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60 SECONDS Q&A WITH LOUISE BELL ENYO

While the volume of contentious insolvency claims has fallen from its peak immediately after the global financial crisis, disputes involving allegations of fraud remain common. Here, Louise Bell, a specialist in complex disputes in insolvency situations at Enyo Law discusses what is keeping her busy.

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LOUISE BELL

RI: Is there a 'most common' type of claim you are seeing as part of your contentious insolvency practice at the moment?

LB: Most of the claims I deal with have a grounding in fraud. Typically, they will involve one or more directors of the insolvent entity, and often they also involve other entities that have been mixed up in the activity, which has caused the insolvent company to suffer a loss. It is sometimes easy to overlook the fact that the company itself is, in many legal scenarios, the victim of the fraud even though ultimately it is creditors who suffer a loss.

In terms of types of claims, the insolvent entity will have at its disposal the usual range of common law remedies. These can usually be supported by the office holder's statutory remedies such as transactions defrauding creditors, preferences and transactions at an undervalue.

RI: How does that differ to the types of claims that were arising 10 years ago, in the immediate aftermath of the financial crisis?

LB: In relation to the types of claim that were arising, I would say it is the same. In terms of the volume of claims, there is a difference. You will always have a hard core of individuals who are routinely dishonest, including individuals who are involved in serious organised crime. There is another sub-set of people who, whilst not routinely dishonest, have a propensity towards dishonesty when they find themselves in difficult financial situations.

RI: The dreaded question: is Brexit impacting the cases and work you are seeing? If not, do you expect it to?

LB: Not yet! The European Union (Withdrawal) Act 2018 provides that the Recast Regulation on Insolvency will continue to apply to all insolvency proceedings commenced in any Member State (including the UK) until 31 December 2020 (the end of the transition period). What will happen after that is pure speculation but certainly, absent a new regime, cross-border enforcement in European jurisdictions will become much more difficult. We will be thrown back to the previous legislation whereby the English courts determine whether they have jurisdiction to commence insolvency proceedings in each particular case, and there is no automatic recognition of those proceedings by the Member States.

The position is not assisted by the fact that very few Member States are signatories to the UNCITRAL Model Law on Cross Border Insolvency. What I would like to see is something very similar to the Recast Regulation being adopted between the UK and each of the remaining Member States. There is some incentive for that to happen because the UK's administration processes and Companies' Act schemes of arrangements are popular with our European counterparts.

RI: You were recently involved in the case Burnden Holdings (UK) Limited v Fielding and another [2018] UKSC 14 before the Supreme Court. Do you think that decision has wider practice points that the market should be aware of?

LB: Yes, I think it does. Prior to the Supreme Court's decision, there was surprisingly little case law on the meaning of section 21(1)(b) of the Limitation Act. It is well established law that directors are 'trustees' for the purposes of section 21 of the Act. The Supreme Court found that, by virtue of their office, directors should be treated as 'fiduciary stewards' of a company's property even though that property was legally owned by the company. Accordingly, a company director will always fulfil the requirement of section 21(1)(b) that he or she has previously received trust property.

In many cases, suspending the period of limitation comes with a requirement to establish that the defendant has acted dishonestly which, as we all know, can be a difficult threshold to reach. That requirement is, however, absent from section 21(1)(b). As stated by the Supreme Court, the purpose of the section "is to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest. It is not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have".

Whilst in an ideal world, none of us wants to be in a position where we are having to find ways to suspend a period of limitation, we have all been presented with claims which, on the face of it, could be met with a limitation defence. This can often happen in an insolvency context where directors' actions are not given close scrutiny until an office holder is appointed. The Supreme Court's decision opens up the possibility for claims to be brought in relation to transactions where the primary limitation period has expired, without the need to show dishonesty.

RI: Historically, how has litigation in an insolvency context been funded?

LB: In the past, in cases where there were no assets in the case with which to fund litigation, claims would need to be funded by creditors or by the lawyers agreeing to act under a conditional fee agreement. Whilst lawyers may be willing to act under a CFA for small claims, on more significant pieces of litigation, the financial investment required from the law firm was usually too much and many claims were just not pursued as a direct consequence of lack of funding.

RI: Has the growth of litigation funding changed the way you and your clients think about how claims may be funded?

LB: The growth of litigation funding has definitely changed the landscape. It is now possible to bring claims that might not otherwise have seen the light of day. Whilst we always approach creditors to ascertain whether they are prepared to provide funding, there is often little appetite for creditors who have already lost money to put more capital at risk.

RI: Generally, who pushes for an approach to funders? The lawyers, the insolvency practitioner or the creditor body (who would otherwise have to fund the dispute themselves)?

LB: It is incumbent on us as lawyers to discuss the various funding options available to our clients at the outset of litigation. It is generally the office holder who will make the decision about whether to make an approach to funders, not least because the office holder must act in accordance with his general duties to creditors when considering whether to bring the claim or not.

RI: How do you see the contentious insolvency market developing over the next five years? Do you see funding forming a significant part of that development?

LB: With more funders now in the marketplace, I think more office holders are looking closely at whether there are claims they should be bringing to increase returns to creditors. For years now, perfectly good claims have not been brought because there were insufficient uncharged assets in a case to fund litigation. In the last five years, there has been a growth in the number of contentious insolvency cases and, with the funding options now available to office holders, I see that growth continuing.