EUROPEAN RESTRUCTURING WATCH ALERT

PARAGON OFFSHORE: JUDGMENT ON CHALLENGE TO 2017 RESTRUCTURING AND THE LIMITS OF THE RULE 12.59 REVIEW JURISDICTION

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The Insolvency and Companies Court in London handed down judgment on Monday, 19 October 2020 rejecting a shareholder challenge to the 2017 restructuring of Paragon Offshore plc (in liquidation) (the "**Company**").

The judgment gives helpful guidance on the approach taken by insolvency courts to reviewing, rescinding or varying their orders under rule 12.59 of The Insolvency (England and Wales) Rules 2016.

It also gives a stark demonstration of where the rule 12.59 jurisdiction ends and the appellate jurisdiction begins, with Deputy ICC Judge Agnello QC declaring the rule 12.59 applications in this case to be "totally without merit".

Introduction to Rule 12.59

Rule 12.59 provides for a review jurisdiction that is unique to insolvency proceedings, which allows a Judge in such proceedings to review, rescind or vary his or her own orders. Rule 12.59(1) states that: "Every court having jurisdiction for the purposes of Parts 1 to 7 of the Act and the corresponding Parts of these Rules, may review, rescind or vary any order made by it in the exercise of that jurisdiction".

In view of the Paragon judgment, parties will need to consider, going forward, the merits in bringing a rule 12.59 application and the possible adverse consequences of same if it is found that the matters should instead have been raised on appeal.

Paragon Background

The Paragon group was a leading provider of offshore drilling services. As a result of financial difficulties, the Company and certain of its subsidiaries commenced Chapter 11 proceedings in the U.S. Bankruptcy Court in Delaware on 14 February 2016. After a series of negotiations, the Fifth Chapter 11 Plan was confirmed by the U.S. Bankruptcy Court on 7 June 2017 and then implemented via a UK pre-pack administration sale of the Company's assets. This was the first time that a Chapter 11 plan had been implemented in this way.

Discharge of the Former Joint Administrators

The Former Joint Administrators of the Company applied to the Insolvency and Companies Court in February 2020 to fix the date for their discharge from liability pursuant to paragraph 98(2)(c) of Schedule B1 to the Insolvency Act 1986.

The discharge application was challenged by a purported shareholder of the Company on a number of grounds, including that the Company was not insolvent at the time that the administration order was made on 23 May 2017.

On 20 July 2020, Deputy ICC Judge Agnello QC dismissed the shareholder challenge and ordered that the Former Joint Administrators be discharged from liability with effect from 3 August 2020. The Deputy ICC Judge also ordered the shareholder to pay the Former Joint Administrators' costs.

The shareholder brought applications pursuant to rule 12.59 for the Deputy ICC Judge to review, rescind or vary the discharge judgment and the associated costs order. In her judgment dated 19 October 2020 (the "**Dismissal Judgment**"), the Deputy ICC Judge dismissed the shareholder's application.

Application of Rule 12.59

The Deputy ICC Judge set out the following questions in the Dismissal Judgment with regards to the test under rule 12.59:

a. "*Do the grounds raised by [the shareholder] essentially fall under the category of being an attempt to re run the same arguments, albeit with some further documents, all of which were in existence at the dates of the previous hearings?*" [para 12]

b. "*Has something changed since the date of the original hearing so that it is appropriate for me to exercise this exceptional jurisdiction?*" [para 26]

The Deputy ICC Judge referred in the Dismissal Judgment to the "very wide discretion" that exists in relation to this rule and to the principles laid out in the recent case of *Discovery (Northampton) Ltd v Debenhams Retail Ltd [2020] EWHC 260*. To these, she added that the rule 12.59 jurisdiction is separate and distinct from the appellate jurisdiction:

> "*The review jurisdiction is not a substitute or a replacement or indeed an alternative to the appellate jurisdiction which exists, subject to permission being granted, in relation to orders made by Insolvency and Companies Court Judges. The review jurisdiction is clearly distinct and not to be used in cases where what*

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> *is in reality being sought, is the exercise of an appellate jurisdiction*." [para 10]

The Deputy ICC Judge confirmed, as set out by Sir Alastair Norris in the *Debenhams* case, that: (a) the rule 12.59 jurisdiction is to be used sparingly and is restricted to 'special' or 'exceptional' circumstances; and (b) this jurisdiction does not allow for a rerun of the case itself even in cases where further arguments are put forward.

The Deputy ICC Judge referred to the comments in the *Debenhams* case that Laddie J's obiter observation in *Papanicola v Humphreys* that "a new argument" would suffice to engage the rule 12.59 jurisdiction did not stand in the mainstream of the decisions in this area:

> "*Although the review jurisdiction is unique to insolvency, hearings in insolvency matters share with general civil litigation the principle memorably summarised by Lewison LJ: they are not dress rehearsals but the first and only night of the show*." [para 11]

Findings

The Deputy ICC Judge held that the three points raised by the shareholder in the rule 12.59 applications were attempts to rerun arguments addressed in the original discharge judgment: "*The court does not review its orders merely because the applicant seeks to run the same arguments but perhaps presented in what it perceives will be a more attractive manner*." [para 28]

In addition, the Deputy ICC Judge held that the "new materials" presented by the shareholder did not constitute a change of circumstances such that the exceptional jurisdiction under rule 12.59 was capable of being exercised. The Deputy ICC Judge dismissed the rule 12.59 applications.

Further, she declared that the rule 12.59 applications were "totally without merit" for the purposes of CPR 23.12, raising the question whether a limited civil restraint order should be made against the shareholder. In this instance, the Deputy ICC Judge treated the shareholder's applications as a single application for the purposes of para 2.1 of PD3C (this paragraph requires there to be two "totally without merit" applications), such that it was not appropriate to consider whether to make a civil restraint order against the shareholder (at that time).

The shareholder applied for permission to appeal the Dismissal Judgment but this was refused by the Deputy ICC Judge on the basis that an appeal would have no real prospect of success.

The shareholder was ordered to pay the Former Joint Administrators' costs of, and occasioned by, the rule 12.59 applications.

The Judge handed down a written judgment with reference [2020] EWHC 2740 (Ch) on the substantive issues and gave an *ex tempore* judgment on consequential issues, including whether the shareholder's applications were "totally without merit", with reference [2020] EWHC 2964 (Ch).

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Weil acted for Nicholas Edwards, David Soden and Neville Kahn of Deloitte LLP as the Former Joint Administrators of Paragon Offshore plc (in liquidation), led by London Restructuring partner Mark Lawford and assisted by associates Wupya Nandap, Maeve Brady, (then) trainee associate Zoe Wedderburn-Day and trainee associate Lucia Azzi. The Former Joint Administrators were represented in Court by Mark Arnold QC of South Square.

Weil acted for Paragon Offshore plc on its Chapter 11 restructuring, which was implemented via a UK administration sale in 2017. The Weil team in the US was led by Restructuring partners Gary Holtzer and Alfredo Perez, while the Weil team in London was led by Restructuring partners Andrew Wilkinson and Mark Lawford.

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.

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