATION IN BANKRUPTCY PROCEEDINGS, INCLUDING EVIDENCE AGAINST THEMSELVES

Authored by: Natalia Hidalgo, Yves Klein and Evin Durmaz - Monfrini Bitton Klein

In bankruptcy proceedings, particularly in cases of mismanagement by the directors of the bankrupt company, the question of the liability of the bank with which the company had opened accounts frequently arises, with the possibility for the creditors of the bankruptcy to obtain greater compensation for their losses from the bank than from the directors' assets.

Whether the legal basis for the action against the bank is its contractual liability for damages, or actions for performance or for unjust enrichment, it will be necessary to prove the bank's breach of the contract or its lack of good faith. Documentary evidence will usually be found in the bank's internal and external correspondence, interview notes, due diligence documents (KYC), risk profiles, etc.

However, Swiss law of civil procedure only imperfectly allows for the possibility of obtaining evidence against the bank during the course of a lawsuit, in particular because of the burden of proof and the bank's ability to refuse to cooperate in the gathering of evidence. In particular, there is no pre-trial discovery in the common law style.

It is therefore usually necessary to precede the action on the merits with an action to render account based on Article 400 of the Swiss Code of Obligations ('CO'), or to include preliminary reliefs to that end, which may, however, take several years and lead only to partial results.

The difficulty of an ordinary action to render account under Article 400 CO not only lies in the length of the procedure, but also in the formulation of the reliefs for the information and documents requested: even if the scope of the bank's duty to render account is rather broad under Swiss law, the action must describe in a sufficiently precise manner the documents and information to which the client alleges to be entitled. The clients must also expose why the information or evidence sought is relevant to their claim, which compounds the difficulty, as the contents of the requested documents will usually not be known to them. If the request is formulated too vaguely or incompletely, there is a risk that the request can never be enforced.

An alternative to the action to render account that is often used is the filing of a criminal complaint, which allows the bankruptcy administration and the creditors of the bankrupt company to become private complainants in the criminal investigation and to obtain the right to access and copy the file of the procedure, in particular the documents that the Public Prosecutor's Office will have ordered the bank to produce.

However, in cases where bankruptcy proceedings are pending (whether purely domestic or as a Swiss ancillary bankruptcy of a foreign insolvency), an efficient way to access these bank documents is through the obligation to inform under Article 222 of the Federal Debt Enforcement and Bankruptcy Act ('DEBA'), which breach is punishable under Article 324 para. 5 of the Swiss Penal Code, with the possibility of enforcing the decision by public force.

In a decision, dated June 8, 2020 (5A_126/2020, ATF 146 III 435), confirming a decision of the Geneva Court of Justice, Supervisory Authority for Debt Enforcement and Bankruptcy Offices (DCSO/27/20 of January 30, 2020), the Federal Court restated and clarified its jurisprudence on the duty of a bank to inform the Bankruptcy Office in the context of its client's bankruptcy.

The case concerned a Cayman Islands company that had had a business relationship with a bank prior to its liquidation in 2009. At the request of the foreign liquidators, the Cayman Islands liquidation order was recognized in Switzerland by the Geneva Court of First Instance in 2010, with the opening of a Swiss ancillary bankruptcy.

The Geneva Bankruptcy Office registered in the inventory of the assets of the ancillary bankruptcy a contentious claim against a Geneva bank with which the bankrupt company had held accounts, concerning outgoing transfers totalling in excess of USD 60 million that took place shortly before its liquidation.

In this context, the Geneva Bankruptcy Office ordered the bank, under the threat of criminal sanctions, to produce a number of documents, including all due diligence documentation (KYC), all internal and external correspondence and meeting notes, with the aim of basing a possible claim against the bank.

The bank filed with the Geneva Court of Justice a complaint against the Bankruptcy Office's request on the following grounds:

Purely internal documents were not subject to the obligation to render account, unlike other internal documents, which could be subject to account provided there was no overriding interest in doing so. In this respect, such examination was to be reserved for the civil court, in the context of an action to render account.

The contested decision, which was issued under the threat of criminal sanctions, deprived the complainant of the possibility of refusing to collaborate without incurring sanctions other than those provided for in Article 164 of the Swiss Code of Civil Procedure, namely the taking into consideration of an unjustified refusal to collaborate in the context of the assessment of evidence in civil proceedings.

The bank then filed an appeal against the Court of Justice's decision to the Federal Court.

The Federal Court rejected the appeal and confirmed that, in bankruptcy proceedings, the obligation to inform has the same scope as that of Article 400 CO. Consequently, the bank is obliged to inform the Bankruptcy Office of everything that allows it to control its activity, including by transmitting internal documents, with the exception of purely internal documents (such as preliminary studies, notes, drafts, collected material and internal accounts), since a fault in the execution of its mandate may give rise to a claim against it, which must be included in the inventory.

CONCLUSION

The advantage of the request for information based on Article 222 para. 4 DEBA over an ordinary action to render account consists in the following elements:

1. **The speed of the procedure.**
2. **The possibility of issuing supplemental requests for information in the light of the documents and information received.**
3. **The threat of criminal sanctions and enforcement by public force.**

Therefore, while the obligation to inform the Bankruptcy Office is similar to that of the bank towards its client under Article 400 CO, the speed of the decision and the means of its execution are superior, so that bankruptcy law is a good alternative to filing a criminal complaint and is far superior to an ordinary action to render account.

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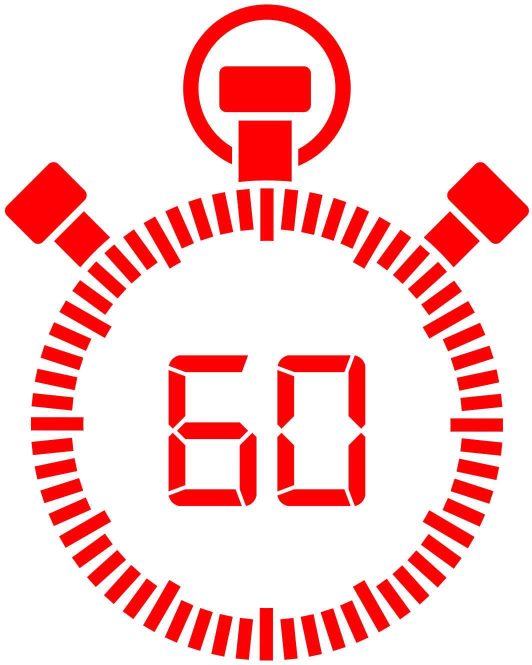
We have been speaking to a diverse range of members and speakers behind the FIRE Community about dinner parties, perfect weekends and what their strangest career experience is. Rick Brown of HFW, Kristina Kicks of Interpath Advisory and Hannah Davie, Steve Holt & Amaechi Nsofor of Grant Thornton talk FIRE and beyond.



60-SECONDS WITH:

AMAECHI NSOFOR, PARTNER, GRANT THORNTON

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

A I'd be a FIFA official (see below)

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

A On the way back from a business trip to Africa, I got mistaken for a FIFA official and got escorted at high speed through the airport into the presidential lounge… imagine having to explain to the President what their chances of hosting the world cup was !

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

A There are no easy aspects, it is fairly challenging and complex stuff, which happens to be the hardest aspect. The variety and situations make it a lot of fun though

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

A "If it doesn't scare you, then perhaps it isn't worth doing". Another one, "the large cases are the same as the smaller ones, just with a few more zeroes in the numbers"

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

A An existing asset recovery case in Africa which involves enforcing an arbitration award on assets that are subject to both worldwide and local freezing orders

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

A I'd learn to fly a plane or drive a racing car… something quick and slightly dangerous

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

A My iPhone… sorry, my family

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

A It has actually made the world a lot smaller which is reflected in how quickly we can get things done overseas and how efficient we are at working… we don't have to embark on frequent trips to get things done

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

A The chance to meet people face to face, it is the best way to build new relationships

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

A Late General Sani Abacha… to ask if there's more of a stash hidden somewhere

Q What does the perfect weekend look like?

A Great weather, camping, no work, lots of beer, Silverstone British grand prix

Q Why are in person events such as the FIRE UK: Welcome Back Summit, so important?

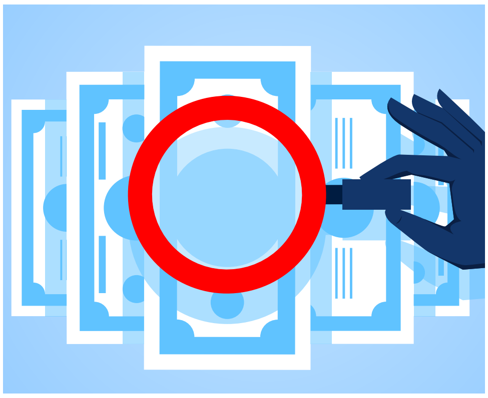
A They provide the opportunity to catch up with old friends and make new friends… hearing about the interesting work people have been up to.

A QUESTION OF CHARACTER:

PROBLEMS FACING THE DISGUISED DISTRIBUTION CLAIM

Authored by: Daniel Lewis - Wilberforce Chambers

Claims for unlawful distributions are not usually regarded as the most stimulating claims that may arise on a company's insolvency, save perhaps for those with a keen interest in the observance of company law formalities and accounting conventions. Of greater interest are likely to be those claims in relation to disguised distributions, particularly where the company has attempted to restructure group debts informally pre-administration or liquidation, or has participated in tax avoidance schemes. Both may involve the grant of a financial benefit to a shareholder. In the former case this may be by way of set off against or the extinguishing of the debt owed by a parent company. In the latter case, this will commonly involve the giving of some reward for services to shareholder/employees other than by way of conventional (and conventionally-taxed) remuneration. Both have been the subject of recent decisions which indicate some of the difficulties such disguised distribution claims face.



The basic principles are not in doubt.

The definition of "distribution" in section 829 of the Companies Act 2006 is striking as to its breadth, comprising "every description of distribution of a company's assets to its members, whether in cash or otherwise", subject to certain defined exceptions (not relevant here).

The question of whether a transaction is a distribution to shareholders is a question of substance, not simply form or of how the parties have chosen to describe it (Progress Property Co Ltd v Moore and another [2011] 1 WLR 1 at [1]). The question of whether the distribution contravenes Part 23 is answered objectively by reference to the relevant accounts; the factual or legal knowledge or understanding of the company is irrelevant (It's a Wrap (UK) Ltd v Gula [2006] BCC 626 at [43]). The application of Part 23 is strict and cannot be eroded by a plea of ratification (Bairstow & Ors v Queens Moat Houses plc [2002] BCC 91)

These are promising foundations for a claim by the company or its liquidators, offering little latitude for the director or shareholder in the defence of the claim. This is certainly true in the straightforward case of the director-shareholder simply taking the company's money (e.g. Re TMG Brokers Ltd (In Liquidation) [2021] EWHC 1006 (Ch)) or receiving payment on the basis of a flimsy pretext, for instance the after-the-event assumption of a "management charge" by the creditor company (e.g. SSF Realisations Ltd (in liq.) v Loch Fyne Oysters Ltd [2021] BCC 354). Those examples are both cases where the subjective intention of the director-shareholders is irrelevant, since the characterisation of the payments as voluntary distributions is a conclusion of law derived from the fact that payments were made for no consideration at the time the distribution was made (see Loch Fyne at [78]).

However, the same will not be true where the payments can be said to have a purpose other than effecting a distribution at the time that they are made, as for instance payments made to shareholder-employees for their services to the company, often through indirect means such as employee benefit trusts or share purchases. It is an uncomfortable contradiction that the directors and shareholders will wish to contend (to HMRC) that the payments were not for services provided to the company, while also maintaining (to the company's liquidators) that the payments were not for no consideration.

Even given the artificiality for which tax avoidance schemes are often criticised, the position adopted by the claimant company in Chalcott Training Ltd v Ralph [2020] EWHC 1054 (Ch) could be said to verge on the "brazen" (the word ascribed to the claims by HMRC). The company had entered into a scheme with the aim of avoiding corporation tax, income tax and NIC on monies paid to its director-shareholders. Essentially the director-shareholders received payment for offering to subscribe for shares, and then repaid a small percentage of this sum advanced in return for which shares were allotted as partly paid.

Here, unusually, it was the company (controlled by one of the recipients of the payments) that contended that the transactions should be characterised, not as they were described at the time as reward for the recipients' services to the company, but as unlawful distributions which should be set aside. The company, therefore, contended that a purely objective test should be applied as to whether value had been given for the payments received, the subjective beliefs of the parties involved at the time being said to be of no relevance.

These arguments were rejected, Michael Green QC (then sitting as a Deputy Judge) holding that the question was whether there was a genuine exercise of the directors' powers in the payment out of the company's capital. The purpose of the payments must be a key factor in determining their character. The subjective intentions of the parties involved at the time were relevant to deciding the true purpose and substance of the impugned transactions.

The question for the court was ultimately whether there was a genuine exercise of the power to award remuneration or whether the power was being used to disguise the true nature of the payments which were really distributions to shareholders. (The decision was unsuccessfully appealed, but not on this point and without demur from the Court of Appeal on the question of characterisation ([2021] EWCA Civ 795)).

While the treatment of the question of characterisation in Chalcot makes sense on the unusual facts of that case, it has the potential to create difficulty for liquidators if applied more broadly particularly where the company has participated in a tax avoidance scheme. Applied to Toone v Ross [2020] 2 BCLC 537 on the question of payments to EBTs for instance, it could lead to a different result (although as noted in Chalcott there was no positive case from the respondents in that case as to what the payments to the EBT in fact were). Were respondents to run a positive case that the payments to the EBT were in fact reward for services provided, this could leave the liquidators with the more difficult claims for breach of duty arising from decision to participate in the scheme, no doubt with reliance in defence of the claim upon the professional advice received.

Although Chalcot involved a solvent company, that should not in principle make any difference to the question of characterisation as opposed to the duties owed by the directors. More important perhaps are the obvious reservations about allowing participants in transactions to disavow the very characterisation that they gave to the payments at the time that they were made: a case of having their cake and eating it too.

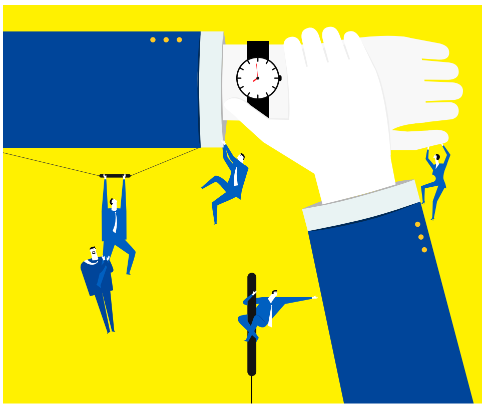
A GUIDE TO COMPULSORY WINDING-UP IN GUERNSEY

Authored by: Michael Adkins, James Tee and Quentin Bregg - Collas Crill

Companies are wound up by the Royal Court of Guernsey (Court) pursuant to Part XXIII of the Companies (Guernsey) Law, 2008 (as amended) (Law). A winding-up by the Court is known as a 'compulsory winding-up' in distinction from a winding-up on the vote of members, which is a voluntary winding-up and is dealt with under Part XXII of the Law.

When can an application for compulsory winding-up be made?

A company may be compulsorily wound up for a number of reasons, the most common being where the company is unable to pay its debts (as described at paragraph 4 below).



Who can make an application for compulsory winding-up?

An application to the Court for compulsory winding-up may be made by:

- the company itself;
- any of its directors, members or creditors; or
- by any other "interested party".

There is Court authority that suggests that an "interested party" is quite a broad concept and may encompass, for example, quasi or indirect members or creditors.

Irrespective of who makes the application, the order made by the Court will operate for the benefit of the company's creditors in the same way.

It should be noted that the Guernsey Financial Services Commission (Commission) also has its own special standing to make a public interest winding-up application (whether or not the Company is supervised by the Commission), for the protection of the public or the reputation of the Bailiwick.

The solvency test and 'unable to pay debts'

For the purposes of the Law, a company satisfies the solvency test if:

- the company is able to pay its debts as they become due;
- the value of the company's assets is greater than the value of its liabilities; and
- in the case of a supervised company, the company satisfies any solvency requirement imposed by applicable regulation.

A company shall be deemed to be unable to pay its debts if:

- it does not pay an owed sum exceeding £750 for 21 days following the date of service of a written demand by HM Sergeant (a statutory demand); or
- it is proved to the satisfaction of the Court that it fails to satisfy the solvency test.

It should be noted that although failure to pay a statutory demand does lead to the Court deeming that it is insolvent, this is rebuttable and the Court always retains a discretion to place the company into liquidation.

There is no express provision made for setting aside a statutory demand and there are no pre-hearing advertising or filing requirements, beyond the usual Court filing and formal notice to the Company and, for regulated entities, the Commission.

Appointing a liquidator

On the making of a compulsory winding-up order, the Court will appoint the liquidator nominated by the applicant for the winding-up. There is no 'liquidator of last resort' in Guernsey. In practice, an applicant will reach a commercial arrangement with their proposed liquidator in order to obtain their consent to act.

The Court must approve the identity of the appointee at the hearing of the application. Most often, the liquidator will be one of a number of experienced Guernsey-based insolvency professionals who are known to the Court. However joint appointments are possible and it is common in cross-border matters to have joint appointees based in whichever jurisdiction the company operated or has assets.

Within seven days of appointment, the liquidator shall send a copy of the compulsory winding-up order to the Registrar of Companies in Guernsey (Registrar). The Registrar will then publish a notice of the winding-up on its website.

On appointment, a liquidator has the following express powers:

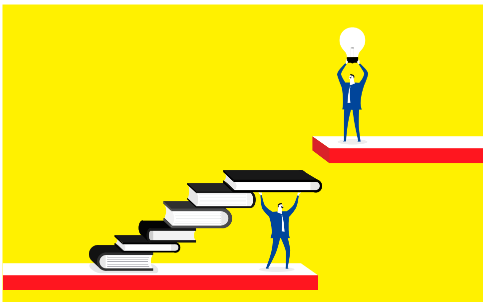
- to bring or defend civil actions in the name of and on behalf of the company;
- to carry on the business of the company, only to the extent expedient for the beneficial winding-up of the company;
- to make calls on capital;
- to sign all receipts and other documents in the name of and on behalf of the company, and do any other act relating to the winding-up; and
- to do any act authorised by the Court.

Once a liquidator has been appointed, all powers of the directors will cease (unless the Court has sanctioned their continuance) and any director who does not comply with this will be guilty of an offence.

The company shall also cease to carry on any business, save for anything that may assist with the beneficial winding-up of the company.

The liquidator only has very basic express powers under the Law, however as a matter of practice the Court will in appropriate circumstances grant additional express powers either at the time of appointment, or subsequently.

During the course of a compulsory liquidation, liquidators often encounter issues in respect of the assets of the company upon which they need guidance of the Court. The Law gives liquidators, as officers of the Court, the ability to apply to the Court for directions on any matter arising during the course of the liquidation.



Next steps

The commissioner and creditors' meeting

Once the liquidator has realised the company's assets, they shall apply to the Court for the appointment of a Commissioner (usually a Royal Court Jurat) to examine the accounts, verify claims and approve the distribution of the funds realised by the liquidator.

The Commissioner must also fix a date for distribution of the company's assets and if this is not disputed, the liquidator can distribute the assets as they think fit. If a claim is disputed, the Commissioner shall refer the dispute to the Court.

Notice of the date of the Commissioner's meeting must be published in La Gazette Officielle on two occasions in successive weeks. The meeting date cannot be less than 14 days after the publication of the second notice.

Liquidator's report to the Court

In addition to details of their receipts, payments and claims, a liquidator must set out in their accounts if:

- they believe any officer of the company has appropriated or misapplied any company assets;
- it appears any person has become personally liable for the company's debts or liabilities;
- it appears any person is guilty of any misfeasance or breach of fiduciary duty in relation to the company;
- the business appears to have been carried on with the intent to defraud creditors or for any fraudulent purpose; or
- any instances of wrongful trading appear to have occurred and come to the liquidator's attention.

Payment waterfall

The order of priority for the distribution of assets on winding-up follows the below chain:

- secured creditors;
- liquidator's costs and expenses;
- preferred creditors;
- unsecured creditors; and
- if any assets remain, the balance will be distributed either pari passu (or as otherwise agreed) among the members of the company.

Compulsory liquidation enables creditors and others to bring the affairs of a company to an end and put in place independent persons to get in the assets of the company, investigate any claims and distribute the assets fairly to creditors and members in accordance with their respective entitlements.

This article was first published by Collas Crill in their Latest Thinking section.

CPR 71:

YOUR ATTENDANCE IS REQUIRED

Authored by: Johnny Shearman - Signature Litigation

Long considered more bark than bite, orders under CPR 71 requiring a judgment debtor to attend court have been given a much-needed boost thanks to a flurry of decisions in the case of *Njord Partners SMA-Seal LP and others v Astir Maritime Ltd and others.* Following a series of back-to-back hearings, the court confirmed that a CPR 71 examination of an individual judgment debtor can take place both remotely and abroad.

What's it worth?

A judgment debt is not worth the paper it is written on unless you can enforce it. If a judgment debtor (a person against whom a judgment or order was given or made (CPR 70.1(2)) has no assets, money will be wasted trying to pursue enforcement proceedings. Therefore, a judgment creditor (a person who has obtained or is entitled to enforce a judgment or order (CPR 71.1(2)) should carefully consider whether it is worth enforcing a judgment debt.

Information as to the judgment debtor's assets is central in determining whether enforcement will be worthwhile and, if so, which method of enforcement will be most fruitful. One way to obtain such information is to require a judgment debtor to attend court. This mechanism is available to a judgment creditor by obtaining an order under CPR 71. Information can be sought as to the judgment debtor's means or, more broadly, any other matter about which information is needed to enforce a judgment debt (CPR 71.2(1(b))). A judgment debtor is required to answer questions on oath and produce documents in their control. If a debtor fails to attend court or attends but refuses to take an oath or answer questions or produce documents, a judge can hold the debtor in contempt of court and the debtor could be imprisoned.

On the face of it, CPR 71 provides judgment creditors with a powerful preliminary step to obtain information before embarking with more formal enforcement proceedings. However, a long-held criticism of the CPR 71 mechanism was that the requirement to attend court could be easily avoided especially where the judgment debtor was abroad at the time of the hearing. Reluctant to jump straight to contempt of court, typically, a debtor would be afforded another opportunity to attend, and the process could quickly become long and cumbersome.

However, the final decision in Njord Partners SMA-Seal LP and others v Astir Maritime Ltd and others [2021] EWHC 1819 (Comm) has confirmed that the requirement that the debtor must attend court should not be taken to mean the court could only be a physical building and attendance can be achieved remotely.

Njord Partners SMA-Seal LP and others v Astir Maritime Ltd and others

The substantive proceedings in Njord Partners concern claims by a group of lenders against a borrower and two of its principals, Tahir and Ali Lakhani. Amongst others, the claimants brought a claim under a contract of personal guarantee against Tahir Lakhani.

Summary judgment on the personal guarantee was obtained in the sum of $47million and the judgment creditor sought an order under CPR 71. Mr Lakhani, resident in Dubai and unable to travel due to restrictions imposed by the UAE as a result of the Covid-19 pandemic, contended that the order requiring him to attend court via video link should be set aside. Mr Lakhani argued that the order under CPR 71 amounted to the compulsory taking of evidence within the UAE and as such could only be undertaken pursuant to a treaty on judicial assistance in civil and commercial matters from 2006.

The court rejected Mr Lakhani's arguments which resulted in an urgent application being lodged by Mr Lakhani for permission to appeal and for a stay on the ground that CPR 71 properly construed did not include attendance by video link. This application was heard after hours on the Friday before Mr Lakhani was due to attend court. The court rejected the application, and the examination went ahead the following Monday.

In dealing with Mr Lakhani's application, the court concluded that:

1. **The requirement that a debtor must attend court was not to be taken to mean that the court could only be a physical building. There is nothing in CPR 71 that restricts attendance at court to physical attendance as opposed to attendance remotely by video link.**

2. **The is nothing in CPR 71 to preclude an oral examination being carried out abroad. A court can constitute itself anywhere, including in another jurisdiction. By extension, this is how witnesses are permitted give evidence by video link.**

3. **There was no breach of the comity principle because a judgment debtor is already subject to the jurisdiction of the court of England and Wales.**

No more playing the system

The court has previously stated that for individual judgment debtors, who may reside anywhere across the globe, there is nothing in CPR 71 that limits its scope to domestic matters. The decision in *Njord Partners* goes someway to supporting the court's position in this regard. Often judgment creditors are kept out of pocket for a long time and there is no reason why they should be forced to throw good money after bad. The only prejudice a judgment debtor faces when required to attend court, if they decide to cooperate, is that they must tell the truth about their assets. In reality, this is no prejudice at all.

Going forward, now it is accepted that a judgment debtor will be required to attend court whether in person or by video link abroad, debtors may find it more difficult to play the system. With contempt of court and the possibility that the court may attach a power of arrest to a committal order, CPR 71 should be borne in mind whenever a creditor is seeking to recover a judgment debt.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THE FRAUD EXCEPTION THAT PROVES THE RULE

Authored by: Daniel Staunton - Kingsley Napley

Under Section 278 of the Insolvency Act 1986 (the "Act") bankruptcy of an individual commences on the day a bankruptcy order is made and continues until discharge. Section 279 of the Act defines the discharge period as being 1 year after the bankruptcy order was made (unless suspended).

Section 281 of the Act deals with the effects of being discharged from bankruptcy, whether automatically after one year (if no suspension) or after such further extended period (if suspension is ordered), namely the bankrupt is released from liability for all their bankruptcy debts.

However, this discharge from liability is subject to important caveats. Most notably, under section 281(3) of the Act being it does not release liability for any bankruptcy debt incurred by means of any fraud or fraudulent breach of trust to which the bankrupt was a party (the "Fraud Exception").

Development of the Fraud Exception

Although there has not been a wealth of authorities on the scope of section 281(3) of the Act the limited reported cases raise some interesting observations.

Firstly, the cases of *Masters v Leaver [2000] BPIR 284* and *Mander v Evans [2001] BPIR 902* examined the definition of "fraud" in Section 281(3) and what types of fraud are caught by the exception.

Masters v Leaver

Masters, a decision of the Court of Appeal in 1999, involved proceedings that had been issued against Mr Leaver in Texas, USA in 1992 seeking, inter alia, the setting aside of certain share issues made by him and seeking damages against him for fraud. Mr Leaver did not take part in those proceedings, instead escaping to England. In his absence, the Texan court granted the equivalent of a default judgment but shortly after Mr Leaver was declared bankrupt in the UK. The claimants attempted to commence enforcement in the UK after Mr Leaver had been discharged from bankruptcy arguing that as [their] judgment was on a fraud claim, Section 281(3) was engaged. The first instance Court found in favour of the Claimant[s].

The Court of Appeal's starting point was to ask whether the necessary allegation of fraud against Mr Leaver had been adequately established to engage Section 281(3). On the facts, it had not. The Court of Appeal, citing *New Brunswick Railway Company v British and French Trust Corporation [1939] AC 1* stated that a foreign default judgment was intended to have limited effect in the UK. A default judgment on an allegation of fraud was not "*affirmative evidence*" of an admission that the liability was incurred in respect of fraud. Accordingly Mr Leaver's appeal was granted and the Fraud Exception was not made out.

Mander v Evans

In *Mander* the High Court grappled with the meaning of "fraud" in section 281(3) and whether it was wide enough to encompass allegations of undue influence. Ms Evans argued that due to the nature of the relationship that existed between her (a client) and Mr Evans (her solicitor) he had asserted "undue influence" upon her to loan him money and that this amounted to "fraud" under section 281(3) of the Act.

The court declined to expand the natural meaning of "fraud" in section 281(3) to include conduct which may be regarded by equity to be unconscionable but does not necessarily involve dishonesty. The claim was therefore dismissed.

Actual dishonesty

Fast forward a decade and the approach in *Mander* was followed in *Templeton Insurance Ltd v Brunswick* [2012] EWHC 1522 (Ch) if not, arguably, slightly widened.

In *Templeton*, the Court found that "fraud" in section 281(3) covered both a 'fraudulent breach of contract' and a 'fraudulent breach of fiduciary duty' not just fraud in the *Derry v Peek* sense (i.e. the tort of deceit). The court held that the touchstone in each case is a finding of actual dishonesty on the part of the bankrupt. The court also reiterated that the purpose of the Fraud Exception is to prevent a person from using the bankruptcy process or invoking his bankruptcy and discharge as a medium for becoming free from debts or liabilities resulting from his actual dishonesty. Section 281(3) is an anti-avoidance mechanism. Thus, following *Mander*, the Fraud Exception is not limited to debts founded in the tort of deceit but to any debts tainted by dishonesty.

Jones & Pyle

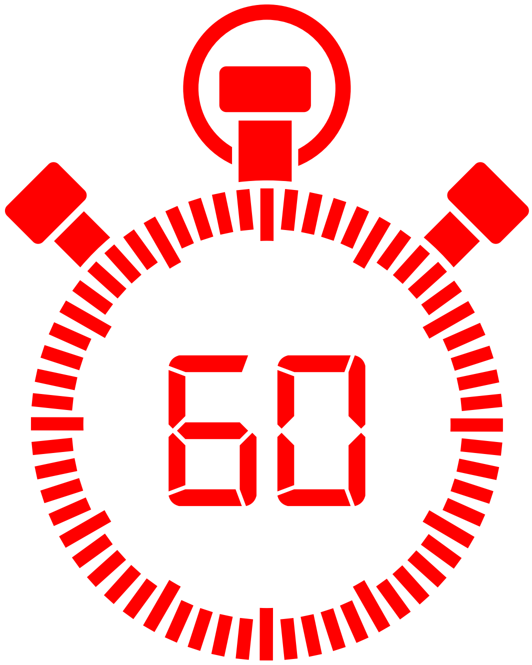
The operation of section 281(3) also came under the microscope again this year in *Jones & Pyle Developments Limited v Rymell* [2021] EWHC 385 (Ch). This case reemphasises the Courts' approach to "fraud" meaning the tort of deceit and/or cases of actual dishonesty. Here, a seller (now bankrupt) was found to have given false responses to enquiries on a property sale; giving an assurance that there were no disputes in relation to the property. After completion of the purchase, the buyer found there was a boundary dispute with a neighbour that had been going on for many years. Proceedings were issued and the buyer obtained judgment against the seller who petitioned for his own bankruptcy and was later discharged. The seller argued that his discharge released him from any liability.

The buyer successfully argued this was a classic *Derry v Peek* case of deceit – the seller knew the representations were false at the time they were given or else was reckless as to their truth and, further, intended the representations to be relied upon. The Fraud Exception applied; on the facts there was actual dishonesty on the seller's part.

Commentary

The decision in Jones & Pyle is hardly novel or ground-breaking but is further evidence (if it was needed) that the court has taken a consistent approach to the meaning of "fraud" in Section 281(3) requiring actual dishonesty for the Fraud Exception to apply. Of course, the burden of proof will remain on the claimant creditor to advance "affirmative evidence" of the bankrupt's dishonesty which will prove difficult in cases where the bankrupt has simply not engaged leaving the creditor with a default judgment to enforce.

We have been speaking to a diverse range of members and speakers behind the FIRE Community about dinner parties, perfect weekends and what their strangest career experience is. Rick Brown of HFW, Kristina Kicks of Interpath Advisory and Hannah Davie, Steve Holt & Amaechi Nsofor of Grant Thornton talk FIRE and beyond.



60-SECONDS WITH:

HANNAH DAVIE, DIRECTOR, GRANT THORNTON

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

A Since appearing on the TV program 'Friends for dinner' with Gordon Ramsey some years ago, I have loved to cook! So, I would be a chef, preferably with my own little Italian bistro.

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

A I went on secondment to Perth in Australia, which was incredibly exciting and an amazing opportunity, and an experience that I would definitely recommend! Then whilst I was there, I was appointed administrator of a sheep farm, which was one of the strangest commodities I have had to deal in my career, although I have been an avid fan of UGG boots ever since.

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

A Easiest, hands down the people, we are fortunate that the work we do is collaborative in nature and means we get to work with amazing experts around the world, both within the GT network and our external contacts. Definitely one of the main reasons why I love my job!

Hardest, the longevity of some of our cases. Working in contentious fraud and insolvency often means cases can take a considerable amount of time to get resolved and recover assets. Keeping the momentum to see these cases through can be challenging. Albeit incredibly rewarding when you find those assets and recover them for the benefit of the creditors or beneficiaries.

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

A Set yourself stretching goals and vocalise what you want to achieve in your career. Then work towards it at the pace that is best for you, you don't need to worry about what everyone else is doing if you are happy with your position.

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

A A bankruptcy matter I am appointed on, which has come out of a divorce judgment. There are assets held in various offshore jurisdictions, which means we are working with solicitors all around the world and utilising powers such as Chapter 15 in America to obtain documentation, alongside obtaining attachment orders in other jurisdictions. Which is proving very interesting and challenging in equal measure!

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

A Learn to fly, so if there's a pandemic again, I can fly myself off somewhere sunny!

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

A Aside from my family, it would have to be my rather extensive handbag collection!

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

A The world definitely feels smaller, I have been able to meet with people all over the world over the last 18 months, even though I have not left my house, which has enabled us to grow our contentious Estates and Family Disputes team with minimal face to face contact. HNW disputes are becoming more prevalent, so to be at the forefront of this ever growing and developing area, across the globe during a pandemic, has been a fantastic opportunity. Albeit I am very excited to be able to meet all these new contacts from around the world in person as soon as possible.

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

A Traveling and holidaying! Having had 3 holidays cancelled in last 18months, I can't wait to get overseas, enjoy sitting on a sandy beach, with a glass of chilled sangria in hand!

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

A I have family who live in Italy and America, so at the moment, I would most like to have them over for a dinner party!

Q What does the perfect weekend look like?

A A lie in, bacon rolls and fresh coffee, ideally made by someone other than me, a walk with my family and the dogs, then back to mine for dinner, drinks and a kitchen disco.

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

A You may sense a theme here, but I am definitely looking forward to seeing friends from the industry and catching up over a glass of wine or two!

REORGANISATION INSTEAD OF LIQUIDATION

THE NEW LIECHTENSTEIN INSOLVENCY LAW

Authored by: Sophie Herdina - Gasser Partner

Liechtenstein's insolvency law has been drafted and enacted on the basis of the Austrian insolvency law, however, most of the reforms implemented in Austria to modernise its insolvency law, have not been replicated in Liechtenstein and the Liechtenstein Bankruptcy Act ("KO") was only subject to minimal change over the last years. Therefore, the insolvency regime still and almost exclusively focused on liquidation including realisation of all assets, while the few potential reorganisation possibilities provided were hardly ever applied in practice. This left Liechtenstein with an insolvency regime no longer appropriate in a modern economic system, which the small Principality in the middle of Europe otherwise has adopted.

Thus, the comprehensive reform of the insolvency law had been awaited in great anticipation, when it entered into force on 1 January 2021. Since the adoption of the new Insolvency Act ("IO"), "Reorganisation Instead of Liquidation" is the name of the game for struggling businesses in Liechtenstein. Within the framework of now uniform insolvency proceedings, which can either be conducted under the auspices of insolvency related liquidation or reorganisation, the continuation and restructuring of companies instead of their dissolution is put at the heart of proceedings. This not only serves to preserve jobs, but may also lead to higher quotas for creditors and finally offers a possibility for companies that are struggling for whatsoever reason but have the potential to successfully be restructured, to avoid certain liquidation and subsequent dissolution in insolvency.

In order to fulfil the goals set, the reform is intended to particularly help entrepreneurs save their businesses and allow them a fresh start and second chance, by stipulating lower thresholds for reorganisation and fighting the stigma of insolvency proceedings.

By both entrepreneurs shall also be incentivised to file for insolvency in a timely manner and in addition an explicit provision, which will only enter into force on 1 January 2022, stipulates a 60-day period for application.

In line with the above and in order to allow reorganisation in the first place, it is made clear in the legal materials that the continuation of the business shall become the rule, as long as this is not obviously to the detriment of the creditors. This is flanked by certain restrictions on the termination of contracts by the contractual partners of the debtor, as such may endanger or even render the continuation and reorganisation of the business impossible.

Furthermore and while a reorganisation plan was previously subject to the requirement of a minimum 40 % quota, which was hardly ever met in real life and constituted a fairly high threshold also in international comparison, this has now been reduced to 20 % facilitating the access to reorganisation proceedings, but still providing for a high enough threshold to encourage timely declaration of insolvency.

Also, the quorum requirements for the acceptance of the reorganisation plan have been lowered. Today, it is sufficient if the simple majority of the creditors represented at the hearing accepts the reorganisation plan. Thus, minorities can no longer block reorganisation.

If the debtor aims for reorganisation rather than liquidation, a reorganisation plan can already be submitted to the court, when applying for insolvency proceedings. In this case the proceedings will be considered and labelled reorganisation proceedings as of their start, which is also intended to push back stigmatisation usually clinging to insolvency proceedings. In specifically well-prepared reorganisation proceedings and especially where a business has run into financial difficulties through no fault of its own and under the prerequisite of a quota of at least 30 % offered in the reorganisation plan, the debtor may continue to administrate the business during the reorganisation proceedings and will only be supervised but not replaced by the reorganisation administrator. As reorganisation is the preferred outcome based on the new insolvency regime, it is also possible to submit a reorganisation plan at any later stage of the insolvency proceedings and by that the debtor may achieve that liquidation proceedings will be converted to reorganisation proceedings in the best case.

Alongside with the above amendments, also the outdated system of dividing insolvency claims into four different classes, which are only satisfied one at a time, often leaving the last class, which comprises most claims usually involved, with a very little or at times even no quota at all, has been abolished. Now all unsecured insolvency claims in general rank pari passu in insolvency proceedings, leading to a fair distribution of the proceeds.

While at first glance it may seem that primarily the position of the debtor has been improved by this reform and proceedings have been facilitated to the debtor's advantage, also creditors benefit from the long-awaited modernisation of the Liechtenstein insolvency regime.

As indicated previously, successful reorganisation along with the incentivisation of timely insolvency application is expected to lead to increased quotas for the creditors. Furthermore, creditors have been granted a greater say in the proceedings as a creditor committee is newly established.

The reform does, however, not only aim at companies and business owners but also takes into account, that in the past insolvency proceedings for non- or ex-business owners, including consumers, resulting in debt relief were not available. Now a new regime which will enter into force on 1 January 2022 has been established to tackle this issue.

Not only the former but also the newly reformed insolvency regime is based on Austrian law, which has proven to be a huge success and thus is a well-tested model. The adopting of most provisions from Austrian legislation ensures or at least enhances legal certainty from day one in most areas, as Liechtenstein courts will refer to Austrian legal writing and jurisprudence, wherever available. Thus, while the new Insolvency Act has only been in force for just over half a year in Liechtenstein and the actual effects of this extensive and eagerly anticipated reform may not yet be visible to their full extent, it is expected in light of the experience of the Austrian model law that the new insolvency regime will lead to similar success and reorganisation will finally precede over liquidation. In light of the uncertain times passed and ahead, where a pandemic – even if handled as well as in Liechtenstein – has led and continues to lead to distress for businesses, one could argue that the modernisation of the insolvency regime has been enacted just in time.

AUSSIE RULES

WHEN THE MEASURES IN THE UK DESIGNED TO PROTECT BUSINESSES FROM INSOLVENCY EVENTUALLY DRAW TO AN END, WHAT GUIDANCE CAN BE TAKEN FROM AUSTRALIA WHERE SIMILAR MEASURES ENDED A FEW MONTHS AGO?

Authored by: Simon Jerrum and Ranjani Sundar - HFW

We have entered time-on in the fourth quarter. Throughout 2020, both the UK and Australian governments responded promptly to the economic consequences created by the COVID-19 pandemic. This led to flexible and innovative measures being implemented in order to meet the economic needs of businesses. However, despite the temporary measures having been in place in the UK for over a year, some of those measures have been extended yet again and are now due to end on 30 September 2021 (for restrictions on winding-up petitions and statutory demands) and 25 March 2022 (for enforcement restrictions in relation to commercial leases in England). The suspension of wrongful trading liability ended on 30 June 2021.

In this article, we consider what guidance UK businesses can take from the Australian experience and what may happen once the final siren eventually sounds. Is the UK going to follow Australian rules, or are we are playing a different game entirely?

With the end of the temporary measures approaching, what does the future hold for financially distressed businesses in the UK? In Australia, similar measures ended between December 2020 and March 2021 but, despite a predicted "tsunami" of insolvencies once those measures ended, Australian insolvencies are still approximately 40% down on pre-COVID levels.

Commercial tenants / Landlord Moratoriums

The UK's *Coronavirus Act 2020*, which received Royal Assent on 25 March 2020, introduced a swathe of emergency measures in response to the pandemic. In particular, section 82 introduced a moratorium on a landlord's ability to forfeit a commercial lease on grounds of unpaid rent in England and Wales. This measure does not give tenants any entitlement to rent reduction (or prevent rent from accruing) but merely prevents landlords from repossessing commercial premises based on unpaid rent. The measure was initially due to expire on 30

June 2020 but, as COVID-19 continued to throw a number of "chaos balls" to businesses across most industries, extra time has now been given five times (with the latest extension due to end on 25 March 2022 in England and 30 September 2021 in Wales).

Regulations were also introduced in the UK to increase the amount of unpaid rent necessary for Commercial Rent Arrears Recovery (**CRAR**) to be used (a procedure that allows landlords to take control of and sell tenants' goods to recover outstanding rent arrears). The level of unpaid rent required to initiate CRAR has been increased several times throughout the pandemic. This measure has also recently been extended for a further nine months in England to 25 March 2022.

In Australia, the NSW Government enacted the Retail and Other Commercial Leases (COVID-19) Regulation (Regulation) on 24 April 2020 to implement the National Cabinet's Code of Conduct for commercial tenancies (Code of Conduct).

This Regulation put in place temporary measures to share the economic impacts of the pandemic between commercial landlords and tenants. The Regulation initially applied for a period of six months but was extended until 28 March 2021 when it lapsed.

Despite this, recently passed amendments to the *NSW Retail Leases Act 1994* (**the Act**) ensure that following the lapse, eligible tenants will remain protected in relation to circumstances arising throughout the April 2020 and March 2021 Regulation period. Under the Act a property owner cannot, for example, evict an eligible tenant because they were unable to pay their rent due to COVID-19 during the prescribed period unless they have first renegotiated rent and attempted mediation. The amendments will not impact a property owners' rights in relation to circumstances arising after the prescribed period.

The UK government ran a consultation between 6 April 2021 and 4 May 2021 to help inform its approach to withdrawing the measures that are in place. At the end of April 2021, ministers received an open letter from hospitality leaders urging them to consider a similar rent relief scheme to that in Australia. On 16 June 2021, the government announced that legislation will be introduced to "ring-fence" unpaid rent that has built up for businesses that have had to remain closed during the pandemic. Landlords and tenants will be expected to share the financial impact of the periods of closure and will be encouraged to come to an agreement on how to handle the money owed (for example, waiving some of the total owed or agreeing a longer-term repayment plan). If agreement cannot be reached between the tenant and landlord, the new legislation will require the parties to use a binding arbitration process to resolve the dispute.

The emphasis on the "sharing" of the financial impact of the pandemic and on the re-negotiation of outstanding rent arrears between the landlord and tenant seems to have taken at least some inspiration from the Australian model.

Winding-up petitions and wrongful trading suspension

The UK's *Corporate Insolvency and Governance Act 2020* (**CIGA**) came into force on 26 June 2020. Among other measures, Schedule 10 of CIGA implemented a prohibition on presenting winding-up petitions (including those based on statutory demands) from 27 April 2020 unless the petitioner can show that it has reasonable grounds for believing that coronavirus has not had a financial effect on the company. This has effectively led to a moratorium on winding-up petitions given the difficulty in showing that the pandemic has not had an effect on the company. The restriction on issuing winding-up petitions is now being extended to 30 September 2021, so it is still some months before creditors will have a restored ability to issue winding-up petitions against recalcitrant debtors.

Section 12 of CIGA introduced a temporary suspension of the wrongful trading liability for directors in the UK, requiring the court to assume that directors are not responsible for the worsening of a company's financial position occurring during the "relevant period". The initial relevant period was 1 March 2020 to 30 September 2020. A second suspension was introduced from 26 November 2020, which expired on 30 June 2021.

Similar measures were introduced by the Australian Federal Government on 24 March 2020 in the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) (**CERPO**). Creditors were prohibited from issuing a statutory demand to a company in circumstances where the debt owed was less than A$20,000 (as opposed to the usual statutory minimum of A$2,000) and the time within which a company needed to respond to a statutory demand increased from 21 days to six months (with a view to allowing companies some breathing space to make payment of their debts). This was implemented for an initial period of six months from 25 March 2020, but was subsequently extended to 31 December 2020.

The CERPO also provided for a "special safe harbour" to relieve company directors of their duty to prevent insolvent trading for debts incurred after 25 March 2020 in the ordinary course of the company's business. These initial measures were due to end after six months, but were extended to 31 December 2020 (in line with the relief provided with respect to winding-up procedures).

Since the Australian temporary measures have been withdrawn, there has been a natural increase in statutory demands and subsequent winding-up applications being issued but, to date, there has been nothing like the "tsunami" that was expected. Notwithstanding this, the Australian government is considering increasing the statutory minimum for issuing a statutory demand to A$4,000 on a more permanent basis in order to curb the still anticipated rush of winding-up applications.

Furlough / JobKeeper

In the UK, the Coronavirus Job Retention Scheme (**CJRS**) has been in place since 20 April 2020. This introduced the (now very familiar) concept of furlough to alleviate pressure on employers and mitigate unemployment levels. As things stand, the CJRS is due to end on 30 September 2021.

Similarly, from 30 March 2020 the Australian Government introduced a A$90 billion wage subsidy program called "JobKeeper". This subsidy was developed to cover the costs of an employees' wages in businesses negatively affected by the pandemic. The subsidy was extended in July 2020 and continued through to 28 March 2021. The program was widely taken-up, reaching over 900,000 organisations and 3.5 million individuals in the first three months. In the original subsidy scheme running from 30 March 2020 to 27 September 2020, eligible employers were given A$1,500 per fortnight to pass on to eligible employees. The amount of the subsidy was gradually reduced between 28 September 2020 and 28 March 2021 (when it ceased).

Whilst there are some suggestions that the withdrawal of JobKeeper in Australia severely affected parts of the workforce in circumstances where parts of the economy continue to be affected by the pandemic, the statistics suggest that Australia's labour market is steadily growing notwithstanding the end of the scheme.

It is undoubtedly the case that employment levels in the UK would have been much more significantly impacted by the pandemic in the absence of the furlough scheme. However, it remains to be seen whether or not the furlough scheme has simply kicked the ball further down the field.

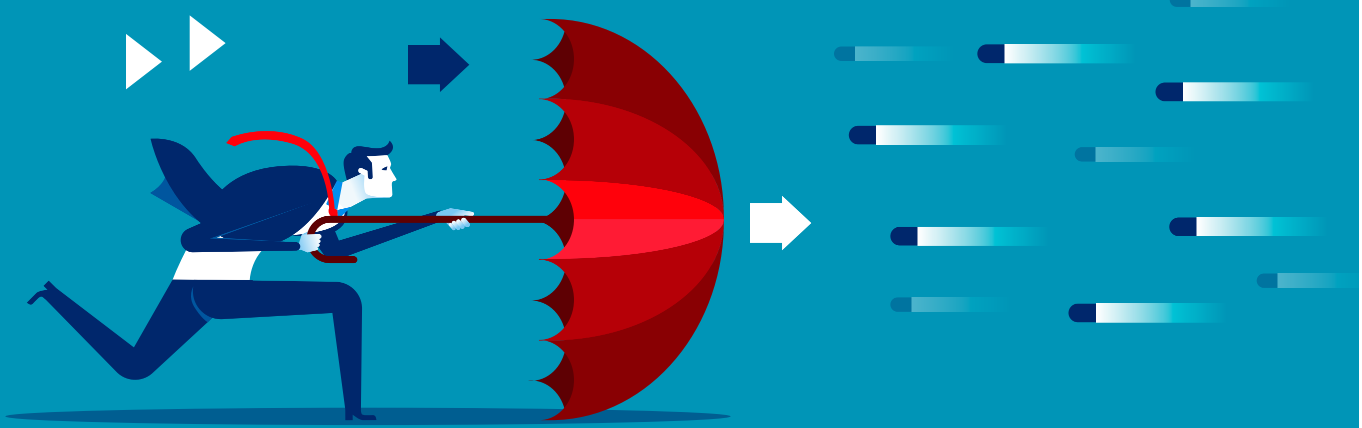
The Highlights

Through a combination of amendments to legislation to compliment the withdrawal of temporary measures, economic decisions made to boost the Australian workforce and an increasingly flexible approach to the needs of the Australian business community, there has been a better economic recovery in Australia than anticipated.

The temporary measures introduced in the UK have meant that the number of formal insolvencies is considerably lower than pre-pandemic levels. However, many commentators predict a wave of new insolvencies as those measures eventually end. The Australian experience may provide a more positive outlook, but it is worth noting that the UK economy differs in a number of significant respects and has suffered well over four million more cases of COVID-19 than Australia. The UK therefore faces some very different challenges to Australia and, as can be seen from the recent extensions, seems to be playing a much longer game.

What will happen next season?

SECTION 236 EXAMINATIONS – WITNESS IMMUNITY TO BECOME A DIRECTOR'S SHIELD?



Authored by: Jamie Tilling - Charles Russell Speechlys

1 SUMMARY

In *Al Jaber & Ors v Mitchell & Ors [2021] EWCA Civ 1190*, a decision that has already caused some consternation among practitioners, the Court of Appeal has held that the doctrine of immunity from suit applies to statements made by an examinee in the context of an examination conducted pursuant to s236 of the Insolvency Act 1986 ("**IA86**").

2 BACKGROUND

2.1 Broadly, the joint liquidators of a BVI company (the "**Joint Liquidators**") which was in BVI compulsory liquidation applied for, and obtained, recognition as foreign representatives in England pursuant to the UNCITRAL Model Law on Cross-Border Insolvency.

2.2 The Joint Liquidators then applied to Court for an order compelling a director of the BVI company (the "**Sheikh**") to attend for public examination and to produce books, papers, and other records pursuant to s236 (the "**Examination**").

2.3 After the Examination, the Joint Liquidators applied to re-re-amend their re-amended points of claim (in relation to their extant proceedings against the Sheikh and others) to including pleadings claiming loss arising from some of the Sheikh's statements made in the Examination which, the Joint Liquidators said, were false (the "**Amendment Application**").

2.4 The Amendment Application was resisted on the basis that written and oral statements made during the Examination were protected by the general immunity afforded to witnesses in civil proceedings – this being the principle that statements made are protected by an immunity from claims arising from those statements. The Joint Liquidators argued that witness immunity did not extend to the Examination.

3 FIRST INSTANCE

3.1 At first instance, after considering the authorities in some detail, Mrs Justice Joanna Smith highlighted the differences between the Examination and judicial proceedings generally and held that the Examination was not protected by witness immunity. This was because, broadly:

3.1.1 the Examination lacked some key characteristics of a judicial proceeding to which immunity would attach; and

3.1.2 granting immunity in these circumstances would create a perverse situation whereby examinees would have an incentive to refuse to cooperate with 'informal' examinations and interviews – whether pursuant to s235 IA86 or under threat of s236 – in order to force a s236 examination which would afford them immunity.

3.2 As such, she granted the Amendment Application.

3.3 The Sheikh appealed following Joanna Smith J granting permission to appeal.

4 COURT OF APPEAL

4.1 In the Court of Appeal, Lady Justice Asplin, with whom Lady Justice Carr and Sir Nicholas Patten agreed, overturned the first instance judgment.

4.2 Asplin LJ considered the authorities in some detail and concluded that Joanna Smith J had considered the issue too narrowly. She held that the Courts have approached the issue of immunity from suit in a context specific manner and that, while the Examination was quite dissimilar from the ordinary situations in which immunity of suit has been held to apply, the Sheikh should nevertheless be protected by immunity from suit for the following reasons:

4.2.1 The Examination took place in Court and before a Judge in circumstances where the Judge, Counsel, and the Joint Liquidators benefitted from immunity in respect of their own comments.

4.2.2 Immunity from suit has already been extended to cover other statements made in the context of insolvency proceedings – for example, in relation to reports provided by the Official Receiver.

4.2.3 The Examination – and the s236 procedure generally – had to be viewed in the context of the wider compulsory winding up proceedings in which they arose and which are commenced by an order of the Court. In particular, the s236 procedure represented the exercise by the Joint Liquidators of their procedural powers and, when examining the Sheikh before the Court, the Joint Liquidators were seeking to further the general purposes of the compulsory winding up which is supervised by the Court.

4.3 Asplin LJ also considered the risk that granting immunity in respect of the Examination would incentivise examinees to refuse to cooperate until a s236 order was made. She concluded that the risk was hypothetical and that any risk could be mollified by the Court's power to order that the examinee pay the costs of any examination.

5 RAMIFICATIONS

5.1 The Court's decision to extend the principle of immunity of suit to s236 examinations means that examinees are immune from causes of action which arise from statements given in that examination.

5.2 However, s433 IA86 provides – as expressly referred to by Asplin LJ in her judgment – that statements made in a s236 examination may still be used in evidence against the examinee. Thus, while the statements themselves cannot found an independent cause of action, they may be admissible as evidence to support an underlying cause of action in respect of, for example, misfeasance against a director.

5.3 This may give practitioners some comfort because the circumstances where the statements made in a s236 examination – in and of themselves – found a cause of action may be rare (for example, where an examinee provides false answers and the answers somehow cause the liquidators or the estate loss). That said, those situations may well occur in practice.

5.4 Creditors' voluntary liquidation

5.4.1 Asplin LJ made much, in her judgment, of the fact that a s236 examination represents an extension of the Joint Liquidators' general powers and duties in respect of the winding up and that the liquidation was supervised by the Court, having been commenced by a Court order.

5.4.2 This begs the question as to whether the principles would apply equally in a creditors' voluntary liquidation ("**CVL**") – although a CVL is still subject to the general oversight of the Court, the liquidation itself is not commenced by the Court.

5.4.3 As such, it is unclear whether the Court's reasoning would apply to a s236 examination conducted within a CVL.

5.5 Pre-s236 interviews

5.5.1 The Court of Appeal did not decide whether immunity would attach to informal interviews or responses to information requests given pursuant to s235, or in anticipation of and under express or implied threat of an application pursuant to s236.

5.5.2 While it may be possible to reason that this would be the case, by analogy to the Court's reference to s236 being the exercise of procedural powers, it is not entirely clear that this logic would hold. S235 is a duty to cooperate as opposed to a compulsive power, and the duty is enforced either by fines for non-compliance or by an application pursuant to s236. As such, s235 is an obligation which falls upon certain categories of persons, as opposed to a power enforceable by a liquidator.

5.5.3 Further authority is needed to determine the point, but practitioners may well take comfort from this distinction.

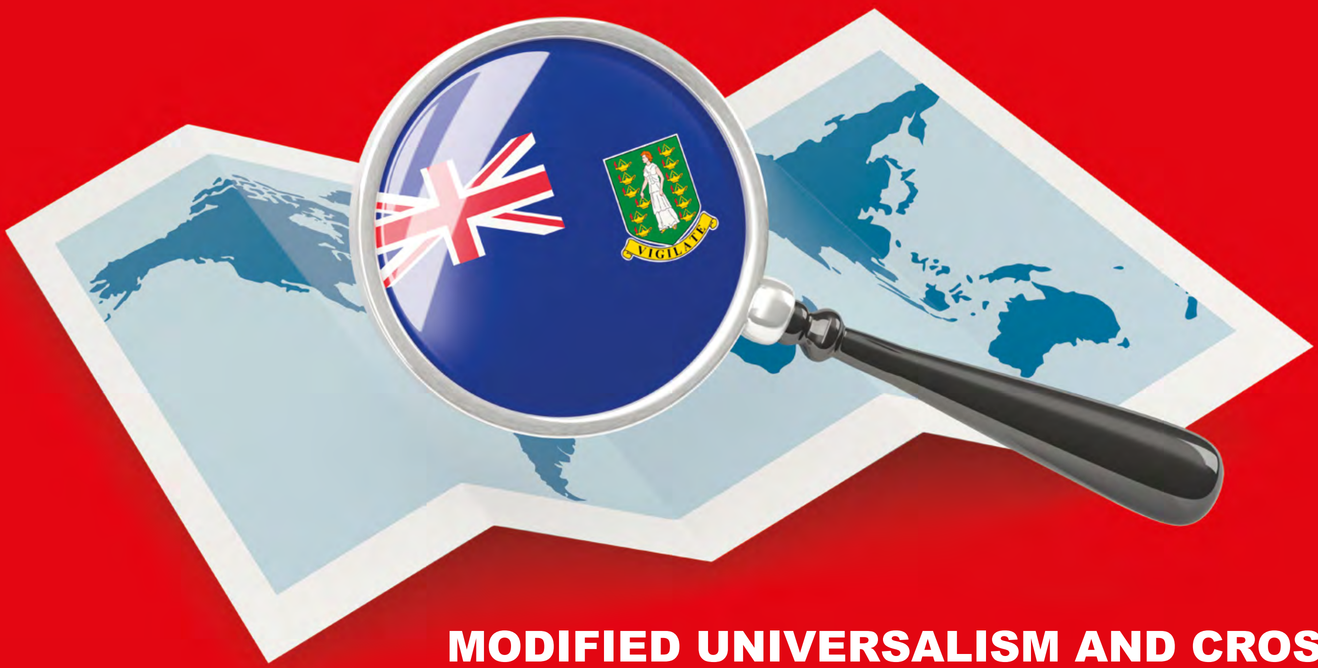
5.6 Costs

5.6.1 Asplin LJ was content that any risk of a 'chilling effect' on the utility of s236 would be avoided by the Court's jurisdiction to award costs against an obstructive examinee.

5.6.2 While that may be the case for an examinee who has nothing to hide (for whom the threat of a costs order for non-compliance may well be sufficient encouragement to cooperate), liquidators routinely issue s236 applications against former directors who have much to conceal and who are, on occasion, of substantial means and for whom the cost of the s236 proceedings will be outweighed by the additional protection afforded to them from immunity from suit in the s236 examination.

5.6.3 This decision, therefore, may have the effect of depriving s236 of some of its utility against fraudulent or delinquent directors; the very class of people against whom it can so often be useful. It remains to be seen how the effect of this decision will play out in liquidations going forward.

HANGING ON BY A (GOLDEN) THREAD:



MODIFIED UNIVERSALISM AND CROSS BORDER INSOLVENCY IN THE BVI

Authored by: Richard Brown and Monique Hanson - Carey Olsen

This article considers the impact of the recent Eastern Caribbean Court of Appeal decision in Net International Property Limited v Erez, which confirmed that the BVI courts did have jurisdiction at common law to recognise foreign insolvency officeholders, but that the common law jurisdiction to provide assistance to such officeholders no longer applies in the BVI. Here, Carey Olsen's Richard Brown and Monique Hansen explain the rationale for the decision, and consider the implications for the application of the doctrine of modified universalism in the BVI.

INTRODUCTION

The 'golden thread' of modified universalism in cross border insolvency has long been an aspiration, rather than a rule. [1] The common law concepts of recognition and assistance play a key role in achieving that aspiration. In recent years these concepts have been affirmed but scaled back, by decisions such as that in *Singularis Holdings Limited v PricewaterhouseCoopers*. [2] Despite the scaling back of the common law from the 'high water mark' of the decision in Cambridge Gas, [3] recognition and assistance remain important in facilitating the efficacy of international insolvencies in the globalised economy.

For some years, doubt has been cast in the BVI over the continued application of the common law jurisdiction to grant recognition and assistance, due to uncertainty over the application of the BVI's insolvency legislation. Until the recent decision in *Net International Property*, there had been little substantive judicial consideration of this point, but obiter remarks had questioned whether the common law powers of recognition and assistance survived.

The Eastern Caribbean Court of Appeal has now considered the current state of the common law in the light of the BVI's statutory cross border assistance regime, and in doing so it has expressly limited the scope of modified universalism in the BVI.

DECISION

In *Net International Property Limited v Erez*, [4] the Eastern Caribbean Court of Appeal considered whether the BVI Courts had jurisdiction at common law to recognise an insolvency officeholder appointed in the courts of Israel, and whether and to what extent the BVI Courts could grant assistance to that officeholder at common law.

The decision turned on the interplay between the Court's common law jurisdiction to recognise foreign insolvency appointments, and its statutory jurisdiction to grant assistance to insolvency officeholders from designated countries under Part XIX of the Insolvency Act, 2003 (the 'Act').

1 Per Lord Hoffman in *Cambridge Gas Transp Corp v Official Cttee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508
2 [2014] UKPC 26.
3 *Ibid.*
4 BVIHCMAP2020/0010 (decision of 22 February 2021).

STATUTORY RECOGNITION AND ASSISTANCE IN THE BVI

Currently the statutory regime for seeking 'assistance' for foreign insolvency proceedings in the BVI is set out in Part XIX (*Orders in Aid of Foreign Proceedings*) of the Act. Under Part XIX, 'foreign representatives' (essentially, insolvency officeholders) from certain designated countries may apply to the BVI court for a range of remedies as set out in that part of the Act, primarily to enable the foreign representative to gain control of assets and take other steps to secure property and information within the jurisdiction in support of the foreign insolvency proceedings.

Part XIX operates on an application-by-application basis, and gives foreign representatives express rights to apply to the BVI court for orders, but without conferring broader 'recognition' of the foreign representative of the sort envisaged by the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law').

The list of designated countries for the purposes of Part XIX of the Act currently includes only nine countries: Australia, Canada, Finland, Hong Kong SAR (China), Japan, Jersey, New Zealand, the United Kingdom and the United States of America. Notably, it does not include Bermuda, Cayman, Cyprus or Guernsey – jurisdictions with which BVI companies frequently have a strong connection.

Whilst the Act does include provisions for the recognition and assistance of foreign representatives under Part XVIII of the Act (*Cross-Border Insolvency*), which is based on the Model Law, those provisions have never been brought into force, and there is no current intention to do so.

COMMON LAW RECOGNITION IN THE BVI

In *Net International*, the Israeli trustee in bankruptcy succeeded at first instance in obtaining an order for his recognition in the BVI, and an order, by way of common law assistance, rectifying a BVI company's register of members to record the trustee in bankruptcy as a shareholder.

On appeal, one of the key issues was whether the common law jurisdiction to grant recognition and assistance survives in the BVI, having regard to the provisions of Part XIX of the Act.

In analysing the position, the Court made clear that common law rights cannot be abrogated by statute unless that intention is clear from the wording of the statute or is necessary by implication of the words used. The Court held that there was no express provision in Part XIX which abrogates the common law recognition jurisdiction, nor was such abrogation implied by the terms of those provisions. Indeed, the Court held that Part XIX did not deal with the issue of recognition at all. The Court therefore unequivocally confirmed that the common law jurisdiction to recognise foreign insolvency officeholders survives in the BVI.

The Court made the point that Part XVIII of the Act does constitute a complete scheme for the recognition of foreign insolvency proceedings which may in turn abolish the common law right of recognition, if it were to be brought into force. However, given that there is no current intention to bring those provisions into force, this is a moot point.

COMMON LAW ASSISTANCE IN THE BVI

The Court of Appeal emphasised that recognition and assistance were two distinct, albeit related concepts.

'Recognition' is the formal act of the BVI court recognising or treating the foreign representative as having status in the BVI.

'Assistance' goes further in giving the foreign representative power to deal with BVI assets.

The Court acknowledged that recognition by itself is generally of limited utility unless accompanied by the grant of assistance and that therefore recognition usually goes hand in hand with assistance. Despite this, the Court was clear that recognition does not necessarily include assistance.

The Court of Appeal therefore had to decide whether a common law right of assistance survived in the BVI having regard to the enactment of Part XIX of the Act. The Appellant relied on the first instance decision of Justice Bannister from 2013 in Re C (*a debtor*), [5] in which the Judge made obiter findings that Part XIX was a complete code for granting assistance to foreign insolvency officeholders in the BVI, and as such assistance should not be made available at common law.

The Court of Appeal held that the obiter findings in Re C should be followed, ruling that Part XIX of the Act was a 'comprehensive scheme for applying for assistance' which only applies to foreign representatives from designated countries. Accordingly, the effect of Part XIX is that assistance at common law does not exist in the BVI. and

5 BVIHC(COM) 0080/2013.

foreign insolvency officeholders from non-designated countries are therefore unable to apply for assistance.

Thus, as Israel is not a designated country under Part XIX of the Act, the Israeli trustee in bankruptcy was not entitled to an order for rectification by way of common law assistance.

In giving judgment, Justice of Appeal Webster noted that he had come to this decision with some regret, 'as it does not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross border insolvency matters.' However, he stressed that Part XIX of the Act clearly reflected a public policy in the BVI to afford assistance only to officeholders from designated countries.

HAS THE GOLDEN THREAD BEEN CUT?

This decision is helpful in confirming that the BVI court does have a common law jurisdiction to recognise foreign insolvency officeholders, but the utility of that position is unclear, and appears not to serve the purpose of the 'golden thread', which was to ensure as far as possible a unified rather than a fragmented approach to cross border insolvency.

The finding that common law assistance is not available will present challenges to insolvency officeholders from non-designated countries, which include many of the offshore jurisdictions with close ties to the BVI, such as Cayman, Bermuda or Guernsey. Liquidators from those jurisdictions can no longer seek relief from the BVI Court on a summary basis; they will instead need to assert substantive legal rights in the jurisdiction.

In the case of Net International, for example, the trustee in bankruptcy would need to commence rectification proceedings in the BVI rather than simply seeking assistance to obtain an order for rectification In other cases, foreign officeholders may need to apply for the appointment of a liquidator in the BVI, if the grounds to do so can be established, or assert other substantive rights, which may or may not require them to first seek recognition. The effect is therefore a tendency towards a multiplicity of proceedings, rather than a unified approach.

WHEN IS COMMON LAW RECOGNITION REQUIRED?

This then casts a spotlight on the concept of common law recognition as a standalone concept. Whilst it is helpful to have confirmation that the concept still exists in the BVI, there remains significant uncertainty as to its application.

There are remarkably few authorities considering this in the BVI, but the question of the need for recognition was considered by the BVI Commercial Court in *KMG International NV v DP Holding SA*. [6] In that case, a liquidator had been appointed in Switzerland in respect of a Swiss company which in turn owned the shares in a BVI company. The liquidator wished to vote the shares in the BVI company to appoint directors, and thus assume control of the company. The company objected to this, arguing that no such step could be taken unless and until the foreign liquidator had sought formal recognition of his appointment from the BVI court. That argument was rejected by the Judge, who found that where a foreign company's properly appointed liquidator is that company's agent under the law of its home jurisdiction, the liquidator does not need formal recognition or assistance of the BVI Court in order to vote and otherwise deal with shares that it owns in a BVI company.

Whilst the decision in *KMG* is helpful to some extent in confirming that recognition may not be required at all for a foreign officeholder (such as a properly appointed liquidator) to take steps to assert control over a BVI company, it remains somewhat unclear where the line should be drawn as to when recognition is or is not required. The judgment itself recognised this. The judge concluded as follows:

'It is an important question to ask in what circumstances a foreign liquidator would need to obtain the recognition and assistance of this Court. In my respectful view, for a foreign liquidator to vote shares held by the foreign corporation over which he is a liquidator, in accordance with the foreign law governing the corporation and his appointment, is not one of those circumstances.' [7]

Consequently, there remains no firm guidance as to when recognition would be required, and this remains a grey area in BVI law.

CONCLUSION

Given the BVI's prominent role in the international economy and the flow of global capital, and in the light of the likely fallout from the Covid-19 pandemic, the BVI's insolvency regime needs to be fully available to international stakeholders.

At present, the golden thread appears to have unravelled almost completely, save in respect of those nine countries that have been designated under Part XIX of the Act, and the residual jurisdiction to grant common law recognition (in circumstances which remain unclear).

The obvious solution would be either to substantially widen the list of designated countries under Part XIX so that foreign insolvency officeholders from more countries can avail themselves of the statutory cross border assistance regime, or to bring Part XVIII of the Act into force so that the BVI becomes a Model Law jurisdiction.

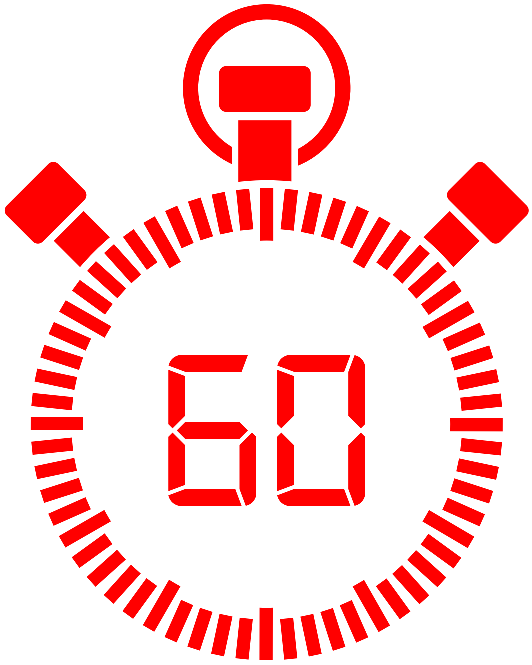
It remains to be seen whether the BVI government will consider taking either of these steps.

An original version of this article was first published in International Corporate Rescue, July 2021.

6 BVIHC(COM) 144 of 2016 (decision of Justice Wallbank, 10 May 2017).

7 *Ibid.*, per Wallbank J at paragraph [35]

We have been speaking to a diverse range of members and speakers behind the FIRE Community about dinner parties, perfect weekends and what their strangest career experience is. Rick Brown of HFW, Kristina Kicks of Interpath Advisory and Hannah Davie, Steve Holt & Amaechi Nsofor of Grant Thornton talk FIRE and beyond.



60-SECONDS WITH:

KRISTINA KICKS, MANAGING DIRECTOR, INTERPATH ADVISORY

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

A Having just returned from a hot and sunny holiday, right now, I would say living somewhere with a much warmer climate than the UK summer this year! From a profession viewpoint, I used to think being a maths teacher would be rewarding and I've always loved working with numbers!

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

A There have been many experiences as you just don't know what each day will bring with contentious insolvency and asset recovery. But one that comes to mind is a site visit to review the contents of safety deposit boxes to check for potential large sums of cash. This was under heavy security and was both strange and exciting; it was a slight anti-climax when the boxes turned out to be empty though!

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

A The easiest aspect is having the passion, drive and commitment to pursue and achieve the best outcome for victims and creditors. A tricky aspect can be juggling the demands on FIRE cases but I am thankful and lucky to work with a great team.

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

A I was inspired by a former judge speaking to me on the five year plans she had during her career. I have found this to be really effective as a career outlook. I am also a firm believer of "being yourself" and this is up there as one of the best pieces of advice for me!

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

A This is always a tricky question for me as I enjoy different aspects of cases for different reasons – the most interesting cases may not always sound as if they are! I have a range of cases, from investor fraud corporate insolvencies to bankruptcy proceedings in matrimonial matters. I find analysing and applying the technical aspects of insolvency law as an insolvency practitioner very rewarding both to formulate asset recovery strategies and during the insolvencies generally. One of my cases earlier this year involved defeating a challenge to key information requests and issues raised on the insolvency to ensure there was no delay to the recovery actions and the insolvency proceedings were not negatively impacted.

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

A Paddle boarding. I had my first try in the sea on holiday and naturally fell straight off. I have been promised it is easier along our local river and canal, but the water will be much colder (maybe they're trying to trick me!). I also have visions of paddle boarding with my puppy, Luna, in the future.

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

A It sounds like a cliché but my family and friends – I am still close with my school friends and despite having all taken different paths in our lives, we have remained the best of friends and we keep each other all very grounded.

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

A I started running again and have vowed to continue with this! I am determined and so have a 10km booked in for October and will then book more runs, provided I survive the 10K.

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

A So much choice... travelling, in person meetings, in an office with colleagues - generally the hustle and bustle of life as we used to know it!

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

A For a lively dinner party, a group of comedians: John Bishop, James Corden, Kathryn Ryan, Phoebe Waller-Bridge – to name a few.

Q What does the perfect weekend look like?

A Time with my children, family and friends - dog walks, dinner, wine, chatting, but I very much enjoy the treat of a weekend away with friends for some quality adult time as well.

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

A It is going to be great to catch up with contacts at my first post-Covid in person conference and also listen to the sessions away from a computer screen! I am also looking to forward to making many new connections.

FUNDING INSOLVENCY CLAIMS

THE COURT'S POSITIVE APPROACH TO THE ASSIGNMENT MODEL

Authored by: Alistair Croft - Omni Bridgeway

Insolvency Practitioners (IPs) are often appointed in circumstances where there appear to be, on the face of it, possible claims within the estate. The problem is that there are frequently no funds available in which to carry out early investigation and corporate intelligence to consider those potential claims.

IPs, therefore, either risk their own time in making such investigations, or seek seed funding from litigation funders to allow for such investigations.

Seed funding allows IPs, and those they instruct, to properly investigate claims at an early stage. Without it, IPs are often severely impeded in relation to the evaluation of the merits of claims, and, importantly, also the investigation into any assets from which a recovery could be made, with the result that good claims are often not pursued.

The benefit to the funder arises because it can fund certain aspects of early investigation in stages without having to commit to funding the full budget for the case (about which little is known) all the way to trial and having to take on the consequential obligation for adverse costs. If the funder also has an internal asset tracing department, like Omni Bridgeway, it can also add value by identifying potential assets from which a recovery can be made. If the information which the IP and the funder are able to gather is positive, this would give the funder the option to proceed whilst a negative outcome allows the funder to withdraw with limited exposure.

An increasingly popular structure to fund such claims can be through the assignment model. Outside an insolvency context this model is generally not permitted in common law jurisdictions. There have been a number of cases over the last 12 months in such jurisdictions which have dealt with the effect of assignments and raised certain factors to consider as to their timing, including the IPs' investigatory powers.

In England, since October 2015 under section 246ZD of the Insolvency Act 1986 (IA), an administrator or liquidator (though not trustee) is able to assign certain causes of action which could previously only be pursued by the office holder (ss. 213 (fraudulent trading), 214 (wrongful trading), 238 (transactions at an undervalue) and 239 (preferences). That right of assignment does not extend to the officeholder's wide ranging investigatory powers under ss 234–236 IA 1986 (Delivery-up of company property; Duty to co-operate with officeholder; and Inquiring into the company's dealings). That seems sensible from a policy perspective, because those powers are not to be used by the IP when it has been decided to litigate (so the IP cannot bypass the normal procedures of disclosure) and the same would apply to any assignee.

Re Transform Medical Group (CS) Ltd [2020] EWHC 2064 (Ch) concerned claims arising out of alleged faulty breast implants manufactured by PIP. The value of the group action claims caused Transform to go, ultimately, into administration.

The administrators of Transform had claims against the law firm and counsel who had acted for Transform in the PIP proceedings and assigned "all claims, choses in action and rights whatsoever" to a SPV and agreed to provide that SPV "with reasonable access to all documentation which is in the Administrators' possession and control relating to Transform's defence in the Litigation, to include any privileged documentation."

The assignment also included that the administrators would be entitled to certain sums from any net recoveries, with the remainder being retained by the SPV and the original claimants. The administrators made an application for disclosure and delivery up of Transform's solicitor's file under sections 234 and 236 IA against the insurers of the law firm and counsel. That application was resisted by the insurers on grounds of privilege arising under a joint retainer, with the aim that the solicitor's file would not be disclosed to the administrators and then onto the assignee SPV. The court decided that the solicitor's file was Transform's property, and the administrators were entitled to hand that file to the SPV as the company's successor in title. The case sets an important precedent for IPs, as it allows them to assign claims effectively, together with the privilege which attaches to the documents needed to establish such claims.

In Manolete Partners Plc v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch), Manolete, a funder, took an assignment of a number of causes of action from the liquidators of Blackwater. The funder issued a hybrid claim, by insolvency application notice, for transactions avoidance claims and a misfeasance claim against the directors (such claims very often go hand-in-hand). The respondents argued that the funder did not have standing to issue the misfeasance claim using s. 212 IA, which was only available to certain officeholders and could not be assigned. The court, reluctantly, agreed, noting that whilst it was common practice to issue claims in this way because the issues arise out of the same set of facts and the same insolvency, the rules do not permit it. Chief ICC Judge Briggs stated,

"I reach these conclusions with regret...the result fails to ensure that claims of this nature are dealt with expeditiously, allotting an appropriate share of the court's resources. An office-holder and assignee of claims will be forced to issue claims arising from an insolvency using different procedures, in different lists within the Business and Property courts, with a risk that without a transfer they will be case managed, at least, by different judges although the claims arise out of the same facts".

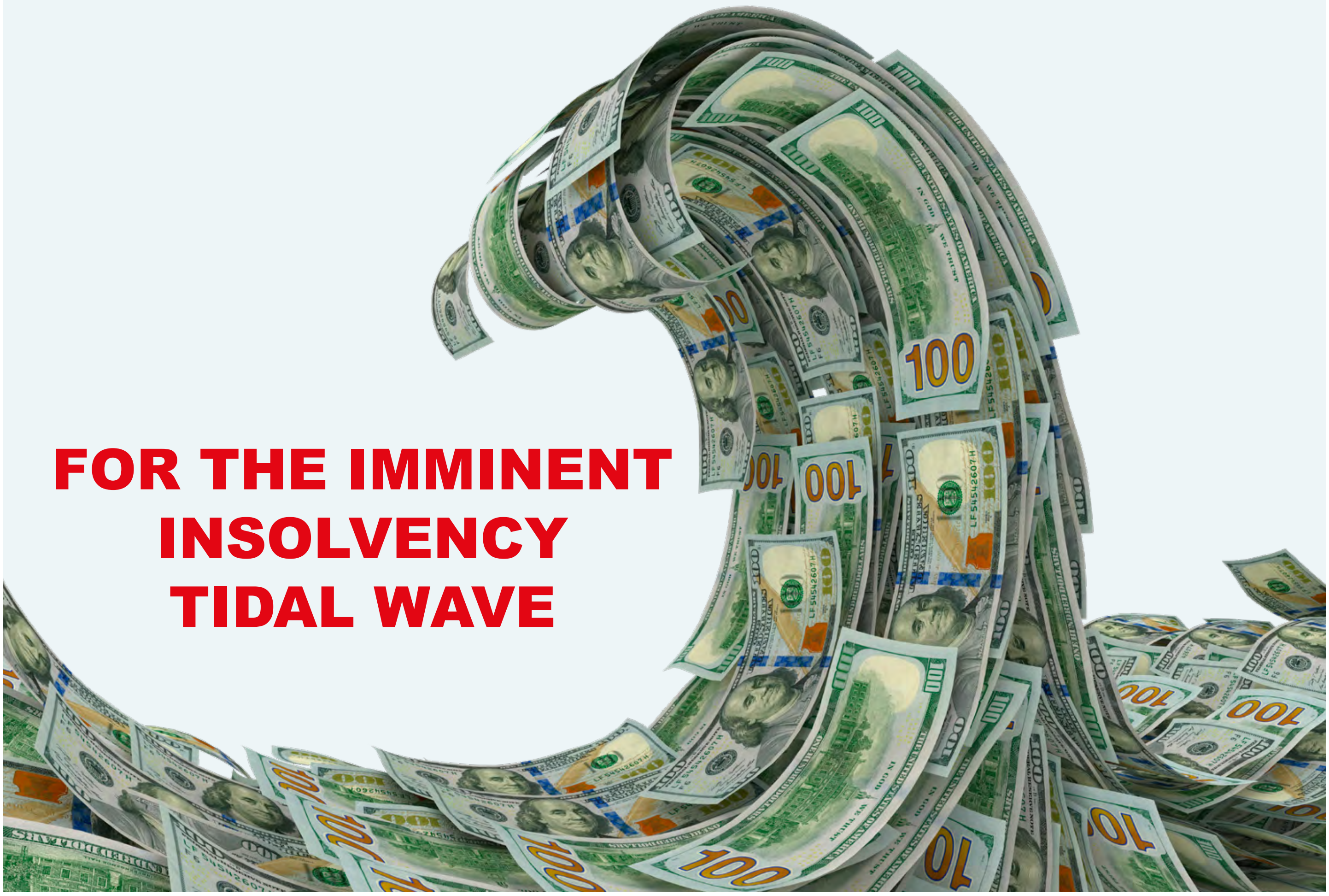
Subject to regulatory reform, the judgment will bring about delay and increase costs, including a separate court fee of up to £10,000.

In Re Totalbrand Ltd; Cage Consultants Ltd v Iqbal and another [2020] EWHC 2917 (Ch), the liquidator assigned, under section 246ZD IA, various claims to a third party which were advanced against, amongst others, a former director. Since the assignment the company was dissolved. The director applied to the court for the assigned claims to be dismissed or stayed because while 246ZD IA allowed the assignment of a claim, it did not amend the identity of the individual to whom an award could be made under the IA. (i.e. the company or the liquidator) and as the company no longer existed there was no one in whose favour an award could be made. Mr Justice Snowden rejected the arguments on the following grounds:

"the plain wording of s. 246ZD(2) itself…makes clear that it permits the assignment of the right of action "including the proceeds of an action"; "s. 246ZD requires a purposive and non-literal interpretation to be given to the sections… to the effect that the right to apply to the court is given to the office-holder "or his assignee following an assignment of the right of action"; otherwise it "… would deprive s. 246ZD of its practical utility for office-holders and thereby frustrate the clear legislative purpose" and the company would have to be kept artificially alive which would likely lead to delay and further costs being incurred to the detriment of creditors.

The number of cases before the English court regarding 246ZD IA are limited, though the courts appear to be interpreting potential ambiguities in untested legislation in line with Parliament's legislative purpose because prior to 2015 not many of the now-assignable claims had been brought against miscreant directors. The reasons cited prior to 246ZD IA by Economic Impact Assessment produced by the Insolvency Service on behalf of the Department for Business Innovation and Skills were due to insufficient funds in the estate to fund such actions, a reluctance on the part of creditors generally to fund such claims, a high evidential bar in fraudulent trading claims, coupled with a lack of director's assets against which to enforce a successful claim. The growth of litigation funding is doing much to address these issues (including specialist funders being able to identify at the outset assets from which to recover) and the expected Covid-increase in insolvencies is likely to see the assignment model continue to grow in popularity. It is worth considering, though, at what point the assignment should be made, bearing in mind that the investigatory powers under ss 234–236 IA cannot be assigned and whether, rather than acquiring the claim outright, there remains an element of deferred consideration payable to the estate upon recovery (so that the office holder remains involved). Where there are challenges to the assignment model, the English courts appear to look favourably, if there is an ongoing benefit to the estate, post assignment (see also the Australian funded case Re LCM Operations Pty Ltd; 316 Group Pty Ltd (in liq) [2021] FCA 324; BC202102384 which found that the funder assignee was not in breach of the implied undertaking when using documents obtained from a public examination against one of the examinees in subsequent litigation).

HOW CREDITORS CAN PREPARE



FOR THE IMMINENT INSOLVENCY TIDAL WAVE

Authored by: Christopher Weil - Mintz Group

As the pandemic upended the global economy, creditors braced for an onslaught of insolvencies that never came.

Indeed, according to a March 2021 study by global trade credit insurance firm Atradius, global insolvencies actually declined by 14 percent in 2020.

However, this had less to do with the resiliency of businesses than it did with the effectiveness of fiscal support programs introduced to support corporations. In the United States, for example, the CARES Act included nearly $860 billion in business loans and guarantees. The United Kingdom guaranteed 80 percent of large businesses loans of up to £300 million. In Japan, affected companies could receive subordinated loans and rent subsidies. This story was repeated around the world—not just in major economies, but emerging markets as well: for example, Poland established a liquidity guarantee fund for medium and large companies.

While the Delta variant has injected some uncertainty into the pace of recovery, there is no question that the end to trillions of dollars of capital injections is on the horizon. For some debtors, the removal of this support will represent a significant and sudden erosion of their financial position, exposing weaknesses that support had kept hidden and calling into question their ongoing viability. Some of those exposed vulnerabilities may have been caused by the pandemic and some may have been long in the making, but when the inflection caused by the removal of support occurs, the insolvencies expected in 2020 will soon materialize in full force.

Along with a higher risk of insolvency, creditors should also be mindful of the increased risk of fraud.

The need for governments to respond quickly to the pandemic, and the limitations imposed by lockdowns, presented considerable challenges to providing relief programs with adequate due diligence. In addition to fraud relating to government programs, economic pressures following the end of those programs may well increase the incentive to commit fraud simply to keep the business in operation.

As we emerge from the pandemic and move into a less-forgiving financial environment with a greater risk of fraud, creditors should be more proactive in assessing their debtors' business and fiscal health as they emerge from the pandemic. Rather than wait until insolvency seems likely, creditors should be closely examining any business that appears less than completely healthy. If it turns out that a debtor's viability is questionable, the sooner the situation is out in the open, the more options both creditors and debtors will have to find solutions. Once a debtor declares bankruptcy—an increasingly common defensive strategy—the creditor's position will be significantly weakened.

A rigorous assessment should be comprehensive and consider the debtor's entire ecosystem—not just its business structure, assets, liquidity levels and access to funding, but the health of its customers, supply chain and inventory. The pandemic has brought a new appreciation of how a business can be crippled by a weakness in any of these dimensions. Even in less volatile times, investigations into debtor businesses have uncovered a range of wide issues, such as the use of revenue of a high-performing company to mask problems at a sibling company, increased vulnerability in supply chains due to interrelated vendors, and compromised liquidity due to the encumbrance of assets.

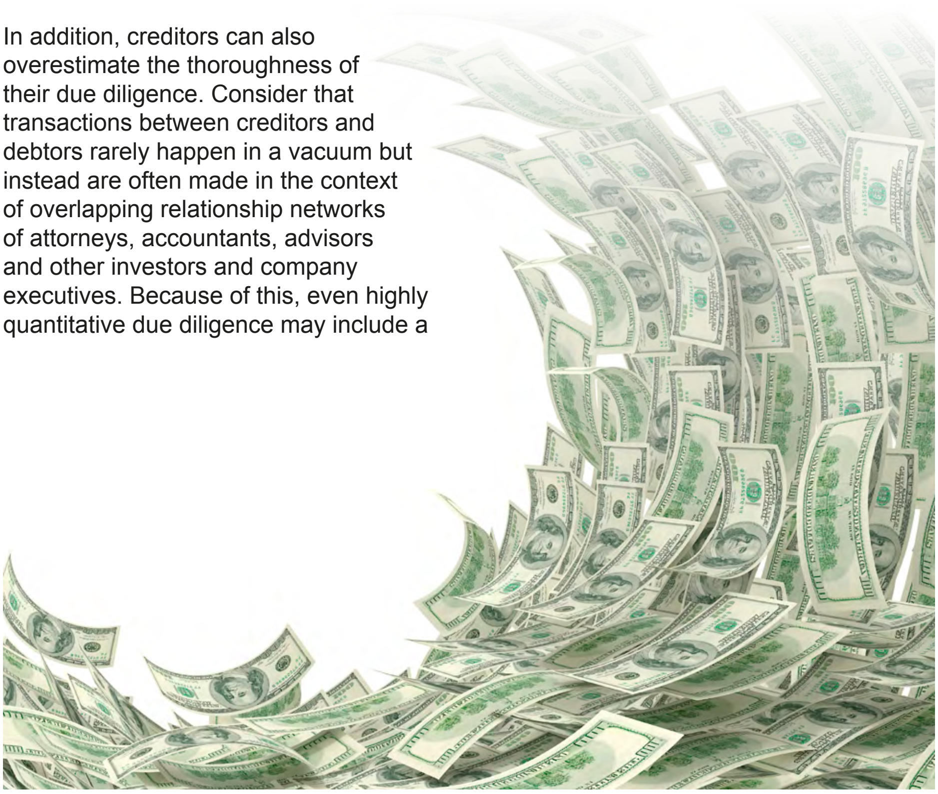
In each of the dimensions that creditors need to consider, the experience of the pandemic has introduced new factors and lowered the threshold prompting concern. For example, it is no longer sufficient to assess the viability of a debtor's vendors; one must also examine the geographic diversification of those vendors and the strength and resiliency of those vendors' own supply chains.

While the wisdom of proactively assessing debtors in this way may seem obvious, there are numerous reasons why creditors may neglect to do so. There is the natural reluctance to invest the time and resources necessary to address problems that are merely possible rather than actual.

The reality is, however, that in a post-pandemic economy, where sustained turbulence is likely and copious government aid absent, debtor problems may be more imminent than they appear at first glance.

In addition, creditors can also overestimate the thoroughness of their due diligence. Consider that transactions between creditors and debtors rarely happen in a vacuum but instead are often made in the context of overlapping relationship networks of attorneys, accountants, advisors and other investors and company executives. Because of this, even highly quantitative due diligence may include a subjective element that limits a deeper look below the surface numbers. This subjectivity is likely to be all the greater in the aftermath of the pandemic, when empathy from the experience of having survived a shared crisis will be high. But the volatile post-pandemic economy is exactly the time when creditors need the steelier, more objective perspective that a thorough examination of debtor positions provides.

One of the most difficult aspects of risk assessment is the accurate forecasting of adverse conditions that may cause previously healthy (or apparently healthy) assets to deteriorate. The removal of government supports is an event that will increase risk for creditors—and is one whose timing and extent is fairly well established. Creditors should arm themselves with this foreknowledge and prepare accordingly.



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POOLING RESOURCES:

INSOLVENCY, CRYPTO AND ELECTRONIC MONEY

Authored by: Mary Young - Kingsley Napley

In the 2020 decision of *Ruscoe and Moore v Cryptopia Limited* (in liquidation) [2020] NZHC 728 the New Zealand High Court in Christchurch considered the situation of an insolvent crypto asset exchange and the status of crypto asset deposits paid by its users. The Court found that those deposits were a species of intangible personal property and an identifiable thing of value which were capable of being held on trust. The consequence of this was that the funds comprising the deposits did not fall within the insolvent estate and were not available for distribution to creditors. Instead they could be returned to the original users of the exchange.

Fast-forward a year and back to this side of the globe, the High Court of England and Wales considered not dissimilar issues in *Jason Daniel Baker and Geoffrey Paul Rowley (as Joint Administrators of ipagoo LLP) v The Financial Conduct Authority* [2021] EWHC 2163(Ch).

In this case the administrators of ipagoo LLP, an electronic money institution ("EMI") which was authorised to issue electronic money, provide payment services across countries and currencies and which was regulated by the Financial Conduct Authority, sought directions from the Court as to the distribution of assets.

Payment providers and EMIs differ from banks in a number of ways but crucially for this case, they are not permitted to take deposits and are obliged to safeguard funds. The rules are set out in the Electronic Money Regulations 2011 ("the Regulations") which themselves derive from EU law. The question the Court was asked to consider, in the event of ipagoo's insolvency, was whether funds paid to ipagoo by its users were held on a trust, created by the Regulations, for the benefit of its users, and whether any funds which had been paid but not dealt with in accordance with the Regulations had the same status.

Under the Regulations, funds received in exchange for electronic money which had been issued must be safeguarded by the EMI. The Regulations set out the options for safeguarding which are by keeping funds received in exchange for electronic money segregated from any other funds held by the EMI (and, where funds are held overnight they must be placed in a separate account with an authorised credit institution or invested in secure, liquid, low-risk assets held by an authorised custodian). Alternatively EMIs must ensure that funds received in exchange for electronic money are covered by an insurance policy or guarantee, the proceeds of which, in the event of insolvency are payable into a separate account designated for this sole purpose. The segregated funds or proceeds of any insurance policy are referred to in the Regulations as the 'asset pool'.

Regulation 24 specifies that, in the event of insolvency of an EMI, the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors and the claims are not subject to the priority of expenses of insolvency proceedings except any expenses relating to the distribution of the asset pool.

The argument which the Court was asked to decide in ipagoo was whether or not the Regulations created a trust relationship between the EMI and electronic money holders:

- **On one side e-money was described as a claim by a holder on the EMI, there is no entitlement for the electronic money holders to interest on funds in the asset pool, and electronic money holders have no interest in the asset pool prior to the insolvency of the EMI. Further, where there were funds which should have been safeguarded but were not, there was no mechanism under the Regulations for those funds to be treated as being part of the asset pool in any event.**
- **On the other side, by looking at the EU laws which the Regulations were intended to implement, it was clear that even funds which had not been safeguarded were intended to be treated as if they had been, and that to achieve this aim required the imposition of a trust under English law. Funds held by EMIs for their electronic money holders were therefore held in much the same way as money held by a solicitor in a general client account. Both the proceeds of the insurance policy and the policy itself would also be subject to a trust.**

The Court commented that the statutory provisions created a relationship which fell somewhere between a bare trust and a personal obligation to repay sums equivalent to those paid by holders for the electronic money. However, the Court found that this did not establish a basis to impose a trust and all the associated features which come along with a trust.

Any funds which should have been protected but were not should not, the Court determined, be treated as if they were subject to the intended protections, but instead an equivalent sum should be treated as falling into the asset pool.

This decision was based on a careful analysis of the Regulations and the EU law they implemented and as such cannot necessarily be used to predict how a Court might approach a similar question arising in respect of a company which is not subject to those Regulations, such as a crypto asset exchange. However, the reluctance of the Court to impose a trust might be an indication of a distinction to be drawn with the approach of the New Zealand Court in *Cryptopia*.

Nonetheless, the decision will place obligations on any insolvency practitioner appointed over an EMI to not only distribute the asset pool to electronic money holders, but also to check whether the asset pool needs to be topped up because of funds which should have been protected (and therefore should have fallen within the asset pool) but which were not subject to the protections set out in the Regulations.

THE USE OF PROVISIONAL LIQUIDATORS IN FRAUD CASES TO PRESERVE

Authored by: Liam Faulkner and Guy Cowan - Campbells

In two unrelated judgments handed down in the same week,[1] the Grand Court of the Cayman Islands dismissed applications by a shareholder to appoint provisional liquidators pursuant to section 104(2) of the Companies Act (2021 Revision) due to a failure by the applicants to jump the "necessity" and "prima facie case" hurdles.

In both cases, the applications were made following the presentation of a contributory's winding up petition on just and equitable grounds alleging a justifiable loss of trust and confidence in the company's management due to alleged fraudulent conduct. In summarily dismissing the applications, the Court has confirmed that it is a serious step to appoint provisional liquidators and that there is a heavy and onerous burden on those that seek such orders. That said, the Court will intervene (and routinely does) where grounds to do so exist.

The four "hurdles"

Under section 104(2) of the Companies Act an application to appoint provisional liquidators may be made by a creditor, contributory or (in certain cases) the Cayman Islands Monetary Authority at any time between the presentation of a winding up petition and the making of a winding up order on the grounds that:

"(a) there is a prima facie case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary in order to prevent –

i. the dissipation or misuse of the company's assets;

ii. the oppression of minority shareholders; or

iii. mismanagement or misconduct on the part of the company's directors."

In *ICG I*, Justice Doyle confirmed that on a plain reading of section 104(2) an applicant seeking the appointment of a provisional liquidator has four main hurdles to overcome:

- **the presentation of the winding up petition hurdle:** the applicant must satisfy the court that a winding up petition has been duly presented and a winding up order has not yet been made;
- **the standing hurdle:** the applicant must satisfy the court that the applicant has standing to make the application to appoint a provisional liquidator, i.e. the applicant is a creditor or contributory of the company;
- **the prima facie case hurdle:** the applicant must satisfy the court that there is a *prima facie* case for making a winding up order on the petition; and
- **the necessity hurdle:** the applicant must satisfy the court that the

1 See the judgments of Doyle J in In the matter of ICG I (Unreported, 4 August 2021, FSD 0192 of 2021) and Parker J in *In the matter of Al Najah Education Limited* (Unreported, 9 August 2021, FSD 0119 of 2021)

appointment of the provisional liquidator is necessary in order to prevent the dissipation or misuse of the company's assets; and/or the oppression of minority shareholders; and/or mismanagement or misconduct on the part of the company's directors.

The two hurdles which will often be the hardest to clear are the *prima facie* case hurdle and the necessity hurdle.

The prima facie case hurdle

On the *prima facie* case hurdle, Doyle J commented that there has been much debate over the years as to the test to be applied in the Cayman Islands and whether the applicant was required to show a good prima facie case or merely a *prima facie* case, and the meaning of those phrases.

Doyle J referred to the decisions of Parker J in *Grand State Investments Limited*[2] and Segal J in *Re Asia Strategic Capital Fund LP*[3] as authority for the proposition that it was not necessary for the applicant to demonstrate that a winding up order will be granted; a prima facie case is established where it is likely, on the basis of a case established by allegations supported by evidence which have not been disproved at the interim stage, that the petitioner would obtain a winding up order on the hearing of the petition.

Doyle J ultimately concluded in ICG I that it was not necessary for him to determine the standing and *prima facie* case hurdles as it was clear to him that the applicant had failed to overcome the necessity hurdle.

The issue was, however, determined in *Al Najah Education Limited* with Parker J adopting a consistent position to the authorities cited by Doyle J in ICG I.

The necessity hurdle

In *Al Najah Education*, Parker J confirmed that there must be clear or strong evidence to show that there is a serious risk that one or more of the wrongs identified in section 104(2)(b) of the Companies Act may well occur if provisional liquidators are not appointed.

In *ICG I*, Doyle J considered the tests to be applied where it is alleged that the appointment of provisional liquidators is necessary in order to prevent (i) the dissipation or misuse of the company's assets and/or (ii) mismanagement or misconduct on the part of the company's directors and held that:[4]

- **The risk of dissipation test:** there is a heavy burden on the applicant, requiring clear or strong evidence as to necessity, to show that the assets of the company are being, or are likely to be, dissipated to the detriment of the petitioner and that there is a serious risk that the assets may not continue to be available to the company unless provisional liquidators are appointed; and
- **The test for mismanagement or misconduct on the part of the company's directors:** mismanagement or misconduct on the part of the directors connotes culpable behavior involving a breach of duty or improper behavior that involves a breach of the governing documents and governance regime.

Application of section 104 in cases of fraud

While the appointment of provisional liquidators under section 104 will always turn on the particular facts of a given case and the strength of the written evidence (particularly as the evidence will only be tested summarily, and witnesses will not be subject to cross-examination), evidence of fraud will often provide a clear path over both the prima facie case hurdle and the necessity hurdle, particularly where the alleged wrongdoers remain in control of the entity in question, thus presenting a risk that one or more limbs of section 104(2)(b) will apply.

A good example of section 104 being relied upon in the case of fraud was In *The Matter of HQP Corporation Limited*[5] where certain disadvantaged shareholders relied upon section 104 to prevent, on an urgent basis, the redemption of shares which, if effected, would have resulted in a small number of shareholders stripping all value out of the company and the company becoming insolvent. The case concerned an admitted fraud by the company's principal and former CEO, whereby various performance metrics had been significantly inflated to (1) induce new investment; and (2) to persuade existing shareholders to consent to that new investment and to subordinate their rights to those of the new shareholders. Following the discovery of the fraud, those new shareholders – who had the least-restrictive share rights – submitted redemption requests, which (under the company's highly unusual Articles) would have had the effect of stripping all value out of the company and leaving the majority of shareholders with nothing.

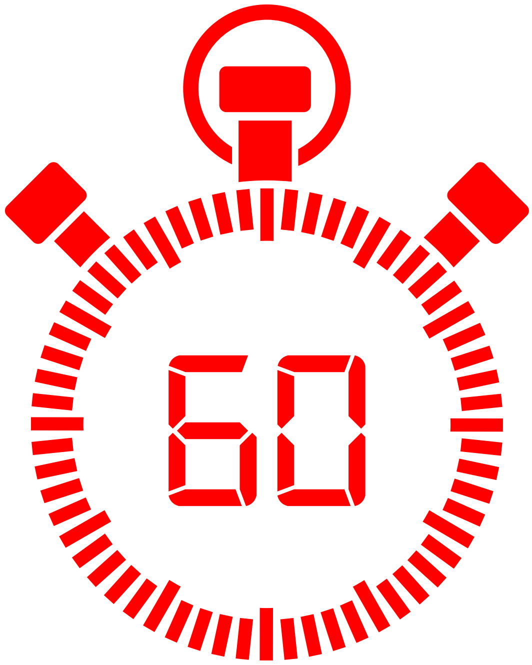
The petitioners (who petitioned qua contributories on various just and equitable grounds and, alternatively, as contingent or prospective creditors on the grounds of insolvency) were able to introduce evidence of the admission of fraud and also of the company's inevitable insolvency if the redemptions were to be effected. In addition, the petitioners asserted under section 104 that the appointment of provisional liquidators (and the consequential stay on redemptions) was necessary to prevent the dissipation or misuse of company assets (in the sense of such assets not being ratably distributed amongst creditors) and to prevent oppression to minority shareholders. Because the Articles provided that redemption would not take effect until a payment to shareholders was in fact made, the Court directed the provisional liquidators not to make any payments and thereby ensure that no redemptions were effected.

It is long settled that the appointment of provisional liquidators is a most serious order, which demands the most anxious consideration by the Court, and that the circumstances of the case have to justify taking such a drastic step. Nevertheless, whilst the relief in *HQP* was granted under urgency and without opposition, the case highlights the Court's willingness to appoint provisional liquidators where it can be shown that a serious fraud has occurred and where there is an immediate need to protect stakeholders as a result of the same, thereby overcoming both the prima facie case hurdle and the necessity hurdle described above.

Campbells acted for the share receivers and independent director in successfully opposing the application to appoint provisional liquidators in ICG I and acted for the successful applicants in Re HQP.

2 Unreported, 28 April 2021, FSD 0011 of 2021 (RPJ)
3 *Re Asia Strategic Capital Fund* LP 2015 (1) CILR N-4
4 Citing the tests described by Segal J in *Re Asia Strategic Capital Fund LP*
5 Unreported, 16 July 2021, FSD 190 OF 2021 (DDJ)

We have been speaking to a diverse range of members and speakers behind the FIRE Community about dinner parties, perfect weekends and what their strangest career experience is. Rick Brown of HFW, Kristina Kicks of Interpath Advisory and Hannah Davie, Steve Holt & Amaechi Nsofor of Grant Thornton talk FIRE and beyond.



60-SECONDS WITH:

STEVE HOLT, PARTNER, GRANT THORNTON

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

A I would run my own shop that would somehow involve an awful hybrid of sports, music and pointless technology. I don't think it would last long!

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

A Getting stuck in Vladimir Putin's private wine tasting room in a limestone mine 100 metres below ground while investigating a bank collapse is probably up there with the stranger experiences I've had.

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

A In the investigations space, a lot of what we do is reliant on instinct – knowing where to look, when something doesn't fit properly or doesn't pass the smell test is vital in uncovering wrongdoing or finding hidden assets. You can't really plan for that spark to hit you.

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

A It was entirely stolen from Steve Martin in Planes, Trains and Automobiles, but the phrase "have a point" was drummed into my head in respect of writing early in my career. That, and silence is often the best tool in an interview – people love to fill empty space!

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

A Sadly I can't talk openly about many of our matters for obvious reasons, but our work for the independent inquiry into Boohoo Group plc's supply chain was certainly eye-opening and a good marker for what we should learn to expect in respect of ESG investigations.

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

A Speak a new language. Embarrassingly, I can barely speak one language and I am always in awe of multilingual colleagues.

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

A Headphones – they solve so many problems!

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

A Rebalancing life and work. I love my work and really enjoy it, but being able to spend quality time with loved ones and carving out time for myself didn't happen enough pre-Covid

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

A Travelling. One of the best parts of our work is building relationships, and doing so in new and interesting locations – something I have missed over the last 18 months

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

A It would depend on the dinner party! I like anyone who can tell a good story and captivate the imagination, so it could be anyone from Nelson Mandela to Lemmy Kilmister of Motörhead!

Q What does the perfect weekend look like?

A Being afforded some sleep, spending quality time with family, maybe a round of golf and a barbeque with friends and family – I am easily pleased!

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

A Seeing people and having a good catch-up chat – video calls are helpful and functional, but nothing beats the connection you make when you actually sit down with someone and hear what they've been up to.

FIRE Starters Global Summit

24th - 25th February 2022

Conrad Hotel, Dublin

TL4 in Dublin, where it all began...

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