

# Contentious Insolvency Situations



# Our Contentious Insolvency Expertise

In insolvencies where fraud or misconduct is suspected, who can you turn to? Duff & Phelps and Kroll's Contentious Insolvency Situations (CIS) team assists stakeholders, including creditors, investors and management, to identify solutions in contentious situations.

Our multi-disciplinary team comprising experts from Duff & Phelps, the world's premier provider of governance, risk and transparency solutions and Kroll, the leading global provider of risk solutions is in 25 countries worldwide, including key global financial centres, and understands local laws and regulations.

## Insolvency and Restructuring Expertise

- Liquidations (court-appointed, provisional or voluntary) and administration
- Receiverships/controllerships
- Investigative receiverships
- Trustee in bankruptcy
- Controlled wind-downs/solvent liquidations
- Liquidating trusts
- Asset realisations and sales mandates
- Distressed/illiquid investment management services

## Forensic Tools

- Data capture and preservation
- Data hosting, analysis and triage review
- Corporate and personal intelligence
- Asset tracing and recovery operations
- Forensic accounting investigations
- Data analytics

25 countries  
*around the globe*

We recognise the challenges that can arise from changing market conditions, competing interests within management, unforeseen events, fraudulent activity or mismanagement. When such situations present themselves, decision makers must proactively implement the available remedies with the assistance of experienced professionals, while also weighing the interests of creditors, investors, regulators and fiduciaries.



# Contentious Insolvency Situations

We help clients identify and investigate potential problems and the strategies available to address them.

## Challenging situations

Where fraud or misconduct is suspected, the powers available under both onshore and offshore insolvency regimes provide effective means to investigate the issues, identify those responsible and, wherever possible, recover value. In such situations, we have the tools to capture and preserve relevant data, and the skills to make sense of that data, reconstruct events to establish the key facts and tell the story of what happened and when.

## Asset tracing, recovery and cross-border issues

Understanding the circumstances of how assets went missing from an organisation is key to being able to recover those assets. Our combination of forensic accounting and asset tracing skills, plus deep-dive intelligence analysis, enables us to identify the disposition of misappropriated assets and form a view on the likelihood of recovery. Our team has extensive experience identifying, initiating and pursuing domestic and cross-border or parallel recovery actions, while also taking a considered cost/benefit approach to those actions. We are skilled at dealing with situations where offshore jurisdictions and structures have been used to obscure the trail and the true beneficial ownership of assets.



# Leveraging Officeholders' Powers

Our CIS team includes dedicated professionals in Europe, the Cayman Islands, the U.S., Canada and Asia. We bring together a broad range of services so our clients can be confident that all options are considered, and strong outcomes are achieved. Our team has years of experience helping clients identify and investigate potential problems and advising on various strategies available to address them.

In some circumstances, formal proceedings might be an appropriate strategy for protecting stakeholders and identifying and recovering assets, including seeking urgent worldwide freezing orders to lock down assets. A petitioning creditor's costs can be paid on priority to certain other costs, and professional fees can be structured to share the risk, such as including recovery-based elements. Formal proceedings also typically lead to embargoes on legal proceedings by third parties, further protecting remaining assets.

The powers available to officeholders are considerable and represent a vital arsenal when seeking cooperation from third parties and obtaining information. These powers can be a factor when deciding on the most appropriate and effective strategy for recovering value. While jurisdictions differ, the UK powers described on the following page provide an illustration of how the powers may be deployed.



# UK Insolvency Act Powers

## Misfeasance

Where there has been a breach of fiduciary duty such as the removal of assets, illegal dividends, misuse of customer deposits or excessive expense claims, a liquidator may ask the court to order the director to repay, restore or account for the assets or property, with interest, or otherwise compensate the company as the court sees fit.

## Fraudulent Trading

Where the business of the company has been carried on with the intent to defraud creditors, the officeholder may ask the court to order the director to make such contributions to the company's assets as the court thinks proper.

## Wrongful Trading

When a director has continued to trade a company when they knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvency, the court can make an order for the director to make contributions as the court sees fit.

## Getting in the Company's Property

Officeholders may seek a court order compelling a person to deliver up any property, books, papers or records to which the company is entitled, and directors have to co-operate. Using s236, the court can summon the director or a third party to appear at a specific time and place or to deliver up specific property, books or records. Similar provisions apply under s366, in respect of bankruptcy appointments.

## Transactions at an Undervalue

A transaction is at an undervalue if the debtor makes a gift or the consideration received is significantly less than the value of the item. On application, the court may order the restoration of the position to what it would have been if the debtor had not entered the transaction.

## Preferences

Preference arises when a debtor puts a creditor or guarantor of any of the company's debts into a position, which is better than the position the creditor or guarantor would have otherwise held. The officeholder may apply to court for an order against the recipient to have the position restored to what it would have been if the company had not given that preference.

## Extortionate Credit Transactions

A transaction is extortionate if the terms require grossly exorbitant payments to be made in respect of the provision of credit, or it otherwise grossly contravenes ordinary principles of fair dealing. On application of the officeholder, the court may:

1. Set aside the whole transaction
2. Vary the terms of the transaction
3. Request that any sums paid under the terms of the transaction are paid to the officeholder
4. Order that any property held as security is returned

## Transactions Defrauding Creditors

In instances of a transaction at an undervalue, where the reason for the transaction was to put assets beyond the reach of creditors or to prejudice the interests of creditors, the court may order the restoration of the position as if the transaction had not occurred.

## Other Powers

Other powers derived from other statutes that an officeholder might consider include **freezing orders** and **search and seizure orders**, although the legal tests for such orders are strict. An officeholder may also consider **private prosecution** as a means of applying pressure on wrongdoers and recovering value.

Before initiating any of the above remedies, however, the officeholder would need to consider whether the assets available justify the action.

# Contentious Insolvency: The Forensic Toolkit

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## **OPEN-SOURCE SEARCHES**

Whether looking at directors, principals of troubled businesses, counterparties or recovery actions, it is important to identify assets and their locations. Open-source information, supplemented by social media and dark web sources, can highlight anomalies and generate leads. Our team has tools to perform searches quickly, efficiently and safely.

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## **DEEP-DIVE REVIEWS**

Where a more in-depth understanding of an individual or entity is needed, including reputational issues, identification of cross-border assets or understanding of wider associations, our team can perform bespoke investigation procedures in the UK and overseas.

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## **ASSET TRACING**

We can perform forensic accounting investigations into asset flows to help identify the ultimate disposition of assets and aid in their recovery.

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## **INVESTIGATIONS**

Our team has deep experience investigating suspected fraud, regulatory breaches, professional negligence or misconduct, accounting irregularities and corruption.

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## **DATA ANALYTICS**

Our data analytics team can sort, analyse, and assist with visualisation of large volumes of transactional or accounting information.

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## **DATA ACQUISITION**

Dealing with servers, laptops, desktops, tablets, smartphones or portable storage devices, our forensic technology team collects data in an evidentially valid manner for storage in its dedicated secure facility. Once captured, the information can be accessed and reviewed without compromising its integrity.

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## **DEPARTED EMPLOYEE TRIAGE**

Our "triage" review aims to identify indications of theft or misuse of commercially sensitive information, or intellectual property performed by departing or departed employees or directors.

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## **DATA HOSTING AND REVIEW**

Using Relativity or other platforms, we can host and review large volumes of structured and unstructured data to support investigations or litigation.

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# Funding

The lack of funds in an estate does not need to preclude a full investigation. We are committed to exploring various funding methods relating to our fees and those of the professionals we engage with. These can include working alongside legal advisors on a conditional fee basis, seeking litigation funding, or deferring a portion of fees until there have been recoveries into the estate.

Our team has a proven track record of recovering funds for the benefit of creditors. We are flexible in our fee structure as detailed below:

- Time cost basis: Fees can be limited to the assets available in the estate and drawn according to the time spent on the matter.
- Fixed fee: The initial investigations and statutory costs can be capped at an agreed level, allowing for a review of further work required at a predetermined time.
- Contingent: Where there are limited or no funds in the estate, either some or all the fees may be deferred until a recovery has been made.
- Funded: We work with litigation funders to allow claims to be brought where there are insufficient monies in the estate to fund them.

We look to use one, or a combination, of the fee structures outlined above to match the stakeholders' requirements and to enhance recoveries for the benefit of creditors.



# Our Experience

Our global CIS team has broad experience in domestic and cross-border situations.

Members of our team have been appointed on numerous complex corporate insolvencies, restructurings and hedge fund liquidations in both onshore and offshore jurisdictions, including the following:

- Appointed as liquidator of a UK company that was financed by members of the public through pension release initiatives. The company purported to invest in children's care homes. Key aspects of the liquidation included investigating the use of investor funds and the identification of company assets to proceed with recovery actions.
- Retained by the board of an offshore hedge fund to defend actions by a U.S. receiver over the freezing of the fund's assets. A key aspect of the role included proving that the fund's assets were not hopelessly commingled with another structure used in a Ponzi scheme. We also assisted the board and the counsel in tracing assets internationally in the U.S., the Caribbean and Venezuela.
- Appointed as administrator of a listed mining group with operations in Africa. Our work included investigations into the conduct of the former directors, analysis of transactions, and research into the connections between parties.
- Appointed as liquidator of Weaving Capital (UK) Ltd, the asset management company appointed to manage Weaving Macro Fixed Income Fund Ltd, a Cayman-domiciled hedge fund that collapsed with investor losses exceeding USD 530 million (mn). Succeeded in bringing civil claims against the former directors/management, with damages of USD 450 mn awarded against four defendants. Also assisted the Serious Fraud Office in the subsequent prosecution of the founding directors.
- Acted as liquidator of Tiuta Plc. and the Connaught Income Fund, Series 1. Tiuta Plc. and its subsidiaries that were providers of bridging loans in the UK. The Connaught Income Fund had provided GBP 100 mn of financing for bridging loans to Tiuta Plc. We conducted detailed investigations to recover assets for the creditors, as well as litigation against numerous professional service providers, and close interaction with regulatory and law enforcement authorities.
- Appointed as administrator of BHS Limited and related companies. We investigated the conduct of former directors and amounts paid or received relating to property and financing transactions.
- Acted as administrators of Carlauren Group, a UK-based unitized sales property investment scheme which attracted GBP 75 mn of retail investor monies globally. Investors' concerns regarding the lack of payment of scheduled returns and failure to develop properties as proposed, led to the Court appointing Duff & Phelps (joint with another firm) as administrators over various group entities to realise assets and investigate the use of investors' funds.
- Appointed as liquidator of various funds that had appointed Bernie L Madoff Investment Securities LLC as investment manager. Our work included liaising with the Madoff Trustee and considering litigation against the various services providers to the funds.
- Appointed as liquidator of the Bear Stearns High-Grade Structured Credit and the Enhanced Leverage funds. Our work included investigating various allegations, including claims the investment manager generated and relied upon erroneous NAV calculations, and conducting extensive litigation against various service providers to the funds.
- Retained as a financial advisor to the Chapter 11 trustee in the bankruptcy of six offshore hedge funds. Our work included investigating the alleged fraud perpetrated on the funds, assisting in determining and delivering all available recovery actions. Also conducted the sales process of the funds' remaining holdings.
- Appointed as liquidator to Eurofoods IFSC Ltd, an Irish-based EUR 500 mn subsidiary of Italian food giant Parmalat Ltd. A complex legal dispute between the Irish liquidator and the "extraordinary administrator" of Parmalat relating to its Centre of Main Interest (COMI) went all the way to the European Courts of Justice and was eventually won by the Irish liquidator in the leading precedent case for COMI.

- Appointed as liquidator of Saad Investments Finance Company (No.5) Ltd, a USD 150 mn special purpose vehicle of PE fund interests. Our work involved Chapter 15 recognition in Delaware as well as recognition in the UK and Switzerland, disclosure applications in various jurisdictions, and active involvement in the USD 9 billion (bn) Al Gosaibi (AHAB) fraud litigation in the Cayman Islands.
- Appointed as liquidator of Crown Currency Exchange Ltd and Crown Holdings (London) Ltd, both traded as a retail foreign currency exchange provider. The companies collapsed and were unable to fulfil thousands of advanced customer orders. We investigated the allegation that the companies operated as a Ponzi-type fraud and pursued claims and recovery actions.
- Appointed as liquidator to a structure domiciled in both the Cayman Islands and Bahamas that was part of a USD 400 mn fraud orchestrated out of Germany. The assets included aircraft, luxury real estate and hedge fund interests. Dealings with foreign authorities in both the U.S. and Europe were required.
- Acted as receiver-manager of a multi-million-dollar residential/commercial property development company. Key aspects of the assignment included the completion of several multi-unit condominium and commercial developments, and fraud investigations regarding the company's principal.
- Official liquidator of two offshore funds that were the largest victims of the Petters' Ponzi scheme (accounting for USD 2.5 bn of the total loss). Key aspects of our work included an investigation into the affairs of the funds, commencement of recovery actions for investors, and dealings within the U.S. Bankruptcy Courts.
- Appointed as liquidator to a USD 100 mn Cayman Islands hedge fund trading in film financing. Key aspects included the filing of parallel Chapter 11 proceedings, management and resolution of large-scale and complex litigation, and realisation of the fund's remaining film loans.
- Appointed as trustee in bankruptcy of an individual who ran a racehorse-betting syndicate that involved the payment of purported returns to existing investors from funds contributed by new investors—a marker of a Ponzi scheme, as per the U.S. SEC definition. Also appointed as liquidator of Bankrupt's limited companies, which had also received funds from the syndicate. Work involved identifying and recovering UK and overseas assets (including over 70 bank accounts), investments, properties, cryptocurrency and racehorses; investigating claims against third parties who received funds from the Bankrupt and working alongside regulatory and law enforcement authorities.
- Following a period of forensic investigation, Duff & Phelps was appointed by the court as interim manager, and then as administrator over the NPD Group (the Group). The Group raised close to GBP 73 mn from retail investors globally and purported to sell unitised investments in the form of rooms within build/off-plan hotels and care homes, offering investors lucrative annual coupons and buyback options. Post appointment, Duff & Phelps is undertaking detailed forensic activities and has commenced an asset recovery programme, which includes launching legal claims against former officers of the Group as well as obtaining various freezing orders over personal assets.
- Appointed as administrator of Blackmore Bond Plc, a property development company that issued six series of mini-bonds raising c. £46 mn from retail investors. Key aspects of our work included an investigation into the affairs of the company, a forensic review of the group's bank accounts and realisation of the company's remaining property assets.

# About Our Firm

## VALUE OF INDEPENDENCE

Our firm is an independent financial advisor. A vast majority of our work involves transactions where we are not the investment banker, relieving us of the typical conflicts of interest that can arise.

Our advice is focused on our clients' needs and objectives.

## INDUSTRY EXPERIENCE

Our scale enables us to specialise in numerous industries. This diversified sector knowledge helps us to quickly understand the context and the key issues and challenges being faced.

## TECHNICAL EXPERTISE

The breadth of our restructuring and advisory services allows us to fully explore all available options on behalf of our clients.

We can quickly mobilise a bespoke team with the appropriate blend of technical knowledge and situational experience, as well as language and cultural understanding.

## ACTING LOCALLY

We serve clients worldwide from 25 countries.

Our local professionals have the advantage of a global team behind them, ensuring our clients receive the best possible service.



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#### **About Duff & Phelps**

Duff & Phelps is the world's premier provider of governance, risk and transparency solutions. We work with clients across diverse sectors in the areas of valuation, corporate finance, disputes and investigations, cyber security, claims administration and regulatory compliance. With Kroll, the leading global provider of risk solutions, and Prime Clerk, the leader in complex business services and claims administration, our firm has nearly 4,000 professionals in 25 countries around the world. For more information, visit [www.duffandphelps.com](http://www.duffandphelps.com).

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