

FOLLOWING A TRAIL OF BREADCRUMBS: THE CHALLENGES OF ENFORCING INTERNATIONAL INSOLVENCY CASES



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In this article we set out potential evidential issues a creditor may face in an international insolvency case and the key areas for investigations.

Consider the following scenario: You are approached by a bank which had loaned large sums of money to a company. The bank felt safe in doing so as the loan was secured by a personal guarantee given by the company's director/shareholder. Unfortunately, the company has fallen on hard times, is now insolvent and cannot repay the loan. The bank's only recourse is now to enforce the guarantee.

However, the guarantor reports that they themselves have fallen on hard times as they have recently gone through an acrimonious divorce and their spouse, pursuant to the terms of a so-called "marriage agreement" entered into months, or maybe only even weeks, earlier, has the right to keep hold of all assets held in the spouse's name. As chance would have it, anything of any real value was, at the time of the divorce, in the spouse's name and the divorce has left the guarantor destitute.

The guarantor's personal guarantee to the bank is worthless and the bank faces being left substantially out of pocket.



The bank believes that the divorce is in fact a sham, that it exists on paper only and, even if the spouses' relationship truly has broken down, the arrangement is a fiction designed to put assets beyond the bank's reach. Furthermore, an initial investigation has revealed that all valuable assets are, in fact, in England, where the debtor's family also resides, but the assets, at least on paper, belong to the guarantor's purported ex-spouse. What is the bank to do?

The answer, in an appropriate case, is for the bank to serve a statutory demand on the debtor, followed, presuming the debtor fails to pay, by a bankruptcy petition in England to seek a bankruptcy order against the debtor so that an English trustee can be appointed to investigate the debtor's affairs and, most importantly, the apparent divorce. The debtor then contests that petition on the basis that they have not been resident or had a place of residence in England in the preceding three years.¹

The bank's pursuit of the recovery of the debt owed to it then becomes a detailed factual investigation to determine the debtor's connection to the jurisdiction and to unravel the fictitious divorce put forward to thwart that recovery. These investigations necessarily cover a wide spectrum of possible sources of information, including sources discovered by expert investigators as well as through targeted requests for disclosure in the underlying proceedings – for example:

¹ As required by section 265(2)(b)(i) of the Insolvency Act 1986.

- **Purchaser of any property:** Who purchased any property in England, how was that purchase financed (including by whom), in whose name was the property registered and what steps have been taken in respect of that ownership since the purchase? Additionally, who has been paying utility bills and the council tax for the property and has the payee changed since the divorce date?
- **Travel:** Cases of this type often descend into arguments regarding how many days the debtor has spent in the jurisdiction. In respect of most countries with a visa regime with the UK, passports are a critical source of information as passports are stamped on entry into and departure from many countries, including the home country itself. Full copies of a debtor's passports therefore allow the bank to recreate the debtor's travel history and cross-check this against the debtor's own version of events. Additionally, the same can be applied to the ex-spouse to determine if the couple continued travelling together after their alleged separation.
- **Business interests:** Consider company records to establish whether the debtor, whilst claiming to have no connection to the jurisdiction, is in fact the director of an English company. Equally, it is worth checking whether the debtor's spouse holds any directorships, particularly if those directorships seemingly match up with the debtor's business interests and have no bearing on the spouse's own professional experience.
- **Social media:** The online accounts of prolific social media users provide a detailed record of that individual's lifestyle and activities. Even if the debtor in question does not use social media, the accounts of those connected to them often provide a detailed insight into the debtor's activities. In one case, a simple internet search for the spouses' names revealed romantic holiday photographs

published long after the couple claimed to have separated. In another case, the debtor's children posted pictures of undisclosed trophy assets such as luxury cars and a yacht where the family happily vacationed together.

- **Bank statements:** In a number of cases a detailed review of the debtor's bank statements disclosed by the debtor has proven critical to unravelling the debtor's false version of events. In one case, the debtor's bank statements revealed he was making very substantial payments to his alleged ex-spouse long after they claimed to have separated, including for expensive jewellery and other items described as "gifts". In another case, the debtor's bank statements revealed a pattern of spending on everyday items at petrol stations and shops within only a couple of miles of the expensive English property with which he claimed to have no connection. The dates of those transactions could then be cross-checked with the dates the debtor was known to be in England by reference to the stamps in his passport.



Whilst many of these points are unlikely to be determinative in isolation, they all feed into the bigger picture of establishing the debtor's connection to the jurisdiction and showing the falsity of the debtor's version of events as well as helping to uncover hidden assets.

Choice of jurisdiction also matters for other reasons – for example, the English court has found that, where a bankruptcy has already been commenced in Russia, Russian law precludes the commencement of parallel bankruptcy proceedings in England.² Whilst there does exist a regime whereby a foreign trustee can gain recognition in this jurisdiction, that process requires the trustee's willingness to become involved in foreign proceedings, which cannot always be guaranteed.

It is therefore important that any creditor considering a bankruptcy petition, especially where various jurisdictions are potentially available, chooses the "home" jurisdiction of the bankruptcy carefully.

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