Liquidator investigations and witness immunity

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In Al Jaber v Mitchell [2021] EWCA Civ 1190 the English Court of Appeal has recently grappled with the issue of whether the statements made by a former director during a mandatory court supervised examination under section 236 of the Insolvency Act 1986 (the **IA**) are covered by witness immunity.

Typically, an individual will have a choice as to whether to provide information. However, there are exceptions, such as where an individual is compelled to provide information in the context of an insolvency process.

An integral part of an insolvency office holder's role is to investigate the circumstances that led to the insolvency and identify realisable assets and claims against wrongdoers to make recoveries, increasing distributions to stakeholders. In general terms, Section 236 of the IA empowers an office holder to require an individual to provide information and documents relating to an insolvent company and/or to attend a private examination in court. It's an important tool.

There are similarities in this regard between section 236 of the IA and article 183 of the Companies (Jersey) Law 1991 (the **Companies Law**). Article 183 of the Companies Law empowers a liquidator of a company to require (among others) any current or former director or secretary of the company, employee or person who was an employee in the 12 months before the start of the winding up of the company to:

1. give the liquidator any information about the company and its business, dealings, affairs or assets the liquidator reasonably requires; and

2. meet with the liquidator at any reasonable time on being given reasonable notice.

In addition and similar to article 234 of the IA, article 180(1) of the Companies Law enables the liquidator to apply to the Jersey Court for an order requiring any person who has possession or control of any asset or record to which the company appears to be entitled to pay, deliver, surrender or transfer the asset or record to the liquidator.

What is witness immunity?

The counterbalance to being compelled (forced) to provide information is an immunity to civil proceedings arising from statements that a witness makes (subject to certain limited exceptions). The UK's Supreme Court in Jones v Kaney [2011] UKSC 13 summarised the justifications for witness immunity given by the House of Lords in Darker v Chief Constable of the West Midlands Police [2001] 1 AC 435 as follows:

1. to protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims;

2. to encourage honest and well meaning persons to assist justice, in the interest of establishing the truth and to secure that justice may be done;

3. to secure that the witness will speak freely and fearlessly; and

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4. to avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.

It's an important principle, but as the English Court of Appeal in *Al Jaber* made plain, the existence of witness immunity has been approached by the courts on a fact specific basis. Even in cases in which the immunity is described in broad terms, the court has conducted a close examination of the case in order to determine whether the immunity applies. It is not a sure thing, and even less so in Jersey as there is no published authority specifically dealing it (although English principles are likely to be persuasive).

First instance

In *Al Jaber*, the key question was whether witness immunity applied to statements made during a former director's examination in court under section 236 of the IA.

At first instance, the English High Court held that witness immunity did not apply. The statements made could therefore be used to bring additional or different claims against the former director. The English High Court held that the four justifications for witness immunity set out above were not applicable to an examination under section 236 of the IA and, fundamentally, that such an examination was distinguishable from traditional judicial proceedings (where witness immunity would typically apply).

Appeal

The English Court of Appeal felt differently. It adopted a broader position and held that an examination under section 236 of the IA is part of a wider "*judicial proceeding*", being part of the compulsory winding-up which commences with an order of the court and is supervised by the court thereafter. It also noted that the judge supervising the examination and the liquidator conducting the examination would both have the benefit of immunity from civil proceedings, which pointed towards the examinee (the former director) also being protected.

In reaching its decision, the English Court of Appeal raised two points of public policy. Firstly, an examinee under section 236 of the IA might be put 'on the spot' as the liquidator's questioning develops in the course of the examination. Even an open and honest examinee acting in good faith may not be able to provide perfect information in that scenario. If he or she faces the prospect of civil claims in respect of mis-statements made during the examination, that may encourage risk averse responses which may undermine the information gathering purpose of the process.

Secondly, public policy requires, in principle, that those who have suffered a wrong should have a right to a remedy. Witness immunity (or immunity from suit) clearly cuts across this. However, the English Court of Appeal held that an office holder has an array of other tools available to it, in particular, the imposition of statutory or fiduciary duties on a director to provide information and/or documentation. Consequently, even if the examinee enjoys immunity arising from statements made under section 236 of the IA, that will not protect the examinee from an action based on non-disclosure of information or documentation.

Conclusion

Being a blend of issues wrapped up in a novel insolvency context, the decision in *Al Jaber* is likely to be of interest in a number of common law jurisdictions.

A liquidator appointed under the Companies Law in Jersey has comparable powers to those under section 236 of the IA. However, the provisions are not identical. For example, unlike section 236 of the IA, article 183 of the Companies Law does not expressly provide for court supervised examination. In contrast, article 180(1) of the Companies Law, concerning the delivery of assets or records, expressly contemplates a liquidator seeking an order from the Jersey Court, if necessary.

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Furthermore, only 'just and equitable' winding up or *désastre* proceedings are commenced by an order of the Jersey Court. Both a summary (solvent) winding up and creditors' (insolvent) winding up are commenced out of court, by a special resolution of the shareholders, giving rise to a question of whether these processes are truly 'court supervised'. That said, the company in a summary winding up or a liquidator in an insolvent winding up (in whatever guise) are able to:

1. apply for an order from the Jersey Court in connection with the determination of any question arising in the winding up, or for the Jersey Court to exercise any of its powers in relation to the winding up pursuant to article 186A (1) of the Companies Law; and

2. apply for an order from the Jersey Court that it exercise any of the powers that would have been exercised by it or by the Viscount of Jersey in connection with ***désastre*** proceedings (the Viscount of Jersey having a statutory power to summon specified individuals to provide information and/or documentation and apply for an order to question such individuals on oath pursuant to article 20(3) of the Bankruptcy (***Désastre***) (Jersey) Law 1990) pursuant to article 186A(3) of the Companies Law.

The English Court of Appeal has, through a well-reasoned judgment, adopted a more holistic approach to witness immunity in the context of examinations under the IA. It remains to be seen whether the Jersey Court will follow suit for those under the Companies Law.

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