



Latitude: Ogier's restructuring and insolvency digest, November 2022

Newsletters - 22/11/2022

In a turbulent economic climate, we're continuing to see an increase in both contentious and non-contentious insolvencies.

As a result of this rising tide, there will continue to be new insolvency cases.

Although the case's origins pre-date the current high inflation economic environment, the UK Supreme Court's judgment in *BTI v Sequana* will be especially influential in our current circumstances.

The case considers whether the duty to act in the best interests of the company requires directors to consider and act in the interests of the company's creditors, rather than the shareholders, only when the company becomes insolvent, or whether directors should do this before insolvency.

While decisions of the UK Supreme Court aren't binding in the jurisdictions in which we practise law, it will nevertheless be highly persuasive and influence the approach taken in the offshore jurisdictions we operate in. You can read our team's briefing on it below.

Enjoy Latitude, and if you wish to discuss any of the issues raised please get in touch with our team.

[Read Latitude online.](#)

Q2 spike in England and Wales corporate insolvencies reflects broader global trend

Reports of the significant increase in corporate insolvencies and voluntary liquidations in England and Wales for Q2 demonstrate the combined impact of government Covid-19 support being withdrawn, soaring energy and fuel costs, and weakening demand - and are being reflected in the nature of the instructions coming into our global jurisdictions from distressed companies across the

Comity, cooperation and conflict in cross-border insolvency: an offshore perspective on modified universalism

Although the principle was only named in the early 2000s, modified universalism has been the "golden thread" running through cross-border insolvency law since the 18th century. The UNCITRAL Model Law on Cross-Border Insolvency provides a tried and tested framework for cross-border cooperation and assistance that is founded on the principles of modified universalism. However, in jurisdictions where the Model Law has not been adopted, including many offshore jurisdictions, it is critical to ensure that the common law principles of modified universalism retain their primacy and potency, and are not inadvertently eroded to the detriment of stakeholders. [Continue reading ...](#)

Seahawk China Dynamic Fund: winding up on just and equitable grounds

In a recent decision, the Grand Court of the Cayman Islands grappled with the question of whether the need for an investigation into the affairs of the company is a stand-alone ground for winding up. While the Court did not determine the question conclusively, it did provide an indication of how it may rule if the issue were to be placed squarely before the Court again. [Continue reading ...](#)

Cayman Grand Court permits joint provisional liquidators to control the timing of their discharge of office

The approach of the Cayman Grand Court to the terms and timing of the discharge of provisional liquidators of *In the Matter of Star International Drilling Ltd* (unreported, FSD 88 of 2021 ASCJ) may provide a window into what is expected to be a similarly flexible approach to the appointment of restructuring officers. [Continue reading ...](#)

Grand Court further develops insolvency test for Cayman Islands segregated portfolio companies

By virtue of the special nature of Cayman Islands segregated portfolio companies, where one portfolio of the company is in financial distress but the others (and their investors) remain unaffected, the Cayman Islands Companies Act (2022 Revision) provides for the appointment of a receiver to the relevant portfolio, without needing to wind up the company in its entirety. To

engage the Court's jurisdiction to make a receivership order over a segregated portfolio, it must be "insolvent" within the meaning of 224(1) of the Companies Act. This raises the question: what's the appropriate test for insolvency to be applied by the Court? [Continue reading ...](#)

Cayman Islands welcomes introduction of reforms to restructuring regime

The Cayman Islands insolvency and restructuring industry is welcoming the introduction of the much-anticipated reforms to the jurisdiction's restructuring regime. These came into force on 31 August 2022. The reforms, which were originally published in 2021, will facilitate the efficient restructuring of distressed companies for the benefit of their stakeholders by, among other things:

- a. retaining the **flexibility** of the existing regime, including the ability of the Court to adapt powers of restructuring officers to particular circumstances
- b. improving **accessibility** to the restructuring regime, including dispensing with the need to present a winding up petition to initiate a court-supervised restructuring
- c. providing additional **debtor protection** to facilitate restructuring beyond those available under the existing regime, including by imposing an automatic stay, with extra-territorial effect, upon presentation of the restructuring petition; and
- d. preserving and enshrining in statute important **creditor rights**, including the right to receive notice of any application in the ordinary course

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BTI v Sequana: directors must continue to be aware of creditors' interests on the road to insolvency

The UK Supreme Court handed down its decision in *BTI v Sequana* on 5 October 2022, unanimously dismissing the appeal from the 2019 Court of Appeal decision and confirming how directors duties ought to be applied when a company is in the zone of insolvency. Although decisions of the UK Supreme Court are not binding upon the jurisdictions in which Ogier practises law, it will nevertheless be highly persuasive and influence the approach taken in the offshore jurisdictions that Ogier advises upon. [Continue reading ...](#)

New developments in Guernsey insolvency: the Guernsey Insolvency Rules

Historically, Guernsey's insolvency law had limited operational provisions (compared to English law) and was largely developed by a bespoke and flexible application of common and customary

law principles by the Royal Court. The old regime will now be updated and revised by the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance 2020 which was passed on 15 January 2020. Although it does not yet have force of law it is anticipated to become law in the latter part of this year. [Continue reading ...](#)

EU Preventative Restructuring Directive takes effect in Ireland

The Irish Minister for Enterprise, Trade and Employment signed into law the European Union (Preventive Restructuring) Regulations 2022 on 29 July 2022. This is the first significant piece of legislation dealing with corporate rescue in Ireland since 1990, when the jurisdiction's examinership process was first codified. In this article, we will outline some of the more material changes the Regulations make to Ireland's existing legislation. [Continue reading ...](#)

A new beginning for restructuring in the Cayman Islands

On 11 November 2022, the Grand Court of the Cayman Islands heard the first petition to appoint restructuring officers under the new Cayman Islands restructuring regime that came into force on 31 August 2022. In this article, we will provide an overview of the recent hearing and the appointment. As this was the first time the Grand Court of the Cayman Islands was required to determine a petition to appoint restructuring officers, some useful points were clarified and practical recommendations offered. [Continue reading ...](#)

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About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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