CHANCERY BAR

Chancery Bar Association Guernsey 2022

Conference Chair – Michael Gibbon KC

Association Chair – Andrew Twigger KC

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Panel Session:

Cryptoassets as investments:
What if it all goes wrong?

Peter Dodge ***Radcliffe Chambers***

Nik Yeo ***Fountain Court Chambers***

Leigh Sagar ***New Square Chambers***

Cryptoassets as investments: What if it all goes wrong?

- A novel and disruptive innovation – is there a need for legislative clarity? (PD)
- Contract law: can computers make mistakes? (NY)
- Disputes involving DeFi investment (LS)

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A novel and disruptive innovation – is there a need for legislative clarity?

Peter Dodge

Radcliffe Chambers

Legal statement: Introduction, [3]

"The great advantage of the English common law system is its inherent flexibility. Rather than depending on the often cumbersome, time-consuming and inflexible process of legislative intervention, judges are able to apply and adapt by analogy existing principles to new situations as they arise. In commerce, the law is there to support and fulfil reasonable expectations. It is "endlessly creative … a living law, built on what has gone before, but open to constant renewal". Time and again over the years the common law has accommodated technological and business innovations, including many which, although now commonplace, were at the time no less novel and disruptive than those with which we are now concerned. In no circumstances therefore are there simply no legal rules which apply."

Legal statement: Introduction, Scope [10]

"As stated in the Consultation Paper, there are a number of areas of law which have intentionally been deemed out-of-scope. In particular we do not address the regulation of dealings in cryptoassets, because it seems more appropriate for regulation to follow the logically prior issues of common law characterisation. Similarly, the remedies which the law will provide in any particular circumstances follow on from an analysis of the relevant legal rights, and can be developed as necessary over time in appropriate cases."

Legal statement: Introduction, Scope, [11]

"The Taskforce considers that matters of taxation, criminal law, partnership law, data protection, intellectual property, consumer protection, settlement finality, regulatory capital, anti-money laundering and counter-terrorist financing are best dealt with by other bodies or organisations. We have not trespassed into issues relating to monetary policy or the nature of cryptoassets as money."

Legal statement: Introduction, Scope [12]

"Finally, we should note that the law can be highly fact-sensitive. We are unable in a document such as this to deal with areas where too many potential factual scenarios would need to be considered in order for us to provide any helpful answers. This Statement is not intended to be legal advice, for which readers should consult a lawyer, and nothing in it should be relied upon as being relevant to any particular circumstances."

Digital Assets: Consultation paper, Q30

- We provisionally conclude that, under the law of England and Wales, crypto-token custody arrangements could be characterised and structured as trusts, even where the underlying entitlements are (i) held on a consolidated unallocated basis for the benefit of multiple users, and potentially even comingled with unallocated entitlements held for the benefit of the custodian itself. Do you agree?

- We provisionally conclude that the best way of understanding the interests of beneficiaries under such trusts are as rights of co-ownership in an equitable tenancy in common. Do you agree?

Digital Assets: Consultation paper, Q30, 31

- Do you consider that providers and users of crypto-token custody services would benefit from any statutory intervention or other law reform initiative clarifying the subject matter certainty requirements for creating a valid trust over commingled, unallocated holdings of crypto-tokens? If yes, please explain what clarifications you think would assist?

- We provisionally conclude that a presumption of trust does not currently apply to crypto-token custody facilities and should not be introduced as a new interpretative principle. Do you agree?

Digital Assets: Consultation paper, Q32

- We provisionally propose that clarification of the scope and application of section 53(1)(c) LPA 1925 would be beneficial for custodians and would help facilitate the broader adoption of trust law in structuring custody facilities, in relation to crypto-tokens specifically and/or to other asset classes and holding structures, including intermediated investment securities. Do you agree?

- If you think that (such) clarification would be beneficial, what do you think would be the best way of achieving this? Please indicate which (if any) of the models suggested … would be appropriate, or otherwise outline any further alternatives that you think would be more practically effective and/or workable.

Digital Assets: Consultation paper, Q41

- We provisionally conclude that tracing (rather than following) provides the correct analysis of the process that should be applied to locate and identify the claimant's property after transfers of crypto-tokens by a transfer operation that effects a state change, and that the existing rules on tracing (at equity and common law) can be applied to crypto-tokens. Do you agree?

- Do you consider that the common law on tracing into a mixture requires further development or law reform (whether generally or specifically with respect to crypto-tokens)?

Digital Assets: Consultation paper, Q42

- We provisionally conclude that the following existing legal frameworks can be applied to data objects, without the need for statutory law reform (although the common law may need to develop on an iterative basis):
  (1) breach of contract
  (2) vitiating factors;
  (3) following and tracing;
  (4) equitable wrongs:
  (5) proprietary restitutionary claims at law; and
  (6) unjust enrichment.

  Do you agree?

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"Contract law: can computers make mistakes"

Nik Yeo

Fountain Court Chambers

Temple

Cryptoassets as investments: What if it all goes wrong?
– Nik Yeo

- *Quoine v B2C2* [2020] SGCA(I) 02

Cryptoassets as investments: What if it all goes wrong?
– Nik Yeo

- *Quoine v B2C2* [2020] SGCA(I) 02

Maj: sufficient if the programmer knew (actually or constructively) that the relevant offer which the non-mistaken party was making would **only ever** be accepted by a counterparty operating under a mistake **and** that programmer acted to take advantage of that mistake

Cryptoassets as investments: What if it all goes wrong?
– Nik Yeo

- *Quoine v B2C2* [2020] SGCA(I) 02

Maj: sufficient if the programmer knew (actually or constructively) that the relevant offer which the non-mistaken party was making would **only ever** be accepted by a counterparty operating under a mistake **and** that programmer acted to take advantage of that mistake

Min: sufficient if there was actual knowledge by an individual on B2C2's side of the mistake as soon as the trade was discovered, **even if** that knowledge only arose after the contract had been concluded – at least where no detriment or third party interests intervened

Cryptoassets as investments: What if it all goes wrong?
– Nik Yeo

- Law Commission England and Wales "*Advice to Govt on Smart legal contracts*" November 2021

sufficient if it ought to have been apparent to any reasonable person in the non-mistaken party's position that a mistake was made

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Disputes Involving DeFi Investment

Leigh Sagar

New Square Chambers

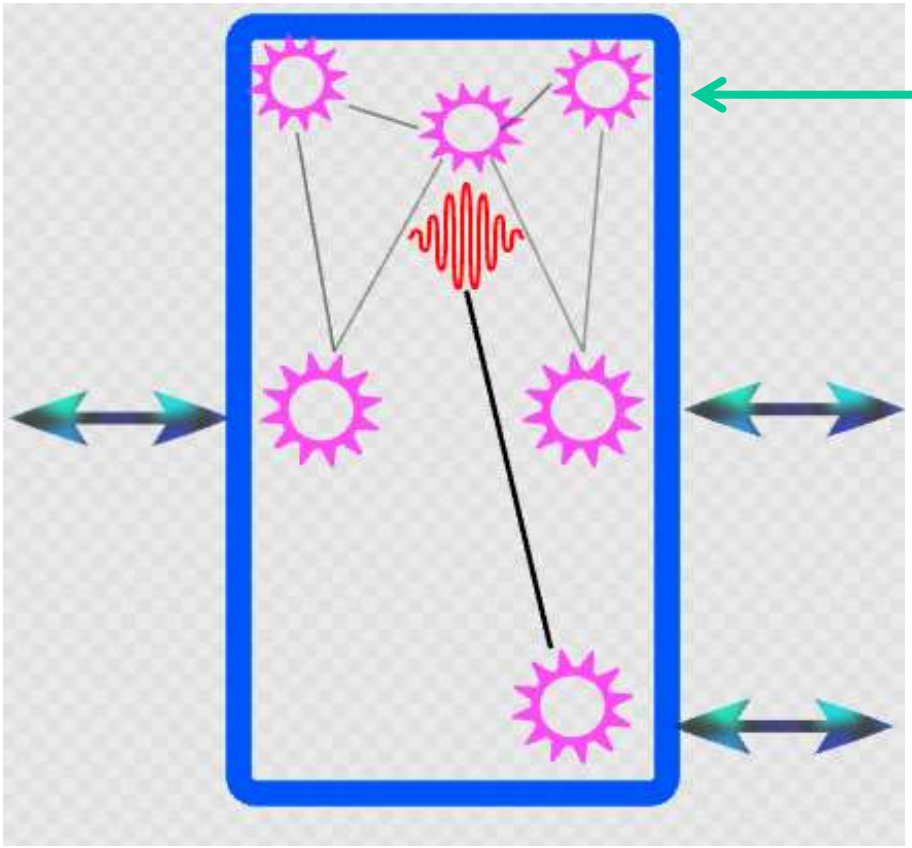
Lincoln’s Inn

The Digital Machine

- The DeFi Protocol
  - The Digital Machine
- DeFi primitives
  - Supply
  - Withdrawal
  - Swap
- The contract
  - *Thornton v Shoe Lane Parking*
- Possible disputes

The Corporeal Machine

DeFi Primitives



Oracle

The DAO

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International On Request Exchange of Tax Information for Trusts and Trust Companies

Harriet Brown

Old Square Tax Chambers

International On Request Exchange of Tax Information for Trusts and Companies

On request exchange: what is it? What isn't it?

The basic mechanism

Requests under TIEAs: how to address a TIEA request

Litigating TIEA requests: protection for taxpayers

The Guernsey position

Provision of information: ramifications for trustees

UK tax consequences of TIEA information request

On request exchange: what is it? What isn't it?

Broadly speaking, three types of exchange:

- On request
- Automatic
- Spontaneous

On request exchange can happen under:

- a double tax treaty
- A tax information exchange agreement (TIEA)

On request exchange: what is it? What isn't it?

- OECD Model DTA (Article 26):

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use

On request exchange: what is it? What isn't it?

OECD Model TIEA, Article 1:

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information

The basic mechanism

The basic mechanism is likely to be similar to that under the OECD Model (and more importantly, Guernsey's TIEAs tend to be based on the OECD Model TIEA). So that's what we're going to focus on

Agreements are bilateral. So is exchange!

Model TIEA, Article 5:

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

The basic mechanism

OECD Model, Article 5(4):

4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

b) information regarding the ownership of companies, partnerships, trusts, foundations, “Anstalten” and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

The basic mechanism

Article 5(5):

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

(c) the tax purpose for which the information is sought;

(d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

The basic mechanism

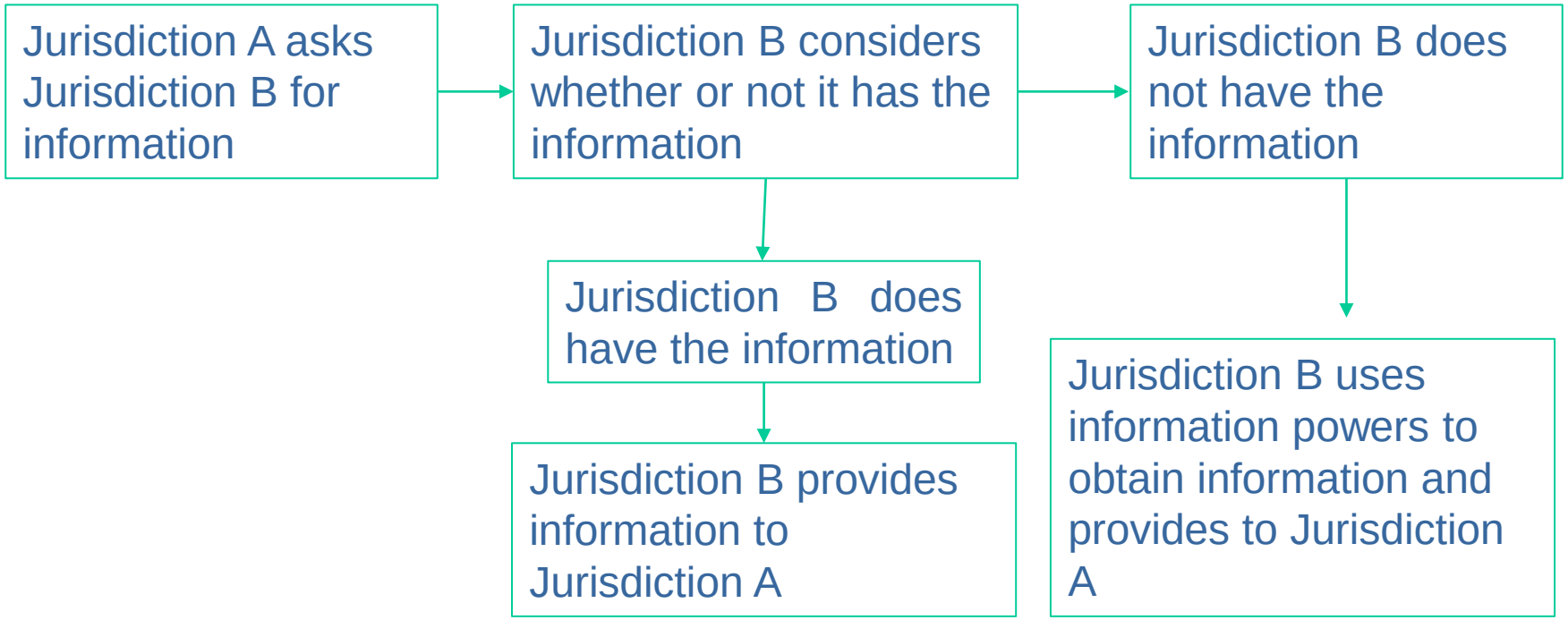
OECD Model, Article 6:

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:

a) Confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request.

b) If the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal

Requests under TIEAs: how to address a TIEA request



Jurisdiction B uses information powers to obtain information and provides to Jurisdiction A

Jurisdiction B uses powers to obtain from the taxpayer and/or third parties

Gives information notice to taxpayer/third party

Third party considers information request

Does requested info assist administration/ enforcement discriminating against non-nationals of Jurisdiction A?

Jurisdiction A able to obtain info under its own laws for purposes of the administration or enforcement of its own tax laws?

Does the requested information disclose any trade, business, industrial, commercial or professional secret or trade process?

Does the info require waiver of LPP?

YOU WILL NEED LEGAL ADVICE TO KNOW WHETHER TO/WHAT TO SUPPLY

Litigating TIEA requests: protection for taxpayers

What is the local jurisdiction regime?

What information are you entitled to from the requesting authority?

What are the time limits for appealing/requesting review of the information notice?

What are the potential grounds? In particular, consider: data protection (GDPR – see *Schrems II*), human rights (more probably relevant with on request exchange than automatic), procedural irregularity

Practical considerations

The Guernsey position

While international law primarily drives the provisions on information exchange, they have to be enacted in national law

Guernsey complies with its international obligations in its Income Tax (Guernsey) Law 1975

The ability to challenge an information request is found in section 75K

The Guernsey position

There is a right of appeal (separate to judicial review, which may also be available)

Application to Bailiff for leave to appeal within **30 days** of the date of the notice. Must have leave from the Bailiff

Subsequent appeals are to the Court of Appeal, and made within **7 days** of the Bailiff's decision

No further appeal

The Guernsey position

Only certain grounds of appeal are permitted

Decision was *ultra vires* or unreasonable in law or some other error of law

Material error as to facts

Must give notice of the appeal to director within **7 days**

The notice to provide information is “suspended” while the appeal is determined

Trustees

Trustees are perhaps particularly vulnerable to receiving information requests in relation to settlors/beneficiaries of trusts

They also have a number of duties to consider:

- Fiduciary duty to the beneficiaries
- Duty of confidentiality
- Professional duties in relation to, e.g. anti-money laundering
- Duties under the Guernsey law, e.g. with regard to disclosing information
- Duties sought to be imposed upon them by foreign law

UK tax consequences of TIEA information request

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Intestacy – how bad can it be?

- Comparing intestacy provisions in E&W and Guernsey
- The importance of domicile
- Lesser known details

Alexander Learmonth KC
New Square Chambers

Intestacy rules – major changes at home and abroad

Inheritance and Trustees' Powers Act 2014 amending s.46 Administration of Estates Act 1925

- Spouse + issue: spouse takes personal chattels, 'fixed net sum' plus half residue absolutely (not just life interest in half residue)
  - Fixed net sum now index-linked: £270,000
  - Personal chattels definition updated
  - Right to appropriate matrimonial home
- Spouse, no issue: all to spouse (not shared with other relatives)
- Issue, no spouse: all to issue, as before (on statutory trusts).

Intestacy rules – major changes at home and abroad

Inheritance and Trustees' Powers Act 2014 amending s.46 Administration of Estates Act 1925

- Then:
  - Parents
  - Siblings of the whole blood (on statutory trusts)
  - Half-siblings (on statutory trusts)
  - Grandparents
  - Uncles and aunts of whole blood (on statutory trusts)
  - Uncles and aunts of half blood (on statutory trusts)
  - *Bona vacantia*

The ‘statutory trusts’ – s.47 AEA1925

“In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of 18 years or marry under that age or form a civil partnership under that age, and for all or any of the issue living at the death of the intestate who attain the age of 18 years or marry, or form a civil partnership under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that ... no issue shall take whose parent is living at the death of the intestate and so capable of taking”

Intestacy rules – major changes at home and abroad

Inheritance (Guernsey) Law 2011, Schedule 1

1. In order for a person to inherit, he must be alive (including "en ventre sa mère") and, when born, capable of living ("né viable").

2. Inheritance is allowed up to, but not including, the seventh degree of relationship and where, in this Schedule, reference is made to a degree of relationship, that degree of relationship shall be calculated using the canonical mode.

3. Females rank equally with males in parity of degree.

4. Siblings of the half blood rank equally with siblings of the whole blood in parity of degree.

Inheritance (Guernsey) Law 2011, Schedule 1

- Paras: 11-18 – Real property
- Paras: 19-25 – Personal property

but in fact they are identical, save as to the matrimonial home:

- If no descendants, all to surviving spouse
  - NB nothing to any unmarried partner - have to rely on Family Provision claim under the 2011 Law of 1975 Act for 2-year cohabitees.
- If both descendants and spouse:
  - Spouse gets half of all real and personal property
  - No fixed net sum.
  - Plus *usufruit* of remaining share in matrimonial home (no need to buy it from estate)
  - Descendants get rest

A cautionary tale: *Re Bhusate* [2018] EWHC 2362

- Husband dies in 1990, leaving widow and children from earlier marriage.
- House is main asset.
- Widow takes grant, elects to capitalise life interest in half residue.
- No appropriation or assent to her.

... 26 years elapse ...

- Claims to own house all fail.
- Claims to share in estate statute-barred after 12 years.

(Fortunately she is allowed to bring a Family Provision claim, about 26 years out of time)

Matrimonial home - differences

Guernsey: “dwelling-house in which the surviving spouse or civil partner was ordinarily resident together with the deceased at the time of the death of the deceased”

England & Wales: “a dwelling-house in which the surviving spouse or civil partner was resident at the time of the intestate’s death”

Conflict of laws:

- Lex situs applies to immoveables
- Lex domicilii applies to moveables.

- In theory, could claim the usufruit in the matrimonial home in Guernsey and the fixed net sum under English law if domiciled there.

Inheritance (Guernsey) Law 2011, Schedule 1

If no spouse, then:

- All to descendants
- If no descendants then to 'privileged collaterals' = brothers and sisters
- Failing which, to ascendants (different order from English law)
- Failing which, to 'remaining collaterals'
- Extending to sixth degree of relationship – (second cousins, first cousins-twice-removed)
- Includes illegitimate children: Law Reform (Inheritance & Misc Prov) Law 2006

- Nearer degrees take in priority to further
- Plus 'Representation' applies, so that the descendants of a predeceased relative who could have inherited take their parent's share.

Genealogical problems and solutions

- Section 27 Trustee Act 1925
- Indemnity from beneficiaries
- Insurance – but may not be recoverable from estate: *Re Evans* [1999] 2 All ER 777.
- Common law presumption of death.
- *Re Benjamin* [1902] 1 Ch 723 – permission to distribute on assumed facts (e.g. death or non-existence of beneficiaries)
- DNA testing:
  - ss.20-21 Family Law Reform Act 1969 – consent or inferences
  - *Re Birtles* [2018] EWHC 299 (Ch) –consent or contempt
- Administration Order under Part 2 of the Law Reform (Inheritance and Misc. Prov) Law 2006

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- Theobald on Wills
- Williams Mortimer & Sunnucks on Executors, Administrators & Probate
- STEP Advocate of the Year 2020
- Ranked Tier 1 Silk for Trusts by Chambers UK Bar directory

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BTI v Sequana – Old hat for Guernsey?

James Potts KC

Erskine Chambers

Summary

- Factual issues in Sequana and decisions of the 3 courts
- Is there a “creditor duty”?
- When is it triggered?
- What is the content of the duty?
- Ratification
- Dividends
- Where does it leave directors in Guernsey and their lawyers?

BTI v Sequana - facts

- Polluted river - US statutory liability
- Chain of indemnities ending with AWA, which stops trading
- Indemnity liability – very large, very uncertain, very long-term
- Provision in the accounts – a best estimate
- Risk that it would prove too low
- Dividend of €135m paid by AWA to sole shareholder, Sequana

First instance decision – Rose J. [2016] EWHC 1686 (Ch)

- "Could not" claims (that the dividend failed to comply with Part 23 CA 2006) dismissed.
- Claims that directors "should not" have paid dividend rejected: Creditor duty did not arise as company not of verge of, or of doubtful insolvency or in precarious or parlous financial state.
- Payment of May dividend breached s.423 IA 1986 - evidence that paid with intention of putting assets beyond reach of creditors or otherwise prejudicing their interests.

Court of Appeal decision – David Richards, Longmore, Henderson LJs. [2019] EWCA Civ 112

- Dividends were within s.423 IA 1986
- Creditor duty triggered where directors knew or should know company was likely (probable) to become insolvent.
- Duty not engaged on the facts.
- *Per curiam* where company presently and actually insolvent, hard to see that creditors' interests anything but paramount [222].

Supreme Court – Reed, Hodge, Kitchin, Arden [2022] UKSC 25

- Common law “creditor duty” preserved/recognised by s.172(3) CA 2006.
- Trigger – directors know or ought to know that insolvency imminent or probable that company would enter insolvent liquidation/administration.
- Duty – take into account and give appropriate weight against interests of creditors and balance them where conflict; creditors’ paramount where insolvent. liquidation/administration inevitable.
- Applies to dividends.

Does the duty exist?

- Answer – yes (but for varying reasons).
- Carlyle Capital Corpn v Conway
- Justifications:
  - Long line of authority inc Australia and New Zealand
  - Confirmed by enactment of s.172(3) CA 2006 (Lady Arden disagrees)
  - Commercial – who has “skin is in the game”?

Trigger for the duty?

- Directors know or ought to know (i) company is insolvent or (ii) bordering on insolvent or (iii) insolvent liquidation or administration is probable.
- It is not "real but not risk" [83], "likely to become insolvent at some point in future" [89]; insolvency *per se* [85] or s.214 IA 1986 test of unavoidability [94(iv)]
- Are there many cases where CA test would be engaged but SC not?
- Any real difference in practice how/when you advise directors?

Content of the duty

- Where liquidation/administration not inevitable, balance creditor interests against shareholders where they conflict.
- Where insolvency process inevitable, creditors' interests paramount.
- "Sliding scale"
- Carlyle nuanced approach endorsed.
- Largely a subjective view. Safety net of Charterbridge Corpn Ltd v Lloyds [1970] Ch 62.
- Any real difference in practice how you advise directors?

Other take-aways?

- Applies to otherwise lawful dividends: Burnden v Fielding [2019] EWHC 1566 (Ch).
- Ratification – not effective when duty engaged?
- "Square the circle" of s.423 IA 1986 / Pauline action (Flightlease Holdings (Guernsey) Ltd v International Lease Finance Corpn (55/2005)) – improper purpose; Sequana at [182]

Where does it leave us?

- Most cases where duty engaged likely to be relatively clear.
- Comfort for directors exercising good faith business judgments.
- Directors need to continue to ensure they are aware of financial position.
- Where any chance of solvency issues intruding – prudent to consider creditors.
- Professional advice to back up business judgments.
- Properly document decision-making.
- Insurance!

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Better the devil you know: Should Guernsey follow Jersey or Bermuda on protector consent powers ? A debate

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Mark Hubbard, Hermione Williams & Sarah Egan
New Square Chambers

Jersey

Bermuda

So, should Guernsey follow Jersey or Bermuda on protector consent powers ?

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‘COME TOGETHER’

Major Developments in the Tort of Conspiracy

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4th November 2022

INTRODUCTION

- How does the ‘combination’ element work in England and in Guernsey?
- What particular developments have there been in relation to combinations involving corporate actors?
- What is the requisite intention element for the tort in England and in Guernsey?
- How has that intention element developed?

THE COMBINATION: ENGLAND AND WALES

"A conspiracy consists … in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means"

***Mulcahy v R* (1868) L.R. 3 H.L. 306 (Wiles J.)**

THE COMBINATION: ENGLAND AND WALES

"...numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce"

Quinn v Leatham **[1901] AC 495 at 538 (Lord Lindley)**

THE COMBINATION: ENGLAND AND WALES

"It is a rare case where there is evidence of an agreement and, in most cases, 'it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination': *Kuwait Oil* at para 112."

Racing Partnership Ltd v Done Bros (Cash Betting) Ltd

[2020] Ch 289 at [257] (Zacaroli J.)

THE COMBINATION: ENGLAND AND WALES

"This is the basis of Nield J's decision in R v McDonnell: see at 245C-D where he said that where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds, and that if it were otherwise it would offend against the basic concept of a conspiracy, namely an agreement of two or more to do an unlawful act. Although a criminal case, it is not obvious why the same should not be true in a civil conspiracy: […]"

***Raja v McMillan* [2021] EWCA Civ 1103 at [56] (Nugee L.J.)**

THE COMBINATION: GUERNSEY

"No express agreement need be proved, tacit co-operation is sufficient, so long as all parties to the conspiracy are aware of the surrounding circumstances and share the same object: *Kuwait Oil Tanker Co. SAK v. Al Badder* (16). Thus, it is sufficient that Mr. Nazarov, as the guiding mind of Ansol Guernsey, knew what was going on and he intended that the company should participate in what he planned to do."

***Vardinoyannis v Ansol Ltd* [2000]**

(Lieut. Bailiff HHJ Newman QC)

THE COMBINATION: GUERNSEY

"The need for 'overt acts' is, initially, an evidential one. It is in the nature of a conspiracy that the "scheming" is covert; very rarely will a Plaintiff be able to adduce direct evidence of the fact of a combination. Frequently, therefore, proven "overt acts" are relied on as material from which the court is invited to infer the existence of the necessary antecedent combination."

***Vardinoyannis v Ansol Ltd* [2000]**

(Lieut. Bailiff HHJ Newman QC)

INTENTION: ENGLAND AND WALES

a) **Ends**: If harm to the claimant is the end sought by the defendant (e.g. because of some animus)

b) **Means**: If harm to the claimant is the means by which the defendant seeks to secure his/her end (usually to secure a benefit for himself/herself)

c) **Consequences**: If harm is neither the end nor the means but merely a foreseeable consequence, the requisite intention is not made out.)

E D & F Man Capital Markets Limited v Come Harvest Holdings Limited **[2022] EWHC 229 (Comm) at [487] (Calver J.)**

INTENTION: ENGLAND AND WALES

"It follows that the current and established state of the law, which I follow, is that laid down by Lord Hoffman and Lord Nicholls in *OBG*, and a specific intention to target the defendant is not required; rather, the harm done to the claimant must either be the end sought by the defendant or the means by which he achieved his end."

E D & F Man Capital Markets Limited v Come Harvest Holdings Limited **[2022] EWHC 229 (Comm) at [500] (Calver J.)**

INTENTION: ENGLAND AND WALES

"[…] Following Lords Hoffmann and Nicholls' test in *OBG*, it is not necessary to have knowledge of the precise identity of the claimant to have the requisite intention (in a case where harm to the claimant is the end sought, that almost always presupposes knowledge of the identity of the claimant, but it is possible that a defendant could have the requisite intention in a "means" or "obverse side of the coin" case without knowledge of the claimant's identity). […]"

***E D & F Man Capital Markets Limited v Come Harvest Holdings Limited* [2022] EWHC 229 (Comm) at [518] (Calver J.)**

INTENTION: GUERNSEY

"As already indicated, the cause of action requires an actual intention to injure the Plaintiff, albeit this does not have to be the sole or predominate intention of the conspirators. However, the precise quality of the required such intention has often exercised the English courts. The issue is generally that of whether a sufficient 'intention to cause injury' to the Plaintiff can be found in the situation where harm has been caused by the unlawful acts of the conspirators, but their motive for committing those acts was not that of causing harm to the Plaintiff (i.e. malevolence) but was something else, usually to obtain a personal gain or confer a gain on another person."

***Jefcoate v Spread Trustee Company Limited* [2014] at [203]**

(Lieut. Bailiff HHJ Marshall QC)

INTENTION: GUERNSEY

"In my judgment, the extension of the mental element required for unlawful means conspiracy liability which *Baldwin v Berryland Books* establishes is simply that such intention can be imputed where the alleged co-conspirator is found to have *taken an active decision not to enquire* whether the proposed planned course of action will or will not cause harm to the Plaintiff, in order to avoid discovering that it will. That situation does not arise in this case and I find the concept of 'reckless indifference' or no further assistance on this topic."

***Jefcoate v Spread Trustee Company Limited* [2014] at [203]**
(Lieut. Bailiff HHJ Marshall QC)

CONCLUSION

- The desire to narrow down the economic torts equally applies to unlawful means conspiracy (compare with *Secretary of State for Health v Servier Laboratories* [2021] UKSC 24).
- Elements of the tort, like the nature of a combination and the requisite intention, are continuing to be tested in the English Courts. *Come Harvest Holdings Limited* will be before the Court of Appeal in December.
- The Guernsey Courts will continue to grapple with these concepts by considering both local judgments alongside English judgments.

CHANCERY BAR

Freezing Injunctions

Peter de Verneuil Smith KC
3VB

Overview

1. Jurisdiction- Broad Idea International.
2. Fortification- Spence.
3. Crypto currency issues.
4. Costs- In re Saka Maka 2 Ltd.

1. Broad Idea International

Privy Council held in Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24:

(1) If personal jurisdiction over the R a FI may be granted if there is a good arguable case that a judgment would be enforceable in that court.

(2) No requirement for a judgment or award in the domestic court. Sufficient a right to proceedings and proceedings will be brought.

(3) No requirement that the judgment be against the respondent.

(4) No requirement for an existing cause of action justiciable before national court before a FI can be granted.

The test re-formulated

The re-stated test for a FI is:

(1) C has a good arguable case that it will obtain a judgment (or order) for payment of a sum of money that will be enforceable through the process of the court.

(2) R holds assets (or liable to reduce value of assets outside ordinary course of business) against which the judgment could be enforced.

(3) There is a real risk that unless injunction granted R will deal with assets other than in ordinary course of business and prevent enforcement.

2. Fortification

The test for fortification is:

(1) An intelligent estimate of the likely loss.

(2) A good arguable case that loss will be caused by reason of FI.

(3) The FI is a but for cause of the loss.

Phoenix Group Foundation v Cochrane [2018] EWHC 2179 (Comm) [14].

The decision in Spence

The test for fortification has been affirmed by COA in The Claimants listed in Schedule 1 v Spence [2022] EWCA Civ 500.

- The court will scrutinize carefully the alleged causation of loss.
- For anticipated losses related to collapsing bank facilities the causative impact of proceedings (as opposed to the FI) will be a major problem for a respondent.

3. Crypto currency issues

Is a crypto currency an asset?

UK Jurisdiction Task Force "*Crypto Assets and Smart Contracts*" 11 November 2019

Vorotyntseva v Money-4 Ltd [2018] EWHC 2598 (Ch) – Birss J

Liam David Robertson v Persons Unknown (unreported 15 July 2019)- Moulder J

AA v Persons Unknown [2019] EWHC 3556 (Comm)- Bryan J

HRD Global Trading Ltd v Shulev [2022] EHWC 1685 (Comm) – Henshaw J.

Cryptocurrencies as assets in other jurisdictions

Singapore – B2C2 Limited v Quoine PTC Ltd [2019] SGHC (I) 03 [142].
New Zealand – Ruscoe v Cryptopia Ltd (in liquidation) [2020] NZHC 728.
Australia – Hague v Cordiner (No. 2) [2020] NSWDC 23.

What is the applicable law of property?

The law of the domicile of the owner of the asset (Ion Science Ltd v Persons Unknown – Unreported 21 December 2020 Butcher J).
Followed in Fetch.ai Ltd v Persons Unknown [2021] EWHC 2254 (Comm) – Pelling J.
If C is domiciled in England and buys bitcoins from an exchange then English law applies as lex situs (Danisz v Persons Unknown (2022) EWHC 280 (QB)- Lane J).
Test maybe residence rather than domicile (Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch) [148]- Falk J).

Orders relating to identity of cyber fraudsters

Norwich Pharmacal relief against a respondent residing out of the jurisdiction refused in AB Bank Ltd v Abu Dhabi Commercial Bank PJSC [2016] EWHC 2082 (Comm)- Teare J but granted in Fetch.ai Ltd v Persons Unknown [2021] EWHC 2254 (Comm) – Pelling J.

Bankers Trust order against respondent outside of jurisdiction refused in AB Bank but granted in Ion Science and Fetch relying on MacKinnon v Donaldson [1986] Ch 482.

The CPR to the rescue

A new gateway (no. 23) has been introduced into the CPR rules for service out where the claim is disclosure of information regarding the identity of a defendant or facts regarding C's property.

No need for separate part 7 proceedings against a defendant.

4. Costs

Can the claimant get its costs on the successful return date?
Increasingly this is done:
Bravo v Amerisur Resources Plc [2020] EWHC 2279 (QB)
Darnitsa v Metabay Import/Export Ltd [2021] EWHC 1471 (Comm)
Rosler v Microcredit Ltd [2021] EWHC 1904 (Ch)
In re Saka Maka 2 Ltd [2022] EWHC 1008 (Ch)

CHANCERY BAR

Chancery Bar Association Guernsey 2022

Afternoon Tea

#chbaconference

CHANCERY BAR

Guernsey sanctions on Russia – key issues

Charles Banner K.C.
Keating Chambers

Overview of Sanctions Legislation and Guidance applicable in Guernsey

- Sanctions (Bailiwick of Guernsey) Law 2018
- Sanctions (Implementation of UK Regimes) (Bailiwick of Guernsey) (Brexit) Regulations 2020 ("the 2020 Regs") which give effect in Guernsey to the following UK legislation:
  - Sanctions and Anti-Money Laundering Act 2018 ("SAMLA")
  - Russia (Sanctions) (EU Exit) Regulations 2019 ("the 2019 Regs")

- OFSI, *UK Financial Sanctions – General Guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018*
- Guernsey Policy & Resources Committee guidance on sanctions reporting obligations and licensing

The Sanctions and Anti-Money Laundering Act 2018 ("SAMLA")

- SAMLA is the main sanctions primary legislation.
- Given effect in Guernsey under r1(1) and sch 1 of the 2020 Regs.
- Applies to all Bailiwick persons, wherever they are in the world.
- Inter alia, provides for:
  - Designation of Persons
  - Financial sanctions
  - Trade sanctions
  - Licences and exceptions

SAMLA – Designation of Persons

Persons can be designated by name or by description.

The power to designate by description "*can only be exercised when it is not practicable for the Minister to identify by name all the persons falling within the description, and the description is sufficiently precise that a reasonable person would know whether any person falls within it*."

SAMLA – Financial Sanctions

In relation to designated persons, Section 3 provides that regulations may:

1. freeze funds or economic
2. restrict the provision of financial services
3. prevent the procurement of financial services
4. prevent the making available of funds or economic resources
5. prevent the receipt of funds or economic resources
6. prevent certain financial services being offered
7. prevent the ownership or control of designated entities.

SAMLA – Trade Sanctions

In relation to designated persons, or persons in a prescribed country, under s5 and sch 1 of SAMLA, sanctions may restrict:

1. imports,
2. exports,
3. the transfer of technology,
4. the acquisition of land, and
5. the provision of services

SAMLA provides that breach of sanctions regulations may be a criminal offence punishable by imprisonment for up to 10 years.

The Russia (Sanctions) (Eu Exit) Regulations 2019 ("2019 Regs")

- The 2019 Regs govern the current Russia sanctions regime.
- Given effect in the Bailiwick of Guernsey under r 1(1) and sch 1 of the 2020 Regs.
- Inter alia, the 2019 Regs provide detailed regulations in relation to:
  - Designated persons
  - Financial sanctions
  - Trade sanctions
  - Exceptions
  - Licences
  - Reporting obligations

The 2019 Regs – Designated Persons

- Persons who are, or have been, involved in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty, or independence of Ukraine.
- Natural persons, entities, or entities owned or controlled by designated persons.
- An entity is "owned or controlled directly or indirectly" by a designated person where that person holds:
  - More than 50% of the shares or voting rights in the relevant entity;
  - The power to appoint or remove a majority of the board of directors;
  - or where "*it is reasonable, having regard to all the circumstances, to expect that [the designated person] would (if [they] chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of [the entity] are conducted in accordance with [the designated person's] wishes*."

The 2019 Regs – Designated Persons

An entity may be "owned or controlled directly or indirectly" where there is a joint arrangement:

- if "*shares or rights held by a person and shares or rights held by another person are the subject of a joint arrangement between those persons, each of them is treated as holding the combined shares or rights of both of them*."

- "Arrangement" is non-exhaustively defined as "*any scheme, agreement or understanding, whether or not it is legally enforceable, and any convention, custom or practice of any kind*."

Thus, the test for whether an entity is "owned or controlled" by a designated person is extremely broad. So far, the courts have refused to provide guidance on the application of this test*: Re Petropavlovsk Plc (in administration)* [2022] EWHC 2097

The 2019 Regs – Financial Sanctions

- Asset-freeze in relation to designated persons (r11)
  - "*A person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources*" (r11(1))
  - "a person "deals with" funds if the person—
    a) uses, alters, moves, transfers or allows access to the funds,
    b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or
    c) makes any other change, including portfolio management, that would enable use of the funds" (r11(4))
  - "a person "deals with" economic resources if the person—
    a) exchanges the economic resources for funds, goods or services, or
    b) uses the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise).

The 2019 Regs – Financial Sanctions

- "funds or economic resources that are "owned, held or controlled" by a person include…
  a) funds or economic resources in which the person has any legal or equitable interest…
  b) any tangible property (other than real property), or bearer security, that is comprised in funds or economic resources and is in the possession of the person" (r11(6)).
- Making funds available to designated person (r12)
- Making funds available for benefit of designated person (r13)
- Making economic resources available to designated person (r14)
- Making economic resources available for benefit of designated person (r15)
- Dealing with transferable securities or money-market instruments (r16) issued by
  - Sberbank; VTB bank; Gazprombank; Vnesheconombank (VEB); Rosselkhozbank (sch 2).
- Loans and credit arrangements (r17) provided to
  - All the entitles above plus: OPK Oboronprom; United Aircraft Corporation; Uralvagonzavod; Rosneft; Transneft; Gazprom Neft (sch 2).

The 2019 Regs – Trade Sanctions

The 2019 Regulations prohibit trade with Russia in:	In relation to restricted goods and technology, a person must not directly or indirectly:

• military goods,
• dual-use goods and technology,
• energy-related goods and activities,
• aircraft and ships,
• luxury goods,
• iron and steel products,
• banknotes,
• jet fuel and jet fuel additives,
• oil and oil products,
• gold,
• coal and coal products,
• goods originating in non-government controlled Ukrainian territory.
	• supply them to Russia,
	• make them available
	  • to a person connected with Russia,
	  • for use in Russia;
	• provide technical assistance,
	• provide related financial services,
	• provide brokerage services,
	• insure certain activities.

The 2019 Regs – Exceptions

Financial Sanctions	Trade Sanctions
• the crediting of a frozen account (particularly with interest or other earnings) by a relevant institution • funds transferred to a frozen account in discharge (or partial discharge) of an obligation which arose before the recipient became a designated person • a drawdown or disbursement from a loan entered into before 15 September 2014 • certain prohibitions on correspondent banking relationships	• non-government-controlled areas of the Donetsk and Luhansk oblasts, if related to an obligation arising from a contract concluded before 23 February 2022. • critical-industry goods, luxury goods and gold which are personal effects, • consumer communication devices and software updates for civilian use, and • various other activities.

The 2019 Regs – Licences

- Licences permit activities that would otherwise be prohibited by sanctions.
- In the UK:
  - Financial sanctions licences are issued by the Treasury (OFSI),
  - Trade sanctions licences are issued by the Secretary of State.
- In Guernsey, under the 2020 regulations:
  - Financial sanctions licences are issued by the Policy & Resources Committee,
  - Financial sanctions licences are issued by the Committee for Home Affairs

OFSI General Guidance

- The OFSI General Guidance is not legally binding. Further, it is not applicable in the Bailiwick of Guernsey. Nonetheless:
  - it provides guidance on how the UK Government interprets sanctions legislation, and
  - may be taken into account by Guernsey authorities when considering questions of sanctions implementation within the Bailiwick.
- What must you do?

  a) *"If you know or have 'reasonable cause to suspect' that you are in possession or control of, or are otherwise dealing with, the funds or economic resources of a designated person you must:*

     i. *freeze them*

     ii. *not deal with them or make them available to, or for the benefit of, the designated person, unless:*

        1. *there is an exception in the legislation that you can rely on; or*
        2. *you have a licence from OFSI [the P&RC in Guernsey].*

     iii. *report them to OFSI [the P&RC in Guernsey].*

  b) *Reasonable cause to suspect refers to an objective test that asks whether there were factual circumstances from which an honest and reasonable person should have inferred knowledge or formed the suspicion."*

OFSI – Licensing

- OFSI is responsible for issuing individual and general licences in the UK.
  - OFSI licences do not have effect in the Bailiwick.
  - The Policy & Resources Committee has replicated many of the OFSI general licences within the Bailiwick
  - The P&RC is limited to the grounds for issuing licences provided under the UK regime.
- Licensing grounds (applicable in the Bailiwick):
  - Basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
  - Reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;
  - Fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources;
  - Extraordinary expenses (and in some cases, to an extraordinary situation);
  - Payment to satisfy an arbitral, administrative, or judicial decision;
  - Payment due under a pre-existing contract, agreement, or obligation.

OFSI – Licensing

- Basic needs:
  - For natural persons, that which is “necessary to ensure that designated persons or financially dependent family members are not imperilled”.
  - For entities, this includes the payment of insurance premiums, reasonable fees for property management services, remuneration of employees, tax payments, rent or mortgage payments and utility charges.
  - This ground does not “necessarily enable a designated person to continue the lifestyle or business activities they had before they were designated”.
- Legal fees:
  - The provision of legal advice under an asset freeze will generally be permitted, but payment for legal services, including on credit, will require an OFSI licence.
  - OFSI considers that the Supreme Court Cost Guides “provide a useful starting point for assessing the reasonableness of legal fees and disbursements”.
- Court fees:
  - Court fees and payments into court for security for costs can be licenced under the reasonable legal fees licensing ground. However, OFSI advises that, depending on the circumstances of the case, a separate licensing ground may be required to pay security for damages into court.

Ezz v HM Treasury [2016] – "Reasonable Legal Fees"

- ***R (Ezz) v HM Treasury* [2016] EWHC 1470 (Admin)** concerned the meaning of "reasonable legal fees" under a licence granted under the EU sanctions regime, the predecessor to the 2019 Regulations. The court held that it was not unreasonable for HM Treasury to assess the reasonableness of legal fees payable in Egypt with reference to the maximum Senior Courts Costs Office ("SCCO") guidance for London legal rates, adjusted by the International Monetary Fund's Purchasing Power Parity conversion rate ("PPP"). Cranston J provided guidance on the meaning of "reasonable legal fees":
  - "*First, reasonable legal fees are not necessarily the highest legal fees payable. Secondly, there can be differing views on what constitutes reasonable legal fees without those views being unreasonable. Thirdly, and crucially in this case, the issue is not what [the Egyptian law firm] quoted as its fees, or their bona fides, but what were reasonable fees for the purposes of Article 4.1(b).*"
- Thus, <u>evidence about where claimed fees stand in relation to usual rates is likely critical for the assessment of "reasonableness</u>" (paras 33-34).

OFSI – Legal Fees General License

- On 28 October 2022, OFSI published a General Licence that permits the payment of legal fees by Russian designated persons or entities:
  - Where legal work commenced before the designation of the individual or entity, there is a £500,000 (inc. VAT) cap on legal fees for the duration of the licence.
  - Where legal work commenced after the designation, it will be necessary to show that all legal fees are "reasonable" (See *Ezz*). Reporting must include hourly fees, workstreams, and evidence that overall fees are at or below £500,000 (inc. VAT). This is the total allowance available for designated persons per case and must be split where separate firms are engaged.
  - In certain circumstances, these two caps can be combined. Where there are separate pre- and post-designation obligations, legal fees up to £1 million (inc. VAT) could be allowed under the General Licence.
  - A specific licence must be obtained for any fees above these caps.
  - Hourly rates for Counsel are capped at £1,500 per hour (inc. VAT)
  - The Legal Fees General license is currently due to expire on 27 April 2023.

OFSI – Penalties

- OFSI has the power to impose financial penalties.
  - In 2022, the UK Government introduced the Economic Crime (Transparency and Enforcement) Act.
  - When enforcing a monetary penalty, the Act removes the requirement for OFSI to prove that a person must have "known or suspected" they were breaching UK sanctions law.
  - OFSI need only show, on the balance of probabilities, that the entity or person breached the prohibition. In effect, this makes breaching sanctions regulations in the UK a strict liability civil offence.
- As yet, the Economic Crime (Transparency and Enforcement) Act 2022 has not been given effect in the Bailiwick of Guernsey.

The Policy & Resources Committee – Licences

- Applications for an individual licence to release of all, or part of, the frozen funds must be made in writing to the Policy & Resources Committee by email or post and should include:
  - The identity of the designated person;
  - Evidence of ownership of or other entitlement to any frozen funds;
  - The grounds on which a licence is requested;
  - Where relevant, a full breakdown of expenses and financial circumstances of the designated person;
  - the precise amount in respect of which a licence is sought;
  - The length of time for which the licence is sought.
- The Policy & Resources Committee will normally decide within 28 days.
- The Committee has produced a template for making sanctions licensing requests.
- Most general licences issued by OFSI have been replicated in the Bailiwick.

The Policy & Resources Committee – Reporting Obligations

- Reporting obligations apply where there is knowledge, or reasonable grounds to suspect, that an individual or entity has committed an offence, or is linked to a sanctioned person.
- A "sanctioned person" is somebody who has been listed by the UN, the EU or the UK under any sanctions measure that has been implemented in the Bailiwick.
- The reporting obligation applies, not only to clients, but where a relevant institution knows or suspects that a sanctioned person is a beneficial owner, underlying investor, or close associate of one of its clients.
- Reports should be made to the Policy & Resources Committee by email. Reports should be accompanied by details of the grounds for knowledge or reasonable cause for suspicion, and any information identifying the relevant person.
- Where the person who is the subject of the report is a client of the reporting party, the report should also give details of the nature and extent of any assets that the reporting party held for that person at the point when the knowledge or suspicion arose.
- Where there is also a possible money laundering or terrorist financing link, an additional report should be made to the Financial Intelligence Service.

CHANCERY BAR

Chancery Bar Association Guernsey 2022

Conference Chair – Michael Gibbon KC
Association Chair – Andrew Twigger KC

Thank you for coming

#chbaconference