

How do you get fraud evidence from company insolvency situations where the insolvency practitioner may not wish to investigate impropriety too deeply?

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Why might the insolvency practitioner not wish to investigate impropriety too deeply?

- Lack of information?
- Lack of funding?
- Lack of prospect of return to the estate?

“It is is not the [officeholder’s] duty to act in the interests of the creditors *at all costs*”; *Patney Wood Farm LLP and others v Kicks and others* [2023] EWCA Civ 901, at §73 (Arnold LJ, with Lewison and Asplin LJJ in agreement)

- Inexperience?

Solutions..?

- Communication
- Funding
- Replace the IP?
- ...funding!

Taking control (if you have the funding)...

- (1) Challenging the officeholder's (lack of) conduct?**
- (2) Finding a suitable (replacement) officeholder**
- (3) Taking assignments of claims**
- (4) Potential use of section 133 of the Insolvency Act 1986 (“IA 1986”)**
- (5) Adverse disclosure order?**

(I) Challenging the officeholder's (lack of) conduct?

- **IPs' investigative powers under the IA 1986 are extensive, e.g.**
 - > s.234 – to get in the company's property, books, papers or records
 - > s.235 – to require certain parties to provide information
 - > s.236 – to have summoned "*any person who the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company*" + delivery up books papers or other records relating to the company or the foregoing
- **As are their powers to recover assets, e.g.**
 - > Bring claims in name of company
 - > Transaction avoidance claims (s.238 (TUV), s.239 (preferences), s.423 (transactions defrauding creditors)).
 - > s.213/214 claims (fraudulent/wrongful trading – NB also applicable in administration s246ZA/246ZB)
- **What can you do if they are not using them?**
 - > s.168 (in compulsory winding up); s.112 (in CVL)...

(I) Challenging the officeholder's (lack of) conduct?

s.168

“(2)The **liquidator** may seek a decision on any matter from the company's creditors or contributories; and **must seek a decision on a matter—**

(a) from the company's creditors, **if requested to do so by one-tenth in value of the creditors;**

(b) from the company's contributories, **if requested to do so by one-tenth in value of the contributories.”**

or

“(5) If any person is **aggrieved by an act or decision of the liquidator**, that person may **apply to the court**; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just.”

s.112

“(1)The liquidator or any contributory or creditor may **apply to the court to determine any question** arising in the winding up of a company, **or to exercise**, as respects the enforcing of calls or any other matter, all or **any of the powers which the court might exercise if the company were being wound up by the court.**

(2)The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.”

(2) Finding a suitable (replacement) officeholder

- If still the OR – use s.136(5)(c) power to requisition OR to invite nominations (need one quarter in value of the company’s creditors)
- Consider their experience: review IP’s (and their partners’ and/or employees’) CVs
- Process for replacement
 - > **s.171 – CVL** “by a decision of the company’s creditors made by a qualifying decision procedure instigated specially for that purpose” – or pursuant to **s.108** by the court “on cause shown”;
 - > **s.172 – compulsory winding up.** “only by an order of the court or by a decision of the company’s creditors made by a qualifying decision procedure instigated specially for that purpose in accordance with the rules”

(2) Finding a suitable (replacement) officeholder

But note that –

(i) in a CVL, if the officeholder was appointed by the Court under s.108, such a decision procedure may only be instigated if either the liquidator thinks fit, the court so directs, or it is requested in accordance with the rules by **not less than one-half in value of the company's creditors** (s.171(3A))

and (ii) in compulsory winding up,

“Where—

(a) the official receiver is liquidator otherwise than in succession under section 136(3) to a person who held office as a result of a nomination by the company's creditors or contributories, or

(b) the liquidator was appointed by the court otherwise than under section 139(4)(a) or 140(1), or was appointed by the Secretary of State,

*a qualifying decision procedure such as is mentioned in subsection (2) shall be instigated only if the liquidator thinks fit, the court so directs, or it is requested, in accordance with the rules, by **not less than one-quarter, in value, of the creditors.**” (s.172(3))*

(2) Finding a suitable (replacement) officeholder

- **Post dissolution? Not necessarily too late ...**

See e.g. *Re Harrington and Charles Trading Ltd (and others)* [2021] EWHC 1566 (Ch) (restoration of companies into CVL and appointment of new forensically minded – and funded – officeholders, where company alleged to have been implicated in fraud)

(3) Taking assignments of claims

- Claims belonging to the Company (liquidator's power under Sch 4)
- Various officeholder claims pursuant to s.246ZD (reversing *Re Yagerphone Ltd* [1935] Ch 392). Includes the right to the proceeds - see *Re Totalbrand Ltd*; *Cage Consultants v Iqbal* [2020] EWHC 2917 (Ch)
- **NB terms of assignment** – consider contractual obligations on officeholder to provide assistance/information.

(4) Potential use of s.133 IA1986 (public examination)

- In a compulsory liquidation the OR and/or liquidator may apply to the Court for the public examination of any person who –
 - (a) is or has been an officer of the company; or
 - (b) has acted as liquidator or administrator of the company or as receiver or manager
 - (c) not being a person within (a) or (b), *“is or has been concerned, or has taken part, in the promotion, formation or management of the company”* .
- Note OR is required to make such an application if requested to do so by either one-half in value of the company’s creditors or three-quarters in value of the company’s contributories (s.133(2))

Potential use of s.133 IA 1986 (public examination)

- When requested the order is (usually) mandatory –
 - > *Re Casterbridge Properties Ltd* [2003] EWCA Civ 1246
 - > But consider *Official Receiver v Deuss* [2020] EWHC 3441 (Ch)
- Person may be questioned “*as to the promotion, formation or management of the company or as to the conduct of its business and affairs, or his conduct or dealings in relation to the company*” .
- In addition to the OR and liquidator, **any creditor who has tendered a proof** and any **contributory** of the company **may ask questions** at the public examination about such matters.
- NB s.112 can be used to direct its application in CVL (see *Re Pantmaenog Timber Co Ltd* [2003] UKHL 49 at §56, endorsing *Re Campbell Coverings Ltd (No. 2)* [1954] Ch 225)

(5) Adverse disclosure order?

- **CPR 31.17** (third party disclosure order – continues to apply under Section II CPR PD 57AD *Disclosure in the Business and Property Courts*); and
- Don't forget **s.155(1) IA 1986**:

“The court may, at any time after making a winding-up order, make such order for inspection of the company's books and papers by creditors and contributories as the court thinks just; and any books and papers in the company's possession may be inspected by creditors and contributories accordingly, but not further or otherwise.”

See further ***Re Cambridge Analytica (UK) Ltd and others*** [2020] EWHC 3770 (Ch), applying ***Sunwing Vacation Inc & Ors v E-Clear UK Plc & Ors*** [2011] EWHC 1544 (Ch)

s.155(1) applications – issues for consideration

- (1) Whether the exercise of the power would be for the purpose of the winding up;
- (2) Whether the order would be just and beneficial (s112(2));
- (3) Whether the court should exercise its discretion to make the order; and
- (4) Whether the court is satisfied with the proposed terms.

NB – available in CVL pursuant to s.112 – *Sunwing*

Thank you for listening!



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