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The Insolvency Act 2003 provides that any proceeds of an action for either a voidable transaction or insolvent or fraudulent trading are "deemed to be assets of the company" because the liquidator is imbued with statutory power to sell company assets as part of the liquidation. The ability to assign claims and utilise litigation funders is a valuable way to swell potential recoveries for the general body of creditors.

The company's property – litigation funding and insolvent companies

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Tucked away in dusty corners of the Insolvency Act 2003 are two slightly obscure provisions: sections 251 and 257. Those sections deal with various rights of action vested in the liquidator of an insolvent company, and they provide that any proceeds of an action for either a voidable transaction under Part VIII[1] (s.251) or for either insolvent or fraudulent trading (s.257) are "deemed to be assets of the company". Everyone other than insolvency geeks will be tempted to gloss over that provision and move on. Those seven little words lead to a multiplicity of consequences not often appreciated.

For those two sections, all claims would be rights of action vested in the liquidator rather than being assets of the company. English case law stretching back 80 years suggested that this had three particular consequences:

- **Firstly**, any recovery by a liquidator under those statutory causes of action did not accrue to the company itself, but instead was held on statutory trust for the company's unsecured creditors (*Re Yagerphone [1935] 1 Ch 392*). It followed from this that even if the company had an all-assets floating charge which would otherwise catch after acquired property, it would not catch the fruits of these claims because they were never the property of the company - they were only vested in the liquidator personally (contrast for example, the position of misfeasance claims, which are rights vested in the company itself, and are caught by the floating charge - see *Re Anglo Austrian Publishing [1892] 2 Ch 158*).

- **Secondly**, because those rights of action did not relate to property of the company, it followed that any claims made by the liquidators were not expenses of the winding-up, as expenses of the winding-up were limited to claims to recover the company's property - not pursuing rights of action vested in the liquidator (see *Re MC Bacon (No 2) [1991] Ch 127, Re Floor Fourteen [2001] 3 All ER 499*).

- **Thirdly**, and most relevant for this article, because those

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> rights of action were personal to the liquidator, they were not within the scope of the liquidator's powers to assign claims vested in the company to a third party. Accordingly, an attempt to assign such a claim is void as contravening prohibitions on champerty (see *Re Oasis Merchandising Services Ltd [1998] Ch 170*).

In relation to the first point (proceedings held on trust for the unsecured creditors), the position under BVI insolvency law remains the same as the common law position. Although those two statutory provisions deem the rights of action to be property of the company, they each further go on to specify that the proceeds are to be "available to pay unsecured creditors of the company". The wording is perhaps inelegant, but the intent is clear: the proceeds are not caught by a floating charge. However, it is certainly not clear why this should be the case. For example, if the liquidator successfully challenges a transaction at an undervalue, the undervalue is reversed and the money comes back into the company's estate. The creditor who has suffered the loss as a result of the undervalue transaction is the floating chargeholder, but the recoveries go to benefit the unsecured creditors. The unsecured creditors receive a windfall and actually benefit from misconduct on the part of the company, which is difficult to justify.

In relation to the second point (liquidator's expenses), the position in the BVI has been modified from the common law. Rule 199(b) indicates that the costs and expenses of the liquidation will include "costs and expenses of any legal proceedings which the liquidator has brought ... whether in his own name or in the name of the company". This should be wide enough to include claims which sections 251 and 257 refer to.

However, it is the third point (assignment of claims) that is arguably of most interest. Because those claims are deemed to be assets of the company, and because the liquidator is imbued with statutory power to sell company assets as part of the liquidation, it means that the liquidator has power to sell such claims to a claims management company to pursue, and *Re Oasis Merchanding* should not be followed in the BVI. This is potentially very important as in many liquidations the liquidator simply does not have funds to pursue what may appear to be promising causes of action. The ability to assign claims and utilise litigation funders is a valuable way to swell potential recoveries for the general body of creditors.

To date, there have not been a great many such claims before the BVI courts. That may simply be a function of lack of awareness in relation to the viability of monetising such claims. Certainly directors of offshore companies – on paper at least – make attractive targets, not least because they are often comprehensively insured. They seem like natural targets for types of claims favoured by litigation funders.

It remains to be seen whether more liquidators afford themselves of the opportunity to assign these wider rights of action in the way which is expressly provided for in the BVI legislation - albeit in a highly understated manner.

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[1] Ie unfair preferences, undervalue transactions, voidable floating charges or extortionate credit transactions.