The International Insolvency Review

Third Edition

Editor
Donald S Bernstein

Law Business Research
The International Insolvency Review

Third Edition

Editor
DONALD S BERNSTEIN

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This third edition of The International Insolvency Review once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to the 2014 edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges are particularly acute in large corporate insolvencies, because neither UNCITRAL’s Model Law on Cross-Border Insolvency nor other enactments, such as the European Union’s Regulation on Insolvency,¹ provide the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions.² Insolvent corporate groups are therefore obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions, or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of Nortel

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2. On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848 (the ‘Recast Regulation’), which will apply to insolvency proceedings initiated after 26 June 2017. The Recast Regulation contains a provision for voluntary, non-binding group coordination proceedings in the EU. The practical impact of this new tool remains to be seen.
and Lehman Brothers, among others), with added costs, dispersed control, legal conflicts and inconsistent judgments.

As discussed in last year’s edition, the search for a legislative or treaty-based solution to this problem is ongoing, but any such solutions would necessarily involve some degree of relinquishment of national sovereignty and a ceding of local jurisdiction and control that may be difficult for local interests to accept, especially without substantial convergence in national insolvency laws. Given the lack of statutory tools, for some time it has been common in cross-border cases to implement insolvency protocols designed to address potential procedural, and in some cases substantive, conflicts. These agreements may be limited to providing a general framework for cross-border cooperation and coordination, or they may also include specific procedures for deferral, claims resolution, communication between the courts or other particular needs of an individual case. Since the time of the Maxwell Communications case, cross-border protocols have enjoyed widespread support from insolvency practitioners and organisations, including from the American Law Institute, the International Insolvency Institute and INSOL Europe.

However, while cross-border protocols are often valuable tools in multinational corporate group insolvencies, they are inherently limited in important ways. Absent supranational legal regimes, courts can only adjudicate disputes under the laws of their own countries, and parties can only be bound to the extent that the writ of the local court can be enforced against them. Fundamentally, cross-border protocols cannot expand the sovereignty or jurisdiction of the court presiding over an insolvency proceeding, superimpose a single governing substantive law or extend the reach of enforcement of local law against foreign parties. This is especially true if multiple plenary insolvency proceedings have been instituted under divergent national legal regimes with respect to members of a corporate group. Cross-border protocols are not a replacement for the enactment of supervening multi-jurisdictional solutions that bring all of the proceedings under a single controlling legal umbrella.

Some observers believe that the deficiencies in the protocol approach to cross-border insolvencies go beyond their inherent limitations. Questions have been raised about whether the effort to overcome these deficiencies leads to aberrational results, as the parties and the courts try to live up to the cooperative spirit of such protocols. In one such critique, former US bankruptcy court Judge James M Peck, who oversaw a number of cases employing cross-border protocols, most notably the Lehman Brothers case, recently addressed this issue in the context of the ongoing fight over distributions in

the *Nortel Networks* insolvency cases.⁵ As discussed in greater detail in the United States chapter of this review, various Nortel entities initiated plenary insolvency proceedings in the US, UK and Canada. After the sale of substantially all of Nortel’s assets, the question remained of how to allocate the resulting US$7.3 billion fund among creditors of the various estates. The parties implemented a cross-border protocol that was designed to promote consistent determinations of legal issues in the various proceedings.⁶ After years of legal maneuvering, the US and Canadian courts did indeed reach consistent decisions, following a trial ‘held in two cross-border courtrooms linked by remarkable and effective technology,’ on the methodology for distributing the fund to creditors.⁷ However, despite the legal wrangling that has so far cost the Nortel and its creditors over US$1 billion in legal fees, as Judge Peck notes, US bondholders have questioned the legitimacy of the rulings under US law, and appeals have been filed.⁸ As Judge Peck explains, even the most accomplished commercial judges may have a ‘propensity to seek pragmatic resolutions in good faith that may solve the problem presented but that may deviate from a merits based determination’.⁹ While judges in multi-jurisdiction insolvency cases should be praised for trying to fit a single irregular peg into both a square and a round hole, it is certainly worth asking whether the integrity of a court’s process can be compromised in the struggle to do so.

Judge Peck argues that courts should not overly strive to enhance consistency in decision making across jurisdictions, as ‘judges who are performing their jobs faithfully within their home court system are doing all that is required of them.’¹⁰ If parties fear inconsistent outcomes, they may be more willing to enter into binding arbitration or find other means of settling their differences as, Judge Peck suggests, they did in the *Lehman Brothers* case.¹¹

While it runs against the grain, after all the efforts of the past 25 years to promote cooperation and coordination in international insolvencies, to suggest that judicial cooperation can sometimes work at cross-purposes with efficient administration of cross-border insolvencies, there is no denying that the likelihood of speedy, clear and accurate (even if inconsistent) substantive adjudication drives settlements in large complex cases. In cross-border cases, striving for judicial decisions that are hard to challenge, even if inconsistent, may be a straighter path to a practical outcome than striving to attain wholly symmetrical results.

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⁶ Id.


⁹ Id.

¹⁰ Id.

¹¹ Id.
Of course, the need for judges to make such pragmatic choices would be reduced if there were clear legal enactments providing for the alignment of insolvency outcomes across jurisdictional lines.

I once again want to thank each of the contributors to this book for their efforts to make The International Insolvency Review a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of our effort to provide truly current coverage of important commercial insolvency developments around the world. My hope is that this year’s volume once again will help all of us reflect on the larger picture, keeping our eye on likely, as well as necessary developments on the near and, alas, distant horizon.

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Davis Polk & Wardwell LLP
New York
October 2015
Chapter 18

JERSEY

William Redgrave and Ed Shorrock

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Jersey has two principal forms of insolvency procedure – désastre under the Bankruptcy (Désastre) (Jersey) Law 1990 and creditors’ windings up under the Companies (Jersey) Law 1991 (the Companies Law), the latter being for Jersey-registered companies. Jersey’s legislation is designed to provide the same outcome whichever procedure is followed. In recent years, there has also been a growing trend for the use of court windings up, also under the Companies Law, principally where the court is satisfied that it is just and equitable to do so (a different test of public interest is also available). A further trend has been the increased use of dégrèvement (an ancient statutory procedure used to disencumber Jersey immovable property). Other forms of insolvency exist, but these procedures are invoked comparatively rarely.

ii Policy

Jersey does not have any form of formal ‘business rescue’ legislation that would enable a company to continue as a going concern. However, the Royal Court (the Court) has always operated to seek to ensure that all stakeholders’ interests are taken into account.

By way of example, there is no statutory mechanism by which a pre-packaged sale of a business’ assets can take place in Jersey. However, in Re Collections Group [2013] JRC 096, the Court approved a just and equitable procedure that gave effect to a pre-packaged sale of the business and assets of the companies that formed Collections Group, which was involved in the sale of clothing and other items. The companies were in a dire financial position and would have had to shut immediately had the Court not placed them into liquidation and authorised the liquidators immediately to enter into an

1 William Redgrave is an advocate and Ed Shorrock is a director at Baker & Partners.
agreement whereby they would sell the business and assets to a new company in return for a future share in the new company’s profits.

The Court recognised that a creditors’ winding up or désastre would lead to a significant number of people losing their jobs and damage retail confidence in the island. Given the statutory notice periods involved in creditors’ windings up and désastres, these would not lend themselves to expedited pre-packaged arrangements, the procedures being designed to protect creditors’ interests.

A pre-packaged arrangement, which is commonly put in place by administrators in England, also took place in *Re Huelin-Renouf Shipping Ltd* [2013] JRC 164.

### iii Insolvency procedures

Désastres can be initiated on the simple grounds that the company is insolvent based on the cash flow test; namely, the company is unable to pay its debts as they fall due. Rather confusingly, a creditor is not entitled to initiate a creditors’ winding up; rather it is for the directors of a company to do so on the basis of insolvency. An application for a désastre may be made to the court by a creditor of the company having a liquidated claim exceeding £3,000. This limit does not apply to creditors’ windings up. A company can declare itself, through its directors, *en désastre*.

Given that all creditors must be given 14 days’ written notice of a creditors’ meeting which usually takes place immediately after a shareholders’ meeting to pass a special resolution to place it into liquidation, the time frame to place a company into a creditors’ winding up can be as little as two weeks.

In relation to just and equitable windings up, the Court has adopted a flexible approach. Recent cases have included, but are not limited to, the following grounds: where the substratum of the company has gone; where an investigation is required; where there might be competing interests between creditors and clients (particularly where financial services businesses are concerned); or where speed and choice of liquidator are important. A just and equitable winding up can be initiated by the company, a director, a shareholder or the local financial services regulator. The time frame involved with just and equitable windings up is usually longer than for creditors’ windings up due to the complexity of the matters in issue and the availability of court time.

### iv Starting proceedings

An application for a désastre may be made to the Court by a creditor of the company having a liquidated claim exceeding £3,000. This limit does not apply to creditors’ windings up. A company can declare itself, through its directors, *en désastre*. In a désastre it is normally necessary to give the Viscount (the principal executive officer of the Jersey Court) at least 48 hours’ notice of an intention to make an application. The application is made by way of a written and oral application together with a supporting affidavit that confirms, insofar as the applicant is aware, that the company is insolvent, has assets and that the applicant has a liquidated claim (if presented by a creditor).

In terms of obtaining a stay of proceedings, an application for a désastre is made *ex parte*, but generally on notice to a debtor.

The Court has some discretion as to whether or not to order a désastre. It also has an inherent jurisdiction to rehear any application on an *inter partes* basis, which would
enable a concerned party (usually the debtor) to apply for a recall of the declaration or to re-argue any point such as an inability to pay debts as they fall due or the absence of a liquidated sum. A failure to make full and frank disclosure may also result in a declaration being set aside. Various circumstances may arise in which a stay or partial stay of proceedings might be granted, such as verification of a debtor’s position or to permit the negotiation of a loan facility to enable the debtor to discharge liabilities in full.

In respect of a creditors’ winding up, the directors resolve to call a shareholders’ meeting to pass a special resolution to place it into liquidation. A creditors’ meeting usually takes place immediately after this meeting but 14 days’ written notice must be given to creditors directly in advance of this meeting. A notice in the local newspaper advertising the meeting must also be placed at least 10 days in advance of the meeting. Creditors are entitled to receive information concerning the company’s affairs and a statement of affairs verified on affidavit by some or all of the directors. At the creditors’ meeting a liquidator is appointed as well as a liquidation committee.

An application for a just and equitable winding up is also commenced by a representation and affidavit, but given the complexities that are usually associated with such applications, more court time is required for such hearings. The Viscount’s views on the appropriateness of such applications are always sought by the Court. Depending on who has initiated the proceedings, parties so affected, such as creditors or directors, are usually convened to such hearings and their views listened to by the Court.

v Control of insolvency proceedings
In the case of a désastre, all the property and powers of the company vest in the Viscount. This includes the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of any property. It is important to note that, unlike in a creditors’ winding up, the Viscount (as, effectively, the liquidator) is not an agent of company – the assets and liabilities of the company and the powers of the directors legally vest in him.

In a creditors’ winding up, the liquidator, once appointed, controls the company. The corporate state and capacity of the company continue until the company is dissolved. On the appointment of a liquidator in a creditors’ winding up, all the powers of the directors cease, except in so far as the liquidation committee (or, if there is no committee, the creditors) sanctions their continuance.

The Court is always involved with applications for windings up on a just and equitable basis by virtue of the statutory provisions of the Companies (Jersey) Law 1991 which reads:

Power for court to wind up

(1) A company, not being a company in respect of which a declaration has been made (and not recalled) under the Désastre Law, may be wound up by the court if the court is of the opinion that –

(a) it is just and equitable to do so; or

(b) it is expedient in the public interest to do so.
In relation to the Viscount in a désastre and a liquidator in a winding up, it is open to them to seek directions from the Court in relation to any matter arising in the course of proceedings. There is no such provision in Article 155 (just and equitable winding up) and any such directions would usually be made under ‘liberty to apply’ provisions in the original order.

Returning to creditors’ windings up, the ability of the liquidator to seek directions is contained in Article 186A, which reads as follows:

**References to the Court**

(1) The following persons, namely—

(a) the company, in a summary winding up;

(b) the liquidator or a contributory or creditor of the company, in a creditors’ winding up,

may apply to the court for the determination of a question arising in the winding up, or for the court to exercise any of its powers in relation to the winding up.

In the past six years there have been two instances in which the Court has invoked Article 186A. The first, in *Re Corebits Services Limited and Zoombits Limited* [2011] involved the authorisation of a pooling arrangement whereby the assets and liabilities of the companies were treated as belonging to a single entity. Reference in that case was made to the powers of liquidators to compromise claims as set out in paragraphs 2 and 3, Part 1, Schedule 4 of the Insolvency Act 1986 but the Jersey equivalent (Article 170 of the Companies Law) was in narrower terms. Article 186A put the Court’s jurisdiction beyond doubt.

The second case, in *Re Aspis Jersey Limited* [2013] JRC 178 dealt with an application by joint liquidators for a determination of a question in the summary winding up of the company as to how the surplus of assets, after payment of all creditors, should be distributed as between the different classes of its shareholders.

Accordingly, it can be seen that the role of the Court, other than in applications under the just and equitable regime and at the initiation of a désastre, is often fairly limited.

**vi Special regimes**

Jersey does not have any special regimes applicable either to different industries or whether the entities concerned are regulated are not.

**vii Cross-border issues**

Due to Jersey’s status as an international finance centre, the Court often has to deal with cases that involve an international dimension. As such, it is well used to dealing with cross-border issues, not only in rendering assistance to foreign courts but also in requesting assistance from foreign courts, most frequently the English High Court.

**Assistance to foreign courts**

The assistance Jersey courts will give is based either on statute, common law principles of private international law or comity. The statutory basis of assistance lies in Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990. This provides for the Court, if it thinks
fit, to assist the courts of a relevant country or territory in all matters relating to the insolvency of a person. The current list of relevant countries and territories includes the United Kingdom, the Isle of Man, Guernsey, Australia and Finland.

All other applications for assistance fall to be dealt with under the common law and as matters of comity.

All applications for assistance in bankruptcy and insolvency matters, even though they do not result in applications for declarations en désastre, should be passed to the Viscount’s Department for comment given its familiarity with the subject matter. Explicit reference to the consultation process with the Viscount’s Department is made in the application. Applications for assistance are usually heard ex parte in open court given the need for justice to be administered in public. Only in rare and extremely sensitive cases will in-private hearings be allowed.

Applications are made by way of representation supported by a letter of request issued by the foreign court, an affidavit from the office holder applying for the order and a copy of the appointment document. Critically, for applications based on comity, the letter of request and the representation should evidence a willingness on the part of the applicant’s jurisdiction to show reciprocity and comity to the island for the purposes of any possible future request from the Jersey Court. The applicant country’s profile and allegiance to the rule of law, such as the appropriateness of its bankruptcy and associated legislation will also be of relevance when considering such an application.

The type of relief sought typically goes beyond the simple recognition of the office holder making the application by the Court. Orders sought frequently refer to disclosure of assets or documents, examination of witnesses, gagging orders, freezing orders, how the information to be obtained is to be used, any time delays before publication of the existence of the order and costs.

Full details both of the applicant and of the relief sought must be made at the outset in order for the Court properly to consider the application. The extent of the disclosure sought is invariably a matter that is given close scrutiny by the Court and it will often reduce the ambit of the relief sought if it is deemed to be too general. The use of ‘liberty to apply’ provisions are often useful if initial enquiries lead to further potential avenues for investigation or disclosure. This also applies to the examination of witnesses.

The Court will also be keen to control to what use the information obtained can be put. Frequently, orders obtained are specific as to what use the information can be put to and to whom it can be disclosed. If there is any change in the terms of the office holder’s appointment in the home jurisdiction or the office holder wishes to use the information for a purpose that was not originally authorised then there is a burden on the office holder to return to Court to seek such permission.

Costs tend to be provided for so as to indemnify an innocent, disclosing party for its costs of taking advice on and complying with the terms of any order so obtained.

Requests for assistance are often at the instigation of an office holder who has been appointed by a foreign revenue authority. Following the general principles established in Government of India v Taylor, Jersey follows the general rule that assistance is not granted by one jurisdiction to another in circumstances where the only creditor is a foreign revenue authority.

In the case of the Representation of Steven John Williams as trustee in bankruptcy of Michael Stephen Collett [2009] JRC 54, the Court recognised a UK trustee in bankruptcy
even though 99.8 per cent of the admitted claims were from Her Majesty’s Revenue and Customs. The Court found that fairness dictated that exclusion of such a claim should not apply where there is at least another unsecured creditor who will stand to benefit from assistance being given.

**Assistance from foreign courts**

As noted above, not only does the Jersey Court render assistance to foreign courts but there is a well-trodden path of foreign courts responding to requests by the Jersey Court.

Such requests frequently arise where Jersey registered companies have their centre of main interest in England or otherwise hold real property there, and where an English-style administration (unavailable in Jersey) would prove more beneficial for creditors.

However, the case of *HSBC v. Tambrook* [2013] EWHC 866 (Ch) gave cause for concern that the letter of request route was no longer available. Tambrook was incorporated in Jersey but conducted the majority of its business in England. The company ran into financial difficulties and was unable to repay a loan that it had obtained from HSBC. The company and the bank mutually agreed that the company would enter into a formal insolvency procedure but administration, which was considered to be the most appropriate form of insolvency proceedings was not available in Jersey (and this remains the position, although reform is currently being considered – see below). As a result, HSBC obtained a letter of request from the Jersey Court to the English High Court requesting assistance pursuant to Section 426 of the Insolvency Act 1986, in which the Jersey Court sought the assistance of the High Court, and in particular the appointment of English administrators to deal with the company’s affairs.

The English judge at first instance refused HSBC’s application, holding that the Jersey court’s request could only be respected where a formal insolvency proceeding had already been opened in Jersey. He said that the English court’s role was not to provide a substitute for another jurisdiction’s deficiencies.

The Court of Appeal unanimously overturned that decision, rejecting what it saw as an ‘unduly and unnecessarily restrictive’ interpretation of Section 426. The Court of Appeal decided that an administrator could be appointed over a Jersey company (or any other company in a country designated under Section 426) without the need for separate insolvency proceedings in that country focusing on both the purpose of Section 426 and its precise wording.

The Court of Appeal considered that:

a  Section 426 should be given ‘a broad interpretation’ and its wording was wide enough to encompass the assistance requested in the case;

b  specifically, the court should not equate ‘having’ jurisdiction (the wording used in Section 426(4)) with ‘exercising’ jurisdiction; and

c  in any event, the Jersey Court had exercised its insolvency jurisdiction, even without there being any formal insolvency proceedings opened or contemplated.
II INSOLVENCY METRICS

i Désastres

As an offshore financial centre, a large part of Jersey’s economy relies heavily on the financial services industry and ancillary services such as legal and accountancy services. Between the years 1990 and 2013 there were 329 declarations en désastre. Of these, 161 were personal failures (though none of these was predominantly attributable to credit card indebtedness) and 168 were corporate désastres. Of the désastres declared between 2000 and 2013 the three main groups comprised, retail, construction and hotels and restaurants.

The average payment to unsecured creditors between 2000 and 2013 was 22 per cent, and a total of some £3 million of assets was realised by the Désastre Section of the Viscount’s Department in 2013. Eleven outstanding cases were carried forward into 2014 but there are no current statistics on these cases or for 2015.

The statistics show that an ongoing decline in the number of declarations en désastre has occurred in parallel with an increase in use of some of Jersey’s older insolvency procedures, notably remise de biens and dégrèvement.

ii Creditors’ windings up

There is no central register that records creditors’ windings up. However, a review of the Gazette section of the local paper, where notices in relation to creditors’ windings up are published, identified nine such notices in each of 2013 and 2014. Publicly available records of Jersey companies, including winding-up resolutions, are available through the Jersey Companies Registry, but a particular company has to be identified and its records searched for discretely.

As with the désastre applications, the companies subject to creditors’ windings up in 2013 and 2014 all centred around companies involved in ‘tangible business’ such as construction, travel agency and retail operations. This reflects the pattern of previous years and the construction industry has been particularly badly affected by the downturn in the world economy.

iii Just and equitable windings up

The past six years have seen an increase in the number of windings up on a just and equitable basis, most frequently on the application by directors. In 2013 there were four successful applications, one in each of 2012 and 2011 and two in 2009.

Outside of the ‘real economy’, the financial services sector has suffered a contraction over the past six years but has recently stabilised and is now showing signs of recovery.

III ANCILLARY INSOLVENCY PROCEEDINGS

There have been no ancillary insolvency proceedings in the past 12 months.
IV TRENDS

We anticipate that insolvency activity will remain at the levels we have witnessed in the past few years in terms of domestic, ‘tangible’ business. There will likely be a continual stream of cases with an international dimension involving recognition of foreign office holders appointed in asset recovery cases initiated by onshore revenue authorities (subject to the general rule of Government of India v. Taylor) or where offshore entities are part of a wider group of insolvent entities.

There is also an increasing focus on insolvent trusts where trustees, creditors and beneficiaries have been keen to bring the affairs of a trust to an end through insolvency proceedings. At the moment, appointments over insolvent trusts are likely to occur in the form of an appointment of a quasi-receiver over the assets of a trust given that the trust does not have a separate legal identity.

In terms of legislative developments, there are currently political moves afoot to review Jersey’s insolvency regime in order to introduce a formal rescue or reorganisation procedure. Although there is an understandable immediate attraction to having such a regime, careful consideration must be given to Jersey’s status as a leading financial services centre. In particular, the introduction of a corporate rescue procedure, with its attendant moratorium on creditor enforcement provisions should not have any adverse impact on that status. Special provisions would need to be made to ensure that companies involved in capital market arrangements were not caught by the new procedure as any interference in the ability of secured charge-holders to enforce their rights might be viewed negatively by lenders and, accordingly, by promoters of such vehicles.
Appendix 1

ABOUT THE AUTHORS

WILLIAM REDGRAVE
Baker & Partners
William Redgrave is an advocate at Baker & Partners.

William is a Jersey advocate and English barrister with extensive experience of litigation and a focus on advocacy. He practised at the English Bar for 13 years before moving to work in Jersey in 2008.

He was appointed as a Crown Advocate in 2012.

William has appeared in many notable recent civil decisions in Jersey. He appeared for the successful plaintiff in a recent case in which a judgment debtor denied for two years the plaintiff’s claim that he was beneficially interested in assets held in a structure headed by a Jersey foundation, such that the judgment could be enforced against those assets.

He has also frequently advised and assisted financial services businesses and regulators in Jersey on a variety of regulatory matters, including AML laws and procedures, sanctions and tax information exchange. He has conducted regulatory investigations on behalf of both regulated businesses and the regulator.

ED SHORROCK
Baker & Partners
Ed is a qualified chartered accountant and has been involved in a variety of litigation support, proceeds of crime, regulatory investigations, enforcement actions and insolvency matter.

Ed leads the regulatory team at Baker & Partners. He has been appointed liquidator of a fiduciary services business under just and equitable provisions, having driven similar cases in the past. He has also been appointed liquidator of a fiduciary services business under summary winding up provisions, both appointments following regulatory enforcement action.

He has also produced reports and provided support for financial services businesses which have assisted them in meeting their obligations under the law, as a result of which
he has delivered practical and realistic advice as to strategic options and operational matters. Ed also acts for the Viscount in more complicated insolvency matters and asset freezing cases and has contributed to what is considered to be the leading textbook on insolvency and asset tracking in Jersey: *Jersey Insolvency and Asset Tracking, 4th Edition* by Dessain & Wilkins.

Ed has also delivered training courses on topics of corporate governance and risk management, speaks at conferences on topics relating to offshore financial centres and writes regularly on associated topics.

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