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ORGANISATION OF COMMONWEALTH CARIBBEAN BAR ASSOCIATIONS

Creative solutions for a liquidator faced with effective asset structuring
Part 1

Side by Side: Animal Abuse in Jamaica and Florida
A Discussion About The Relevant Legislation in These Neighboring Jurisdictions

Court Appointed Receivers in the Eastern Caribbean
A useful enforcement tool

July - December 2019



**What to do
by or on behalf
of the creditor
faced with
effective asset
planning.**

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Mr. Ruggles Ferguson

President's Message

Seasons Greetings and welcome to our 2nd Edition of the OCCBA Journal. I am proud to say that our First Edition was received with high praise and must thank our membership for their support in this fledgling venture. I renew our Editor-in Chief's call for articles and praise the high quality of the content which her team continues to produce. The Journal continues to meet its mandate of bringing our colleagues across the Sea together.

Since the Journal launch at our Miami Conference in June 2019, we had our 2019 Conference held in the beautiful and ever bustling Republic of Trinidad & Tobago.

The November 29th OCCBA Law Summit in Trinidad was a resounding success with raving reviews by attendees on the very insightful and thought-provoking sessions. Several persons attending the weekend activities signed up as individual members of OCCBA and our membership drive continues.

We also launched our OCCBA Secretariat at the headquarters of the Law Association of Trinidad & Tobago (LATT) – a first for OCCBA. The Secretariat will no doubt significantly strengthen our administrative capacity. Special thanks to LATT and its hardworking staff which 'walked the extra mile' to ensure the success of the weekend activities. We were able to fully utilize the Secretariat to hold the OCCBA Council meeting on Saturday (Nov 30th).

Our very productive Council Meeting in Trinidad augurs well for the forward movement of OCCBA. Approaches to future legal education and money laundering legislation formed part of the discussions together with OCCBA Website, OCCBA Bi-annual Journal, Boosting individual Membership, and launching of OCCBA Secretariat. Representatives came from the majority of constituent Bars including Bahamas, Belize, Jamaica, Guyana, Trinidad, Grenada, Antigua, St Lucia. Individual Members from St Vincent & the Grenadines also attended. Former President of the American Bar Association Paulette Brown was a special guest at the Council Meeting.

The Annual Dinner and Awards Ceremony of LATT was another huge success, with all tickets being sold out. The very lively and upbeat event, which honoured persons serving at the Bar for 50 years, was patronized by most of the attendees to the Law Summit.

I encourage you to save the date for our 2020 Law Summit in Miami, June 12th & 13th, 2020.

Till then, I wish you all the very best for the season and a Happy and Prosperous New Year. I am excited to see OCCBA grow and continue to contribute to the personal and professional development of its members.



Mr. Tim Prudhoe is the founder and principal of the firm Prudhoe Caribbean. Originally admitted as a Barrister in England, he is also admitted in the Turks and Caicos Islands (“TCI”), Belize, Bermuda, British Virgin Islands, Dubai (DIFC), Gibraltar, Grenada, Trinidad and Tobago and St. Vincent and the Grenadines. He is a licensed insolvency practitioner (TCI). For almost 10 years he was a Partner in a New York-headquartered global disputes practice.



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CREATIVE SOLUTIONS FOR A LIQUIDATOR FACED WITH EFFECTIVE ASSET STRUCTURING

BY: TIM PRUDHOE, Attorney-at-Law and
MIKHAIL CHARLES, Attorney-at-Law

(Part 1 of 2)

This first part of a two-part article looks at practical ways of extracting value from otherwise unpromising judgment enforcement scenarios in the context of collective insolvency

Deploying the “nuclear button” power of revocation in respect of a discretionary trust

From as long ago as the reign of Elizabeth I, in the sixteenth century, there has been legislation aimed at blocking the valiant efforts of debtors to defeat the interests of their creditors. Several Caribbean jurisdictions have since built on that tradition with statutory frameworks bringing clarity to the length of time within which it is possible to bring this type of fraudulent conveyance claim; others have made clear that a structure successfully attacked on this basis is only vulnerable to the underlying value of that particular creditor’s or creditors’ challenge(s).

It has been said that there are those jurisdictions which seek to differentiate themselves in the marketplace by way of short limitation periods for such attacks or hefty issue fees for the bringing of this type of claim.

So far, so simple. But what to do by or on behalf of the creditor faced with effective asset planning, undertaken in a way and at a time that does not leave open such clear vulnerabilities to creditor attacks?

This assumes that you have already turned over the usual stones around the issues of ability at the time of settlement.

So, having come up short on identifiable assets of the judgment debtor from which to satisfy the judgment, where the debtor is an individual, there may be pre-insolvency scope for a court-ordered oral examination as to assets. In this context questions should always include the debtor's known – or even *discretionary* - beneficial rights under a trust structure.

Outside of an oral examination, or in respect of a corporate debtor, the obligations of officer-holders to co-operate with the liquidator is another route to the same information.

A beneficiary is entitled to know of their holding that status¹ but obviously investigatory work may be needed to even to know the right people, and ask them the right questions.

The question of when a settlor's reservation of powers in respect of a trust might be deployed against him or her as a litigation tool without the need to launch a full assault on the validity or efficacy of the trust by a challenging third party (e.g. a motivated creditor or divorcing spouse) requires careful planning by experienced practitioners.

1. *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709

Assuming that there is access to the relevant documentation, liquidators and their lawyers must scrutinize the terms of any trust instrument in order to see if it contains a power of revocation in the hands of the bankrupt or (in the case of a corporate entity) the insolvent company. If so, such power vests in the trustee in bankruptcy or liquidator and can be exercised by him/her so as to reclaim for the insolvent estate the assets held on trust.

Initial analysis of the trust documentation would involve “headline” consideration of the following:

- (a) viable arguments as to “**sham**” (*whereby the assets are deemed never to have left the hands of the settlor, or at least “resulted”*). The test for ‘sham’ being that the true arrangement is different to what is expressed on the face of the trust documents², the trustee must necessarily be a part of the ‘plot’.³
- (b) evidence of transaction at an undervalue or a preference⁴. The release of a power (*because the power will be designated “property”*) may be construed as a transaction at an undervalue⁶ or a transaction defrauding a creditor.

It is also important to consider whether the terms of the trust are sufficiently certain even to constitute a trust. The potential argument being that if the trust is not constituted then the settlor holds the assets and can be pursued in a linear fashion.

Assuming though, that none of these issues offer a path towards enforcement, the question then becomes whether there are revocation powers to the trust which the settlor can activate as judgment debtor.

This has become more prevalent in recent years because it helps sell trust “product” in offshore jurisdictions, the beauty of such a power from the perspective of judgment enforcement is that it can vest in the liquidator or trustee-in-bankruptcy. It can therefore then be exercised by him or her to realise property for the insolvent estate that which is even legitimately held on trust.

Looks like a duck, swims like a duck, it’s probably a duck

A power of revocation does not have to be expressed in any specific form of words. The idea is one of retained power to “reverse out” the asset or even collapse the structure all together. Subject to that, there is no magic formulae. Examples would include:

- (a) ‘The trustee may revoke this trust at any time, whether in whole or in part (the latter by re-settlement or variation)’.
- (b) ‘The settlor may vary this deed [so, pulling specific assets out] at any time, even to the extent of revoking all the trusts it establishes.’

2. *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 (CA) where Lord Justice Diplock held: ‘it means acts done, or documents executed by, the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create’.

3. *Regent Trust Company Limited v MacKinnon* [2004] JLR 477 (Jersey); *A v A* [2007] EWHC 99 (Fam) (England and Wales) and *Official Assignee v Wilson* [2007] NCA 122 (New Zealand Court of Appeal)

4. In England, there are powers to realise trust assets for the benefit of creditors in Sections 339 – 341

and Section 423 of the Insolvency Act 1986. Generally, transfers to trustees can be avoided as being: (a) transactions defrauding creditors (Section 423); (b) transactions at an undervalue and preferences (Sections 339 – 340) or (c) voluntary dispositions of land made with the intent to defraud subsequent purchasers.

5. Section 436 Insolvency Act 1986: includes “obligations and every description of interest”: such as non-contractual right to Barristers’ fees, see *Gwinnett (as trustee) v. George* [2019] EWCA Civ 656.

6. Section 339 Insolvency Act 1986 (UK)

- (c) ‘The settlor may revoke all the trusts hereby established without the consent of any of the trustees.’

Where the existence of sufficient language is unclear, consider raising the allegation on the basis of what is there as a way of leveraging a settlement in respect of a specific asset: half a loaf being better than no loaf at all!

There are different types of powers – (i) **beneficial** (where the recipient of the power can act in whatever way they wish), (ii) **limited** (power is given for the benefit of other beneficiaries other than the recipient and with the proviso that the power must be exercised in good faith) or (iii) **fiduciary** (duty owed to objects which must be considered periodically as to how they are exercised).

The above angle of attack is focused solely on beneficial powers, as the nature of the other powers are far too unconnected to the settlor for any viable offensive by a liquidator.

Another angle of attack may be to consider the use of the court’s power to order discovery / disclosure (i.e. attacking the beneficial nature of a power) against a settlor who may be in control of the trust documentation, this angle of attack may be attractive in jurisdictions following the English model where civil procedure rules which can be trigger and which have detailed discovery / disclosure regimes hinging on the concept of control.

The vesting of the power to revoke

In England the power vests in the ‘trustee in bankruptcy’ pursuant to Section 283(4) of the Insolvency Act 1986 (IA 1986). In the Turks and Caicos Islands (‘TCI’) the equivalent power is in Section 346 of the Insolvency Ordinance, in the British Virgin Islands (‘BVI’) it is Section 311 of the Insolvency Act 2003.

An example of the value of controlling the power of revocation is found in Privy Council decision of Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd [2011] UKPC 17; [2011] 4 All ER 704 (and widely known as “TMSF”). In TMSF, the debtor was made bankrupt in Turkey. He had established two discretionary trusts in the Cayman Islands. He and his wife were the beneficiaries of these trusts, and the debtor (settlor) had a power of revocation.

A creditor commenced proceedings in the Cayman Islands seeking the appointment of a receiver by way of equitable execution over the power of revocation.

The Privy Council found that the power of revocation was ‘tantamount to ownership’ and that the creditor was therefore entitled to seek the appointment of a receiver by way of equitable execution over the power.

In the Court of Appeal of the Cayman Islands it had been queried whether a sole creditor should be entitled to seek the appointment of a receiver when there was a trustee in bankruptcy in whom

the power might vest. By the time the case reached the Privy Council it had become apparent that the power of revocation did not vest under Turkish law in the trustee in bankruptcy, and therefore the creditor could not have relied upon him to obtain the property by the usual means.

“ Powers of revocation and other fundamental trust-altering powers are tantamount to ownership.”

The Privy Council then had to deal with the question whether a power can be considered to be “property”.

The Privy Council reviewed earlier English and American authority and concluded that the powers of revocation and other fundamental trust-altering powers were of such a nature, that the powers were tantamount to ownership. Critically, it found that the power to revoke could not be regarded as a fiduciary power: *‘the only discretion which a settlor has is whether to exercise the power in his own favour’*.⁷

For obvious reasons, the relevant power must be a power of the bankrupt otherwise than in his capacity as a trustee of him or herself. *The test is*

whether the power can be exercised for the benefit of the bankrupt alone.

The takeaway is that a settlor should consider long and hard before retaining for himself any power which he can personally benefit from – his fate (*in the sense of fighting off judgment execution*) will be bound up with his ‘powers’.

The decision in TMSF delivers interesting arguments that could plausibly be deployed:

1. A claimant seeking injunctive relief on an interim basis could conceivably target a settlor with an unfettered power to revoke. The question will then be whether the settlor with that power be made to disclose the value and existence of trust assets on the basis of retained rights over the assets rising to a level tantamount to ownership.

2. Attacking a settlor irrespective of whatever type of relief sought – for him to disclose pre-trial of trust documentation (*the basis being, looking at the relationship between the litigant and the third party and then inferring that the documents must be under the litigant’s control, an arrangement akin to agency*⁸ a concept broader than in *Schmidt v Rosewood*⁹, where the issue was a beneficiary’s proprietary right to trust documentation).

3. A receiver appointed over an express power of appointment over trust property or power to add beneficiaries (*a power frequently found in offshore trusts*) may be a useful “short-circuit” in judgement enforcement. The use of receivership in this context is again suggestive that the right or power to call for an asset to be handed over to a judgment creditor or other debtor where they have no beneficial interest in it, is equivalent to ownership or reflective of a practical reality.

7. *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17; [2011] 4 All ER 704

8. *North Shore Ventures Ltd v Anstead Holdings Inc & Ors* [2012] EWCA Civ 11

9. *Schmidt* (n 1)

Finally, it is always worth considering the tax implications of the revocation before the exercise of such a power.¹⁰

Conclusion:

As can be seen, use of a discretionary trust as a mechanism by which to protect assets from judgment creditors or insolvency does not create an impregnable fortress. Retained settlor power(s) provide viable routes of attack, so too targeting the rights of debtor beneficiaries.

In Part 2 we will expand on directors' behaviour heading into to insolvency.

¹⁰. *JSC VTB Bank v Skurikhin and others* [2015] EWHC 2131



SIDE by SIDE

ANIMAL ABUSE IN JAMAICA AND FLORIDA

A DISCUSSION ABOUT THE RELEVANT LEGISLATION IN THESE NEIGHBORING JURISDICTIONS

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“The Greatness of a Nation and Its Moral Progress Can be Judged by The Way Its Animals Are Treated” - Gandhi

The issue of animal rights, specifically animal abuse, has rarely seen significant attention both in the legal profession and the greater society. However, with the transformation of the global society over the past decade, we are now seeing greater advocacy in once over-looked areas. Despite this progress, calls for greater and broader animal protection have not been as vocal or urgent, resulting in a general indifference towards the rights of the creatures that share this earth with us.

The state of Florida, and the island of Jamaica both have legislation which criminalize acts of animal abuse. However accountability for animal abuses in Florida is greater. Even the reporting of the alleged animal abuses in Florida far exceeds

that in Jamaica. Just recently, Florida news reports included features about a Pinella County woman who was seen on tape choking and pulling her dog¹ as well as the growing issues caused by the presence of herpes-infected monkeys at a local Florida park². Jamaican news features on animals are far and few between.

THE CRUELTY TO ANIMALS ACT IN JAMAICA.

The Cruelty to Animals Act, enacted in 1904 in Jamaica, deals with animal abuses in the island. The fact that the Cruelty to Animals Act is 115 years old, contains only twenty-one sections (*for comparison see The Companies Act of Jamaica which contains three hundred and ninety five sections with several amendments and deletions over the years*) and has had no revisions throughout its existence is suggestive of the disinterest and/or indifferent attitude of society and parliamentarians to animal rights.

FLORIDA STATUTES CHAPTER 828 - ANIMALS: CRUELTY; SALES; ANIMAL ENTERPRISE PROTECTION.

In Florida, Chapter 828 deals with animal abuse as a criminal offense. Note that within the State of Florida, federal prosecutors can lay federal criminal charges for alleged animal abuser, though state prosecution is more commonly pursued.

COMPARING AND CONTRASTING THE JAMAICAN AND FLORIDIAN LEGISLATION.

Some features to note in the two pieces of legislation, which impact the prosecution in both jurisdictions are discussed below. These features are also reflective of the problems as well as the approach of both the legislators and prosecutors in these two jurisdictions of holding offenders accountable.

1. Both Acts speak to the “cruel” treatment of animals as amounting to a criminal offense.

In section 3 of the Jamaican legislation an offense is committed when a person “*cruelly beats, ill-treats, starves, over-drives, over-rides, over-loads, abuses, tortures, or otherwise maltreats any animal.*” Section 18 provides that the offence is to be tried “summarily” meaning that it is tried in the parish court. The Florida legislation, like the Jamaican legislation, also references the “*cruel... manner*” element of the offense in subsection (1).

The problem with both pieces of legislation, nonetheless, is the inclusion of the word “cruel” and “cruelly” in the text of the relevant provisions. How are these words to be interpreted and applied to the facts at hand?

Perhaps though, in trying to determine what these words mean, we can rely on former United States Supreme Court Justice Potter Stewart’s now famous words in the case of *Jacobellis v. Ohio*³, “*I know it when I see it*”.

1. Salo, Jackie. Florida Woman Busted for Kicking, Choking Dog on Video. <https://nypost.com/2019/09/22/florida-woman-busted-for-kicking-choking-dog-on-video/>. September 22, 2019

Note: Although reflective of the issue of reporting animal abuse, these charges are federal versus state charges. This Article addresses animal laws at the state level.

2. Paluska, Micheal, Florida’s herpes-infected monkey population is booming and it could have fatal consequences. What’s the plan to control Florida’s diseased monkey population? <https://www.abcactionnews.com/news/full-circle/floridas-herpes-infected-monkey-population-is-booming-and-it-could-have-fatal-consequences>. April 24, 2019

3. 378 U.S. 184 (1964)

2. Florida distinguishes between “animal cruelty” and “aggravated animal cruelty.” The Cruelty to Animals Act in Jamaica has no such distinction. This distinction in Florida, between animal cruelty and aggravated animal cruelty is not subtle as it changes the gravity of the punishment. Firstly, the animal cruelty charge is a misdemeanor (usually punishable by either incarceration of up to a year), whereas the aggravated animal cruelty charge is classified as a felony (usually carries imprisonment for a term exceeding one year as well as the removal of specified individual rights). Secondly, the animal cruelty charge has a penalty of US \$5000, whereas the aggravated animal cruelty charge has a penalty of US \$10,000.

The Florida legislation goes further to deal with an intentional element of the offense where there has been torture or torment⁴, mandating that, in addition to a fine of \$2,500, an offender must “...undergo psychological counseling or complete an anger management treatment program.”, indicative of Florida’s legislators’ serious attitude to punishing offenders. Acts such as using animals for scientific experimentation, dog-fighting or rattle snake-round ups, are widely recognized as examples of intent amounting to torture or torment.

By way of illustration, a Florida woman was charged with **aggravated** animal abuse in August 2019⁵. The media reports revealed that the woman was homeless and unable to care for her Chihuahua dog. She contacted a local animal shelter and was advised to bring in the dog. The woman arrived at the shelter when it was closed and instead of waiting for the shelter officer to arrive, threw the small dog over the fence causing

it to suffer injuries. In this instance, “aggravated” charges seem more than appropriate since she acted intentionally in throwing the dog over the fence.

Jamaica, however, does not elevate its animal abuse charges to “aggravated” even if the accused acts intentionally. Consider that of the few animal abuse incidents actually reported in Jamaican media, the acts could be considered intentional. In 2018, a video was shared on social media showing a baby crocodile along a highway in Jamaica, clearly out of its natural habitat. Passers-by attempted to capture it using strings and plastic bags to cover its mouth, and the crocodile is seen erratically flopping around much like a fish out of water, likely trying to escape⁶. The baby crocodile was eventually placed in the back of a waiting police vehicle. The police were not only aware of the manner in which the baby crocodile was being treated, but their silence throughout the length of the video was approval enough for the participants. Although we cannot decipher from the video alone, it is unlikely that the any attempt was ever made to contact the National Environmental and Planning Agency (NEPA) (for proper and humane removal of the baby crocodile). There is no report of charges being brought and even if they were, their acts though intentional, would not carry any more serious punishment, for being **aggravated**, unlike in Florida.

Regarding the punishment in Jamaica, a fine is payable following a guilty verdict, and failure to pay the fine can result in imprisonment for a maximum of three months. Thus, the imposition of incarceration under this Act is available only if

4. 828.12 (2)(a)

5. Wesh. Florida Woman Allegedly Throws Chihuahua Over Animal Shelter’s Fence. <https://www.wfla.com/news/florida-woman-allegedly-threw-small-dog-over-animal-shelters-fence/>. Aug 2 2019.

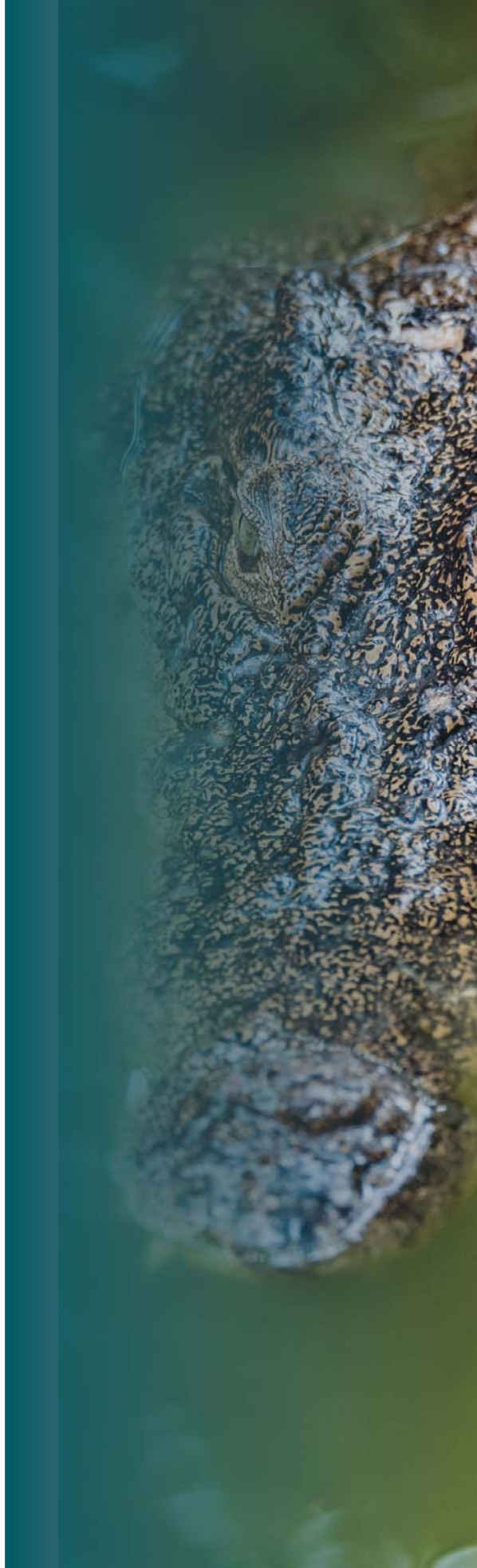
6. Kalashnikov, Kael. Crocodile on Highway in Jamaica 2018 <https://youtu.be/X3ULZGy72k>. Jan 5 2018.

the judge imposes a fine which is not paid “*forthwith.*” This punishment seems quite insignificant, and the Jamaican legislators ought to consider imposing mandatory incarceration in addition to a fine.

Conclusion

Of the two jurisdictions, Florida’s legislation is significantly more comprehensive in terms of the punishment, the classification of the crime, the inclusion of the element of intent, and the greater penalties for re-offenders. Jamaica’s legislation is left wanting for stiffer penalties, more exhaustive protections and greater clarity in the prosecution of the offense of animal abuse. Discussions such as these should help bring the issues of the role legislation can play in protecting the welfare of our animal friends to the forefront, remembering that they can’t speak for themselves.

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COURT APPOINTED RECEIVERS IN THE EASTERN CARIBBEAN A USEFUL ENFORCEMENT LOOK

BY: TIM PRUDHOE, Attorney-at-Law and
MIKHAIL CHARLES, Attorney-at-Law

Receivership, carefully planned and strategically executed, can be a valuable addition to the litigator's repertoire in their delivery of effective client solutions.

This article explores the following core issues:

- (1) the difference between a receiver appointed in accordance with one or more security documents as compared to a court appointed receiver;
- (2) in what circumstances a receiver can be of use and some recent examples; and
- (3) the right of indemnity for the receiver.

A RECEIVER

A receiver may be defined as a manager owing duties to the person who appointed him or her to administer property or the affairs of another person or entity.

The main function of a court-appointed receiver is to protect the assets received by him or her pending the outcome of court proceedings. Further permission must be sought before bringing, defending or compromising legal proceedings.

This is different to administrative receivership or other forms of receivership (e.g. under an agreement) where the appointment is dependent on the execution of a document securing assets and or the occurrence of pre-defined scenarios, for example default on a loan that will trigger the right to appoint a receiver.

A receiver appointed by the court has a right to be indemnified in respect of his or her costs and receive remuneration out of all the assets which are subject to the receivership. That right is not extinguished even though the receivership is discharged by consent, and the receiver hands back control of the assets to their legal owners.

Accordingly, the receiver can obtain an order charging all the assets over which he or she was appointed receiver with the amount of his costs and remuneration, whether he or she has ever reduced those assets into his possession¹.

Court appointed receiverships are a useful means of bypassing deadlock within corporate structures, preserving assets that may be misapplied. Also, in the context either of dispute or post-judgment assets dissipation risk, court appointed receivership can be a viable route to asset preservation.

“ A receiver appointed by the court has a right to be indemnified in respect of his or her costs and receive remuneration out of all the assets which are subject to the receivership.”

1. Foskett on Compromise 8th Ed., main work Part 7 - Chancery Litigation, Chapter 23 - The Settlement of Chancery Litigation, Court-Appointed Receivers.

SNELL'S EQUITY ILLUSTRATES THE POSITION:

“The court may appoint a receiver at any stage: before proceedings have started; in existing proceedings or on or after judgment. There are two purposes for making such an appointment. First, the court may appoint a receiver as an interim means of preserving property until the rights of those interested in it can be determined. In the words of Lord Hardwicke L.C., the power to appoint a receiver:

“is a discretionary power exercised by this court with as great utility to the subject as any sort of authority that belongs to them, and is provisional only for the more speedy getting in of a party’s estate, and securing it for the benefit of such person who shall appear to be intitled and does not at all affect the right.”

.....

Secondly, where a litigant has obtained judgment, the court will sometimes appoint a receiver as a form of execution. A receiver appointed by the court must be an individual² .

JURISDICTION

The Eastern Caribbean Supreme Court (“ECSC”) is a superior court of record for the Organisation of Eastern Caribbean States (“OECS”), comprising six independent states: Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and three British Overseas Territories (Anguilla, British Virgin Islands, and Montserrat). It has unlimited jurisdiction in each member State³.

The jurisdiction within that court system to appoint a receiver flows from the enabling

statute of the Eastern Caribbean Supreme Court and is ratified by relevant legislation in each of its member states. Despite individual amendments, it is substantively identical.

The jurisdiction for appointing a receiver is contained within Section 24 (1) of the Act,⁴ :

“A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge thinks just.”

The procedural rules for appointing receivers are contained in Part 51 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the “EC CPR”)** which provides that a receiver can be appointed, or an injunction granted to restrain a judgment debtor from dealing with any property identified in the application. Such an application may be made *ex parte*.

Applicants seeking this type of relief on a without notice basis have a duty to make a fair presentation to the judge of the material facts and the law relevant to the application. The BVI approach largely mirrors orthodox English authority, for example in *Addari v Addari*⁵ the Court of Appeal adopted the English formulation in *Brink’s Mat Ltd v Elcombe*⁶.

This approach being that an applicant must make a full and fair disclosure of all the material facts, make proper inquiries bearing in mind the nature of the case which the applicant is making out, the Order and the probable effect of the Order on the defendant.

2. Snell’s Equity (33rd Edition, 2018, 19-003)

3. < <https://www.eccourts.org/court-overview/> > Accessed 10 August 2019

4. Eastern Caribbean Supreme Court Act Cap. 24 of the Revised Laws of Saint Vincent and the Grenadines

5. BVICAP 2005 / 0002

6. [1988] 1 WLR 1350

The English position, is:

“The High Court may by order (whether interlocutory or final) ... Appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

The English and the Eastern Caribbean approaches are framed in near-equivalent terms making their case law of great guidance to the discerning practitioner.

Across the OECS, corporate structures are popularly used for asset managing, asset holding or other active purposes. The company and insolvency laws are generally creditor friendly and modelled on their English antecedents e.g. **the Companies Act 1985 and Insolvency Act 1986**. The use of court appointed receivers is particularly frequent in the British Virgin Islands (‘BVI’) context⁷. This likely reflects the BVI’s status as one of the world’s largest corporate service provider jurisdictions.

USES OF RECEIVERS

• Taking Control of and Preserving Assets

In the BVI case of *Norgulf*⁸, Rawlins JA cited passages from **Gee on Commercial Injunctions** (again re-cited with approval in *Vinogradova*⁹) that point out that the appointment of a receiver is usually a draconian measure.

Rawlins JA also noted that “... the main object for the appointment of a receiver is to safeguard or preserve property for the benefit of those who are entitled to it”¹⁰.

When a receiver is appointed, a defendant no longer has control of the assets of the company to continue its operation as a going concern.

The appointment of a receiver may be the best tactic to deploy until the determination of a dispute, particularly with consideration to potential lengthy negotiations and Court proceedings.

In *Vinogradova*, a BVI domiciled holding company held controlling interests in three Cypriot companies, which were used to make loans for substantial sums.

On the death of the ultimate beneficial owner, one of his children had a dispute with others pertaining to the repayment of the loans, proceedings were initiated in Russia by respondent siblings to recover loans against the Heir of the holding company, and in Switzerland to recover the full beneficial ownership of the holding company.

Ultimately at the Court of Appeal level, the grant of a receivership order was disbanded on the grounds that there was no risk of dissipation of the assets of the holding company and even if there was risk of dissipation then that risk was nullified on the basis of the proceedings ongoing in other jurisdictions.

There are cases where the management of a company is paralysed by disputes between shareholders or uncertainty as to who are the validly appointed directors and / or shareholders and some urgent action is needed to deal with assets before the underlying dispute can be resolved. A receiver could be appointed in such a situation, if necessary, to vote shares or to otherwise control the company to preserve assets.

7. Court appointed receivership has received recent judicial consideration and comment in *Alexandra Vinogradova v Elena Vinogradova* BVIHMAP2018/052 (a decision of the Eastern Caribbean Supreme Court – Court of Appeal delivered July 30th, 2019)

8. *Norgulf Holdings Limited and another v Michael Wilson and Partners Ltd*, BVIHCVAP2007/0008

9. *Vinogradova v Vinogradova* BVIHMAP2018/052

10. *Supra* n.8 at para. 22

Other examples include – getting a receiver appointed pending the grant of probate or letters of administration¹¹; where a partnership is clearly at an end¹² or even where foreign litigation concerning property is pending¹³.

- **Extending the remit of a freezing order**

As a form of equitable relief, a freezing order may be considered and / or granted at the same time as an application for the appointment of a receiver.

*“...assets like the Cheshire Cat, may disappear unexpectedly ... modern technology ... may enable assets to depart at ... speed.”*¹⁴

It may be strategic to seek the appointment of a receiver to expand the scope of litigation.

A receiver may be appointed where a respondent has breached the terms of a freezing order, a receiver would be *“invariably appointed where there was a continuous failure to comply with a disclosure obligation”*¹⁵. It should be noted that the Court can and will order a defendant to provide disclosure of its assets in order to ensure that the injunction is effective.

The Privy Council confirmed that such disclosure obligations are an integral part of a freezing injunction and not merely a severable part or incidental to the body of the injunction.¹⁶

Appointment of a receiver has consequences in the context of litigation. It can be a significant strategic pressure point. This is because a defendant in proceedings dealing with an asset over which a receiver is appointed is required to co-operate with that receiver.

Examples of the “*just and convenient*” test:

(1) In *Dalemont Limited v Alexander Gennadievich Senatorov and Riggels Enterprises Limited*¹⁷, Dalemont Limited a judgment creditor sought appointment of receivers over the shares of three BVI companies belonging to the judgment debtor. The Court held that the beneficial interest was plainly an asset. The Court also had regard to whether uncertainty is a sufficient concern to refuse the application, this was deemed not to make the appointment pointless.

(2) In *JSC VTB Bank v Pavel Skurikhin & Others*¹⁸, the Court made a wide order and was prepared to appoint a Receiver over “whatever may be considered in equity as the assets of the [defendant]” if he “[had] the legal right to call for those assets to be transferred to him or to his order, or if he [had] de facto control over the trust assets”.

- **Judgment Enforcement**

The tracing powers of a receiver under English law are wide, a judgment creditor may use a receiver to get indirect control of assets held by companies or other entities which control them in fact.

As to BVI entities, the use of a receiver can be particularly effective in enforcing judgments. The appointment of the receiver can effectively target shares in a company e.g. a holding company, in practical terms the receiver can use his powers to vote shares to, for example, appoint or remove directors in the company or a subsidiary to gain control of tangible assets. These may be sold off to repay debt arising as a judgment.

11. *Re Oakes* [1917] 1 Ch. 230

12. *Pini v Roncoroni* [1892] 1 Ch. 633

13. *Transatlantic Co. v Pietroni* (1860) Johns. 604

14. *Neill LJ in Derby v Weldon Nos 3 & 4* [1990] Ch. 65 at 95

15. *Konoshita v J Trust* BVIHCAPP2018/0047

16. *Emmerson International Corporation v Renova Holdings Ltd* [2019] UKPC 24

17. Claim No. BVIHC (Com) 149 of 2011

18. [2015] EWHC 2131 (Comm)

Where assets have been misapplied by errant directors of an insolvent company, receivers may be appointed to lift the corporate veil of connected companies¹⁹ in the interests of justice (and appropriately supervised by the Court) to ensure that creditors are not left unsatisfied.

Similarly, where assets have been reassigned under different corporate structures which are under the control of a bad actor, then the appointment of a receiver may be an effective means²⁰ for a judgment creditor to get hold of assets.

The use of a receiver has even been confirmed by the Privy Council in *TMSF v Merrill Lynch Bank and Trust Company*²¹, as being a proper use to co-opt the powers of revocation under a trust to be exercised on behalf of a judgment creditor.

HOW IS A RECEIVER APPOINTED

An application in the Eastern Caribbean context for appointment is made under CPR Part 51

An applicant must show the following:

- *That they have a good arguable case for the appointment of a receiver*
- *There is a real risk of dissipation; and*
- *It is just or convenient to appoint a receiver*

The case must be one that is ‘more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success’²², a refinement on this is that an applicant must satisfy a higher evidential threshold than if they were applying for a freezing injunction²³.

19. *Bank of Credit and Commerce International SA v BRS Kumar Brothers Limited* [1994] 1 BCLC 211

20. ‘Receivers: Panacea or Problem’ *Trusts and Trustees* (2010) 16 (4): 226 at 228

21. *Tasarruf Mevduati Sigorta Fonu (Appellant) v Merrill Lynch Bank and Trust Company (Cayman) Limited and others (Respondents)* [2011] UKPC 17

22. *Mustill J in Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398 at p.404

Any application that omits material facts or law may not be granted or may be discharged on a response from the defendant / respondent to the proceedings.

Cogent admissible evidence of events requiring the application and a view on the likelihood of the impact of any order (if made) will be required by the Court.

This will be a heavily fact-dependent exercise.

The “*just and convenient*” test considers appropriateness of the remedy; a Court is likely to consider whether a freezing order is sufficient instead of a receivership appointment.

As most cases include some cross-border element, ordinary principles of comity will influence any decision i.e. the jurisdiction of a ‘friendly’²⁴ Court, will not be infringed on lightly, especially where a foreign court is more appropriate for the grant of relief.

PRACTICAL CONSIDERATIONS FOR THE APPLICANT

The receiver is selected by the court, which will take account of the views of all parties to the dispute and will normally seek to appoint someone wholly independent. The principal exception to this is where one of the parties to the dispute must be appointed because nobody else can manage the business²⁵.

An applicant will usually be required to give a cross-undertaking in damages as a pre-condition to the court appointment. This reflects the serious nature and implications of an appointment. An

23. *Supra* n.8 at Para. 22

24. *Bannister J in Yukos CIS Investments Limited and another v Yukos Hydrocarbons Investments Limited and others* BVIHC (COM) 2010/0085 at para. 27

25. *Sargant v Reed* (1876) 1 Ch D 600; *Picarda, The Law Relating to Receivers, Managers and Administrators* (2nd edn, 1990) at pg. 302.

indemnity from the applicant may be also may be required by the receiver to cover his or costs in case of the assets of the target company or underlying business being insufficient.

Once a court-appointed receiver takes possession of property over which they have been appointed, their possession is that of the court and may not be disturbed without permission.

Any interference with a court-appointed receiver's conduct of the receivership, or with their possession of the property over which they have been appointed, is a contempt of court and is punishable accordingly. After appointment of the receiver, the property's owner is deprived of any power to dispose of or otherwise deal with the property to which the appointment relates.²⁶

A court-appointed receiver is an officer of the court and not the agent or trustee of any of the parties involved in the action. See *Channel Airways Ltd v Manchester Corporation*²⁷.

A court-appointed receiver is under the same duties as a receiver appointed out of court, being to act in good faith, avoid a conflict of interest, and seek to obtain the best price for the sale of any property as would be reasonable in the circumstances.²⁸

INDEMNITY

A court-appointed receiver is an officer of the court. He is not the agent of the party who obtained his appointment. If he is appointed receiver of the assets of a defendant company, he is not the agent of the company although he may be authorized to act in its name. The appointment does not give the receiver title to or vest the assets in him.²⁹

A court-appointed receiver cannot be sued by a party in respect of his conduct as receiver without the permission of the court.³⁰

As an officer of the court the receiver appointed by the court has one important privilege in relation to his conduct of the receivership. The court has power, on his release or discharge, to protect the receiver from liability for acts done in the course of his duties but will only do so after investigation or making provision for the investigation of claims of which the court has notice.³¹

Conclusion

The extensive use worldwide of Caribbean corporate structures suggests that carefully planned and strategically implemented use of the receiver by appropriately experienced legal professionals able to navigate the impacting issues can deliver effective asset preservation and potential recovery either during the pendency of litigation or post-judgment.

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26. < https://www.lexisnexis.com/uk/lexisps/restructuringandinsolvency/document/393781/55KG-P041-F18C-C24J-00000-00/Receiverships_overview > Accessed 13th August 2019

27. [1974] 1 Lloyd's Rep 456

28. *Mirror Group Newspapers plc v Maxwell* (No 2) [1998]

29. *Clayhope Properties v Evans* [1986] 1 WLR 1223 at 1228, confirmed in *Munib Masri v Consolidated Contractors International SARL* [2009] 2 WLR 621

30. *McGowan v Chadwick* [2002] EWCA 1758, Lawtel

31. *Lightman & Moss on The Law of Administrators and Receivers of Companies* 6th Ed., 29 – 030

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