



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Caribbean Insolvency Symposium

Caribbean Track

Insolvency Remedies for Offshore Fraud: Closing the Net on the Bad Guys

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AMERICAN BANKRUPTCY INSTITUTE CARIBBEAN INSOLVENCY SYMPOSIUM 2019

INSOLVENCY
REMEDIES FOR
OFFSHORE FRAUD:
CLOSING THE NET ON THE
BAD GUYS



Proposition: This house believes that recent developments in offshore law have made the tools available through the offshore insolvency process to trace and recover assets more effective.

Moderator: Laura Hatfield, SolomonHarris/Bedell Cristin

Panelists:

- Scott Berman – Friedman, Kaplan, Seiler & Adelman
- Nava Hazan – Squire, Patton, Boggs
- John Royle – Grant Thornton Specialist Services (UK) Ltd.
- Shelley White – Walkers Global

FINDING ASSETS

Cayman Islands

Norwich Pharmacal

USA

USA Title 28 USC Section 1782

USA

Pre-Action Discovery from
Third Party

Cayman Islands

Liquidators' powers



Norwich Pharmacal

- A Norwich Pharmacal order (NPO) requires a respondent to disclose certain documents or information to the applicant. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.
- Norwich Pharmacal relief is not generally available against a respondent who is likely to be a party to the potential proceedings. The respondent must, however, be either involved or mixed up in a wrongdoing, whether innocently or not. An NPO is an equitable remedy, and will be granted only where "necessary" in the interests of justice.
- An NPO can be obtained pre-action, during the course of an action, and post-judgment.
- *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133, [1973] 2 All ER 943.

USA Title 28 USC Section 1782

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

Pre-Action Discovery from Third Party

- New York law permits pre-action discovery under CPLR §3102(c), which provides: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. (nb. Similar rules exist in a few other states)
- The Federal Rules of Civil Procedure, Federal Rule 27, "Depositions to Perpetuate Testimony" permits the preservation of testimony, physical evidence, and documents that are not likely to be available at a later time.
- Federal Rule of Bankruptcy Procedure 2004(a) states that "[o]n motion of any party in interest, the court may order the examination of any entity."

Liquidators' powers

- Companies Law (2018 Revision)
- Section 101 provides that a Liquidator may require a Statement of Affairs
- Section 102 also powers to investigate and prosecute fraudulent activity.
- Section 103 provides official liquidators with the ability to apply to the Grand Court for examination, either by way of sworn affidavit in response to written interrogatories and/or by oral examination, of:
 - persons having sworn or concurred with the Statement of Affairs;
 - directors and officers of the company; professional service providers of the company;
 - controllers, advisors , liquidators, or receivers of the company;
 - anyone, not falling into the above categories, who has been concerned with or taken part in the promotion or management of the company

FREEZING ASSETS

Cayman Islands

Injunctions in aid of foreign proceedings

USA

Injunctions in Federal Court

Cayman Islands

Recognition of Liquidators in USA

Appointment of Receivers

USA

Injunctions in State Court



Mareva Injunctions in aid of foreign proceedings

- Mareva Injunctions in Cayman Islands in aid of foreign proceedings
Mareva Ltd. Naviera S v International Bulk Carriers, S.A. CA 1 FEB 1975
- s. 11A Grand Court Law (2008 Revision)
 - (1) The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which-
 - (a) have been or are to be commenced in a court outside of the Islands; and
 - (b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law.
 - (2) The Court may, pursuant to this section, grant interim relief of any kind which it has power to grant in proceedings relating to matters within its jurisdiction

Injunctions in US Federal Court

Injunctions in Federal Courts

Grupo Mexicano de Desarrollo v Alliance Bond Fund Inc. 527 US 308 (1999)

US Recognition/Receivers

- US Bankruptcy Code Chapter 15, Section 1521 provides that upon recognition of a foreign proceeding, the Foreign Representative can ask the Court for any relief available to a Trustee in Bankruptcy (with some exceptions) including under:
Bankruptcy Code §105 to issue any order that is “*necessary or appropriate to carry out the provisions of this title*” which was used as the basis for an injunction preventing the transfer of any assets of the Defendant in an adversary proceeding in which a turnover of monies, along with an accounting, was sought by a Chapter 11 trustee. In *Ball v. Soundview Composite, Ltd. (In re Soundview Elite Ltd.)*, 2016 WL 30339 (Bankr. S.D.N.Y. Jan. 4, 2016)
- Receiver appointed under s. 11A Grand Court Law (2008 Revision) to preserve property from some danger threatening it.

Injunctions in State Court

- *Koehler v. Bank of Bermuda Ltd.* 12 NY 23d 533, 883, NYS 2D 763 (NY 2009)
- *Motorola Credit Corp v. Standard Chartered Bank*, NY 3rd 2014, Slip Op 07199 (October 23, 2014)
- *Gucci Am Inc. v. Bank of China* 768 F. 3rd 122 (2d Circuit 2014)

ILLEGALITY

Cayman Islands

Ex-Turpi Causa

Ruling in *Ahmad Hamad Algosaibi & Brothers Company (AHAB) v Al-Sanea & Ors*

USA

In Pari Delicto

Varying approaches to In Pari Delicto e.g. Delaware: *Stewart v Johnson Lambert & Co., Del. Supr. No. 204, 2015, Order* (2 November 2015)



Ex-Turpi Causa

- Ex turpi causa non oritur actio" translated as "from a dishonorable cause an action does not arise"
Williams v Everett (1725) 104 ER 725
- Ruling in *Ahmad Hamad Algosaibi & Brothers Company (AHAB) v Al-Sanea & Ors*
Denying AHAB's right to enforce its claim would, in my view, uphold rather than undermine the integrity of the law.....The Defendants are not seeking to blame AHAB for the wrongs for which the Defendants are responsible. Instead the Defendants are seeking to blame AHAB for the wrongs for which AHAB is responsible.

In Pari Delicto

- In pari delicto (in equal fault)

A plaintiff is barred from recovering damages if both the plaintiff (and/or the officers, directors, or employees) and the defendant had a role in causing the loss unless there is an adverse interest exception.

New York – *Kirschner v KPMG LLP*, 15 N.V. 3rd 446 (2010)

- Varying approaches to In Pari Delicto e.g.

Delaware: *Stewart v Johnson Lambert & Co.*, Del. Supr. No. 204, 2015, Order (2 November 2015)

Massachusetts: *Merrimack College v KPMG, LLP* (SJC-12434) May 2018

PROCESS

USA

Jury Trials in USA

Alternative Fee and Funding Arrangements

Cayman Islands

Cost Recovery and Security for Costs in Cayman

Speed of Court process



Vote

- By show of hands

Questions?

Thank You

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