THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
COMMERCIAL DIVISION
CLAIM NO. BVIHC (COM) 2022/0119

IN THE MATTER OF THE INSOLVENCY ACT, 2003
AND
IN THE MATTER OF THREE ARROWS CAPITAL LTD (IN LIQUIDATION)

BETWEEN:

[1] RUSSELL CRUMPLER
[2] CHRISTOPHER FARMER
(in their capacity as liquidators of THREE ARROWS CAPITAL LTD (in Liquidation))

Applicants

-and-

[1] KYLE DAVIES
[2] ZHU SU

Respondents

Appearances:
Mr. Richard Fisher KC, with him Mr Henry Phillips, Mr Grant Carroll, Mr Daniel Mitchell and Mr Daniel Kessler of Ogier for the Applicants

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2022: December 6, 19
2023: April 5

JUDGMENT

[1] **SMALL DAVIS, J [Ag.]**: This is an application made by the Joint Liquidators of Three Arrows Capital Limited on an ex parte basis for an order directing the Respondents to attend to be examined in private and on oath concerning the affairs of the Company and to produce and

provide the documents set out in a schedule. The application was heard on 7 December 2022 and the order made on 19 December 2022. These are the written reasons for the decision.

[2] The Respondents are co-founders and directors of the Company. The Company was an investment firm with a focus on cryptocurrency and digital assets. It was a master fund through which investments were placed via offshore and onshore feeder funds. The Company's most recent annual report dated 30 December 2021 reported assets of US$6.146 billion and liabilities of US$2.968 billion. As a result of extreme value movements in the cryptocurrency markets in mid-May2022, the Company's business collapsed and on its own application, the Company entered into compulsory liquidation by order of the Court made on 27 June 2022. The Respondents moved the application for compulsory liquidation which was consolidated with an application by one of the Company's creditors.

[3] The Liquidators have been trying to identify, locate and obtain control of the Company's assets. Despite many requests made by the Liquidators, the Respondents have failed to cooperate by providing information and documents, which they are under a statutory obligation to do under the provisions of the Insolvency Act. The main issue on the application was whether the Court can make an order under section 284 and 285 with extra-territorial effect. The Respondents are not within the British Virgin Islands. A secondary issue was whether the Court should make an order for both the examination and production of documents when the Respondents' location is unknown and therefore the ability to enforce compliance with the order is unclear.

[4] The efforts of the Liquidators to gather the information that they need from the Respondents are set out in the Second and Fifth Affidavit of Russell Crumpler filed in support of the Application. The initial request for information was made by letter dated 27 June 2022 addressed to the "Directors of the Company" and was sent to the email address for the management of the Company and to the Company's former lawyers in Singapore and the BVI who acted for the Company at the time of its liquidation. The directors were specifically requested to provide a Statement of Affairs as required by section 276 of the Insolvency Act. Follow up letters were sent on 5 July and 7 July 2022. There was no compliance with the Liquidators' request, even though they stated they would enforce the request by making an application to the Court.

[5] The Liquidators received correspondence by way of an email from a Singapore law firm and although there was the indication of an intention to cooperate, cooperation has been lacking or at least inadequate. In fact, while persons purporting to be the Respondents attended a virtual meeting on 8 July 2022 with their lawyer, their cameras remained off and they did not speak. The Respondents cancelled two further meetings. Mr Zhu attended a video conference meeting on 11 August 2022 but Mr Crumpler describes their interaction as woeful.

[6] Among the information required by the Liquidators is a complete list of the assets, information needed to access and take control of the Company's digital assets, such as wallet addresses and the seed phrases. They also need information to help them understand how the Company was operated and how to take control of the assets.

[7] The Respondents provided some limited information in mid July 2022. An asset list was provided listing assets said to be worth US$1 billion but no information that would enable the Liquidators to obtain control over the assets which are all crypto tokens and non-fungible tokens and agreements for future tokens and equity. These digital assets are spread across a number of public cryptocurrency addresses stored on various blockchains. Ownership of the public address is proved by having the public and private key pairing. The private key is necessary to access and transfer the digital assets from a public address. This information from the Respondents is therefore critical.

[8] A revised asset list identified the Company's bank accounts but no details such as the account number, location and name on the accounts were provided. The list also raised points which would certainly need clarification, such as putting forward significantly different bank balances, asserting that a number of tokens were locked and could not be transferred to the Liquidators and mentioning that the seedphrases for the digital wallets, which store all the information needed to access all the private keys and recover all the crypto assets in a particular wallet, effectively the 'master key', were being held in a personal safe and that the directors needed time to retrieve them. The Liquidators were being told for the first time that the Directors have access to the critical seedphrases.

[9] The Liquidators have made concerted efforts to obtain assistance from the Directors which the Directors are obliged to give. Between 27 June and 11 July 2022 alone the Liquidators unsuccessfully attempted to contact the Directors on 16 occasions, trying to obtain information about the Company's affairs. The evidence shows that Liquidators have been assiduously corresponding with the Respondents in an effort to gather the information that they need. They have also taken steps to have their appointment recognised in Singapore and the US Bankruptcy Court.

[10] In their correspondence, the Liquidators have made plain the areas of inadequacy of the information provided and the importance of the information that is continued to be sought. The Liquidators have also repeatedly invited the Directors to meet virtually. The Directors' responses, coming through their lawyers in Singapore have all been cooperative only in promise but not in deed. The Liquidators have very little to show for all their months of corresponding with the Directors with a view to gathering necessary information to carry out their duties. The correspondence from the Directors has been either non-responsive to specific requests (for example to have a virtual meeting) or inconsistent and contradictory, for example initially stating that they would need time to retrieve the seedphrases from a safety deposit box, then that the safety deposit box belonged to Mr Davies personally, to finally saying that they did not have any access to the safety deposit box and could not provide any confirmation of its contents. The Respondents have only provided the Liquidators with piecemeal and incomplete information on the whereabouts and means to obtain control of the Company's assets, which are largely in a form that is easily transferable. Dates given to the Respondents to comply with the Liquidators' requests have passed. On most occasions, the Liquidators' letters detailing the information that was specifically being sought was met with a request for time to take instructions and/or time to respond substantively. On many occasions, no substantive response was received. The Respondents failed even to meet their own proposed deadlines for producing required documents and information.

[11] The Liquidators were eventually able to have two meetings. Mr Zhu attended the 11 August meeting and Mr Kyle Davies attended the 27 August 2022 meeting. Their Singapore lawyer was present on each occasion.

[12] The Respondents' expressions of willingness to cooperate have not been followed up with cooperative action. The Respondents have not provided:

(a) detailed information with regards to the Company's bank accounts - no account numbers provided;

(b) Access or information in relation to the safe deposit box which allegedly contain the seedphrases required to obtain control of the digital wallets, although it has been promised since 22 July 2022. This is critical to the custody of the Company's assets.

(c) certain tokens which the Company ought to be in a position to claim when they reach their vesting period.

(d) information as to certain non-fungible tokens;

(e) information as to how investment portfolios were managed;

(f) electronic and physical records;

(g) details of the Company's secured and unsecured creditors;

(h) details of the associated companies and the intra company dealings.

[13] The Liquidators need the information not only to be able to take control of the Company's assets, but also to gain an understanding of the Company's activities, particularly those in the months leading up to being placed in liquidation and to respond to allegations being made by creditors and third parties, some of whom claim that there are undocumented agreements with the Company.

[14] The Liquidators wrote to the Respondents on some specific digital assets, notably the Luna and Terra tokens whose significant devaluation led to the Company's insolvency, as well as the Company's dealings with an entity with respect to the purchase of 1.5 million KILT tokens. Messrs Advocatus responded on behalf of the Respondents denying any knowledge of the matters. This response is at dissonance with information that the Liquidators received from the entity which includes a loan agreement dated 20 November 2021 executed by Mr Davies

in his capacity as co-founder and CEO. The Liquidators also have information that the KILT tokens have been sold. This has not been disclosed in any of the information provided by the Respondents.

[15] In all of this, the Respondents' location is unknown.

Statutory Obligation of Officers, Employees and Promoters of the Company

[16] By section 276 of the Insolvency Act the Liquidators may give notice to relevant persons to prepare and submit a statement of affairs. "Relevant person" is defined as -

(a) a person who is or who, within the relevant period, has been an officer of the company;
(b) a person who is or who, within the relevant period, has been in the employment of the company and who, in the office holder's opinion is capable of providing the information required;
(c) a person who is or who, within the relevant period, has been an officer of or in the employment of a company which is an officer of the company; or
(d) a person who, within the relevant period, has promoted the formation of the company.

[17] Section 277 (3) is in mandatory terms and section 277(4) creates as statutory offence for failure to comply:

"(3) Subject to section 278, a relevant person required by an office holder to prepare and submit a statement of affairs shall verify the statement of affairs by affidavit and submit the statement of affairs to the office holder, together with the verifying affidavit, on or before the date specified in the notice sent to him or her under section 276(1).

(4) A relevant person who, without reasonable excuse, contravenes subsection (3) commits an offence."

Section 278 permits the relevant person to provide an affidavit of concurrence instead of a statement of affairs.

[18] Section 277 lists the particulars that must be set out in the statement of affairs. The Respondents, as founders, officers and directors of the Company, are among the classes of

persons to whom the Liquidators may make the request for preparation of a statement of affairs.

[19] On 27 June 2022 the Liquidators issued a Notice to the Respondents to prepare and submit a statement of affairs by 1 August 2022. The request for the statement of affairs was repeated on 27 September 2022 in a letter to Advocatus. Up to the date of hearing the Respondents have not complied with the request.

[20] Section 282 empowers the Liquidators to obtain information:

"(1) An office holder may, by notice in writing, require a person specified in subsection (2)-

(a) provide them with information concerning the company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs as they reasonably require;

(b) to attend on them at such reasonable time and place as specified;

(c) be examined under oath or affirmation by them or by their legal practitioners on a matter referred to in paragraph (a).

(2) A notice under subsection (1) may be sent to-

(a) an officer or former officer of the company;
(b) a member or former member of the company;
(c) a person who was involved in the promotion or formation of the company;
(d) a person who is, or within the relevant period has been, employed by the company, including a person employed under a contract for services;
(e) a person who is, or at any time has been, a receiver, accountant or auditor of the company;
(f) a person who is or who, at any time has been, an officer of or in the employment of a company which is an officer of the company; or
(g) if the office holder is the Official Receiver or a liquidator or provisional liquidator to any person who has acted as administrator, liquidator or provisional liquidator of the company.)

(3) A person who receives a notice under subsection (1) and who, without reasonable excuse, fails to comply with the notice, commits an offence."

[21] The clear intendment of the legislation is that relevant persons, employees and certain agents have an obligation to cooperate with the officeholder to the point of it being an offence for their failure to do so.

[22] Sections 284 through 288 bring the examination of persons for the purpose of providing information concerning the company into the arena of the Court.

Applications for examination before the Court

284. (1) Where a company is in liquidation, an application may be made to the Court, ex parte, by the liquidator or by the Official Receiver, for an order that a person specified in subsection (2) appear before the Court for examination concerning the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company.

(2) An application under subsection (1) may be made in respect of—

(a) a person specified in section 282(2); or

(b) any other person who the applicant considers is capable of giving information concerning the company or a connected company; or

(c) any other person who the applicant knows or suspects has in his or her possession or control any asset of the company or is indebted to the company. (Inserted by Act 11 of 2004)

(3) An application under subsection (1) shall state whether the applicant seeks a public or a private examination.

[23] Where the Court makes an order for examination, Section 285(3) provides that the Court :

"(a) shall direct the examinee to appear before the Court to be examined at a venue specified in the order;

(b) shall state whether the examination is to be a public or a private examination;

(c) may require the person concerned to produce at the examination any books, records or other documents in his or her possession or control that relate to the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company;

(d) may provide for an alternative method of service of the order on the examinee;

(e) shall state the action that may be taken against a person if he or she does not appear before the Court as required by the order; and

(f) where the examination is to be a public examination, may require the examination to be advertised, specifying the method of such advertisement."

[24] Three important features of section 284 to 285 are that the examination before the Court may be public whereas examination by the officeholder is held in private, the sanction for non-compliance with the order must be set out in the order and the privilege against self-incrimination is expressly removed (section 287(1)).

[25] Section 288provides that failure to attend the examination without reasonable cause is an offence and the court may cause a warrant to issue for the arrest of the examinee and for the seizure of any books, papers, records in their possession.

Do sections 284 and 285 have extra territorial effect

[26] I am called up to construe section 284 of the Insolvency Act. The modern approach to statutory interpretation is that the court seeks to give effect to the purpose of the legislation, which must be derived from its language and context. Quoting Lord Bingham in **R (Quintavalle) v Secretary of State for Health**[1]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[27] The Liquidators seek an order directing that the Respondents, directors of the Company at the time when the Company went into liquidation, attend for a private examination and produce certain documents at the examination. The Respondents are not physically within the BVI. Nonetheless, the Liquidators have no hesitation in saying that the order can properly be made against the Respondents.

[28] For the Liquidators, Mr Fisher KC submitted that given the paucity of case law on how the Court should approach a section 284 application, the Court should adopt the English court's approach in dealing with applications for private examination under section 236 of the UK Insolvency Act 1986 to guide the manner in which the court should exercise its discretion.

[29] To make an assessment whether the course proposed by Mr Fisher KC is appropriate, it is necessary to review Section 236 of the UK Insolvency Act to see whether it bears any similarity to section 284:

> Inquiry into company's dealings, etc.
> (1) This section applies as does section 234; and it also applies in the case of a company in respect of which a winding-up order has been made by the court in

[1] [2003] UKHL 13, [2003] 2 AC 687 at [8]

England and Wales as if references to the office-holder included the official receiver, whether or not he is the liquidator.

(2) The court may, on the application of the office-holder, summon to appear before it—

(a) any officer of the company,

(b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or

(c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

(3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.

(3A) An account submitted to the court under subsection (3) must be contained in—

(a) a witness statement verified by a statement of truth (in England and Wales), and

(b) an affidavit (in Scotland).]

(4) The following applies in a case where—

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court—

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

[30] Section 288 mirrors section 236(5) and (6) of the UK Insolvency Act.

[31] As is evident, section 236 of the UK Insolvency Act provides a scheme whereby the court may summon the person to appear before it and may direct that an account be given by way of a witness statement verified by a statement of truth or affidavit as the case may be.

[32] However, as it relates to private examination before the Court, section 237(3) the UK Insolvency Act provides:

> "The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 or this section shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom."

[33] The UK case law has uniformly construed section 236 as having no extra territorial effect. That is hardly surprising, given section 237(3) which makes it plain. By contrast, section 133 of the UK Insolvency Act which deals with public examination has not expressly stated its reach and has been consistently treated as having extra territorial effect.

[34] This application was made ex parte and in fulfilment of their duty to the Court, the Liquidators' Counsel raised the issue of whether the part of the Insolvency Act dealing with examination before the Court has territorial effect. Mr Fisher KC brought to the Court's attention the decision of Wallbank J in **The Matter of Ocean Sino Limited (in Liquidation) Chu Kong v John Greenwood and Roy Bailey**[2] in which the learned judge held that sections 284 and 285 have no extra territorial effect. Mr Fisher KC contended that **Chu** was wrongly decided and that in any event it is not binding on this Court.

[35] In **Chu**, the liquidators applied to the court for an order directing a former director to attend for a private examination. The former director was based in Hong Kong. The learned judge held that the proper approach to the construction of section 284 is to limit its territorial effect and that the court had no power to order the examination of the former director who was not present within the BVI or who could be served process within the jurisdiction of the court and did not accept service.

[36] In making the argument that this court should not follow **Chu** (which of course, as a court of equal jurisdiction, is not binding) Mr Fisher KC made the following points. Firstly, the court can exercise personal jurisdiction over any person who is (i) within the jurisdiction (ii) on whom proceedings can be served out or (iii) has submitted voluntarily. The authority in support of this point is **Stichting Pensioenfonds Shell v Krys**[3].

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[2] Unreported, Claim No BVIHC (COM) 0065 of 2016, 18 May 2022
[3] [2014] UKPC 41 at [72].

[37] Secondly, the court can permit service out through a gateway of CPR 7.3(7)(a): where the claim relates to the constitution, administration, management or conduct of the affairs of a BVI incorporated company. There is no equivalent gateway in England. The application for examination under section 284 or 285 plainly concerns the management and conduct in the affairs of the company, which falls within the scope of CPR 7.3(7)(a).

[38] Thirdly, Sections 284 and 285 must be construed in context (including with the knowledge of CPR 7.3(7)(a)) and should have extra territorial effect, just as section 133 of the UK Insolvency Act 1986. The learned judge was wrong to conclude to the contrary when there was no language directly correlating to section 237(3). The BVI context is the nature of the business conducted by BVI entities and the fact that many directors never physically come to the BVI. The fact that the order is sought to be made for examination of a person abroad is a factor to be taken into account in the discretionary aspect of whether an order should be made.

[39] Fourthly, the Respondents can be taken to have submitted to the jurisdiction for the purpose of these proceedings. They are persons who were directors at the time that the liquidation commenced and were the parties who initiated the liquidation of the Company. In accepting the office of directors, they have submitted to the jurisdiction of this court for the purpose of any enquiry into the Company's affairs. The learned judge had not been dealing with an application concerning current directors and did not address any argument based on the proposed examinee being a director.

[40] I decline to follow the decision in **Chu**. I have come to the conclusion that sections 284 and 285 do have extra territorial effect and that the court has jurisdiction over the relevant persons on whom process can be served out.

[41] I have carefully considered the arguments made to the court in **Chu** and the learned judge's reasoning in arriving at his conclusion. The arguments made by Mr Fisher KC find favour with me and make a great deal of sense in their logic and application of fundamental legal principles. The matter is one of pure construction of legislative provisions.

[42] To put **Chu** in context, the order made on an ex parte was a very wide examination order against a former director, not just in relation to the BVI company but also into transactions by entities alleged to be subsidiaries within the group and where the further entity was already in liquidation in Hong Kong. Since Mr Chu was known to be in Hong Kong, he was subject to its jurisdiction. This was of some relevance to the learned judge.

[43] Wallbank J found that it is critical that the court has jurisdiction over the persons against whom an order is made; the person must either be accepting service or be present within the Territory. The decision rested entirely on the application of the underlying principle that legislation normally does not have extra territorial effect and in the absence of express words to that effect, that the general rule of construction of legislation is to be applied. The Court accepted **Re Tucker**[4] as expressing the correct principles to be applied. On the issue of submission to the jurisdiction, which was argued because Mr Chu had participated in the insolvency proceedings and had filed a claim for a debt, the judge found that submission in his capacity as a creditor rather than as a proposed examinee was insufficient.

[44] In **Re Tucker,** the UK Court of Appeal was considering section 25 of the Bankruptcy Act 1914. Lord Dillon quoted James LJ in **ex parte Blain** who expressed the principle of territoriality of legislation:

> "It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction."

[45] This principle was explained as being rooted in international comity: the legislature of one country should not be imposing on nationals or persons under the jurisdiction of another country to appear before its courts when that person had not been within its jurisdiction. The

[4] [1990] 1 Ch 148

governing principle is that all legislation is prima facie territorial, binding its own subjects and others who bring themselves within the allegiance of the legislating power.

[46] Lord Dillon accepted that principle is a rule of construction:

> "These passages in Ex parte Blain were referred to by Lord Scarman and Lord Wilberforce in Clark v. Oceanic Contractors Inc. [1983] 2 A.C. 130. Lord Scarman, at p. 145, stated that the principle there referred to (which put into modern language he restated as being that "unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction") was a rule of construction only. Lord Wilberforce said, at p. 152, that the principle, which was really a rule of construction of statutes expressed in general terms, required an inquiry to be made as to the person with respect to whom Parliament was presumed, in the particular case, to be legislating.
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> I look, therefore, to see what section 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath and to produce documents. I note that the general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C., Ord. 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court. Against this background I would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court."

[47] In **Re Tucker**, which was a bankruptcy case, examination was being sought of the debtor's brother, an English national living in Belgium. The issue of the territorial effect of section 25(1) was conclusively settled by regard being paid to section 25(6) which expressly limited jurisdiction to persons within England.

[48] Just as Lord Dillon did in construing section 25, so too I look to see what section 284 and 285 was legislating. The purpose of the examination is to enforce the obligation of persons who have information or who have been engaged in the promotion, management, administration of

the insolvent company to adequately assist the liquidator in his investigations and the efficient conduct of the liquidation. Section 285 is aimed at persons who have chosen to be involved with the company. There would be no disrespect to a foreign jurisdiction and I do not perceive any violation of any principles of comity. There are clear indicators that section 285 was intended to have extra territorial reach. The BVI is an offshore jurisdiction. More often than not, the companies' directors are resident overseas and many never come to the BVI. The companies have no other physical connection with BVI other than their registered agent and office. Usually, there are no assets within BVI. The fair inference is that persons abroad are within the ambit of section 284 and 285.

[49] Sections 284 and 285 do not have any express provision limiting the reach of the court's jurisdiction to order the examination of persons who can assist the liquidator in the investigation of the insolvent company's affairs. The fact is that this is a company operating outside the jurisdiction and with none of the principals, officers, directors etc being within the BVI. This must mean that the situation would inevitably arise that persons abroad might be required to give information about the Company. A company only acts through agents. It has no information except what is known or possessed by its directors, officer, those responsible for its formation, etc. Hence the statutory obligation of directors and other relevant persons to provide information and cooperate with the Liquidators' investigation.

[50] Lord Dillon noted the fact that at the time that the Bankruptcy Act was enacted, there was no power to serve any process in bankruptcy proceedings on anyone, except the debtor, who was not in England. This is not the case in this jurisdiction. By the Insolvency Rules, the Civil Procedure Rules apply to insolvency proceedings except those rules expressly disapplied. Rule 24(1)(a) applies CPR Parts 5 and 7 to the service of certain types of applications as if the document was a claim form. CPR 7 deals with service of court process out of the jurisdiction. The threshold is that the matter meets one of the gateways set out in CPR 7.3 and the court gives permission. CPR 7.3(7) provides the gateway: the subject matter concerns the *the constitution, administration, management or conduct of the* affairs of a company incorporated within the jurisdiction. This argument was not made to the learned judge.

[51] In **AWH Fund Ltd (in compulsory liquidation) v ZCM Asset Holding Company (Bermuda) Limited**[5] the appellant, a Bermudan company appealed against a decision of the Court of Appeal of the Bahamas granting the liquidator of the respondent Bahamian company permission to serve out of the jurisdiction a claim that payments made to the appellant by the insolvent company were void as undue or fraudulent preferences pursuant to the Bahamas International Business Companies Act 2000 section 160, and that the claim met the merits threshold for such service. The appellant argued the presumption against the extraterritorial effect of legislation applied to section 160 of the IBC Act and relied on the fact that the Bankruptcy Rules of the Bahamas (which adopted the UK Bankruptcy Rules 1914) contained no power to order bankruptcy proceedings to be served out of the jurisdiction, and that therefore the deliberate policy of the legislature was that there should be no possibility of such service. The liquidator submitted that it would make no sense if there was no extraterritorial jurisdiction in the case of an IBC and the liquidator could not make claims against foreign creditors. It was submitted that a foreign creditor who had been fraudulently preferred was clearly within section 160, and RSC Order 11 provided a route through which the court could properly order service outside of the jurisdiction. In short, the creditor could not reap the benefits of the IBC without being subject to its law, and therefore there was sufficient connection between the appellant and the Bahamas by reason of its activities with the IBC. The issue that the Privy Council had to decide was whether there is a jurisdictional gateway available for the service out of the jurisdiction of the claims of the liquidator.

[52] The appellant's argument was that the Bahamian legislation said nothing to indicate any extra territorial application. Recourse could not be had to RSC Ord. 11 (service out) because Ord 1 r 2(2) provided that the Rules did not apply in bankruptcy proceedings or the winding up of companies.

[53] The Privy Council held that the wording of section 160 tended to indicate that it was capable of having extraterritorial effect. It was not restricted merely because it did not express provide for extra territorial reach. The section used the word "any" in relation to "conveyance" and "creditor" without qualification. It would make no sense to restrict section 160 to Bahamian

[5] [2019] UKPC 37

dispositions, particularly in the case of an IBC. Regard must be had to the wider context of section 160, which included the scheme of the IBC Act and the companies legislation which showed that the corporate regime was established to create a vehicle for and attract foreign investors and therefore it would make no sense if there was no extraterritorial jurisdiction. Further, it was settled law that insolvency provisions could have extraterritorial effect. There just had to be a connection between the jurisdiction of the court giving leave for service out and the respondent on whom service was ordered.

[54] The reasoning as expressed by Lady Arden in delivering the Board's conclusion on the jurisdictional gateway bears recitation:

> 40. .....The Board recalls that, in a winding up, a liquidator may serve notices on creditors and contributories outside the jurisdiction under the powers given by the Companies Acts and without express mention. **Such powers are consistent with the fact that winding up legislation (at least) has extraterritorial effect**. "The service of [a notice placing a foreign shareholder on the list of contributories] is no infringement of the jurisdiction of the Courts of a foreign country. If notices of this kind could not be served abroad, it might in many cases be impossible to wind up a company at all." *(In re Nathan Newman & Co) (1887) 35 Ch D 1, 3*, a decision of the Court of Appeal of England and Wales distinguishing *In re Anglo-African Steamship Co*, on which Mr Simms relies.
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> 41. The Board further accepts that, as Sir Donald Nicholls held in *Paramount Airways* there needs to be some connection between the jurisdiction of the court giving leave for service out, in this case the courts of The Bahamas, and the respondent on whom service is ordered. In this case, the redemptions took place outside The Bahamas but they related to shares of a Bahamian company. The natural place for any winding up proceeding would therefore be The Bahamas and, there being no suggestion that ZCM did not appreciate that it was dealing with a Bahamian company, the Board considers that a sufficient connection with the jurisdiction is shown to warrant the presence of a jurisdiction in the courts of The Bahamas to order service of these proceedings on the respondent out of the jurisdiction.
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> 42. Moreover, in circumstances such as these, the absence of a power in custom made rules applying to winding up of an IBC cannot be taken as an indication that the courts could not find an appropriate power elsewhere. On the contrary, where an IBC is in liquidation in The Bahamas, it is proper for its courts to rely on

other sources of jurisdiction to entertain in appropriate cases proceedings to enforce a claim vested in the liquidator under section 160 to have a transaction declared void. It is desirable that such claims should be heard by them in the interests of ensuring that the purposes of the winding up are fully achieved."

[55] The reasoning applies a fortiori to this case notwithstanding that **AWH** did not concern examination in insolvency proceedings. Given the nature of the BVI as an offshore jurisdiction, priding itself on having in excess of 41% of the offshore companies worldwide formed in the BVI, over 750,000 companies incorporated since 1984 with the introduction of the International Business Companies Act, and according to the BVI Financial Services Commission Annual Report 2021, with over 300,000 active companies, it would be exceedingly implausible if an order for examination of a director, or former director or any of the persons in the categories set out in section 284 did not apply to persons who were not within the BVI. There are rules in place permitting service out of the jurisdiction and a specific and directly relevant gateway. Further, a person who voluntarily utilized the corporate vehicle should anticipate that if the company was wound up, the liquidation would be conducted in the place of its incorporation. To paraphrase one argument, it would be untenable that a foreign director is subject to BVI company legislation while a director when carrying on business, but then should be beyond the reach of the court when the company has failed, the failure perhaps due to the foreign director in question. Indeed, among the important matters the Liquidators seek information from the Respondents on, which has not been forthcoming, are the full identification and access to the Company's assets, information as to the matters which led up to the insolvency and details of the creditors.

[56] The Board stated that the real protection for a foreign respondent from illegitimate exercise of jurisdiction over him is that there has to be sufficient connection between the respondent and the jurisdiction of the Court of The Bahamas before the court has jurisdiction to entertain a claim for pursuant to section 160 to avoid the payment as a fraudulent preference. A fortiori, the application for examination must demonstrate the connection between the person sought to be examined and the company to avail the jurisdictional gateway of CPR 7.3(7).

[57] **In re Seagull Manufacturing Co Ltd**[6], is authority for the interpretation of section 133 of the UK Insolvency Act – public examination by a court - as having no territorial limits. There, the liquidator of a company which was being wound up in England sought leave to serve an order for the public examination of a director resident abroad made under section 133. The Court of Appeal of England held that the Court has the power to order those connected with the running of English companies which are being wound up to appear for examination in England, regardless of their place of residence at the time of the proceedings. Section 133 had no territorial limits, being intended precisely to ensure that officers responsible for the formation and running of English companies were liable to examination in public whether or not they were in the jurisdiction. In distinguishing **Re Tucker,** the Court of Appeal rejected the director's argument that there being express limitation in the sections dealing with private examination, the same territorial limit is implicit in section 133 because otherwise there would be a surprising anomaly between public and private examinations given the overlap between the persons within each section. The Court highlighted the significance of the absence of any provision of territorial limitation, the presence of which was determinative in **Re Tucker**.

[58] The Court reiterated that the principle regarding territoriality is one of construction. Importantly, the Court clarified that it is a rebuttable presumption. Legislation is presumed in the absence of express enactment or plain implication to the contrary to be applicable only to persons who have made themselves amenable to the jurisdiction and that, considering the legislative intent, the relevant section is not territorial, the order could be served out of the jurisdiction.

> "In the *Clark* case [1983] 2 A.C. 130, which raised a question as to the liability to English tax of a non-resident corporation, Lord Wilberforce considered the rule of construction laid down in *Ex parte Blain,* 12 Ch.D. 522 and said [1983] 2 A.C. 130, 152:
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> > "[it] requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration? The contention being that, as regards companies, the statute cannot have been intended to apply to them if they are non-resident, one asks immediately—why not?"

[6] [1993] Ch 345

In considering Lord Wilberforce's question as to who comes within the legislative grasp of the section, one must look to the policy of the legislature in enacting the section in question. Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice. That seems to me to be a wholly improbable intention to attribute to Parliament. Further, section 133 must be construed in the light of circumstances existing in the mid-1980s when the legislation was enacted. By use of the telephone, telex and fax machines English companies can be managed perfectly well by persons who need not set foot within the jurisdiction. There is no requirement that an officer of an English company must live in England, nor of course need an officer of an overseas company which may be wound up by the court. Such a company is very likely to have officers not within the jurisdiction. I would emphasise that the question before this court is one of the scope of the Act and we are not concerned with whether the order for public examination can be effectively enforced against a person out of the jurisdiction: cf. *Theophile v. Solicitor-General* [1950] A.C. 186, 195."

[59] The following passage is also instructive as it addresses the focus on legislative intention which when discerned, govern the interpretation of the law, even in the absence of express words:

"There is every reason to think that the provisions for public examination, now enacted in section 133, were intended by Parliament to serve those purposes. Moreover the legislative intention, that there should be a proper and effective investigation through public and private examination, has been held to be so clear that even in the absence of express words this court has been able to hold in the *Bishopsgate* case [1993] Ch. 1 that an examinee is not entitled to invoke the privilege against self-incrimination.

In answer to Lord Wilberforce's questions in the *Clark* case [1983] 2 A.C. 130, 152, Mr. Teverson, appearing for Mr. Slinn, would seek to give a number of reasons why section 133 should not be construed to apply to those outside the jurisdiction. First, he submits that express words would be needed to make those not within the jurisdiction liable to public examination. He relied on the general practice of international law that courts of a country only have power to summon before them persons who accept service or who are present within the territory of that country when

served with the appropriate process. Further, he submitted, the very fact that the court can wind up foreign companies means that without express words it could not have been Parliament's intention that section 133 did apply to any foreign officer of a company.

I am not persuaded by these contentions. I can see no reasons of comity which would prevent those who voluntarily were officers or otherwise participated in the formation or running of an English company to be capable of being summoned by the English court for the purposes of public examination. The fact that Parliament has provided for the compulsory winding up of foreign companies, knowing that those companies would only be wound up when there was a sufficient connection with the jurisdiction, and the fact that Parliament provided that section 133 should apply in such a case, seem to me to indicate that the officers of such companies who may well not be within the jurisdiction should be examinable publicly."[7]

[60] And finally, in the dicta of Hirst LJ:

"In my judgment the key to this appeal lies in the determination of the question "who . . . is within the legislative grasp, or intendment, of [section 133 of the Insolvency Act 1986]?:" *Clark* v. *Oceanic Contractors Inc.* [1983] 2 A.C. 130, 152, *per* Lord Wilberforce. This section is headed "Public examination of officers" and each class of persons referred to in subsection (l)(a) to *(d)* is or has been personally involved in that capacity in the direction or management of the company in liquidation.

The purpose of the public examination is to enable the official receiver in the fulfilment of his duty under section 132 to investigate, inter alia, the causes of failure of the company, and its business dealings and affairs, for which the officer in question is or may have been wholly or partly responsible, and therefore personally and directly accountable for what has gone wrong. The efficient and thorough conduct of such investigation by the official receiver is of great public importance, as several recent notorious cases have demonstrated. This process would be frustrated if, for example, a director, who had with the aid of modern methods of communication run the company entirely from abroad, was immune from public examination as he or she would be if Mr. Teverson's submissions were correct. The same applies to a director who has defrauded the company in England and then absconded abroad shortly before the liquidation. These are by no means fanciful illustrations in the world of the 1980s and 1990s, and many similar ones could be given.

It follows that, in my judgment, all officers as described in section 133(l)(a) to *(d),* whether inside or outside the jurisdiction, are within the legislative grasp and

[7] At page 356B

intendment of section 133, which on its proper construction has no territorial limits.

I would add that I find no difficulty in distinguishing *In re Tucker* [1990] Ch. 148 for the reasons given by Peter Gibson J."

[61] In reconciling **Re Tucker** and **Re Seagull**, it must be remembered that section 284 addresses both public and private examination without making any distinction between the two. And with no delimiting provision as in the case of section 25 of the UK Bankruptcy Act 1914, it is therefore not bogged down with the express limitation on private examinations, the legislative intent points only in one direction, that of extra territorial application and I consider that the learning in **Re Seagull** is relevant and applies mutatis mutandis to private examinations.

[62] Peter Gibson J also remarked, albeit obiter, that the debtor out of the jurisdiction could be examined privately or publicly as **Re Tucker** decided the point in relation to "any person" and not the debtor himself. There is something to be said for the fact that as far as a company is concerned, it only acts through agents and therefore they are the persons who could be compellable. Insofar as the company is to be compelled to give information to the liquidators, it is at least the persons defined as relevant persons and identified in section 282.

[63] Whilst it is accepted that the court has no power to issue a subpoena to a person outside of the jurisdiction to give evidence or to produce documents, I consider that to be a factor to be taken into account in the exercise of the discretion. Lord Mance reconciled this problematic issue in **Masri v Consolidated Contractors International (UK) Ltd (No. 4)**[8] by identifying the position of persons who fall within the category of persons susceptible to the order for examination who are connected to a company being compulsorily wound up as not in the same class as ordinary witnesses. Further, section 285(3)(e) empowers the court upon making the order for examination to state in the order the action that may be taken against a person if he or she does not appear before the court as required by the order. The Act therefore does not contemplate the issue of a subpoena but rather that the examinee will be served with the order, which will clearly state the consequences of non-compliance. There would no doubt be a range

[8] [2008] UKHL 43, [2010] 1 AC 90

of sanctions that the court would have at its disposal. Restricting the person's participation in the liquidation process readily comes to mind.

[64] Section 284 being aimed at persons who have chosen to be involved with the offshore company incorporated in the BVI does not offend international comity and to that extent limits its reach to those persons who have brought themselves under the BVI regime. It makes no sense that section 284 should be confined to directors for example, who are present in the BVI but excludes the persons controlling the company who are never physically present. The presumption against extra territoriality is based on the principle that the legislature will not seek to intervene in matters that are legitimately the concern of another country. As said by Lord Justice Males in **Gorbachev v Guriev**[9] although a person may be outside the jurisdiction, if the relevant matter with which the court is concerned may properly be regarded as within the jurisdiction, the presumption against extra territoriality has less force and illustrates that the extent to which legislation affecting persons outside the jurisdiction is contrary to international comity will depend on the circumstances.

[65] As the world operates now, proceeding against persons outside the jurisdiction can no longer be described as an exorbitant reach. The modern thinking is that legislation which affects foreigners who have done something to bring themselves within the jurisdiction will not infringe the principle of territoriality and is not an usurpation of an illegitimate authority over such persons. There is good reason and clear policy supporting the interpretation of section 284 as giving this court the power to order the examination of persons within the categories even though they may not be within the BVI. In any event there is a clear gateway permitting service out of the jurisdiction on such persons.

[66] This is the way Lewison LJ put it in **Orexim Trading Ltd v Mahavir Port & Terminal Pte Ltd**[10] where the issue was whether he court had jurisdiction to order service out of the jurisdiction of an application to set aside a transaction under section 423 of the UK Insolvency Act 1986:

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[9] [2022] EWCA Civ 1270 at [50].
[10] [2018] 1 WLR 4847

In construing the words of the paragraph it is also worth bearing in mind a change in judicial attitude towards the service of proceedings outside England and Wales. In days gone by the assertion of extra-territorial jurisdiction was described as 'exorbitant'. But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date. In *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043, for example, Lord Sumption (with whom the other justices agreed on this point) said at [53]:

> 'This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. ... Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries.... It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.'

[67] Both on a literal construction of sections 284 and 285 and on a purposive approach, having regard to the clear policy and intendment of the legislation, the power of the court to order the examination of the identified categories of persons has no territorial limit.

Merits of the Application

[68] The power given to the Court by section 285 is a discretionary one. In the exercise of my discretion I have taken into account that the Respondents are in breach of their obligations and prima facie have committed an offence by their failure to prepare and submit the statement of affairs as requested by the Liquidators. The Liquidators are hampered in the conduct of the liquidation and have been unable to collect in the Company's assets or gain a proper understanding of its affairs which would assist in dealing with the claims of the creditors.

[69] I have taken into account that the nature of the Company's assets and its business renders the need for the Respondents' assistance even more important. Cryptoassets are a new and unique form of property with no identifying features which easily mark them as belonging to any one in particular. The only way to take control of a cryptoasset is by having the correct information to enable proof of ownership. The Respondents' failure to fully and promptly cooperate with the Liquidators poses as serious risk to the Company's assets.

[70] I accept Mr Crumpler's evidence regarding the paucity of documentation that the Liquidators have received, and the examination of the Respondents seems the only source of information. The Respondents were the persons with day to day management of the Company.

[71] The Respondents have made statements in the media and through their lawyers which calls the Liquidators good faith into question and they maintain that they have been cooperating with the Liquidators. I do not accept that. It is noteworthy that the Respondents have refused to attend virtual meetings and have not accepted that they have a legal responsibility to disclose the information requested by the Liquidators in their several letters.

[72] The Liquidators have obtained recognition in Singapore and the United States of America and have filed applications for discovery and delivery up of some of the assets which are addressed in this application. In the Fifth Affidavit, Mr Crumpler reported that the US Bankruptcy Court in the Southern District of New York had granted the motion to issue subpoenas to be served on the Respondents however the motion for service through alternative means was still pending. The Liquidators also contained an order from the Singaporean Court requiring the Respondents to file an account of their dealings with the Company and to produce all documents in their possession or under their control. I do not regard the existence of these orders as factors detracting from the grant of the orders sought in this application. Those courts have acted ancillary to and in aid of the winding up order made by this Court; BVI remains the main jurisdiction governing the liquidation and the order is being sought by from the directors of a BVI company. Further, the Liquidators received information that the Respondents are not and have not been in Singapore and the Liquidators visit to the Company's office in Singapore confirmed that their departure.

[73] The Liquidators have been candid that they do not know the Respondents' current location and there is some evidence pointing to their being in Indonesia or the United Arab Emirates.

[74] The Respondents have been afforded more than reasonable opportunities to provide the information voluntarily. The Liquidators have acceded to their requests for extensions of time. At the time of hearing, the liquidation had been ongoing for six months and the Liquidators still had no clear picture of the Company's operations, identity and location of its assets and its creditors.

[75] I have looked at the proposed areas of examination and I am satisfied that they are legitimate subjects for the Liquidators to be apprised of. I have looked at the books, documents and records which the Liquidators require the Respondents to produce which are listed in Schedule 1 to the draft order. They are all necessary and proper information which the Liquidators reasonably require to conduct the liquidation of the Company.

Service

[76] CPR Parts 5 and 7 are applicable to insolvency proceedings. Section 285(3)(d) of the Act grants a general discretion, when ordering an examinee to attend before the court, to provide for an alternative method of service of the order on the examinee.

[77] The legal principles in considering an application to serve out of the jurisdiction are well known and traversed in this jurisdiction. I am mindful of the points on which the Liquidators have to satisfy me as authoritatively stated in **Nilon Limited v Royal Westminster Investments S.A.**[11] I am satisfied on the serious issue to be tried, that there is a jurisdictional gateway in that this is a matter relating to the administration, management and conduct of the affairs of a company incorporated in the jurisdiction and also that there is a claim under an enactment, namely section 284 of the Insolvency Act which confers extra territorial jurisdiction on the court and that BVI is the suitable and appropriate forum for the issue of examination of the Respondents to be tried. As a place where the Respondents had been thought to be located,

[11] [2015] UKPC 2

Singapore may be another appropriate forum but given the developments whereby the Respondents are no longer in Singapore, the BVI is clearly and distinctly the appropriate forum.

[78] The Liquidators propose to serve the Respondents at their last known address, which is in Singapore and also by the email. CPR 7.8A(4) permits an applicant to seek an order for alternative method of service whether service under CPR 7.8 is impracticable. The Liquidators have given evidence that personal service on the Respondents is impracticable given the uncertainty of their location and the Respondents' own evasiveness about their location. They have been corresponding with the Respondents by email to the Company's former solicitors and the Respondents present solicitors. Given that the Respondents' current solicitors have been corresponding with the Liquidators on their behalf since July 2022.

Disposition

[79] For the reasons above stated, the application is granted in the following terms:

1. Mr Zhu Su and Mr Kyle Davies, directors of Three Arrows Capital Ltd at the time of its liquidation:

   (a) do attend at the Eastern Caribbean Supreme Court in the High Court of Justice, Virgin Islands (Commercial Division) (the "**Court**") on [DATE TO BE INSERTED] to be examined in private and on oath in the above matter;

   (b) do produce and provide to the Liquidators for the purpose of such examination and the liquidation proceedings generally all documents set out in Schedule 1 to this order in their possession or control. Such production is to be made by no later than 7 days before the date of the examination or such other date as may be agreed with the Liquidators.

2. All appearances before the Court shall be virtual using Zoom, the details of which will be arranged by the Court.

3. Permission be granted to serve this order and the documents relating to the Application outside the jurisdiction on the Directors.

4. The Directors are not required to file an acknowledgement of service or a defence, but if they contest the effect of this order they must do so within 28 days of the deemed date of service.

5. The Liquidators shall serve this Order, the Application and its supporting documents (a) by email to :

    (i) the Directors' respective Company email addresses;

    (ii) Solitaire LLP, the Company's former solicitors based in Singapore;

    (iii) Advocatus Law LLP, the Directors' current solicitors based in Singapore;

    (b) By post to the Directors' respective personal addresses.

6. The deemed date of service be 14 days after all the steps in paragraph 5 of this Order are taken.

7. The Application and the two Affidavits of Russell Crumpler shall not be available for public inspection.

8. The costs of this Application be reserved. Any costs not payable by the Respondents or not recovered from them be paid as an expense of the liquidation pursuant to rule 199(a)(ii) of the Insolvency Rules 2020.

Tana'ania Small Davis K.C.

Commercial Court Judge [Ag]

By the Court

Registrar