MOURANT OZANNES

UPDATE

Litigation News, Q2 2017

A warm welcome to the latest edition of Mourant Ozannes' litigation newsletter.

It has been another relatively busy quarter across our jurisdictions, with continued developments to law and regulation, and decisions made in the Courts that may well have an impact on companies, trusts, trustees and other clients we work with on a regular basis.

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Restraining the pursuit of foreign proceedings in the British Virgin Islands

Update prepared by Shane Donovan (Senior Associate, BVI)
June 2017

// The courts of the British Virgin Islands will, in appropriate cases, act to restrain the bringing or continuing of foreign proceedings, or the enforcement of foreign judgments in the BVI or worldwide, where the claimant in the foreign proceedings is amenable to the BVI court's jurisdiction, and either an injunction is required to protect against the invasion or threat of invasion of a legal or equitable right, or the claimant is guilty of unconscionable conduct. However, any application must be made promptly and before the foreign proceedings are too far advanced.

In *Adamovsky & Stockman Interhold SA v Malitskiy & Filipenko* (Appeal No. BVIHCMAP2014/0031, 3 February 2017), the Eastern Caribbean Court of Appeal confirmed that the principles on which British Virgin Islands (**BVI**) courts will act to restrain the bringing or continuing of foreign proceedings ("anti-suit" injunctions) are the same as those on which they will restrain enforcement of a foreign judgment in the BVI or worldwide ("anti-enforcement" injunctions).

Factual Background

The respondents had obtained a judgment against the appellants in a claim for unfair prejudice in the sum of US$35.8 million from the BVI court on 1 October 2014 (the **BVI Judgment**). The day after judgment was handed down in the BVI, the appellants commenced proceedings against the respondents in Ukraine.

On 5 November 2014, the respondents applied to the BVI court for an anti-suit injunction to restrain the prosecution of the Ukrainian proceedings. That application was to be heard by the BVI court on 20 November 2014. However, the day before the hearing of the respondents' application in the BVI, the Ukrainian court entered judgment in favour of the appellants against the respondents in the sum of US$49.5 million (the **Ukrainian Judgment**).

The hearing in the BVI nevertheless proceeded on 20 November 2014, and by order dated 21 November 2014, the BVI court restrained the appellants from enforcing the Ukrainian Judgment in the BVI and elsewhere in the world (other than Ukraine) (the **Anti-Enforcement Order**).

The Applicable Legal Principles

The Court of Appeal endorsed the general principle as stated in rule 38(5) of *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed.) that:

[A]n English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgments, where it is necessary in the interests of justice for it to do so.

It stated that the basis of the jurisdiction exercised by the BVI court in anti-suit cases had been established by Pereira JA (as she then was) in *Krys & Lau v Stichting Shell Pensioenfonds* (Appeal No. HCVAP 2011/036, 17 September 2012), where she said:

[20] There is no doubt that the court has jurisdiction in personam, where 'the ends of justice' so require, to restrain a person amenable to its jurisdiction from commencing or continuing with proceedings in a court abroad. ... Parameters within which this jurisdiction must be exercised must not be fixed but remain fluid or flexible as equity must adapt and find new solutions to new problems in fulfilling 'the ends of justice'. ...

...

[32] [T]he most obvious example in which the jurisdiction will be exercised is where the conduct of the claimant pursuing foreign proceedings is said to be vexatious or oppressive or otherwise unconscionable.

The Court of Appeal thus stated that there are two threshold requirements to establishing jurisdiction for the purpose of seeking anti-suit/anti-enforcement relief:

1. The person sought to be restrained must be amenable to the court's jurisdiction; and
2. Assuming amenability is established:
   (a) the injunction is required to protect against the invasion or threat of invasion of a legal or equitable right; or
   (b) unconscionable conduct on the part of the person to be restrained is made out.

The Court of Appeal stated that, even where the threshold requirements are satisfied, the court must then go on to evaluate whether it would be a right (i.e. proper) exercise of discretion to grant the order. It said that considerations of comity and the need for caution are critical to this evaluative stage.

Amenability

Generally speaking, there is unlikely to be much difficulty in establishing amenability to the BVI court's jurisdiction where the party sought to be restrained is a BVI incorporated company. In *Adamovsky*, this was not an issue as the appellants had appeared on the anti-suit application and participated in the hearing unconditionally.

The Invasion of a Legal or Equitable Right

The most common basis upon which anti-suit injunctions are sought is that the party who seeks to litigate a dispute in a foreign court has agreed to arbitrate the dispute or has agreed that the BVI court should have exclusive jurisdiction. However, the *Adamovsky* case did not involve any invasion or threatened invasion of a legal or equitable right of the respondents. Rather, it was alleged that the appellants had acted unconscionably in bringing the Ukrainian proceedings.

Unconscionability

As the Court of Appeal recognised, whether or not unconscionable conduct is established will involve an evaluative assessment of the facts in any given case.

In *Adamovsky*, shortly before the trial of the unfair prejudice claim in the BVI, the first appellant, Mr Adamovsky, had sought permission to amend his counterclaim to add a claim for rescission of a shareholders agreement that he had entered into with the respondents (the **SHA**). The SHA governed the future relationship between the parties to the agreement so far as it concerned their interest in a group of companies referred to at the trial of the unfair prejudice claim as "the Holding". The SHA did not affect the parties' relationships as shareholders of the BVI company to which the unfair prejudice proceedings related. By the terms of the SHA, Mr Adamovsky's share of the profits of the Holding was reduced by 10%, and he was to be compensated commensurately in other ways.

There was no allegation in the body of the proposed amendment that Mr Adamovsky had suffered any loss or damage as a result of entering into the SHA, and there was no claim for payment of any such loss or damage in the proposed amended prayer of relief. Permission to amend was refused by the BVI court. In refusing permission, the court expressed the view that the SHA had nothing to do with the unfair prejudice claim, and that the proposed claim would be more appropriately dealt with, if anywhere, by the Ukrainian courts.

By their Ukrainian proceedings, the appellants sought rescission of the SHA and claimed multiple punitive damages under Ukrainian law by reason of a fraud alleged to have induced Mr Adamovsky to enter into the SHA.

At first instance, the BVI court granted the Anti-Enforcement Order. It held that Mr Adamovsky's motive in commencing the Ukrainian proceedings and for ensuring that the second appellant, Stockman Interhold SA (**Stockman**), which was never a party to the SHA, jointly obtained the benefit of any judgment in the Ukrainian proceedings, was to arm himself and Stockman with a set off for the purpose of extinguishing the BVI Judgment. In so finding, the BVI court found as a matter of fact that: (i) Mr Adamovsky suffered no loss by entering into the SHA; (ii) he was fully compensated for the loss of his 10% by the arrangements contained within the SHA itself; (iii) the arrangements contained in the SHA were carried forward and partially performed in a "Dissolution Agreement"; (iv) Mr Adamovsky had no difficulty accepting and retaining very substantial benefits under the Dissolution Agreement; and (v) Mr Adamovsky had not received 10% less or any percent less than he would have otherwise received on dissolution of the Holding.

Although the court rejected the respondents' submission that the issues raised in the Ukrainian proceedings had already been adjudicated upon as part of the BVI proceedings, it held, following the decision of the English Court of Appeal in *Masri v Consolidated Contractors International Co SAL* [2009] QB 503, that the court had power over persons properly subject to its *in personam* jurisdiction to make ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments. It held that:

Although the sort of behaviour displayed by Mr Adamovsky in this case took the form of obtaining a money judgment rather than re-litigating the merits of the Claimant's claim, as in Masri, I can see no difference in quality between the two types of conduct. One is an attempt to get a foreign Court to declare contrary to the judgment of the home Court, the other is mounting a baseless claim for losses never suffered, or claimed in the original proceedings, or sought to be claimed in the original proceedings for no other purpose than frustrating the Order of the home Court. Each is conduct on the part of someone who has submitted to its jurisdiction designed to interfere with the processes of the Court.

As regards the question of unconscionability, the Court of Appeal held that:

[W]here the alleged unconscionable conduct turns on the hopeless or baseless nature of the claim, the trial judge in assessing this factor, must exercise great care that he does not burrow into the foreign court's jurisdiction and decide issues of fact that fall squarely within the adjudicative role and function of the foreign court applying its law as the forum court.[1]

The Court of Appeal was of the view that the court below had not been entitled to take a view that the Ukrainian proceedings were baseless as a factor in determining unconscionable conduct. It further held that:

To pursue a juridical advantage in a foreign court which is the court of forum is not, without more, unconscionable conduct. The fact that the appellants filed the claim in Ukraine the day after the judgment of 1st October was handed down is not sufficient to draw a conclusion that the jurisdiction of the courts of Ukraine was cynically invoked.[2]

...

[O]btaining the Ukrainian judgment in the circumstances in which they did, was not tainted by unconscionable conduct. It was conduct in pursuit of legitimate legal claims before a foreign court of competent jurisdiction in

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[1] Paragraph 36
[2] Paragraph 46

which they had the juridical advantage and which the BVI court had declared was the forum court. There could be nothing unconscionable about that.[3]

As regards the court below's reliance on the *Masri* principle, the Court of Appeal said that it *does not provide the court with a roving charter to protect its process including its judgments from any subjectively perceived undermining assault as the trial judge seemed to think.*

The Court of Appeal therefore found that the court below had been wrong to conclude that the appellants had acted unconscionably in bringing the Ukrainian proceedings.

The Exercise of the Discretion

The Court of Appeal also held that the court below had erred in the exercise of its discretion by failing to take into account and give sufficient weight to the following factors:

1. The court had previously ruled that Ukraine was the proper forum for SHA disputes.

2. The court had ruled that the claim in Ukraine was never adjudicated upon by the BVI court and as such there was no cause of action estoppel, no issue estoppel and no *Henderson v Henderson* abuse of process. In relation to the latter, the court had underscored the fact that Mr Adamovsky had tried to litigate the rescission claim in the BVI but had been refused permission.

3. The court had ruled that there was never any justification for restraining Mr Adamovsky or Stockman from litigating the rescission claim in the Ukrainian Court.

4. That these rulings meant, in effect, that the respondents had no equitable right to restrain Mr Adamovsky and Stockman from bringing the proceedings in the Ukraine.

5. That the judgment of the Ukrainian Court was already in existence.

6. It was given in proceedings begun by Mr Adamovsky in a jurisdiction where he was entitled to avail himself of whatever juridical advantages the law of that jurisdiction gave him.

7. It was a final judgment (subject to the right of appeal) of a court of competent jurisdiction given on the merits untainted by any vitiating factors.

8. The correctness of the Ukrainian judgment as a matter of Ukrainian law could not be questioned.

9. The foregoing factors in combination would militate against a conclusion that the Ukrainian proceedings were not an attempt to litigate genuine rights but were designed to frustrate (in the sense of preventing enforcement of) the BVI Judgment.

Conclusion

This case provides a welcome reminder of the principles upon which anti-suit or anti-enforcement relief will be available.

The Court of Appeal's finding that there is no significant difference in the thresholds for granting anti-suit or anti-enforcement relief accords with the decision of the English Court of Appeal in *Ecobank Transnational v Tanoh* [2016] 1 WLR 2231, which was delivered in the period between the hearing of the appeal in *Adamovsky*, and the delivery of judgment.

Cases in which anti-enforcement injunctions have been granted are few and far between. As the English Court of Appeal said in the *Ecobank Transnational* case:

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[3] Paragraph 48

This dearth of examples is not surprising. If … an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgment is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgment was given either because the relevant agreement was reached post judgment or because he had no means of knowing that the judgment was being sought until it was served on him.[4]

An applicant for anti-suit relief should therefore act promptly and claim relief at any early stage. The longer a foreign proceeding is permitted to continue without any attempt to restrain it, the less likely the BVI court is to grant an injunction. Importantly, the *Ecobank Transnational* case (which would be of persuasive value in the BVI) suggests that any time during which the foreign jurisdiction is being challenged will not be left out of account when considering the question of delay.

Considerations of comity will also assume greater force the longer the foreign proceedings are allowed to continue, as the court will be entitled to take into account significant wasted costs incurred in the foreign court proceedings, and the wasted resources and time of the foreign court, which could have been avoided had the applicant acted sooner.

For these reasons, if someone is considering seeking anti-suit or anti-enforcement relief from the BVI courts, they should seek BVI legal advice at the earliest possible stage.

Contacts

Eleanor Morgan
Partner, BVI
+1 284 852 1712
eleanor.morgan@mourantozannes.com

Nicholas Fox
Partner, BVI
+1 284 852 1723
nicholas.fox@mourantozannes.com

Shaun Folpp
Partner, Hong Kong
+852 3995 5729
shaun.folpp@mourantozannes.com

Shane Donovan
Senior Associate, BVI
+1 284 852 1731
shane.donovan@mourantozannes.com

[4] Paragraph 19

BVI Court of Appeal confirms law on the construction of exclusive jurisdiction clauses

Update prepared by Nicholas Fox (Partner' BVI) and Charlotte Walker (Associate, BVI)
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// In *Dmitry Vladimirovich Garkusha v Ashit Yegiazaryan* BVIHCMAP 2015/0010 the BVI Court of Appeal confirmed that, when constructing an exclusive jurisdiction clause, the BVI Courts have and will continue to follow the approach taken by the House of Lords in *Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others* [2007] UKHL 40 (the *Fiona Trust* case)

Introduction

This case concerned an application for leave to appeal to Her Majesty in Council (the **Privy Council**) against a judgment of the BVI Court of Appeal handed down on 6 June 2016, on grounds that the decision raised questions of great general or public importance which ought to be referred to the Privy Council for resolution.

One of the primary questions for resolution was whether the Court of Appeal's judgment included a misstatement of, and was wider than the approach to, the interpretation of arbitration clauses taken by the House of Lords in the *Fiona Trust* case.

Fiona Trust case

The *Fiona Trust* case arose out of eight charterparties. Each one contained a *law and litigation clause* which enabled either party to it to refer *any dispute arising under this charter* to arbitration in London.

The owner of the ships alleged that the charters were procured by bribery, as a consequence of which the charters had been rescinded.

The question was whether an arbitrator or a court of law should determine whether the recision was proper. Accordingly, the issue was whether, as a matter of construction, the arbitration clause was apt to cover the question of whether the contract was procured by bribery.

<u>Approach of the Lower Court</u>

When the Fiona Trust was argued, there was some level of discord among the lower courts as to the proper construction of arbitration clauses. Some courts thought that an arbitration clause referring dispute *arising under* a contract was different in scope to a clause referring disputes *arising out of* a contract. Disputes concerning the rights and obligations created by the contract were said to be captured by the phrase *arising under*, whereas a wider class of disputes was covered by the phrases *in relation to* or *in connection with* the contract. The result was that some disputes were referable to a court of law while others could only be referred to arbitration.

<u>House of Lords Judgment</u>

The House of Lords, led by Lord Hoffman, lamented that the distinctions made in previously decided cases *reflect no credit upon English commercial law*. It held that:

> *the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.*

Accordingly, arbitration clauses were to be:

> *construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.*

It followed, on the facts of Fiona Trust, that the language of the arbitration clause in the relevant charterparties contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it had been procured by fraud, bribery, misrepresentation or otherwise. Accordingly, the clause did apply to the dispute at hand.

The Court also decided that the principle of separability contained in s.7 of the Arbitration Act 1996, meant that the invalidity or rescission of the main contract did not necessarily mean the arbitration agreement is invalid or is rescinded. Section 7 of the Act meant that the two agreements had to be treated as having been separately concluded, and the arbitration agreement could only be invalidated on a ground which related directly to it and was not merely as a consequence of the invalidity of the main agreement.

The House of Lords therefore endorsed the Court of Appeal's analysis that claims to rescind the charterparties on the basis of bribery would fall within the scope of a charterparty arbitration clause. Such allegations did not directly prevent the arbitration agreement from being effective and did not, therefore, affect the parties' obligations to arbitrate.

Garkusha v Yegiazaryan

This case centred principally around two Share Purchase Agreements, which contained an exclusive jurisdiction clause in the following terms[1]:

> *Any disputes, differences or claims arising out of or in connection with this Agreement, including with respect to its performance, breach, termination or invalidity, shall be settled by the courts of the British Virgin Islands*.

The Appellant, who by these agreements had contracted to sell his entire shareholdings in two BVI companies, contended that he had be compelled to do so by threat of violence, intimidation and financial pressure exerted by the other parties. He bought various claims in the BVI, based on those allegations.

In determining whether permission to serve those claims out of the jurisdiction should be granted, the BVI court first had to consider whether the claims that related to the Share Purchase Agreements fell within the exclusive jurisdiction clauses.

At first instance, the BVI Court determined that they did not. The Court of Appeal reversed that decision, finding that they did. In reaching that decision, the Court of Appeal accepted that, for these purposes, there was no distinction to be made between an arbitration clause and an exclusive jurisdiction clause.

The Defendants sought permission to appeal the Court of Appeal decision to the Privy Council. One basis on which the Defendants made that application, was their argument that the Court of Appeal had misstated and adopted a wider test than that set out in Fiona Trust, by stating:

> *Following the guidance in the English and BVI cases I find that as a general principle tort clause for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause and unless there are exceptional circumstances should be dealt with in accordance with the clause.*

<u>Court of Appeal's decision on permission to appeal</u>

The Court of Appeal dismissed the application for leave to appeal to the Privy Council.

In doing so, it confirmed that the Court of Appeal had not declared any principle concerning the construction of exclusive jurisdiction clauses which in any way departed or was intended to depart from or criticise the guidance given by the House of Lords in the *Fiona Trust* case.

[1] Together with one earlier agreement, which contained no such clause.

In reaching this decision, the Court of Appeal held that when the earlier court had declared the *general principle* that *tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause*, it intended no more than to restate in its own words Lord Hoffman's assumption that the signatories to an arbitration clause intended all disputes arising out of their contractual relationship to be decided by the same tribunal, unless the contrary intention is stated.

The Court of Appeal went on to clarify that the earlier court's concluding statement that the parties' intention that disputes should be referred to the court identified in the exclusive jurisdiction clause ought to be followed *unless there are exceptional circumstances* was nothing but the foreshadowing of the discretion which it accepted to be reposed in the court to deny a party access to the jurisdiction chosen in the exclusive jurisdiction clause, where there are *strong grounds* for doing so.[2]

Conclusion

Following this judgment, to the extent it was ever in doubt, the position regarding arbitration and exclusive jurisdiction clauses in the BVI is now clear. The House of Lords decision in Fiona Trust regarding such clauses is persuasive and will continue to be followed.

This is a welcome clarification of the BVI law position.

Contacts

Eleanor Morgan
Partner, BVI
+1 284 852 1712
eleanor.morgan@mourantozannes.com

Nicholas Fox
Partner, BVI
+1 284 852 1723
nicholas.fox@mourantozannes.com

Shaun Folpp
Partner, Hong Kong
+852 3995 5729
shaun.folpp@mourantozannes.com

Charlotte Walker
Associate, BVI
+1 284 852 1729
charlotte.walker@mourantozannes.com

[2] Citing the House of Lords judgment in Donohue v Armco Inc and Others [2002] 1 All ER 749, 759, in which Lord Bingham stated: :

I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.

Protecting the flank: foreign restructuring and provisional liquidations in the Cayman Islands

June 2017

Provisional liquidators are normally appointed to protect company assets pending the hearing of a winding up petition. However, the provisional liquidation process may also be used as a tool to assist with cross-border restructurings.

A company may apply to appoint provisional liquidators in order to protect itself and its assets from creditors while it restructures its business. This is essential where a Cayman Islands company sits within a network of companies undergoing restructuring in a foreign jurisdiction. Placing the Cayman Islands company into provisional liquidation protects it from creditors who are not subject to the moratorium put in place by the onshore court whilst the wider restructuring of the group, including the Cayman Islands company, takes place. In this context, the aim of a provisional liquidation is similar to the UK administration process or proceedings pursuant to Chapter 11 of the US Bankruptcy Code (**Chapter 11**).

Provisional liquidation procedure

The provisional liquidation jurisdiction is governed by section 104 of the Companies Law (2016 Revision). Section 104(2) deals with the traditional grounds for such an appointment, namely that a provisional liquidator is necessary to prevent the dissipation or misuse of the company's assets. The important subsection for restructuring purposes is section 104(3), which provides that the company can make an *ex parte* application to appoint a provisional liquidator on the grounds that it is or is likely to become unable to pay its debts within the meaning of section 93[1] and the company intends to present a compromise or arrangement to its creditors. A compromise or arrangement has been found to include a Chapter 11 restructuring or a foreign scheme of arrangement. It should be noted that in order to take advantage of this provision, the company must present a winding up petition (and have standing to do so). Once the restructuring process is successfully concluded, the winding up petition is simply withdrawn and the company continues in existence.

What happens once provisional liquidators are appointed

The appointment of provisional liquidators triggers a moratorium on claims. The court will grant the provisional liquidator such other powers as it thinks fit. However, the court will be mindful not to disturb the debtor in possession requirement pursuant to Chapter 11. Accordingly, the powers of the provisional liquidator are usually light touch, often being only a power to monitor the progress of the foreign restructuring and report to the court and the creditors. A provisional liquidator will be particularly keen to ensure creditors in a foreign restructuring are afforded the same rights as they would be allowed in proceedings under Cayman law. It is, of course, open to the provisional liquidators to apply for further powers should it become necessary to do so.

Recognition in foreign jurisdictions

The Cayman Islands provisional liquidation regime is capable of recognition in other jurisdictions. Provisional liquidators appointed under section 104(3) have been recognised pursuant to Chapter 15 of the US Bankruptcy Code, examples include LDK Solar Co Ltd and Suntech Power Holdings Co Ltd.

Potential changes - new restructuring moratorium procedure

Whilst the current process for restructuring provisional liquidations is useful, it is paradoxical that the company must be wound up before measures can be put in place to rescue it. With this in mind, proposals have been

[1] ie that the company is cash flow insolvent.

made to revise the regime by amending the Cayman Islands Companies Law and Companies Winding Up Rules. Such proposals call for the creation of a standalone court supervised restructuring moratorium, separate from the winding up regime.

In summary, the proposals would mean:

- There will be no need to present a winding up petition.
- The filing for an appointment of a restructuring officer will give rise to an immediate moratorium.
- The threshold for a restructuring moratorium will be the same as that for appointing provisional liquidators pursuant to section 104(3).
- The moratorium will have extra-territorial effect, although enforcement will only be possible in the Cayman Islands in respect of parties subject to *in personam* jurisdiction.

Conclusion

The proposal paper is still awaiting submission to the Insolvency Rules Committee for review, but it is hoped these changes will make it easier for companies to benefit from the moratorium on claims; in the meantime, companies can take advantage of the procedure as provided in section 104(3).

Contacts

Simon Dickson
Partner, Cayman Islands
+1 345 814 9110
simon.dickson@mourantozannes.com

Contributories winding up petitions: nullity and the ability to substitute a petitioner

Update prepared by Shaun Folpp (Partner, Hong Kong), Jennifer Maughan (Senior Associate, Hong Kong), Christopher Levers (Senior Associate, Cayman Islands) and Jessica Bush (Associate, Cayman Islands)
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// **In a recent decision delivered by the Honourable Mr Justice Segal, the Grand Court of the Cayman Islands has expressly considered the issue of whether a contributory's winding up petition filed by a petitioner who did not have legal standing to petition is null and void; and, if not, whether the court has an inherent jurisdiction to substitute a petitioner to cure such a defect. The decision of Mr Justice Segal has significant implications for a company's members (and those asserting to be its members) wishing to present a petition to wind up a company on just and equitable grounds where the shares are not registered in the petitioner's name and were not for at least six months prior to presentation of the petition.**

Background

The decision stemmed from a contested contributory's petition (the **Petition**) seeking to wind up Natural Dairy (NZ) Holdings Limited (the **Company**) on just and equitable grounds pursuant to section 92(e) of the Companies Law (2016 Revision) (as amended).[1]

Following the appointment of Joint Provisional Liquidators (the **JPLs**) to oversee certain functions of the Company,[2] it was discovered that the petitioning contributory (the **Petitioner**) was not a registered shareholder, but rather held its shares through a nominee arrangement.[3]

Section 94(3) of the Companies Law provides the circumstances in which a contributory is entitled to present a winding up petition (either: the shares, or some of them are partly paid; or they were allotted to him, or have been held by him, and been registered in his name for at least six months prior to presenting the petition; or they have devolved to him through the death of the former holder). As the Petitioner met none of these requirements (being only a beneficial owner of the share at the time of the presentation of the petition, the nominee bank being registered on the Company's register of members), the Company sought to strike out the petition on the basis that the Petitioner failed to comply with the strict statutory requirements of section 94(3)(b) of the Companies Law and as a result the petition was a nullity. In the alternative, the Company argued that even if the petition were not a nullity, it should be struck out on the basis of, amongst other things, the Petitioner's failure to comply with the statutory requirements; that there was no extant application for

[1] In the matter of *Natural Dairy (NZ) Holdings Limited*, cause number FSD 186 of 2016 (NSJ) (2 March 2017), unreported.
[2] As the court has broad discretion upon an application to appoint provisional liquidators to grant them any powers it considers appropriate, the JPLs in this case were given limited powers to discharge two primary functions: preparing a proposal to be submitted to the Stock Exchange of Hong Kong (**SEHK**) for the shares to resume trading; and to investigate potential claims against the Company's former directors.
[3] As the Company is listed in the SEHK (though its shares are not currently trading), many of its shares are held through nominee banks. The Petitioner held its shares in the Company through such an arrangement.

substitution before the court; and, in any event, the court did not have jurisdiction to make an order for substitution on a contributory's petition and, even if it did, the court should not make such an order in this case.

In response, the Petitioner argued that the Petitioner had standing; that even if it did not (and had failed to comply with the statutory requirements), it was not a nullity; that while the court had the discretion to strike out the petition, it should not do so in circumstances where there were contributories registered on the Company's register of members who were willing to be substituted as petitioners and where, the Petitioner submitted, the court had the power to order substitution despite there being no express power to do so under the Companies Winding Up Rules (the **CWR**).[4] The Petitioner went on to argue that if the court was not minded to make an order substituting the proposed contributories onto the petition, the court should grant the Petitioner leave to amend its petition and rely on its claims that it was a creditor.

The Petitioner also argued, amongst other things, that as the requirement to have been a registered shareholder for at least six months prior to the petition was designed to prevent vulture funds or other parties acquiring shares with a view to presenting a petition immediately or shortly after acquisition, the mischief which the statute intended to prevent did not apply.[5]

Did the Petitioner have standing?

The court was not willing to apply a purposive interpretation to section 94(3) of the Companies Law in order to limit its application to those cases that were within the mischief the section was seeking to remedy (ie seeking to protect companies from opportunistic buyers seeking liquidation as a means of realising value). In support of its argument on standing, the Petitioner also sought to rely upon cases dealing with the meaning of members in the context of members' schemes of arrangement. However, the court was not persuaded by either of these arguments as this would require a departure from the settled approach (not to mention directly contrary to the statutory requirement) of requiring petitioners to be registered members for at least six months prior to petitioning and the authorities are clear that a beneficial owner of a share is not a contributory.[6] Accordingly, the Petitioner was unable to satisfy the statutory requirements of section 94(3) and did not have standing to present the petition at the time when the Petition was presented.

Is a Petition a nullity if presented by a person with no standing?

The Company's position was that the ability to petition for the winding up of a company is entirely statutory and, if the requirements set out in the enabling statute are contravened, the consequence is that a petition brought is a nullity. This approach was consistent with a number of authorities which concluded that proceedings which appear to be duly issued, but fail to comply with a statutory requirement, were held to be nullities.[7] The Company further argued that the consequence of the petition being a nullity was that everything done in support of the Petition was incurably bad, including the appointment of the JPLs.[8] In those circumstances, the Company argued that the petition should be struck out and the JPLs' appointment discharged.

The court accepted, as a matter of principle, that there are cases in which proceedings issued without complying with a statutory condition can result in those proceedings being a nullity. However, while the court saw some force in the argument that the requirement to be a registered shareholder was a jurisdictional condition (and not merely a procedural requirement) which must be satisfied in order for a petitioner to have the right to petition, it ultimately considered that where a petitioner lacked standing that, of itself, did not result in the petition being a nullity. This is a surprising finding given that standing to bring a claim (and in this case to present a petition) is a fundamental element, without which proceedings would ordinarily be considered defective. The court also made an analogy to creditors' petitions which had been brought on the basis of a disputed debt and found that although in such circumstances creditors lacked standing, the petition was

[4] The CWR only expressly provide for substitution of a petitioner on a creditor's petition (CWR, O. 3, r. 10).
[5] In the Memorandum and Objects of and Reasons to the Companies Amendment Bill, 2007, Jones J remarked that '[section 94(3)'s] effect is to impose a constraint upon "vulture funds" and those who wish to buy shares with the intention of realizing value by liquidating the company'. It should be noted that section 94(3)(b) is in near identical terms to section 244(1)(a)(ii) of the English Companies Act 1948 and case law decided on that section (and its predecessor, section 40 of the Companies Act 1867) contends that where ownership of shares in a company is in dispute, or where it cannot be shown that someone is a registered member of a company, the question of standing should be determined outside of liquidation proceedings (see, for example, *Brightman J in re J.N. 2* Ltd [1978] 1 W.L.R. 183 at 188; and Vaughan Williams J in *Re A Company* [1894] 2 CH 349 at 351).
[6] *Hannoun v R Limited and Banque SYZ Company Limited* [2009] CILR 124 and *Kelly v Mawson* (1982) 6 ACLR 667.
[7] See for example, *Re Pritchard* [1963] Ch 502.
[8] Citing *MacFoy v United Africa Co Ltd* [1961] 3 WLR 1405 at 160.

considered demurrable rather than a nullity or void.[9] Ultimately, and having regard to the modern practice of limiting cases in which proceedings are treated as a nullity, the court did not consider that it should extend the classes of nullity to this type of case and refused to strike out the petition.

Inherent jurisdiction to substitute

Given the court's finding that a petition which was defective for lack of standing was nonetheless not a nullity, it went on to consider whether it was possible for a registered contributory to be substituted as petitioner. This raised a jurisdictional issue: namely whether the court had the power to order substitution on a contributory's petition in the absence of any express power, either in the Companies Law or the CWR.

Indeed, the only reference to substitution in either the Companies Law or the CWR is expressly confined to creditors' petitions; both the Companies Law and the CWR are silent regarding substitution in the context of a contributory's petition. The Company argued that the use of the court's inherent jurisdiction to permit substitution in the case of a contributory's petition would be inconsistent with the CWR and therefore impermissible. The Company relied on the decision of the Cayman Court of Appeal in *HSH Cayman I GP Limited* to argue that the court is only entitled to invoke its inherent jurisdiction to fill a lacuna left by the CWR where doing so would be consistent with the scheme established by the CWR.[10] As the legislature had excluded a power to substitute on a contributory's petition, the Company argued that to use the court's power to invoke its inherent jurisdiction in making such an order would be inconsistent with the scheme provided for by the CWR, particularly where they specifically provide for a power of substitution in relation to creditor petitions.

The Petitioner argued that the court had the inherent power to control its own process and that the power could be used in any way which was not inconsistent with their overall scheme, pointing out that the inherent jurisdiction had been exercising to permit amendments to petitions, order security for costs and to make representative orders.

Ultimately, the court determined that such a power did exist within its inherent power. It held that the omission of an express power to substitute on a contributory's petition did not indicate an intention to exclude such a power but was instead the likely result of there being less of a need for its express inclusion. The express inclusion of a power of substitution in relation to creditor's petitions had been necessary to prevent companies from paying off their creditors one by one in order to avoid a winding up. The court considered that the same issue does not arise in relation to a contributory's petition as contributories cannot just be paid off and tend to have a longer term and different relationship with the company than creditors.

The court ultimately held that the power to substitute a new petitioner was within the scope of the court's inherent power to regulate its own procedures and to facilitate the efficient and cost-effective management of proceedings. Invoking its inherent power to do so would not to be inconsistent with the CWR.

While the failure of the Petitioner to verify its status as a registered member prior to presenting the petition was regarded as serious, Segal J considered that on balance, he would allow substitution. The court was heavily influenced by the impact any dismissal would have on the appointment of the JPLs. The evidence relied on by the Petitioner in its application for the appointment of JPLs was said to remain unaffected by the issue over its standing and, in circumstances where the court considered that the JPLs' appointment was warranted, it was appropriate that the JPLs remain in office. By permitting the substitution of another contributory, the need for the discharge and fresh application for the appointment of the JPLs was avoided.

Comment

This decision provides a clear indication that the court is willing to exercise its inherent power to regulate its own procedures and to facilitate the effective management of proceedings, even if doing so involves a liberal and expansive interpretation of the prevailing statutory scheme in issue.

It is also, however, a decision that raises some considerable concerns. As the reader is no doubt aware, there is no statutory unfair prejudice regime in the Cayman Islands by which minority shareholders can apply to court to protect their interests: the only right a member has (save in circumstances where the wrong occasioned results in a cause of action which vests in the company (ie a derivative claim)), is the draconian step of presenting a petition to wind up the company on just and equitable grounds. This is particularly significant when dealing with a contributory's petition. The company will usually be solvent and trading. The presentation

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[9] There are a number of English cases which found contributory's petitions which lacked standing to be demurrable (see *Re Gattopardo Ltd* [1969] 2 All ER 344; *Re A Company* [1894] 2 CH 349).
[10] [2010] 1 CILR 114 (CA).

of a winding up petition (absent directions to the contrary) must be advertised. It also means that from the date of presentation of the winding up petition, and if a winding up order is eventually made, all dispositions of the company are voidable absent an order of the court. It follows that a company can be harmed irreparably both in terms of reputation and by potentially impeding the company's business from continuing to run as an ongoing concern – which is precisely why a line of English authorities has required that the question of standing of a contributory be determined prior to the presentation of a petition, and where there was found to be no standing, the petition was struck out.

Accordingly, whilst the court has found it has an inherent jurisdiction to substitute a new petition onto a contributory's petition, the decision should be read with caution and should not dissuade a prospective petitioner from settling the question of standing prior to presenting its petition.

Contacts

Shaun Folpp
Partner, Hong Kong
+852 3995 5729
shaun.folpp@mourantozannes.com

Jennifer Maughan
Senior Associate, Hong Kong
+852 3995 5747
jennifer.maughan@mourantozannes.com

Christopher Levers
Senior Associate, Cayman Islands
+1 345 814 9249
christopher.levers@mourantozannes.com

Jessica Bush
Associate, Cayman Islands
+1 345 814 9132
jessica.bush@mourantozannes.com

Reform of Guernsey's Insolvency Laws

Update prepared by Abel Lyall (Partner, Guernsey)
April 2017

// **The States of Guernsey has approved proposals for reforming Guernsey's insolvency laws and directed that the necessary legislative amendments be prepared. When introduced, the reforms will enhance the current corporate insolvency laws, giving greater protection to creditors and investors.**

On 9 February 2017, the Committee for Economic Development recommended the enactment by the States of Guernsey of amendments to the Companies (Guernsey) Law, 2008 (the **Companies Law**) to reform and enhance Guernsey's corporate insolvency provisions.

In proposing these reforms, the Committee recognised that '*effective, equitable and clear insolvency laws are an essential ingredient of a modern economy. Exit strategies for business are an increasingly important factor when choosing where to establish a venture … since they enable creditors to understand at the outset how a liquidation or administration will progress. In turn this can lead to willingness on the part of credit providers to lend in a jurisdiction; so allowing businesses improved access to finance to facilitate growth.*'

On 31 March 2017, Guernsey's legislative body, the States of Deliberation, approved the Committee's proposals and directed that the legislation necessary to give effect to the reforms be prepared.

Overview of the key proposals

Administration

The introduction in 2008 of the option for companies to enter into administration instead of liquidation was a significant step forward in Guernsey's insolvency regime and it has proved to be a popular mechanism particularly when dealing with major insolvencies where a more advantageous realisation of the company's assets may be realised than would be the case if the company was wound up. In order to assist the development of this area of law, three key changes have been introduced to the current law.

Creditors' Committee Procedures

The proposals provide that administrators shall call at least one initial meeting of the company's creditors within a set number of days following their appointment. If the current practice in England is adopted, then that is likely to be 28 days. The administrators will be required to send a notice of their appointment to creditors with an explanation of the administration process and its aims. The procedure following the initial meeting will remain as flexible as possible so as to ensure that the administrators can tailor the administration process to the size and complexity of the administration and the number of creditors.

Powers of Administrations

The powers currently afforded to administrators under Schedule 1 of the Companies Law do not expressly permit administrators to make distributions to creditors. The proposals introduce an express power for administrators to make distributions to all types of creditors, provided that such distribution is in accordance with the objects of the administration. This reform paves the way for a more simplified exit from administration.

Exit from Administration

At present an administrator must apply to the court for the administration order to be discharged and for the company to be handed back to its directors or placed into liquidation. More often than not, the assets have already been realised and there is nothing for the liquidator to do except make distributions. The proposals give the Court the power to permit dissolution of the company at the same time as discharging the administration order where the court agrees that making a winding up order would be an unnecessary extra step. This reform dovetails with the additional powers given to administrators to make distributions to all types of creditors.

The simplification of the discharge procedure whilst ensuring that creditors are adequately safeguarded (without an excessive number of additional rules and law to effect this change) is to be welcomed.

Winding Up

Under the reforms, the objective of winding up in Guernsey (irrespective of whether the company is solvent or insolvent) will be codified. In summary, these objectives will be to: safeguard and collect in assets, realise the company's assets and distribute the proceeds to the companies' creditors in order of priority after liquidation costs and the payment of any surplus assets to the entitled recipients. These duties will need to be carried out in an efficient and reasonable manner.

Proof of debt procedure

At present, whilst it is possible to seek directions to establish a proof of debt procedure, this is time consuming and often increases the costs involved in the liquidation. The proposals will introduce a clear procedure for the establishment of a claim in a winding up, and there will now be rules and guidance as to advertising for claims, how claims should be submitted and the factors a liquidator should consider when determining the validity of a claim. Liquidators will be given statutory powers to accept or reject claims and provisions will be made for creditors to challenge a liquidator's decision in Court.

Disclaimer of onerous assets

Liquidators will be given statutory powers to disclaim onerous property and unprofitable contracts, subject to the requirement that notice should be given to all relevant parties including Her Majesty's Receiver General where property may become *bona vacantia*. It has been recommended that interested parties be given the right to challenge a liquidator's decision to exercise this power.

Unclaimed dividends

The proposals include a statutory scheme whereby unclaimed dividends may be paid to the States, from whom it can be reclaimed within a specified period of time.

Winding up of foreign companies

The Royal Court will be given the power to compulsorily wind up an insolvent foreign company. It has been proposed that the statutory provisions afforded to the Royal Court reflect the position in England (see section 221(1) of the English Insolvency Act 1986), so that the Royal Court may take account of English jurisprudence, which would be of persuasive authority in this regard.

Reforms specific to voluntary liquidations

In summary the proposals provide for:

- The requirement for liquidators appointed by an insolvent company in a voluntary winding up to be independent, subject to the court having the power to approve a liquidators who do not meet the independence criteria.
- Where the company being voluntarily wound up is insolvent, notice of the liquidator's appointment should be sent to all creditors of the company and there will be an ongoing statutory obligation to report to creditors and shareholders.
- The final meeting in a voluntary winding up will not be invalidated by reason alone of the meeting being inquorate (for example, because there are insufficient members present to form the necessary quorum under section 213 of the Companies Law).

General Amendments

Insolvency rules

At present, there is no set of procedural rules for corporate insolvency in Guernsey. One of the main advantages to supplementing primary legislation with statutory insolvency rules is that aside from the certainty which it provides, the rules can be updated swiftly and adapted as need be with the need to enact primary legislation. The Committee's suggestion that statutory power be given to the Committee to make insolvency rules, advised by a standing rules committee (to include industry practitioners) has been adopted by the States.

Reporting misconduct

The Committee's proposal that administrators and liquidators be under a statutory duty to report any findings or suspicion of misconduct on the part of officers or directors of a company has been approved. Once the amendments are incorporated into law, reports will be made to the Registrar of Companies in respect of non-GFSC licensed entities and to both the Registrar of Companies and the GFSC in respect of licences or former licensees.

Transactions at an undervalue and extortionate credit transactions

Under the current law, liquidators have limited powers to challenge antecedent transactions, and in particular do not have statutory power to attack transactions at an undervalue and extortionate credit transactions. Under the proposals approved by the States, liquidators and administrators will be able to apply to court to set aside such transactions. The changes, once enacted, will bring Guernsey's regime broadly in line with that in the UK.

Statement of affairs and examination powers

Under the proposals as approved, liquidators will be given the same powers as administrators to require the production of a statement of affairs from the company's directors and officers about the company's financial position. In addition, liquidators will be given the power to apply to Court to request an order for the production of documents and information from the company's directors, accountants, bookkeepers, bankers and any other person with knowledge of the company's affairs. Liquidators will also be given the power to apply to Court to require the attendance of directors and former directors for the purpose of examination.

Next Steps

With the States having considered the proposals and directed that legislation be prepared to effect the proposed changes, the next step will be the production of draft legislation to implement the proposals. This will be a significant undertaking, but a welcome step and one which will provide greatly improved clarity and functionality to corporate insolvency in Guernsey.

Contact

Abel Lyall
Partner, Guernsey
+44 1481 739 364
abel.lyall@mourantozannes.com

Guernsey Court of Appeal rejects 'oppressive' scheme of arrangement

Update prepared by Abel Lyall (Partner, Guernsey)
June 2017

// The Court of Appeal has dismissed an appeal against a Royal Court decision refusing to sanction a scheme of arrangement. The Court held it had no jurisdiction to sanction the proposed scheme given the failure by the company to comply with statutory requirements for share buy-backs, and in any event it was one that the Court 'unhesitatingly' would have refused to sanction on discretionary grounds.

The Court of Appeal in Guernsey has dismissed an appeal by Puma Brandenburg (**Puma**) against the refusal by the Royal Court of Guernsey to sanction its scheme of arrangement (the **Scheme**). In a landmark judgment, the Court of Appeal was highly critical of the Scheme, describing the manner in which Puma pressured minority shareholders to accept a significantly discounted offer price on their shares, as 'oppressive'. Mourant Ozannes acted for the minority shareholder that successfully opposed the Scheme.

The decision is the first time a Court of Appeal in Guernsey has considered a scheme of arrangement proposed under the Companies (Guernsey) Law, 2008 (the **Companies Law**), and is a very rare example of a scheme of arrangement being refused sanction at an appellate level on both jurisdictional and discretionary grounds.

Background

The Scheme was proposed by Puma, an unlisted Guernsey company incorporated in 2006 for the purposes of raising capital to invest in German real estate. Puma had previously been involved in two restructurings, firstly in 2009 when it was amalgamated with Shore Capital Group Limited (**Shore Capital**) and then in 2012 on its demerger from Shore Capital.

Puma's year-on-year financial performance had been excellent and its board considered it had a 'strong future', specifically advising shareholders in the Scheme document that it 'intended to pursue long term growth by holding and improving investment assets whilst at the same time seeking to take advantage of cheap long term finance'. They had however apparently identified a 'divergence' of interests between the majority shareholders, Mr Howard Shore (who is also an executive director of Puma and an indirect owner of Puma's investment advisor) and his wife (the **Majority Shareholders**), who wanted to continue and expand the investments of Puma, and most of the various minority shareholders, who, as it was contended, said they had not intended to invest in a real estate company, having acquired their shares via the demerger in 2012. As an unlisted investment company (as with most unlisted entities), there was no liquid market for Puma shares, and the board said it was looking at means to provide a 'liquidity event' to those shareholders who were not aligned with the long-term interests of the company.

The scheme of arrangement

The Scheme proposed by the board was a simple one. Puma was to undertake a selective buy-back of all shares other than those held by the Majority Shareholders. Unlike in traditional third party 'takeover schemes' that are regularly utilised and sanctioned in Guernsey, it was Puma itself that was to pay for the shares rather than the person or entity who would benefit from the takeover, in this case the Majority Shareholders.

Puma's shares were split between A ordinary shares (holding voting rights and rights to return of capital) and B ordinary shares (holding rights to payment of dividends), with separate meetings held for each class. The consideration which Puma would pay to shareholders for the buy-back shares was €4.50 for each A share and €1.50 for each B share – a valuation which represented a 43.6 per cent discount to Puma's net asset value

(**NAV**). If sanctioned, the result of the Scheme would have been a transfer to the Majority Shareholders from the (collective) minority of approximately €37 million in value, leaving the Majority Shareholder as sole owners of Puma and all of its assets. At an *ex parte* hearing on 10 November 2016, the Royal Court ordered that class meetings of the minority shareholders be convened to vote on the proposed Scheme. The Scheme was approved by the required majorities of both class meetings on 1 December 2016. In all, 95.88 per cent by value (comprising 25.89 per cent by number) voted in favour of the Scheme.

Opposition to the Scheme

Notwithstanding a number of shareholders abstained from voting (or simply failed to return a proxy form), two minority shareholders voted against the Scheme, one of which instructed Mourant Ozannes to oppose the Scheme at the subsequent sanction hearing before the Royal Court.

This shareholder asserted that the Royal Court had no jurisdiction to grant the Scheme as Puma had not (and indeed could not) comply with section 313(3) of the Companies Law which provides that before effecting a buy-back of shares the company 'must obtain the consent of the shareholders whose shares are to be acquired to that acquisition'. The shareholder also opposed the Scheme on discretionary grounds, including that (a) the Scheme was not fair and not reasonable, (b) the Scheme was disproportionate to the stated aims of Puma's board; and (c) the Scheme document contained material non-disclosures.

In a judgment delivered by the Bailiff on 24 February 2017, the Royal Court refused to sanction the Scheme, finding that it was contrary to the share buy-back provisions in the Companies Law, which specifically require a shareholder to 'consent' to the acquisition of its shares. The Royal Court went one step further in finding that when voting in favour of the Scheme, the members who approved the transaction (which included the significant shareholding of the brother of Mr Shore, one of the Majority Shareholders) were not acting in the *bona fide* best interests of the class as a whole. Puma appealed.

Decision on appeal

In a two-day hearing before the Guernsey Court of Appeal, Justices Mr Nigel Pleming QC, Mr George Bompas QC and Sir Michael Birt confirmed the decision of the Royal Court.

The Court of Appeal undertook a detailed consideration of the scheme of arrangement provisions found in Part VIII of the Companies Law. It found that these provisions, which were introduced in 2008, bear a 'close resemblance' to what is found in Part 26 of the UK Companies Act 2006. The Court of Appeal noted that the Royal Court was right to draw guidance on the interpretation and operation of the relevant sections from decisions of the English courts.

The Court of Appeal further confirmed that the term 'arrangement' under Part VIII should be interpreted broadly and that the Royal Court clearly had jurisdiction to sanction a scheme involving a takeover. The issue on appeal however, was whether Puma could effect own-share purchases under a scheme of arrangement in light of the statutory requirement for it to obtain the consent of shareholders to the acquisition of their shares.

Jurisdiction

The Court of Appeal held that the Bailiff was correct in his interpretation of the consent requirement under section 313 of the Companies Law.

The Court of Appeal noted that in general terms, there was no reason why own-share purchases should be precluded from being effected by a scheme of arrangement. However, given the statutory requirement in section 313(3), they held that before the court can sanction a scheme of arrangement to effect a purchase of its own shares from shareholders, those shareholders must be shown to have individually and specifically consented to that acquisition. The required consent element of section 313(3) could not be supplied by the court through the action of sanctioning the scheme of arrangement.

The Court of Appeal noted that this interpretation was clear from the language of the section, and supported by the absence in the Companies Law of anything expressly to disapply section 313(3) to schemes of arrangement.

Discretion

While this was sufficient to dispose of the appeal, the Court of Appeal went on to consider the question of whether the Scheme should be sanctioned on the exercise of the court's discretion.

While noting they were merely 'guidelines', the Court of Appeal agreed the Bailiff was correct to apply the traditional English tests for the exercise of the discretion, principles expounded long ago by the English Court of

Appeal in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 and then by Lindley LJ in *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385. Those tests have been restated and applied many times, including by the Royal Court in *Re Montenegro Investments Limited (In Administration)* and *Re Assura Group Limited*.

Accordingly, when exercising the discretion the Court will examine whether:

- the class of members was fairly represented by those who attended the court meetings and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent;
- the scheme is such that an honest and intelligent man, a member of the class concerned and acting in respect of his interests, might reasonably approve; and
- there is a 'blot' on the scheme.

The Court of Appeal also considered the question of what is meant by a 'blot on the scheme', a principle which they held recognises that the court must be satisfied that the Scheme is appropriate to be sanctioned: in other words, the court must be satisfied that there is nothing about the Scheme which makes it oppressive of, or unfairly prejudicial to, persons who may be bound or affected by it.

Having considered the appropriate tests, the Court of Appeal held the Bailiff had not erred in exercising the discretion against sanctioning the Scheme, holding that 'unhesitatingly' they would have, in any event, refused to sanction the Scheme:

- The Scheme relied on the votes of shareholders who had committed to vote in favour of the Scheme, but who were 'insiders' closely associated with the majority shareholder, and that the offer price was the product of discussions between those insiders and the majority shareholder. As a result the Court of Appeal was not satisfied that the majority at the meetings voted *bona fide* in the interests of the class of members as a whole.
- They were not satisfied that the arrangement was one 'which an intelligent and honest man acting in respect of his interests might reasonably approve'. Critical to this finding was the substantial transfer of value from the minority shareholders to the Majority Shareholders as a result of the share buy-back, along with the lack of evidence or explanation in the Scheme documentation for the heavily discounted offer price which appeared to be without explanation based on the financial performance of the company.
- Finally, the Court of Appeal concluded that there was a 'blot' on the Scheme and it should not be sanctioned. They found the company put 'undue pressure' on shareholders to sell their shares at a price that had no real reference to the value of their shares by threatening that no dividends or distributions would be paid in the foreseeable future. The Court of Appeal agreed such conduct was 'oppressive'.

Disclosure in the Scheme Circular

In his decision at first instance, the Bailiff was satisfied that the disclosure made to members in the Explanatory Statement was sufficient and this decision was challenged by the minority shareholder on appeal. The Court of Appeal expressed 'misgivings' about the Bailiff's conclusions, noting that the disclosure requirement for the Explanatory Statement in Scheme Circulars went beyond the statutory requirement in section 108 of the Companies Law. Citing the commentary in *Buckley on the Companies Act*, they held that the company was required to give 'such a statement of the main facts as will enable the recipients to exercise their judgment on the proposed scheme'. In particular they noted:

- Given the price was a 'very poor return' on Puma's NAV, there was nothing to help explain to shareholders why the Scheme could be fairly approved and imposed.
- There was no information about the consultations between the company and the various committed shareholders (the 'insiders') that led to the setting of the price.
- There was no information on the relationships between those committed shareholders and the Majority Shareholders in circumstances where the Scheme held out the prospect that those committed shareholders would have their shares purchased even if the Scheme failed. The Court found there was no explanation of this prospective favoritism.
- While the Scheme Circular referred to the accounts from March 2016 there was no reasonably current statement of the company's net current assets and available reserves.

- There was no explanation as to how the interests of the company in securing shareholders aligned with the company's long term investment objectives mandated ownership by the Majority Shareholders. The Court of Appeal found it was probable that the 'real and unstated objectives' were those of the Majority Shareholders to take over the company, something the Court held ought to have been disclosed.

The substantive failures in the presentation of the Scheme led the Court of Appeal to issue a warning at the end of the judgment, reminding companies proposing schemes of arrangement that 'care should be taken' in their preparation 'to ensure a fair presentation both those to be bound and to the Court'.

Comment

Since their introduction in 2008, schemes of arrangement have become a regular and popular means of effecting corporate restructurings in Guernsey. As the Court of Appeal makes plain, the term 'arrangement' is broadly defined, and will encompass takeover schemes. Such arrangements are currently and will continue to be sanctioned by the Royal Court.

By contrast, the scheme proposed by Puma was highly unusual and not one seen either here in Guernsey or in the UK before – it was in effect a 'takeover' by the Majority Shareholders paid for by Puma itself – truly a novel concept. The problem for Puma was two-fold. First, the Scheme failed to comply with the clear and express statutory requirement for an individual shareholder's consent as per section 313(3) of the Companies Law, meaning the Court had no jurisdiction to sanction the Scheme. More fundamentally, there was simply no evidence to show that the Scheme was a fair one such that it was appropriate to be sanctioned.

The sanction of a scheme has never been a rubber stamp, and the Court in Guernsey will guard carefully its role both in ensuring the statutory requirements applicable to the scheme have been met, and that the scheme is fair and not oppressive to those proposed to be bound. It is also highly unusual for a scheme of arrangement to be refused sanction on discretionary grounds, as schemes of arrangement are normally carefully constructed to avoid these problems.

The decision should give comfort to those undertaking schemes of arrangements in Guernsey that the Courts will take a consistent and predictable approach to the sanction of schemes, while members (and indeed creditors) should be confident that the Court will be meticulous in ensuring that their rights as a minority are protected.

Mourant Ozannes' Partner Abel Lyall appeared before the Royal Court of Guernsey and on appeal for the opposing minority shareholder.

Contact

Abel Lyall
Partner, Guernsey
+44 1481 739 364
abel.lyall@mourantozannes.com

The difficulty in maintaining privilege over documentation produced by internal investigations

Update prepared by Tim Richards (Counsel, Guernsey)
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// Recent decisions of the English and Guernsey Courts have highlighted the difficulties parties face when seeking to maintain privilege over documents produced by internal investigations. The best way to avoid these difficulties is to instruct outside lawyers at an early stage.

Two recent court decisions in England and Jersey have highlighted the difficulties companies face in maintaining privilege over documentation produced by internal investigations. Such internal investigations are regularly prompted by the intervention of a regulator such as the Guernsey Financial Services Commission (the **GFSC**) (the regulator for the finance industry in the Bailiwick of Guernsey). Regulated companies should be aware that unless litigation is in prospect, most or all internal documentation produced by such an investigation may not be privileged and hence may be disclosable. The easiest way to avoid such difficulties is to engage external lawyers at an early stage so that possible pitfalls can be avoided.

In the Jersey case of *Smith v SVM Ltd* [2017] JRC026 [**link to full judgment**] (the **SVM Case**), a Jersey Master held that a report which the Jersey Financial Services Commission (**JFSC**) had required SVM Limited to obtain on the conduct of its investment business was not subject to legal professional privilege and hence that report was disclosable in an action by a client of SVM Limited in relation to that business. The Master held, *inter alia*, that the exercise of powers by a regulator, such as the JFSC, was not adversarial and that the dominant purpose of any report obtained by the JFSC was to allow the JFSC to discharge its regulatory responsibilities.

The Master accepted that his conclusions meant that a regulated entity might receive a complaint about services provided, which complaint is also made to the JFSC and that such a complaint could lead to the JFSC exercising regulatory powers, including requiring the production of a report which the regulated entity then has to disclose if it is later pursued by the complainant. Such a report is likely to be a fact finding exercise and an assessment of whether or not regulatory standards have been met, as such, it would not be subject to legal professional privilege. This applies even if the regulated entity can establish that legal proceedings by a former client or clients are reasonably in contemplation. The key point being that the dominant purpose of the exercise by the JFSC of its regulatory powers was not the production of documentation for use in anticipated litigation.

The recent English case of *SFO v Eurasian Natural Resources Corporation* [2017] EWHC 1017(QB) (the **ENRC Case**) [**link to full judgment**] also highlights the extent to which documentation produced by internal investigations may not be subject to privilege.

In 2011 a whistle-blower at ENRC made various allegations of fraud and bribery in relation to ENRC's businesses in Kazakhstan and Africa. ENRC then commenced an internal investigation and at the same time self-reported to the SFO. There were various follow up meetings between ENRC and the SFO and subsequently the SFO commenced its own criminal investigation into ENRC in 2013. Later the SFO requested that ENRC disclose internal documentation produced during its internal investigations. ENRC refused claiming legal advice privilege in relation to a small subset of documents and litigation privilege over most of the remainder. Litigation privilege applies to confidential documentation produced when litigation is reasonably anticipated and where the dominant purpose for the production of the document is for use in the litigation. The judgment handed down in early May 2017 refused the claims for litigation privilege and made a number of findings including the following:

- a raid by the SFO and the processes triggered by a raid (including an SFO investigation) did not constitute adversarial litigation
- reasonable anticipation of a criminal investigation did not amount to reasonable anticipation of litigation
- litigation privilege applies only to documents prepared for the sole or dominant purpose of *conducting* litigation (and not to documents produced with the purpose of enabling advice to be taken in connection with anticipated litigation)
- litigation privilege does not apply to documents created with the purpose of obtaining advice about how to *avoid* contemplated litigation.

It must be emphasized that the ENRC decision was in the context of a criminal investigation launched by the SFO. The judge's findings, however, are both surprising and controversial not least because its effect is that litigation privilege in England in the criminal context may arise only in limited circumstances and far more rarely that in a civil context. It is also worth noting that the Guernsey Royal Court is not bound by the ENRC decision and the decision is likely to be appealed in England.

In conclusion, both the SVM and ENRC Cases serve to highlight the difficulties clients may face in maintaining claims to privilege over documentation produced by internal investigations. In order to reduce such difficulties, many of these pitfalls can be avoided by instructing outside lawyers at an early stage in order that, where possible, effective steps can be taken to preserve privilege.

Contact

Tim Richards
Counsel, Guernsey
+44 1481 739 386
tim.richards@mourantozannes.com

Will the reform of Guernsey's insolvency laws to introduce a statutory power of investigation assist Guernsey appointed liquidators in cross-border investigations?

Update prepared by Tina Asgarian (Senior Associate, Guernsey)
June 2017

// **Under the current provisions of the Companies (Guernsey) Law 2008 (the Companies Law), Guernsey appointed liquidators do not have express statutory powers to require delivery up of a company or a third party's books and records, or to examine and interview third parties. However, this is all set to change.**

Under the recommendations approved by the States of Deliberation on 31 March 2017,[1] one of the key reforms to the insolvency provisions of the Companies Law, which has been approved by the States, is the statutory power for liquidators to apply to the court and to request an order for the production of documents and information from directors, officers, employees, shareholders, accountants, book-keepers, bankers and any other person involved in the promotion of the company or with knowledge of the company's affairs.[2] The proposal further provides that liquidators should have the explicit power to apply to court to require attendance of directors and former directors for the purpose of examination. The proposal to include this statutory power in the amendments to the Companies Law[3] will – if exercised properly – be a welcome tool in the Guernsey liquidator's armoury as well as that of foreign office-holders who are seeking information in Guernsey.

These proposed powers, which although extraordinary, are directed at enabling the court to help the office-holder to complete his/her functions as effectively and with as much expedition as possible. They will allow office-holders to obtain general information and discover facts with as a little expense as possible. Whilst it is anticipated that the discretion conferred on the court will be unfettered, in exercising its discretion, the court will no doubt be guided by the need to balance the requirements of the office-holder with the possible oppression to the person from whom the information is sought.[4]

An interesting feature of the proposed amendments will be the extent to which the powers may be used by Guernsey liquidators in insolvencies with a cross-border element. The *Huelin-Renouf*[5] insolvency marked a significant step in developing Channel Island wide restructuring laws and demonstrated the benefits of cross-border co-operation for the company's creditors. But the amendments to the Companies Law could potentially

[1] See Mourant Ozannes update: 'Reform of Guernsey's Insolvency Laws', 7 April 2017.
[2] See paragraph 3.3.4 of the Committee for Economic Development's recommendations, dated 9 February 2017, as approved by the States.
[3] The proposals submitted to the States appear to be expressed in the widest of terms, which suggests that the powers will closely resemble the provisions of section 234–236 of the English Insolvency Act 1986: see for example *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 (HL) at 163, which refers to the powers conferred under the English Insolvency Act as being 'expressed in the widest terms'.
[4] See generally *British & Commonwealth Holdings Plc (joint Administrators) v Spicer & Oppenheim* [1993] AC 426.
[5] *In the matter of Huelin-Renouf Shipping (Guernsey) Limited (In Liquidation)*, 4 September 2015, Judgment 46/2015.

increase the geographical extent and reach of a Guernsey liquidator's powers, not just to obtaining information, but to discovering facts relevant to the affairs of the company.

Given the ever increasing and sophisticated nature of cross-border insolvencies, it is anticipated that the need for Guernsey liquidators to require information and documents which are located abroad will increase over time. As matters currently stand, Guernsey liquidators – wearing their hat as foreign office-holders - may request documents from other countries where the local laws or legislation permit foreign office-holders the right to rely on similar powers in their local legislation. The clearest example of this is the position under section 426 of the English Insolvency Act 1986 (the **IA**). A Guernsey liquidator wishing to seek the assistance of the English courts under this provision may apply to the Royal Court of Guernsey and ask that it issue a letter of request seeking the assistance of the UK court. The request is authority for the UK court to apply either its own insolvency law, or the corresponding insolvency law of Guernsey. Because Guernsey's Companies Law does not contain any express statutory powers of investigation, a Guernsey appointed liquidator may find that reliance on this provision (in England) is more easily founded on the English statutory provisions under section 236 of the IA.

If, however, the States' proposals are adopted and the Companies Law is amended to give Guernsey liquidators the statutory powers to investigate, then the amendments of themselves may give the Guernsey courts scope to increase the extraterritorial powers of Guernsey liquidators to require a person resident outside the jurisdiction to submit to the court an account of his/her dealing with the company or produce any books, papers or other records in his/her possession or under his control relating to the company.[6] Of course, much will depend on how the statutory powers are drafted, but assuming that the provisions will be similar in nature to section 236 of the IA, then such a provision, coupled with the power to wind up an overseas company,[7] could pave the way for the Guernsey courts to extend the scope of the liquidator's power to respondents outside of the jurisdiction.[8]

The issue of the extraterritorial effect of the English provisions of section 236 of the IA is currently the subject of active judicial debate in England.[9] But whatever the outcome of the debate in England, from a Guernsey perspective, when it comes to seeking assistance from foreign courts, having a statutory power within the Companies Law will of itself be of great assistance to Guernsey appointed liquidators (who are seeking assistance outside of the confines of section 426 of the IA - ie, under the common law[10] or other local legislation). Whether those rights will be further extended will in part depend on the wording of the amending provisions, but also the facts and circumstances prevailing at the time.

Cross-border issues play an increasingly important part in Guernsey's insolvency law and practice and international elements may present themselves at any time, even during the course of a local insolvency. These proposed reforms to the corporate provisions of the Guernsey Companies Law will greatly assist Guernsey liquidators and ensure that they are well placed to respond to the continued and ever increasing international dimension of modern insolvency proceedings.

Contact

Tina Asgarian
Senior Associate, Guernsey
+44 1481 731 447
tina.asgarian@mourantozannes.com

[6] In addition, if the Guernsey provisions are wider in scope than the provisions of section 236 of the IA, the Guernsey office-holder may apply for relief under the laws of Guernsey, even if the practice diverged from the English practice. See for example: *England v Smith* [2001] Ch 419 and *Re Duke Group Ltd* [2001] BCC 144.
[7] See paragraph 3.2.9 of the Committee for Economic Development's recommendations, dated 9 February 2017, as approved by the States.
[8] See for example *Re Mid East Trading Ltd* [1998] BCC 726 at paragraph 753.
[9] See the conflicting decisions of David Richards J in *Re MDF Global UK Limited* (In special administration (No 7) [2015] EWHC 2319 (Ch) and that of HHJ Hodge QC in *Omni Trustees Limited ; Official Receiver v Norriss* [2016] Ch 325.
[10] See for example the judgment in the Privy Council decision in *Singularis Holdings Ltd v PwC* [2014] UKPC 36, in which it was stressed that the common law power of assistance was subject to (among other things) the limitation that it did not enable office-holders to do something which they could not obtain by order of the courts under which they were appointed.

High Court in England rules on Jersey limitation period for breach of directors' duties

Update prepared by Justin Harvey-Hills (Partner, Jersey), Andrew Bridgeford (Consultant, Jersey) and Stephen Alexander (Counsel, Jersey)
May 2017

// In a judgment handed down on Monday 15 May 2017 the High Court in England ruled that the Jersey limitation period for claims against directors for breach of duty under Article 74 of the Companies (Jersey) Law 1991 is 10 years.

The Jersey limitation period (or prescription period, as it is known) for claims against directors for breach of duty under Article 74 of the Companies (Jersey) Law 1991 (***Companies Law***) has not been definitively decided by the Jersey courts. The judgment of the English High Court in *O'Keefe & anor (in their capacity as joint liquidators of Level One Residential (Jersey) Ltd and Special Opportunity Holdings Ltd –v- Caner & ors* [2017] EWHC 1105 (Ch) on this particular point of Jersey law, considered as a matter of foreign law, is therefore of considerable interest.

A ten-year period was held to apply to both:

- claims for breach of a director's fiduciary duty to act honestly and in good faith with a view to the company's best interests (Article 74(1)(a)); and
- claims for breach of the director's duty of care, skill and diligence (Article 74(1)(b)).

In reaching this conclusion, the High Court accepted the expert evidence of Jersey law given by Mourant Ozannes partner and Jersey advocate Justin Harvey-Hills, who was instructed by the liquidators. This was preferred to the evidence of two other Jersey experts, who were instructed on behalf of the directors and who argued, on various grounds, that the period was three years.

Two Jersey companies, Level One Residential (Jersey) Ltd and Special Opportunity Holdings Ltd, had gone first into UK administration and then into liquidation. The liquidators then commenced proceedings in England against the directors under section 212 of the UK Insolvency Act 1986, seeking compensation for their alleged misfeasance and breach of duty. The substantive cause of action against the directors, being for breach of duty under Article 74 of the Companies Law, was governed by Jersey law. As a consequence of sections 1(1) and 4(1) of the Foreign Limitation Periods Act 1984, the applicable limitation period was in these circumstances also treated by the English courts as governed by Jersey law. The directors argued that the claims against them for breaches of duty were time-barred under Jersey law and the question of limitation was taken as a preliminary issue of Jersey law, upon which the expert evidence was heard.

There is no decisive Jersey authority on the matter. The question of the correct prescription period for claims for breach of directors' duty under Article 74(1)(a) and (b) had been considered *obiter* and on a relatively tentative basis in two Jersey cases, *In the matter of Northwind Yachts Ltd*, 2005 JLR 137 and *Alhamrani v Alhamrani* 2007 JLR 44, and more recently in a case management decision of the Master, *CMC Holdings Ltd v Forster* [2016] JRC 149. It had not, however, been the subject of a definitive judgment of the Royal Court. The issue was therefore fiercely contested in the English proceedings.

Jersey does not have a limitation statute. Where there is no specific period, the default period is 10 years save where another period is by analogy clearly more applicable (*Re Esteem Settlement* [2002] JLR 53). The directors argued variously that either the tort period under Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 (three years) or the period during which a beneficiary may sue a trustee for breach of trust in Article 57(2)(b) of the Trusts (Jersey) Law 1984 (***Trusts Law***) (again three years) applied directly or by analogy.

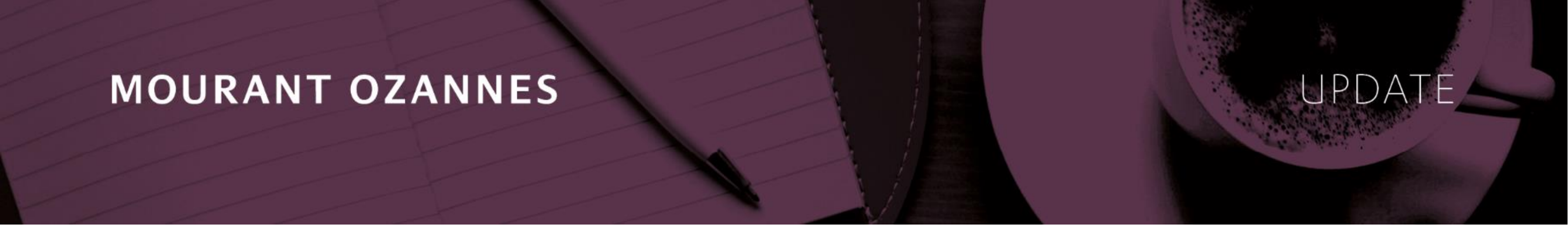
After hearing extensive evidence on Jersey law, Andrew Keyser QC, sitting as a judge of the High Court, held that the 10-year period applied to both claims under Article 74, which were consequently not time-barred. The following aspects of the decision are worth highlighting:

- A breach of Article 74 of the Companies Law did not amount to the tort of breach of statutory duty. It was not the case that breach of any duty that is laid down in a statute amounts to that tort.
- The tort period could not apply to Article 74(1)(a) since a breach of fiduciary duty was not a tort. Damage, for instance, is not a pre-requisite for a claim for breach of fiduciary duty whereas it is generally an essential element of tort.
- The trust period under Article 57 of the Trusts Law could not apply to Article 74(1)(a) directly since a director was not a trustee and as a matter of construction of the Trusts Law, Article 57 applied only to trustees in the conventional sense. Nor was the trust period capable of application by analogy. In applying it by analogy it would be necessary to apply all of the material parts of Article 57 and not just one part. In reality the prescription period for breach of trust was potentially much longer than three years, from the date of the breach of duty, because, under Article 57(3B) of the Trusts Law, a successor trustee could sue a former trustee for breach of trust for three years following the former trustee's retirement.
- In relation to both these points, the position under Jersey law was therefore held to differ from English law, where there is a long line of authority applying section 21 of the Limitation Act 1980 (which deals with trustees) to directors on the basis that directors are treated as trustees or constructive trustees for the purposes of limitation. In Jersey there is no limitation statute and the limitation periods relating to trustees are set out in the Trusts Law and are highly bespoke to trustees.
- Breach of the duty of care in Article 74(1)(b) of the Companies Law was not a tort but rather a breach of an equitable duty of care.
- Nor was the tort period clearly more applicable by analogy to a breach of Article 74(1)(b). In fact, quasi-contract (which carries a slightly different meaning in Jersey and Guernsey to England) was the closest analogy and the period for claims in quasi-contract is again 10 years.
- The application of a prescriptive period by analogy does not turn mechanically on the similarities and dissimilarities between different causes of action. Judges in Jersey also had regard to considerations involving the coherence of the law and the practical convenience of departing from the 10-year default period in any given case. In the present case His Honour Judge Keyser found that there was no good reason to depart from the default period of 10 years. It was right that the same 10-year period should apply to claims under both Article 74(1)(a) and (b) and, as it does, to claims for breach of contract and in quasi-contract.

This is a decision of the English High Court and, as such, it will not strictly be binding on the Jersey courts. Nevertheless, it is likely to carry considerable weight. Over the course a six day hearing it was possible to explore the issues in much greater detail than had been called for in the limited number of relevant Jersey cases. Three experts of Jersey law were instructed by the parties. Each gave extensive written and oral evidence, upon which they were then cross-examined in detail. The parties were also variously represented by three Queen's Counsel and three Junior Counsel, two of whom, acting for the directors, were also qualified in Jersey law.

Whether the period for breach of directors' duty and related causes of action *should* be shorter than 10 years is a separate question and one which is ripe for review by the States of Jersey.

Mourant Ozannes partner Justin Harvey-Hills, whose expert evidence was accepted by the High Court, was assisted by Consultant Andrew Bridgeford and Counsel Stephen Alexander, and instructed by the English solicitors for the liquidators, Memery Crystal LLP. The liquidators were represented at the hearing by Antony Zacaroli QC and Ryan Perkins of South Square. The Memery Crystal team was led by Harvey Rands and included Jenni Jenkins, Nick West and Eleanor Hassani.



Contacts

Justin Harvey-Hills
Partner, Jersey
+44 1534 676 105
justin.harvey-hills@mourantozannes.com

Andrew Bridgeford
Consultant, Jersey
+44 1534 676 586
andrew.bridgeford@mourantozannes.com

Stephen Alexander
Counsel, Jersey
+44 1534 676 172
stephen.alexander@mourantozannes.com

Mourant Ozannes & QEB Hollis Whiteman Financial Services & Regulatory Forum 2017

June 2017

// A round-up of the Mourant Ozannes & QEB Hollis Whiteman Financial Services & Regulatory Forum, noting regulatory developments and upcoming changes.

Introduction

Thank you to those who were able to come along to our inaugural Financial Services & Regulatory Forum, hosted in conjunction with QEB Hollis Whiteman. Over 200 guests heard speakers from Mourant Ozannes and QEB Hollis Whiteman, as well as our guest speakers from the Jersey Financial Services Commission and Jersey Government, cover a range of topics which have been of key importance to regulated businesses over the last six months, and will continue to keep people busy over the next six months and beyond.

We hope that this conference provided valuable assistance to attendees to help keep ahead of regulatory challenges and risks. To help ensure that you get as much out of the event as possible, and for those who missed it, we've prepared a short summary of the key points which were discussed.

We hope that you found the Forum to be useful. If you have a couple of minutes, please do complete our feedback survey.

Important developments in the law of tax evasion: Nicholas Griffin QC & Tom Broomfield |QEB Hollis Whiteman

The Criminal Finances Act 2017 **(CFA)** and the Finance Act 2016 **(FA)** enacted important changes in UK tax evasion legislation. The CFA contains strict liability offences, applicable to 'relevant bodies' or corporates only, of failing to prevent UK tax evasion and foreign tax evasion. If the offence is made out, it is for the defence to prove to the civil standard that it has put in place reasonable preventative procedures. The FA contains new civil penalties for enablers of offshore tax evasion, which include a power to publish the details of those found liable, and strict liability criminal offences for engaging in offshore tax evasion.

International sanctions, relevance to Jersey and management of sanction risk: Mathew Cook | Mourant Ozannes

Sanctions

Sanctions compliance is a key area for Jersey regulated businesses, with UN and EU sanctions having direct effect in Jersey, and other sanctions (in particular, the OFAC sanctions from the US) having potential effect and significant consequences in case of breach. Staff training and awareness of sanctioned jurisdictions and activities, robust policies and procedures, regular screening of customer databases, and ensuring sufficient information on customers and intermediaries to be able to identify sanction breaches are key tools in addressing sanctions compliance. Sanctions may also require trigger reporting obligations, including where a business has only been approached by a sanctioned entity. The recent introduction in the UK of an ability to directly fine for sanction breaches without the need for criminal proceedings highlights the escalation in focus on sanctions compliance.

Privilege

A recent case *(SFO v ENRC)* in England highlights potential limitations on privilege in regulatory investigations. In that decision, the Court held that a majority of documents over which privilege had been claimed needed to be disclosed. Particular issues included the range of people who had given instructions to the lawyers, the question of whether certain documents constituted advice or fact-finding, the purpose for which documents had been prepared and the fact there had been a promise of co-operation which was then effectively reversed by seeking to withhold documents. The judgment highlights the need for a carefully controlled process and regular review if privilege is to be maintained.

Personal accountability in regulatory proceedings: Jason Mansell | QEB Hollis Whiteman

In pursuing its enforcement agenda of credible deference the UK FCA continues to focus on the role of individuals when investigating regulatory failings. Not only does this extend to those individuals directly implicated, but increasingly to senior managers responsible for the business area where the alleged misconduct occurred.

In the UK the implementation of the Senior Managers and Certification Regime (**SM&CR**) should make it easier to hold individuals personally accountable. With clear lines of responsibility it should be obvious where responsibility for regulatory failings should properly lie. It is however likely that the increased appetite to discipline individuals may lead to a rise in the number of contested cases. UK senior managers will need to demonstrate awareness of the risks in the business areas for which they are responsible and to take steps to control that risk through appropriate delegation, efficient corporate governance systems and effective remedial actions where issues are identified.

Session 1 Panel: Justin Harvey-Hills | Mourant Ozannes

In this session the Panel further considered the implications of the recent developments for Jersey regulated businesses. It was noted that the CFA legislation was largely designed to bring about a change in behaviour by potential facilitators of tax evasion and that it was not anticipated that there would be large numbers of prosecutions. However, if a business's procedures are found to be lacking (and it was noted that a criminal prosecution of the client was not necessary, a voluntary admission would do), prosecutions could flow to ensure examples are made of businesses. It was clear therefore that reviews of procedures will be required, and that these should involve more than a simple extension of existing policies to include reference to tax evasion.

The growing trend of regulatory enforcement was also noted, and it was considered that the restrictions on the use of privilege were largely intended to avoid businesses being able to avail themselves of long-established measures of self-preservation and instead to co-operate at all costs. The need for caution and a careful plan for dealing with regulatory investigations was therefore ever greater.

Supervision update, key findings and focus for 2017: Jill Britton | Jersey Financial Services Commission

Over the past year the JFSC has made significant progress towards the strategic goal of risk-based supervision. The changes necessary in systems and operating practices in order to achieve this goal are well on course for delivery, with further industry engagement on data capture requirements to be undertaken in the latter part of 2017. On-site examinations continue to be a key supervision tool with themed reviews being the focus for 2017. Policy development continues at pace to ensure Jersey remains a well-regulated and growing financial services industry and continues to earn the right to market access through the adoption of international standards.

The focus for the remainder of 2017 includes further embedding our supervisory approach through increased industry engagement, data collection to support the risk model and international assessments, and ensuring delivery of enhancements to our system capabilities, to realise efficiencies and make it easier to interact with industry. The industry and JFSC continues to face multiple regulatory changes and needs to continue to work together in safeguarding the best interests of Jersey.

An update on international standards on transparency and fighting financial crime: George Pearmain | Government of Jersey

While the international market remains challenging, maintaining Jersey's reputation as a well-regulated jurisdiction will allow local businesses to continue to pursue foreign opportunities. There are a number of new obligations which are expected in the near future, including the exchange of notes with the UK (coming into force 1 July 2017) and developments in financial crime regulation, which are currently being considered by the Financial Crime Strategy Group. These developments are likely to necessitate changes in law during 2018, to enable the effectiveness of those requirements to be assessed at the next MONEYVAL visit in 2020. Jersey is also well-placed to adopt a market-leading position in relation to future FinTech developments.

International Transparency Standards, Risks and Opportunities: Sarah Huelin | Mourant Ozannes

Jersey is committed to updating its central register of beneficial owners or controllers by 30 June 2017. The JFSC and trust companies have undertaken a significant amount of work to meet that commitment in a short space of time. This fast and flexible response, as well as the quality of the information on the register, showcases some of Jersey's strengths which can be used to competitive advantage as Jersey continues to respond to international transparency demands.

New obligations to notify personal information to the JFSC do give rise to information security concerns but the JFSC is focussed on cyber security risk and encouraging trust companies to do the same. The new obligations also give rise to the risk of criminal and civil liability. These risks can be mitigated by understanding the new obligations, communicating with clients and making amendments to terms of business.

For trust companies, there are also opportunities to charge more fees and stand out from competitors by providing pragmatic and efficient assistance to client entities, including by using technology to streamline all reporting obligations and minimise the risk of human error.

Changes to the JFSC outsourcing policy, what you need to know: Fiona Magee | Mourant Ozannes

The JFSC Outsourcing Policy has been amended (the **2017 Policy**). Since 1 June 2017, new outsourcing arrangements need to comply with the 2017 Policy. Existing outsourcing arrangements will need to comply no later than 1 June 2018.

It's important to be aware that the definition of 'outsourcing' has changed in the 2017 Policy. This means that you may have existing arrangements which were not subject to the 2011 Outsourcing Policy, but that will be in scope for the 2017 Policy.

For further information, the Spotlight article in our recent **FinReg Bulletin** is a good place to start.

Session 2 Panel: Simon Gould | Mourant Ozannes

Jill Britton indicated that the JFSC did not currently intend to copy the UK's Senior Managers Regime, but will be proposing to extend the civil penalties regime to individuals. She also explained that, although no civil penalties have yet been imposed, this is primarily because the regime does not have retrospective effect. However, a number of 'yellow card' warnings have been given.

George Pearmain gave reassurance that the highest level of importance is given to prevention of hacking of the central beneficial ownership/controller register. He also commented that although the eVID project is being approached with caution, Government does see it as a potential game-changer for Jersey.

Contacts

Justin Harvey Hills
Partner, Jersey
+44 1534 676 105
Justin.harvey hills@mourantozannes.com

Simon Gould
Partner, Jersey
+44 1534 676 367
simon.gould@mourantozannes.com

Mathew Cook
Counsel, Jersey
+44 1534 676 371
mathew.cook@mourantozannes.com

Sarah Huelin
Counsel, Jersey
+44 1534 676 540
sarah.huelin@mourantozannes.com

Fiona Magee
Associate, Jersey
+44 1534 676 144
fiona.magee@mourantozannes.com