The role of the Court's inherent jurisdiction in insolvency litigation

Introduction

1. The audience here this evening will know that it is not uncommon for a judge to ask an advocate: "what is my jurisdiction to do what you are asking?", and for the response to be: "the Court's inherent jurisdiction". The subject is not just of passing interest. What may come as a surprise is that in 1995 the term "inherent jurisdiction" found its way into 40 reported cases; in 2012, over 100 judgments and in 2017, 80 reported cases on Westlaw alone. Two cases have recently been heard in the Rolls Building where the Court has been asked to invoke its inherent jurisdiction in the context of an insolvency dispute. I wish to explore them with you this evening and seek to draw out some principles.

2. The first is **Re Zinc** where the shareholders of a group of companies owned the freehold and long leasehold titles of 10 Hilton hotels, one of which is in London. A restructuring took place involving a loan, debenture and interest rate swap. In 2017, various events of default occurred, including failure to repay a debt. Creditors appointed administrators, and there was a proposal to sell the London hotel. The applicants, who were the shareholders, argued that the sale of the London Hotel could produce a surplus. The administrators argued that the shareholders' valuation was unrealistic and that on a sale there would be no return for shareholders or unsecured creditors. The shareholders' reaction was to bring a removal application on the basis that the incumbent administrators lacked independence and sought the appointment of interim administrators. A sale of the London Hilton had been agreed and an exchange of contracts was imminent.

3. In refusing the application, the Court held that it only had the power to appoint an additional administrator under the Insolvency Act 1986 and that the consent of the incumbent administrators was required. There was no inherent jurisdiction to appoint. Relying on **Lehman Brothers International (Europe) (In Administration)** [2017] UKSC 38, [2018] A.C. 465, the judge reasoned that, if he was wrong and there was an inherent jurisdiction, he would not appoint an additional administrator as there was no established judge made rule permitting such an appointment.

4. The second concerned a personal insolvency case. In **Barker v Baxendale-Walker** a bankruptcy order had been made following the appointment of interim receivers. I understand that the petitioning creditor who was a judgment creditor of circa £17m held discussions with the OR, prior to the adjudication of bankruptcy. The OR had agreed to seek a Secretary of State's appointment of the interim receivers, as they had been in post, had investigated some of the dealings and learnt about some of the affairs of the bankrupt. The OR thereafter changed his mind, perhaps, I do not know, under pressure from others. The petitioning creditor entered into correspondence with the OR who responded that if the PC were to make an application to the Court for the appointment of the interim receivers he would not resist.

5. An application for a review was made to vary the bankruptcy order appointing the interim receivers with effect from the making of the bankruptcy order. At the hearing, new creditors appeared who may have been associated with the bankrupt. They opposed the application, first, by seeking an adjournment and, secondly by arguing that the Court did not have jurisdiction to appoint as section 291A of the Act provided that, on the making of a bankruptcy order, the OR would become the trustee in bankruptcy. The Court may appoint a supervisor of a failed VA under the same provision, but there is no mention of appointing interim receivers within that section. The petitioning creditor argued that if there was no inherent jurisdiction the Insolvency Act gives the Court "full power" in personal insolvency cases under section 363. In my view, section 363 could be employed as the remedy sought was not inconsistent with legislation and, in the circumstances, it was fair, just and expedient to do so. As a general rule, inherent jurisdiction can be employed to appoint an insolvency practitioner as an office-holder.

Exploring inherent jurisdiction

6. That the High Court has an inherent jurisdiction to exercise is beyond doubt. In an article published in 1970 from "Volume 23 Current Legal problems", I H Jacob (the senior QBD Master and father of Lord Justice Jacob) wrote that the inherent jurisdiction of the Court is a virile and viable doctrine, that it has been defined as being the reserve or fund of

powers, and that it is a residual source of powers which the Court may draw upon whenever it is necessary, just or equitable to do so, in particular, in order to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial. Jacob's article concluded that such inherent jurisdiction is procedural in nature in aiding the administration of justice. Jacob was described by Lord Woolf as a "master of civil procedure". There is nothing that I have read to suggest that his summary no longer holds good.

7. Jacob's treatise has been criticised. In his article "Inherent jurisdiction and its limits" published in [2013] OtaLaw Rw5, Marcelo Rodriguez Ferrere (a lecturer at the university of Otago, New Zealand) concluded that Jacob's seminal piece on the inherent jurisdiction of the Court paints an incomplete picture even though it has been cited with universal approval in nearly every common law system. He says this because there was a failure to distinguish between inherent jurisdiction and inherent powers and noted that inherent jurisdiction is no longer restricted to the higher Courts. It is more accurate, he argues, to think of the term "jurisdiction" as the source of "powers". However, the author acknowledged that "inherent jurisdiction" was commonly used as an umbrella term.

8. Some have asked whether inherent jurisdiction differs in any meaningful way to judicial discretion? I believe it does. In "The Rule of Law and the Perils of Judicial Discretion" (2012) 56 SCLR 135, F Lamer writes that judicial discretion is the "power to select the most appropriate among a variety of permissible solutions in adjudicating disputes based on broad statements of principle". Ferrere says this describes inherent jurisdiction as it is a "power born out of the realisation that no one can codify all solutions to human problems in advance of occurrence". I would remark that the difference is that jurisdiction is the power, and discretion is the exercise of the power.

9. Further insight may be gained from Halsbury's Laws which explains that the inherent jurisdiction enables the Court to fulfil its role and the overriding feature is that it is a part of procedural law, and not a part of

substantive law; it is exercisable by summary process, without trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in the litigation between the parties; and it may be exercised even in circumstances governed by rules of Court (although a claim should be dealt with in accordance with the rules of Court, rather than by exercising the Court's inherent jurisdiction, where the subject matter of the claim is governed by those rules).

Inherent jurisdiction exercised – other areas of law

10. A quick tour of the last few decades reveals the Court invoking its inherent jurisdiction in varying types of situations and at all levels. Taking the highest levels in chronological order (this is not intended to be exhaustive) in the 1980s, Lord Diplock said in **Bremer Vulkan Schiffbau v South India Shipping Corporation Ltd** that the Court's inherent jurisdiction is a general power to control its own procedure so as to prevent it being used to achieve injustice. In 1990, Lord Donaldson MR (**Re F (Mental Patient: Sterilisation)** [1990] 2 AC 1) remarked that the "common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law." He said that the "process of using the common law to fill the gaps is one of the most important duties of the judges". In 2000, in **Ebert v Venvil, Ebert v Birch** ([2000] Ch 484 at 490), it was argued that the Court did not have an inherent jurisdiction to make an order to prevent a litigant from commencing fresh actions without the permission of the Court. According to Lord Woolf, the starting point must be the extensive nature of the inherent jurisdiction of any Court to prevent its procedure being abused. He said "we see no reason why, absent the intervention of a statute cutting down the jurisdiction, that jurisdiction should apply only in relation to existing proceedings and not to vexatious proceedings which are manifestly threatened but not yet initiated". He said "in this connection we have gained considerable assistance from the article by I. H. Jacob "The Inherent Jurisdiction of the Court"".

11. I have said that inherent jurisdiction is used in various cases. I take family law as an example. In family law, the inherent jurisdiction has

been used in cases concerning children, to take care of those who are not able to take care of themselves. A glance at the case law shows that the jurisdiction was commonly used in wardship cases prior to the implementation of the Children Act 1989, but today it is used in diverse circumstances, such as an application to:

(1) decide upon the lawfulness of proposed treatment of children, including sterilisation;
(2) direct medical treatment;
(3) determine the steps that should be taken to prolong the life of a child suffering from serious illness;
(4) prevent the publication of harmful information or to protect the confidentiality of proceedings; and
(5) grant exclusion orders.

12. These examples demonstrate the breadth and creativity the jurisdiction brings, to aid justice, convenience and expediency, and to advance the laws of England and Wales. Further examples of advancement, if they are needed, can be seen in applications made every day in the Rolls Building: i.e. Mareva (as they were known) injunctions and Anton Pillar orders.

Inherent jurisdiction – focus on insolvency

13. So, what role does the inherent jurisdiction have in the context of insolvency which has a strong statutory code? We know that insolvency law, as Professor Goode has taught us, is principled and we know that it involves many areas of substantive law, property, contract, tort, trusts and more, but overlaying substantive laws of England and Wales is the insolvency process or procedure that seeks to rescue businessess, investigate failures, disarm executive powers and determine rights within a class process. That does not mean that insolvency law does not decide issues of substance but, rather it displaces and vests and re-vests property and property rights and provides a tool for structured distributions. As Lord Sumption so eloquently put it in **Lehman Brothers**:

> "The view that insolvency proceedings are in principle purely administrative, is consistent with the way that the law has developed historically… Throughout their history, a cardinal feature of both has been, that the effect of bankruptcy, winding up or administration on the company's existing liabilities is procedural, not substantive."

14. As a procedure, the inherent jurisdiction of the Court has played, and continues to play, an important role in insolvency. It has been invoked to:

- restrain presentation or advertisement of a winding up petition;
- permit set-off in respect of costs, save in respect of a claim where the director has been found to be guilty of misfeasance;
- stay proceedings or judgment; and
- fill in the gap, since at least 1890, for corporate insolvency law matters. For instance, there remains no express power to review, rescind or vary an order in corporate insolvency whereas section 375 of the Act deals with personal insolvency. Inherent jurisdiction fills the gap.

Most of you will be aware of the power of the Court to award costs legitimately incurred in dealing with a trust fund: **Re Berkeley Applegate (Investment Consultants) Ltd**, **Harris v Conway** [1989] BCLC 28, [1989] Ch 32. In **Re Sports Betting Media Ltd (In Administration)** [2007] EWHC 2085 (Ch), Briggs J considered the jurisdiction in the context of administrators. He explained that, whilst the statutory scheme contained no specific provision which would entitle the new administrators to be paid out of the fund subject to the paragraph 99(4) charge, the Court had an inherent jurisdiction to require persons beneficially interested in property to subject their beneficial entitlements to a right of payment to persons who have come otherwise than by officious intermeddling into the position of fiduciaries and incurred time and cost in realising the fund. He found that the principle applied to the position of administrators. It seemed to the judge that the right arose "as a matter of common sense, justice and equity".

15. Some of these matters are now codified but are derived from judge made law. There are other areas too where the Court's inherent jurisdiction has been called upon. Many in this room will recall that, before the introduction of the 2003 Act and the new administration process (I use that word), an administrator could not make a distribution to creditors. Rimer J in **Re Designer Room Limited** [2005] 1WLR 1581 found that administrators under the "old" administration regime did not have a power to make distributions and the Court had no jurisdiction to sanction. This decision was contradicted by other first instance decisions, and Lewison J held in **Re Cromptons Leisure** that the Court had the power under its inherent jurisdiction to sanction a distribution. That decision was quickly followed by **Re Lune Metal Products Limited** in the Court of Appeal where Neuberger LJ agreed that the Court could exercise its inherent jurisdiction to sanction a distribution.

16. Sir David Neuberger has used inherent jurisdiction to innovate, certainly when sitting as a first instance judge. He was not afraid to invoke the Court's inherent jurisdiction when a need was shown. Firstly, in **Clements v Udal** [2001] BCC 658, he held that he had power under the Court's inherent jurisdiction to appoint an administrator on a temporary basis, pending an application for removal of the existing administrators and did likewise in respect of a trustee-in-bankruptcy, liquidator and supervisor. He said "so far as administrators and liquidators are concerned, there is no statutory power which in terms gives the Court power to do that which I am invited to do. However, there is an inherent jurisdiction to grant such relief."

17. And then in **Lancefield v Lancefield** the Judge (Mr Justice Neuberger) wound up a company notwithstanding that he acknowledged that there was no petition and no petitioning creditor. You may think that such formalities are there to protect and ensure that those who have an interest have an opportunity to have a say. The judge found however that as he was seized of the matter and it was the right thing to do in the circumstances of the case, the Court could wind up the company under its inherent jurisdiction. This decision looks as if it may have conflicted with the legislation. We shall return to conflicts with legislation in a moment.

Inherent jurisdiction – limitations

18. On the subject of assistance to foreign office holders, it may be recalled that only 10 years ago there was a difference of opinion at the very top of the judicial tree. In **HIH Casualty and General Insurance Ltd**, the House of Lords was asked whether the English Court could order remission of assets to a liquidator in a foreign country. The split was in favour of invoking the Court's inherent jurisdiction. The minority thought that if there were an inherent jurisdiction it had been restricted by IA 1986, section 426 to countries designated by the Secretary of State. In other words, the Court's inherent jurisdiction was cut down by legislation. Supporting the wide inherent jurisdiction of the Court, Lord Hoffmann asserted the "principle of (modified) universalism". As is well known, the golden thread of universalism has now lost its shine.

19. Although the House of Lords found by majority that Parliament had not cut down the Court's inherent jurisdiction in **HIH Casualty**, instances of the Court finding such a limitation can be discovered. There are other limitations and those who ask the court to invoke its inherent jurisdiction should be aware of precedent and be alive to the possibility that the Court may choose a different path if there is an alternative statutory remedy.

20. **Hosking v Slaughter and May** provides an example of the latter. Liquidators were appointed following an administration and sought to challenge the fees paid by the administrators to Slaughter and May in respect of legal services. ICC Judge Jones held that the 1974 Solicitors' Act did not apply and that the Court had an inherent jurisdiction to exercise so that the costs could be assessed. The argument was refined and changed on appeal (as is so often the case). The appeal judge remarked that in reality the argument focussed on the exercise of inherent jurisdiction and the extent to which it was controlled or limited by the Insolvency Rules 1986.

21. The Court at first instance and on appeal was taken to **Donaldson v O'Sullivan** [2008] EWCA Civ 876 which concerned an application to set

aside a block transfer. Under the provisions of the Act, the court could remove a trustee, but it had no power to appoint a new trustee except in the special cases referred to in the Act. Here, there was a parallel with the **Baxendale-Walker** case. Having considered a number of authorities, Lord Justice Lloyd said:

> "All of those cases seem to me to support the thesis that bankruptcy is a Court-controlled process in relation to which the Court has wide powers, exercisable for the purpose of the insolvency process as a whole, which are not limited to those conferred expressly by the relevant legislation. There are non-statutory elements in the law of bankruptcy, such as the principle *in Ex parte James*, even though these may result in an application of assets which is not strictly in accordance with legal rights and obligations. Clearly if the Act said in terms that the Court could make a certain kind of order only in given circumstances, it would be a very strong construction to hold that it could do so in other circumstances as well. That is not the present case…"

22. In case you may think that rather extraordinary, in **Zaoui v Attorney-General** [2005] 1 NZLR 666 (SC), a New Zealand case concerning an Algerian refugee, the Supreme Court held that the inherent jurisdiction of the High Court can only be excluded by clear statutory wording. An exclusion of the inherent jurisdiction will not be inferred where the statute is silent. This is striking, but I should point out that I have found no such dictum regarding this jurisdiction.

23. Returning to **Hoskings**, the Court of Appeal held that the administrators could agree to pay the fees of Slaughter and May both before and after the end of the administration. If the liquidators do not agree with the fees that had been paid, they could bring misfeasance proceedings against the administrators. The Insolvency Act 1986 and the Rules provide ways in which liquidators can challenge the decision of an administrator to pay legal fees, but do not provide a means by which liquidators can require the assessment of costs paid in an earlier administration. The Court's inherent jurisdiction was not considered. It

may be inferred that it was not thought relevant as the Court had found an alternative remedy for the liquidators. Perhaps it was a missed opportunity. To expect the liquidators to make a claim against another professional without knowing in advance whether the sums paid out in respect of legal fees were reasonable, proportionate and proper, is perhaps unrealistic and probably inappropriate. By invoking the inherent jurisdiction and allowing the costs to be assessed, an objective analysis of the sums paid could have been obtained. The liquidators would then have been able to decide whether or not to initiate proceedings against the administrators. If the Court's inherent jurisdiction had been considered, the Court of Appeal may have concluded that this was a better outcome.

24. As I have mentioned, the primary finding in **Re Zinc** was that Parliament had provided the circumstances in which an additional administrator could be appointed. There was no requirement to look outside the four walls of the legislation. Inherent jurisdiction was cut down. This is clearly consistent with **Donaldson**. But the judge did go on to consider whether he should exercise the Court's inherent jurisdiction in any event and turned to **Lehman Brothers International (Europe) (In Administration)** for guidance.

Judge made rules – well-established

25. In **Lehman Brothers**, Lord Neuberger warned that a judge made rule should be well-established, consistent with the terms and underlying principles of current legislative provisions and be reasonably necessary to achieve justice in order for it to be applied. It was this case that persuaded the Court in **Re Zinc** not to invoke its inherent jurisdiction in the alternative. In my view, Lord Neuberger was not discussing inherent jurisdiction. True, the Supreme Court was addressing the common law but it was concerned with substantive law common law, principally the issue of currency conversion claims. I can make this view good because early in his judgment Lord Neuberger explained that the Supreme Court had recently considered a number of common law issues in an insolvency context. He referred to substantive law common law matters, such as the anti-deprivation rule (**Belmont Park Investments**

Pty Limited) which was decided as a matter of contractual interpretation where it was said that the contract breached a fundamental principle of insolvency law (namely, all the assets of the insolvent estate should be available for creditors), and the common law rule against double proof (**Kaupthing Singer and Friedlander Limited**) where Lord Walker starts his judgment by saying that the rule is implicit in the Insolvency Act. There is no mention of inherent jurisdiction in the judgment of Lord Neuberger. It follows that his remarks limiting common law rules to those that have been well-established, does not apply to the Court's inherent jurisdiction. That conclusion means that, by relying on **Lehmans** as authority to cut down the jurisdiction, the Court was wrongly influenced in **Re Zinc**.

26. If I am wrong and it is thought that **Lehman Brothers** was about the exercise of the Court's inherent jurisdiction, there is a conflict between the Court of Appeal's decision in **Donaldson** which informs practitioners that there is scope for the Court to direct that things be done (or not done) in apparent conflict with express provisions of the legislation and Lord Neuberger's warning of consistency with the "current legislative provisions". For my part, I would be disappointed if the Court's inherent jurisdiction were restricted as Lord Neuberger may have suggested. I would argue that the requirement of a well-established rule to invoke inherent jurisdiction is not itself well-established. It is wrong in principle. If the inherent jurisdiction were so restricted in the past there would have been no Mareva injunctions and no Anton Pillar orders; in short, without an inherent jurisdiction the common law would become slowly ossified around yesterday's problems.

27. In our time, the social and economic environment in which legal issues arise is changing far faster than legislation. It takes time for a judge made rule to become well-established. On the horizon, artificial intelligence, smart contracts and blockchain will inevitably greet the doors of the insolvency Courts. One can confidently predict that the Courts will have to resolve questions of that sort without a legislative framework. There will be a myriad of situations, that cannot be forecast, where the Court may need to engage its jurisdiction to safeguard process, fill gaps, ensure the observance of the due process of law,

prevent vexation or oppression, and do justice between the parties, thereby securing a fair trial.

Conclusion

28. In conclusion, even though strongly rooted in legislation, the highest authority informs us that insolvency laws are not restricted to the 1986 Act and the Rules. Nevertheless, those asking the Court to exercise its inherent jurisdiction should always pay attention to whether statute has intervened to cut it down. Inherent jurisdiction is a wholly different thing from judge made substantive law and it is also different from discretion. The inherent jurisdiction of the court relates mostly to controlling the use of procedures but the family law examples I have given are perhaps telling illustrations of why one should not take a narrow view. The recent cases of **Re Zinc**, **Barker v Baxendale-Walker** and **Hoskings v Slaughter and May** remind us of some of the questions that need to be asked. It is safer to have a well-established rule only because there will be less opportunity for appeal, but a first instance judge should not be afraid to innovate where there is merit.

29. Finally, exercising inherent jurisdiction, an English judge may order anyone to do anything, whereas a French (or other civil law) judge can only exercise those coercive powers expressly laid down in a code or in statute. This is something to celebrate when drinking your cocktails this evening.

Nicholas Briggs

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