



AMERICAN
BANKRUPTCY
INSTITUTE

2022 Caribbean Insolvency Symposium

Maximizing Value of the Bankrupt Estate

Kai McGriele, Moderator

Bedell Cristin | Grand Cayman, Cayman Islands

John Royle

Grant Thornton | Grand Cayman, Cayman Islands

R. Adam Swick

Reid Collins & Tsai LLP | Austin, Texas

Jessica Williams

Harneys | Grand Cayman, Cayman Islands



'He has a great understanding of client needs, great technical knowledge and calm, assured manner.'
Chambers Global

'Kai McGriele is worthy of specific mention. He has a good market reputation and has an equally good depth of knowledge with respect to insolvency matters.'
Legal 500 Caribbean

'The Cayman disputes team has good strength in insolvency and trust matters. Kai McGriele is a particular standout; knowledgeable and personable.'
Legal 500 Caribbean



Partner
kai.mcgriele@bedellcristin.com
+1 345 949 0488

Kai McGriele is a Partner in the Litigation Insolvency and Restructuring Practice at Bedell Cristin in the Cayman Islands. Kai's practice primarily involves working with insolvency practitioners, lenders, investors and service providers with a particular focus on insolvency and restructuring of Cayman Islands based hedge funds and other investment vehicles. Kai has also obtained extensive contentious trust experience representing both institutional trustees and beneficiaries, both onshore and offshore.

Before joining Bedell Cristin Kai worked with Cadwalader (London office) and Appleby (Jersey office).

Professional
Attorney at law - Cayman Islands
Advocate* - Jersey / Solicitor* - England & Wales
Member of the American Bar Association
Member of STEP (Society of Trust & Estate Practitioners) Cayman Council
INSOL International, Insolvency Lawyers Association
Member of RISA (Recovery and Insolvency Specialists Association) Legal Regulatory Committee
Member of International Committee of National Association of Federal Equity Receivers (NAFER)
*non-practising

Kai's experience includes:

Advising liquidators of in relation to claims against rating agencies and advising in relation to the Court approval of assignment of aspects of those claims to a third party and continuing to advise the liquidators as assignors as regards the prosecution of those claims.

Acting for Nominee Shareholders in the official liquidation of Weaving Macro Fixed Income Fund Limited appealing a preference claim for redemptions paid brought by the liquidators exceeding US\$8 million. The Privy Council gave judgment in 2019 which is of fundamental importance to Nominee Shareholder operations going forward.

Representing major creditor in the liquidation of insurance company and advising on interactions with US/Cayman litigation. Advised on the successful Court approval of the acquisition of a claim exceeding \$60 million against former management.

Representing directors of a Fund in relation to COVID related issues which caused the Fund's insolvency and he continues to advise the liquidators in relation to the liquidation generally and in particular recognition issues to realise assets globally.

Acting for creditor in relation to official liquidation as regards significant claims over assets in Georgia primarily in the context of a contested sanction application.

Continuing to act for significant creditors in the liquidation of Cayman class B bank holding deposits of over US\$550 million.

Acting for liquidators of several Cayman captive insurance segregated portfolio companies involved in multi-million dollar litigation with Floridian regulator.

Acting for the defendant in a large multi-jurisdictional claim involving allegations of misrepresentation and fraud. The claim is of significant value and involves aspects of an alleged breach of duty by the former official liquidators of a Cayman company.

Acting for former liquidators in relation to application for approval of fees acting as liquidator and subsequently trustee of a STAR Trust in addition to advising on issues of bona vacantia and receipt of proceeds from a liquidating trust.

Representing a Fund holding significant but illiquid assets and successfully defending a winding up petition brought by a secondary market activist investor.

Representing multi-jurisdictional trustee in relation to a Public Trustee v Cooper application before the Cayman Court to clarify the interpretation of the terms of a trust deed and bless the Trustee's decision to re-organize and distribute the trust's assets which were in excess of US\$700 million.



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jessica.williams@harneys.com
+1 345 815 2907

Jessica Williams is a partner in the Litigation, Insolvency and Restructuring practice group at Harneys in the Cayman Islands. Her practice focuses on insolvency and restructuring, trust and estate litigation, shareholder disputes and asset tracing and enforcement. Her clients include financial institutions, HNW individuals, insolvency practitioners, trustees, court appointed administrators and other office holders.

Before joining Harneys, Jessica spent four years at AO Hall (now Walkers) in Guernsey. Prior to that, she was a litigation lawyer at the Office of Fair Trading and involved in the bank charges test case. She spent the first four years of her career as a commercial litigator in New Zealand.

Jessica is a member of ABI, INSOL, IWIRC, RISA and STEP.

Her experience includes:

Working closely with corporate and funds colleagues to provide advice in distressed fund situations, including on redemptions, suspensions, director duties and wind downs.

Advising on a number of appraisal/arbitrage valuation (s.238) proceedings, including *In re Qunar Cayman Islands Ltd*.

Acting for the provisional liquidators in relation to the Cayman Islands restructuring of China Lumena New Materials Corp through schemes of arrangement in Hong Kong and the Cayman Islands.

Acting for Kaisa Group Holdings Ltd in relation to the restructuring of its offshore debts, which involved schemes of arrangement in the Cayman Islands and Hong Kong, and recognition under Chapter 15 of the US Bankruptcy Code.

Acting for plaintiffs in their international efforts to locate and enforce against dissipated assets including the obtaining of freezing and disclosure orders.

Acting for a court appointed administrator of the estate of a HNW individual who died intestate.

Acting for a trustee seeking declaratory relief and directions from the Grand Court concerning steps the trustee wished to take under the *Re Beddoe* jurisdiction.

Acting for the liquidations of a group of Cayman Islands companies in a complex, cross-border insolvency, which required proceedings (recognition and substantive) in multiple jurisdictions.



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john.royle@uk.gt.com
+1 345 769 7206

John has over 22 years receivership and asset recovery/insolvency experience in both the UK and the Cayman Islands. His work includes acting as official liquidator or receiver of entities/assets by appointment of the Grand Court of the Cayman Islands, typically in contentious or alleged fraudulent activity matters. John also acts as a Voluntary Liquidator of numerous Cayman Islands entities (and Irish) and led local forensic assignments.

Relevant Experience

- Voluntary liquidation (and subsequent official liquidation) of a Cayman fund with indirect investments into the Madoff Ponzi scheme. Whilst the fund was completely insolvent at the outset, conducted various sales processes of secondary positions held in BVI Madoff Feeders, returning the Fund to a solvent position and resolved a complex legal issue over secured creditor interest. Fund outcome being all creditors repaid in full to the tune of multi-million dollars and a surplus for investors.
- Receiver of the shares in a Cayman topco, with in excess of \$500mm of asset value in the structure, with assets/subsidiaries in Cayman, Isle of Man, Delaware and Curacao. Recognition of appointment obtained in Switzerland to gain control of bank account with, in excess of US\$200mm. Successful s1782 application in New York and New Jersey to compel the production of records.
- Receiver of Axiom (x2 cells within segregated portfolio company (SPC)). First ever UK cross border recognition of a Cayman receivership, which in turn aided litigation strategies including a Worldwide Freezing Order for £120 million against numerous defendants in the UK, Isle of Man and the Marshall Islands. Asset recoveries generated from Barbados, UK, Isle of Man, Canada, Cayman, Switzerland and potentially France. Work involved tracing of £120 million syphoned from Axiom to various related and insider parties.

Professional qualifications and memberships

- UK licenced insolvency practitioner under the JIEB system
- Statutory licenced and qualified insolvency appointment taker in the Cayman Islands
- Chairman of the RISA Education Committee, (the Cayman Islands' member chapter of INSOL International)
- Member of the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL)
- Member of the Insolvency Practitioners Association (IPA) (UK licencing body)
- Member of R3 the UK insolvency trade association and the UK's affiliation to INSOL
- Authorised appointment taker/liquidator of Irish entities, with tax residency in the Cayman Islands



Josh Bruckerhoff is a partner at Reid Collins & Tsai LLP. He represents bankruptcy trustees, offshore liquidators, hedge funds, and Fortune 500 companies in litigation against directors and officers, law firms, banks, auditors, and recipients of fraudulent transfers.

Representative bankruptcy and insolvency cases:

- Lyondell Chemical Company
- Bear Stearns offshore funds
- Doral Financial Corporation
- Centaur LLC
- ICP Strategic Credit Income Fund
- Adeptus Health



Assignment of Claims in Bankruptcy

- Bankruptcy trustees can assign and sell estate claims.
 - Typically, the assignments are to litigation or liquidating trusts created as part of the plan of recognition.
 - Even in states that continue to have champerty laws, there is usually an exception for bankruptcy and related proceedings. For instance, New York law provides an exception for: “judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate.”
- There are questions concerning whether a trustee can assign or sell federal avoidance claims to a creditor where the only benefit to the estate is the purchase price for the claim.



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Assignment of Claims in Bankruptcy

- Creditors can also assign their claims to a trust created as part of the bankruptcy.
 - The assigned claims can include state-law fraudulent-transfer claims, fraud claims, negligence-based claims, and others.
- What is the benefit to the creditors?
 - Having claims pursued by a single entity saves costs and avoids a race to the courthouse amongst creditors.
 - Generally all creditors participate pro rata in accordance with amount owed to them. But creditors also can negotiate increased recovery percentages by assigning certain claims to a trust.
- What are some hurdles created by the assignment of creditors claims to a trustee?
 - When claims require individualized proof, such as fraud claims, the trustee has to design a system to prove up these claims on a collective basis.



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Abandonment of Claims in Bankruptcy

- Can bankruptcy trustees abandon fraudulent-transfer claims back to creditors?
 - There is a split among the courts on this issue.
 - The Second Circuit, in *In re Tribune*, questioned whether creditors can regain the right to pursue state-law fraudulent transfer claims. The Second Circuit found that it did not have to answer based on its preemption ruling.
 - The First, Third, Fourth, Sixth, and Ninth Circuit Courts, as well as numerous other district courts, have ruled that creditors regain “standing” or the “authority” to pursue state-law fraudulent-transfer claims once abandoned.
 - Some questions remain concerning what constitutes an “abandonment” by the debtor/trustee for a creditor to regain authority to pursue state-law claims.



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Abandonment of Claims in Bankruptcy

- Why would a trustee abandon its ability to bring an avoidance action?
 - Lack of adequate funding.
 - Any recovery on those claims results in a dollar-for-dollar reduction of their claims against the estate, thereby increasing the trustee's distributions to all other creditors. A trustee's abandonment of certain federal-law claims can thus facilitate a trustee's ability to conserve the assets of the estate and to maximize distribution to creditors by providing an avenue for creditor recovery that otherwise would not exist.
 - Legal bars that apply under federal law but not under state law—e.g., section 546 of the Bankruptcy Code.
 - The Second Circuit held that there is federal preemption. No other court has addressed the issue yet. But the Solicitor General stated in a brief to the U.S. Supreme Court: "The text of Section 546(e) does not express an intent to preempt state-law avoidance claims brought by creditors."



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Litigation Funding

- Private Funding of Legal Services Act 2020 now fully enacted
- Abolishes criminality of historic doctrines of maintenance and champerty
- Provides victims of fraud the greater possibility of a recovery given legalisation of third party funding of litigation
- More access to funding options for impecunious estates



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Assignment of claims

- Type of claims, depend on assignability
- Personal claims of an office holder by virtue of powers upon appointment v's claims owned by an entity in liquidation – key differentiation
- Sale v's assignment
- Court blessing/sanction requirement?



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Assignment of Claims – sanction applications

- Views of liquidators given considerable weight but not dispositive
- Financial consequences and views of stakeholders
- *In re Pacific Harbor Asia Fund I Ltd (In Official Liquidation)* (Unrep Grand Court 6 May 2020)
- Role of the Liquidation Committee

Faculty

Kai McGriele is a partner with Bedell Cristin in Grand Cayman, Cayman Islands. His practice involves working with insolvency practitioners, lenders, investors and service-providers with a particular focus on the insolvency and restructuring of Cayman Islands-based hedge funds and other investment vehicles. His practice also spans general commercial litigation, where he acts for a variety of corporate clients, and he has experience in cross-border and multijurisdictional litigation (including work with a regulatory and judicial review dimension) and often works closely with foreign attorneys. Mr. McGriele also has contentious trust experience, representing both institutional trustees and beneficiaries both onshore and offshore. As well as litigation up to appeal court level, he has used alternative dispute resolution methods to successfully conclude disputes. Mr. McGriele is a member of STEP's (Society of Trust & Estate Practitioners) Cayman Council, INSOL International, the Insolvency Lawyers Association, RISA's (Recovery and Insolvency Specialists Association) Legal Regulatory Committee, and the International Committee of the National Association of Federal Equity Receivers (NAFER). He received his LL.B. from the University of Liverpool.

John Royle is a principal with Grant Thornton LLP in Grand Cayman, Cayman Islands. He has been a licensed and qualified insolvency practitioner since 2008. Mr. Royle's notable assignments include Saad Investments Co. Ltd., Axiom Legal Financing Feeder and Master Funds, Various Madoff feeder fund exposure, EMPGI Group (education sector) and GFP Dunas (Global HoldCo for Peruvian electricity distribution plants). Previously, he was a manager with Begbies Traynor Group. Mr. Royle has a Certificate of Proficiency in Insolvency Education from BPP Professional Education.

R. Adam Swick is a partner with Reid Collins & Tsai LLP in Austin, Texas, where he handles all types of complex issues that arise in cross-border litigation. He has advised numerous foreign representatives in chapter 15 cases, including those of AJW Offshore Ltd., ICP Strategic Credit Income Fund Ltd., Tibanne Co. Ltd. (the parent of Mt. Gox) and Saad Investments Co. Ltd. He also represented the foreign representatives of Condor Insurance Ltd. before the Fifth Circuit Court of Appeals and obtained a favorable ruling that subject matter jurisdiction over fraudulent transfer actions is not prohibited by chapter 15. Prior to joining RCT, Mr. Swick was an attorney for Baker & McKenzie LLP, Greenberg Traurig LLP and King & Spalding LLP. He is admitted to practice in Texas, New York, the U.S. District Courts for the Western, Northern, Eastern and Southern Districts of Texas, the U.S. District Court for the Northern District of Illinois, and the U.S. District Courts for the Northern and Southern Districts of New York. Mr. Swick received his B.A. with honors from the University of Texas at Austin in 2002 and his J.D. *summa cum laude* from Southern Methodist University Dedman School of Law in 2006, where he was class salutorian.

Jessica Williams is a partner with Harneys in Grand Cayman, Cayman Islands in its Litigation, Insolvency, and Restructuring practice group. Her practice focuses on insolvency and restructuring, trust and estate litigation, shareholder disputes, and asset-tracing and enforcement. Her clients include financial institutions, HNW individuals, insolvency practitioners, trustees, court-appointed administrators, and other officeholders. Before joining Harneys, Ms. Williams spent four years at AO Hall (now Walkers) in Guernsey. Prior to that, she was a litigation lawyer at the Office of Fair

Trading and was involved in the bank charges test case. Ms. Williams spent the first four years of her career as a commercial litigator in New Zealand. She is a member of ABI, INSOL, IWIRC, RISA and STEP, and a regular contributor to the Offshore Litigation Blog. Ms. Williams received her B.A. with honors and her LL.B. from the University of Otago.