SOUTH SQUARE DIGEST

A REGULAR REVIEW OF NEWS, CASES AND ARTICLES FROM **SOUTH SQUARE BARRISTERS**

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Schemes of Arrangement

AUGUST 2015

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'SOME OF THE MOST BRILLIANT BARRISTERS AT THE BAR'

August 2015

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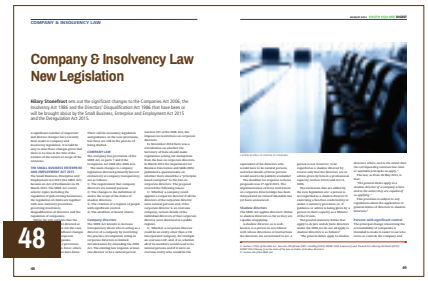

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FROM THE **EDITOR**

DAVID ALEXANDER QC

A summer of tragedy and farce

Welcome to the summer edition of the Digest, the last one for this legal year. The financial world has been dominated in the last few months by Greece and whether there would be a Grexit from the Euro. In scenes bordering on the farcical it went down to the wire with some extraordinary things happening. In late June 2015, according to the Eurogroup, the Greeks broke off negotiations. The Prime Minister, Alexis Tsipras, then decided to have a referendum on whether to accept what was on offer with his party, Syriza, campaigning for a "no" (or "Oxi") vote. Greece then made history by becoming the first developed country in history to default on its debts to the IMF when it failed to make a payment of Euros 1.5 billion (although that default was then merely downgraded to Greece being in "arrears"). Next the Greeks had their referendum and overwhelmingly voted "no" to the European proposals (the split was 61% to 39% on a 62.5% turnout). So back to the negotiating table Mr Tsipas went, only to emerge with even harsher terms from Europe than those which were on offer prior to the Greek referendum and which he appears to have felt compelled to accept to prevent Greece falling out of the Eurozone. The whole thing appears to have been, and continues to be, a tragedy for Greece with many suggesting that Greece would have been far better off just to have dropped out of the Eurozone and returned to the Drachma. What that tragedy does suggest, however, is that here in the UK we are probably very lucky that we never joined the Euro.

GREEK FINANCE MINSTER VAROUFAKIS, ON HIS BIKE

So outside of the Greek crisis, what else has been happening? Three other things stand out for me. Firstly, the tragic events in Tunisia when a lone gunman arrived on a jet-ski on the beach and killed 38 holidaymakers (of whom 30 were British) staying in a resort just north of Sousse.

Secondly, the farce that is FIFA. Corruption allegations have always surrounded FIFA. But it took the FBI to do something about it that mattered. And at the end of May 2015 seven FIFA officials were arrested at the Hotel Bar au Lac in Zurich where they were preparing to attend FIFA's 65th annual congress which was scheduled to include the election of a new President. Amazingly, despite what was

BLATTER: THE PRESIDENT WHO FINALLY QUIT?

happening, the election carried on and Sepp Blatter, who has been President since 1998, was re-elected. Mass calls for his resignation followed and, in a moment akin to people knowing where they were when man first walked on the moon, on 2 June 2015 Blatter said he was resigning. Only apparently to try to go back on that subsequently and postponing the election of a new President until 2016.

Thirdly, Donald Trump. The American Presidential race is hotting up. On 14 June 2015 Trump announced at Trump Tower that he was entering the race. Ever since, he has been what one can only describe as controversial, for example making a slur against Mexicans and attacking John McCain's war record. Yet the publicity he was generating appeared to be doing him some good, at least until the TV debate. Surely the US cannot have him as President, can it? Probably not, but Trump has certainly generated interest in the Republican nomination election.

So what do we have in this edition of the Digest. As always there are plenty of articles of interest. Firstly, there is an article by William Trower QC on the significance of two recent schemes of arrangement designed to facilitate the payment of redress to consumers asserting claims arising out of the mis-selling of financial products. There is also an article by Tom Smith QC on the circumstances in which the English court will find a "sufficient connection" for the purposes of the scheme of arrangement jurisdiction.

In addition there is an article by Marcus Haywood and myself on where the defence of *Ex Turpi Causa* lies following the decision of the Supreme Court in *Jetivia SA v Bilta* and an article by Stephen Robins on developments in common law and judicial assistance following *Singularis*. Finally there are also articles by Richard Fisher on whether trouble lies ahead in relation to satisfying the "sufficient connection" test in relation to schemes of arrangement; and Hilary Stonefrost on the changes brought about by the Small Business Enterprise and Employment Act 2015 and the Deregulation Act 2015 .

Apart from articles, this edition of the Digest contains a report on the recent decision of David Richards J in what are known as Waterfall A and Waterfall B, as well as the usual case digests, the latter edited this time by Lloyd Tamlyn.

Plus we have a report by William Willson on the highly successful INSOL International one day seminar in Bermuda, an EU/EEA law update by Robert Amey and Andrew Shaw, a summary of the findings in a new report published by South Square and Grant Thornton UK LLP following research in relation to cross-border insolvencies, news in brief, diary dates and the South Square Challenge.

We hope that you enjoy this edition of the Digest. As ever, if you wish to be added to the circulation list (and it is free) or your contact details change, please email kirstendent@southsquare.com and we will endeavour to make sure you get the next edition. In the meantime, all at South Square wish you a good summer.

'THE DONALD' HAS SPICED UP THE RACE TO THE WHITE HOUSE

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Consumer Redress and the Scheme Jurisdiction

William Trower QC discusses the significance of two recent schemes of arrangement designed to facilitate the payment of redress to consumers asserting claims arising out of the mis-selling of financial products

The compulsory rearrangement of rights against a company is a long-established principle of English law. It is a useful tool, not just when a company is in financial difficulties, but also when there are other good commercial reasons for the rearrangement. In such circumstances, all that is required is that an appropriate majority (75 percent by value and 50 percent by number) of stakeholders regard the rearrangement as appropriate, and the court (applying the relevant legal test) is prepared to confirm that this is the case. Not all legal systems have such a process, but English law has long accepted that it is sometimes better for a class of members or creditors to have their strict legal entitlements restricted or varied against the wishes of some individual members of the class, so long as a sufficient number consider that it is in their interests for that to happen, and so long as the court is able to conclude that the rearrangement is fair.

In the case of a company's members the link to the Companies Act 2006 and its statutory predecessors is all relatively straightforward. Their respective rights, both *inter se* and as against the company, will in large part derive from the statutory contract to which they and the company are party. The compromise or arrangement is imposed on any dissenting minority under the authority of the statute, being the same statute that in many other respects governs the relevant relationship. It is no surprise to find that this statute also contains mechanisms for a compulsory variation of the terms of that relationship.

At first blush, it is more surprising to find that the same statute also contains provision for the rearrangement of rights which creditors have against their corporate debtor. There are historic reasons for this, but there is now little else in the Companies legislation which relates to those creditor rights; indeed those rights may derive from contracts or relationships which are wholly unrelated to matters of company law. Whether the liability is actual, contingent or future is neither here nor there, nor does the source of the liability matter. It can be derived from a contract, a statute or arise at common law. From at least the late 19th century (e.g. *Re Midland Coal, Coke and Iron Co* [1895] 1 Ch 267) it has been clear that the word creditor is used in the widest sense, including all persons having any pecuniary claim against the company. Indeed it is wider even than the category of claims which are capable of proof in a winding-up or administration, and so is capable of extending to creditors with non-provable claims in tort (*Re T&N Limited* [2006] 1 WLR 1728).

The consequence of this is that the courts have become accustomed to sanctioning schemes between a company and many different types of creditor. Of course, the jurisdiction is most often employed where the creditors are bank lenders or the holders of other debt instruments, such as debentures or loan notes. In this type of case the scheme is normally proposed because the company's future development is circumscribed by the terms of its existing financing arrangements. Rearrangement is required in order to enable it better to flourish or even survive.

However, the jurisdiction has also been used to rearrange many other types of creditor right, where the context is slightly different, e.g. claims of trade creditors, landlords, tort claimants, employees and insurance or reinsurance policyholders. In recent years, landlords have more often been affected by CVAs than they have by schemes of arrangement under the

A COMPANY MAY BE FACED WITH A SITUATION IN WHICH IT KNOWS OR SUSPECTS THAT THERE ARE CLAIMS OUT THERE, BUT THE EXTENT OF THOSE CLAIMS IS HIGHLY UNCERTAIN

Companies Act, but the rearrangement of the rights of tort claimants and employees was at the core of much of the T&N litigation while, until a recent change in policy from the FCA, many London market insurers and reinsurers used the jurisdiction to rearrange the rights of their policyholders.

Furthermore, in an appropriate case, the rearrangement of rights can extend not just to the relevant scheme creditors' rights against the scheme company, but also to their rights against third parties, so long as that rearrangement can still properly be described as part of an arrangement with the scheme company. A striking example of the innovative use of the scheme jurisdiction in this type of case was in *Re T&N Limited* (No 4) [2007] Bus LR 1411, where a scheme took effect so as to vary the rights which the Scheme companies' employees had not against the Scheme company itself (which were left unvaried by the scheme), but against its employers' liability insurers. In these types of case, the need for certainty is often the impetus behind the proposed scheme. In particular a company may be faced with a situation in which it knows or suspects that there are claims out there, but the extent of those claims is highly uncertain and the very fact of that uncertainty is acting as a break on the company's ability to plan for the future.

In this context, two recent cases have added a further category of creditor to the list, namely customers with actual or possible claims for the payment of financial redress arising out of the alleged mis-selling of insurance and other products regulated by the FCA. In *Re Card Protection Plan Limited* [2013] EWHC 3288 (Ch) and [2014] EWHC 114 (Ch), where the scheme meetings were convened by David Richards J, and the scheme itself was sanctioned by Proudman J, the scheme creditors were customers with claims arising out of their purchase of a card protection product and an identity protection product. These products were either sold by Card Protection Plan Ltd ("CPP") itself, or through the agency of a number of business partners, including high street banks and other well known financial institutions. CPP was vulnerable both to mis-selling claims from customers who had purchased one of the products and to ricochet claims by business partners if and to the extent that the business partners were themselves liable to pay redress to customers.

In *Re A I Scheme Limited* [2015] EWHC 1233, in relation to which Norris J both

Consumers whose claims do not exceed more than a few hundred pounds fall into a very different category from sophisticated financial institutions

convened the scheme meetings and sanctioned the scheme, the relevant customers were purchasers of a credit card security product sold by Affinion International Limited ("Affinion") under a number of brand names including Card Protection, Sentinel, Sentinel Gold, Sentinel Protection, Sentinel XL, and Safe and Secure Plus. This card security product was sold both directly by Affinion and with the assistance of business partners whose involvement in the sales was similar to the role played by the CPP business partners. The structure was such that customers might have had claims for redress against both Affinion and the business partners, and those entities themselves asserted the possibility of cross claims against each other arising out of the customers' claims for redress.

At the time it proposed its scheme, CPP had been subject to an FCA investigation following concerns regarding potential mis-selling of the relevant products. It was engaged in a past business review ("PBR") overseen by a skilled person appointed under s.166 of FSMA 2000 to contact and offer redress to customers who had suffered loss as a result of a relevant sale. In the case of Affinion, there was no such investigation or PBR on foot, but Affinion had identified the possibility that customers might make Consumer Credit Act or similar claims against it and/or the business partners arising out of the inclusion in the product of fraud insurance cover which customers probably did not need. It had therefore entered into discussions with the FCA on the steps to take to deal with these potential claims.

The concept behind each scheme was very simple. It provided a straightforward procedure for assessing whether customers were eligible for compensation, the level of which was set in all cases as the total amount paid by the customer in respect of the relevant product (plus 8 percent interest), less any payments made to the customer under the product (plus 8 percent interest). There is a longstop bar date by which all claims for redress must be made. By the time of that bar date all such claims are released, either by the occurrence of the bar date itself, or by the earlier making of a claim under the scheme. The release granted by each scheme extends to the business partners. There is a scheme administrator to administer each scheme, and customers have a right of appeal to a scheme adjudicator. The Financial Ombudsman continues to have a role, but only by deciding what any determination under the scheme should have been. This is possible because the FCA has given appropriate directions to ensure that the Ombudsman has to consider any complaint by reference to the terms of the scheme, rather than by applying the usual test of what is fair and reasonable in all the circumstances.

In each case the potential number of scheme creditors was huge. CPP had identified almost 7 million scheme creditors while, in the case of Affinion, there were almost 2 million potential claimants. These numbers, and the inherent uncertainty as to the time for which these liabilities might be hanging over the company (and their extent), was one of the commercial considerations behind the proposal of the scheme. But the desirability of introducing a more streamlined process for dealing with such an enormous number of potential claims was also a strong incentive for customers to vote in favour of the scheme.

The number of potential claimants, and their profile as retail consumers, obviously gave rise not just to significant logistical challenges, but also to the need to take real care in ensuring that they were given appropriate guidance as to what was going on. Consumers whose claims do not exceed more than a few hundred pounds fall into a very different category from sophisticated financial institutions. It was recognised from the outset that the court would need to have a high degree of assurance that the rearrangement of customer rights was both intrinsically fair and obviously capable of being in their own best interests.

This did not mean that the court was likely to apply a different legal test to the question of fairness. As with any other case, the creditors acting collectively are the best judges of their own interest (Re *English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, 409). However, the court was always likely to subject the terms of the scheme to a particularly rigorous analysis to ensure that the scheme taken as a whole was obviously something that a rational creditor could support. In carrying out that task, it was very important that both schemes were put together in close consultation with the FCA, one of whose core regulatory principles is that the firms it regulates are required to treat customers fairly. It was also important that the FCA did not simply confirm that it did not object to the scheme without further explanation of its position, an approach which it had adopted when commenting on many of the schemes promulgated by solvent insurers and reinsurers. Instead, in both cases, the FCA produced a lengthy and well-reasoned analysis of the terms of the proposed scheme, including an explanation of why all of the relevant provisions satisfied its own regulatory requirements, and concluded that in its view the scheme constituted an appropriate mechanism for providing redress.

The adoption of this approach by the FCA was welcome. Doubtless, it reflected a recognition that there were sound regulatory reasons for facilitating the scheme process, and it is clear that the court was much assisted both by the views of the FCA on the substance of the Schemes themselves and by the fact that the FCA had given careful consideration to the means by which the Scheme companies had communicated with Scheme creditors and the form of those

communications. One small illustration from the Affinion scheme reflects the type of issue which might arise in a consumer redress scheme, but which would never arise in a more conventional scheme between a company and its bank lenders. When notification of the proposed scheme was first given to customers on the Affinion database, a small number of customers intimated (some in quite forceful terms), that they wished to have no further communication in relation to the scheme. Sometimes this was because of a general irritation with credit card companies, but sometimes it was because of genuine emotional distress, for example arising out of the fact that the communication related to the affairs of a recently deceased customer. The solution was for the court to give a direction which, within tightly defined limits, released the scheme company from giving any further notifications to a specific category of identified customers.

In the case of Affinion, a special refinement was required. Affinion was not in a position to propose a scheme itself, because there was a material risk that, by taking such a step, an event of default would have been triggered under its New York law-governed financing agreements. A structure was therefore put in place under which a special purpose company (A I Scheme Limited) executed a deed poll under which it assumed joint and several liability to all of Affinion's Scheme creditors. It did so for the sole purpose of promoting the Scheme, including the grant of what then amounted to third party releases to Affinion and the business partners in respect of their own liabilities to the Scheme creditors. The ability to release Affinion and the business partners was achieved by application of the principles summarised by Patten LJ (at para 65) in *Re Lehman Brothers International (Europe)* [2010] Bus LR 489. Although obviously unusual, Norris J was satisfied that the scheme was still an arrangement for the purposes of the statute and that the structure was appropriate. As he put it, the structure was not created as a matter of "*mere artifice*", it had a "*solid grounding in commercial necessity*". I doubt that there will be many other cases in which the adoption of a similar structure is appropriate, because the test of commercial necessity will be quite difficult to satisfy. However, where it is satisfied, this aspect of the Affinion scheme sets a useful precedent.


WILLIAM TROWER QC

The overall lesson to be learnt is not just that the scheme jurisdiction continues to flourish. More specifically, the lesson is that the jurisdiction continues to be a flexible means of ensuring that the sensible rearrangement of creditor rights can always be achieved, against the wishes of a small dissenting minority and where there is a need to bind actual or potential creditors to a process for crystallising and accelerating the payment of their claims. Sometimes it is necessary, both in the interests of the company and the class as a whole, to require creditors to make their claim or lose their rights – in effect to put up or shut up. These two cases show how it can be done in a customer, regulatory context. So long as the jurisdiction is properly applied, there is no distinction in principle between the position of a few bank lenders each with a claim worth several million pounds, and the position of several million consumers each with a claim worth a few hundred pounds.

Lehman Brothers:
Waterfall II(A) and II(B) Decisions

In the matter of Lehman Brothers International (Europe) (In Administration) [2015] EWHC 2269 (Ch), David Richards J

Introduction

In the June 2015 edition of the Digest, Alexander Riddiford reported on the Court of Appeal judgment in the appeals against the decision of David Richard J: In re Lehman Brothers International (Europe) (in administration) [2015] EWCA Civ 485. Following on from this, on 31 July, Mr Justice David Richards handed down two judgments relating to the Lehman Brothers Waterfall II application, which address a number of important and novel points of insolvency law arising from the £7 billion surplus in the estate of Lehman Brothers International (Europe) ("LBIE"). Five silks and seven juniors from South Square, representing six different parties, appeared on the application.

Background

Following the discovery of a large surplus (estimated at over £7 billion) in the estate of Lehman Brothers International (Europe) ("LBIE") the administrators applied to the court for directions as to the payment waterfall. These have become known as the 'Waterfall' applications.

In his judgment in Waterfall I ([2015] Ch 1, largely affirmed at [2015] EWCA Civ 485) David Richards J had determined that the surplus should be applied first to pay interest under rule 2.88 of the Insolvency Rules 1986 ("statutory interest"), secondly to pay non-provable claims (including the "currency conversion claims" of creditors whose pre-administration debts were denominated in foreign currency and who had suffered a loss as a result of depreciation of sterling) and thirdly to pay subordinated debt.

The Waterfall II(A) Decision

The Waterfall II(A) judgment concerns the correct calculation of statutory interest and currency conversion claims. In summary, the judge held:

1/. Where the applicable rate of statutory interest is the rate specified in the Judgments Act 1838 ("judgment rate"), interest is payable on a simple basis.

2/. To calculate the daily rate of statutory interest at the judgment rate, the administrators should take the annual rate and divide it by 365, except where that year includes 29 February, in which case the correct divisor is 366, *Harrahill v Kennedy* [2013] IEHC 539 not followed. A year for these purposes commences on the anniversary of LBIE's administration, 15 September.

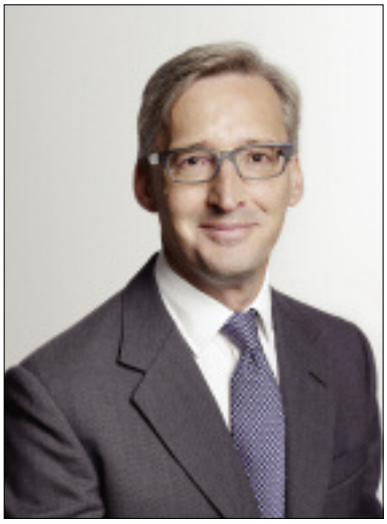
3/. When calculating statutory interest, dividends already paid to creditors are to be treated as having been paid to discharge principal first, then interest, *Bower* v *Marris* [1841] Cr&Ph 351 not followed. Rule 2.88 represents a complete code for the payment of post-administration leaving no non-provable claim for further interest, be it interest on interest or interest calculated according to the rule in *Bower* v *Marris*.

4/. The words "*the rate applicable to the debt apart from the administration*" in rule 2.88 refer not only to a numerical rate of interest, but also to the mode of calculation (ie, they can include compound interest).
5/. A foreign law judgment rate is not "*the rate applicable to the debt apart from the administration*" unless a relevant foreign judgment had already been obtained before the commencement of the administration.
6/. When establishing, under rule 2.88(9), "*whichever is the greater*" of the judgment rate and the rate applicable apart from the administration, the administrators must compare the total amounts of interest that would be payable, rather than the numerical rates themselves. Where a proved debt comprises two or more separate debts, with a contractual rate applicable to some but not to others, the composite debt should be disaggregated into its constituent parts and the appropriate rate of interest paid on each part.
7/. Statutory interest is payable on future debts and on the amount admitted to proof in respect of contingent debts from the date of the commencement of the administration.
8/. Calculation of currency conversion claims should not take into account the statutory interest paid to the relevant creditor.

The Waterfall II(B) Decision

The Waterfall II(B) judgment concerns the construction and effect of certain post administration contracts, specifically a Claim Resolution Agreement (the "CRA") and Claims Determination Deeds ("CDDs"). In particular, whether a creditor's rights to statutory interest, currency conversion claims or other non-provable claims have been released by those agreements and, if so, whether the administrators should be directed not to enforce such releases on the basis of the rule in *ex parte* James, Re Condon [1874] LR 9 Ch App 60, alternatively paragraph 74 of Schedule B1 to the Insolvency Act 1986. In summary, the judge held:
1/. As a matter of construction, neither the CRA nor any CDD has the effect of releasing in whole or in part claims to statutory interest under rule 2.88. All creditors, including signatories to the CRA or CDDs, are entitled to payment of statutory interest at the higher of the judgment act rate and the rate applicable to the debt apart from the administration.


ANTONY ZACAROLI QC


ROBIN DICKER QC


HENRY PHILLIPS


DANIEL BAYFIELD

2/. As a matter of construction, neither the CRA nor any CDD has the effect of releasing currency conversion claims.
3/. As a matter of construction, the CRA does not give rise to or create any currency conversion claims.
4/. If, as a matter of construction, the CRA or any of the CDDs had the effect of releasing currency conversion claims, the administrators would have been directed, under the rule in *ex parte James, Re Condon* [1874] LR 9 Ch App 60 and under paragraph 74 of Schedule B1 to the Insolvency Act 1986, not to enforce such releases.
South Square members involved in LBIE were Robin Dicker QC, William Trower QC, Antony Zacaroli QC, David Allison QC, Tom Smith QC, Daniel Bayfield, Richard Fisher, Stephen Robins, Adam Al-Attar, Henry Phillips and Alexander Riddiford.

Schemes - conferring jurisdiction by changing the governing law

The circumstances in which the English Court will find a "sufficient connection" for the purposes of the scheme jurisdiction have developed significantly, but the approach is based on sound foundations, writes Tom Smith QC

In recent years the circumstances in which it has become established that the English Court will accept jurisdiction to sanction a scheme of arrangement in respect of a company have expanded enormously. From its origins as a procedure used essentially for domestic (i.e. English incorporated) companies, schemes have successfully been promoted in an increasingly wide range of circumstances:

- Foreign companies with substantial assets in England[1].
- Foreign companies where the relevant liabilities were governed by English law and subject to English jurisdiction[2].
- Foreign companies where the relevant liabilities were governed by English law alone[3], but which have no other connections to the jurisdiction.
- Foreign companies where the liabilities are governed by foreign law but the centre of main interests (COMI) is in England (including where the COMI has been deliberately moved to England for the purposes of establishing scheme jurisdiction)[4].

Much of this development is centred around the increasing recognition that at its heart a creditor scheme of arrangement is a mechanism for compromising or restructuring *liabilities* (usually contractual in basis), and therefore what matters for the purposes of jurisdiction is not so much the characteristics of the *debtor company* (e.g. its place of incorporation) but the characteristics of the relevant *liabilities* themselves (e.g. governing law and jurisdiction). These considerations go hand in glove with the fact that the international effectiveness of schemes will usually be a critical consideration, and that one of the principal ways a scheme may achieve effect internationally stems from the fact that many jurisdictions will recognise a variation or amendment of liabilities effected in accordance with the law governing those liabilities.

Changing the Governing Law

Building on these principles, in the recent cases of *Apcoa*[5] and *DTEK Finance*[6] the companies sought successfully to found the jurisdiction of the Court to sanction the relevant scheme on the basis of a change of the law governing the liabilities from a foreign law to English law[7]. (In *Apcoa* jurisdiction was sought to be founded by reference to both the governing law and jurisdiction clauses in the relevant finance agreement, whereas in *DTEK* the company's primary case on jurisdiction was founded on the governing law provision alone.)

The facts of *DTEK Finance* are instructive. That case concerned a Netherlands incorporated finance vehicle which formed part of a Ukrainian energy group and which had issued Notes governed by a New York law indenture. At first blush, the

1/. The earliest example might be Re Heron International NV [1994] 1 BCLC 667.
2/. Re Rodenstock GmbH [2012] BCC 459.
3/. Re Vietnam Shipbuilding Industry Group [2014] 1 BCLC 400.
4/. Re Magyar Telecom BV [2015] 1 BCLC 418.
5/. Re Apcoa Parking UK Ltd [2014] BCC 538 and Re Apcoa Parking Holdings GmbH [2015] BCC 142.
6/. [2015] EWHC 1164 (Ch).
7/. This article does not address the further question, which may apply where one or more scheme creditors is domiciled in the EU, of whether the Court has jurisdiction over such scheme creditors for the purposes of the Judgments Regulation. That raises the question, not yet resolved, of whether a scheme is a measure where the creditors are "sued" so as to fall within Article 4 of the recast Judgments Regulation.

scope for an English law scheme of arrangement to effectively restructure the liabilities under the Notes might be thought to be limited. However, the terms of the note indenture permitted a change of governing law (by, arguably, a simple majority of noteholders). The company solicited such a change of governing law from New York law to English law, and the scheme was promulgated and sanctioned by the Court on the basis that the change of governing law was alone sufficient found to jurisdiction.

The logic underlying this approach is sound. As Hildyard J concluded in *Apcoa*, there is no reason in principle that English law should have any less status or effect as the governing law of liabilities where it results from a change of governing law as compared with the situation where it was the governing law from the outset. Accordingly, once it is accepted that English governing law is sufficient to found the jurisdiction of the Court to sanction a scheme in respect of those English law liabilities, it does not matter whether English law was the original governing law or whether it became the governing law as the result of a change. In either case, the fact that English law is the governing law has the same effect and consequences. All that matters in a case where there has been a change of governing law is that the change to English governing law was effective.

The Effectiveness of the Change

The question of whether the change to English law was effective may not, however, be straightforward on the facts of individual cases. Logically, the question of whether the change to English law was effective will be governed by the previous governing law, on the footing that such law will govern the effectiveness of amendments and variations made to the contract.

In *DTEK* itself, this meant that the question of whether the change of governing law to English law was effective was governed by New York law, being the original governing law of the note indenture. For the purposes of effecting the change, the company had relied on the provisions of the indenture which allowed changes to the indenture and the notes to be made by a simple majority of noteholders except in relation to certain specified amendments where a super majority of 90 per cent was required. The specified amendments requiring a 90 per cent majority did not include either changes to governing law or jurisdiction.

A dissenting creditor, Alden, however argued that the change in governing law fell foul of a different provision in the indenture (which derived from and reflected language contained in the US Trustee

THE RELEVANT LIABILITIES IN THE DTEK CASE AROSE UNDER NOTES GOVERNED BY A NEW YORK LAW INDENTURE

TOM SMITH QC

Indenture Act 1939 itself[8]) to the effect that the right of any noteholder to receive payment of principal or interest or to bring proceedings for the enforcement of such payment should not be "*impaired or affected*" without the consent of a 90 per cent majority of noteholders. The company, supported by its experts on New York law[9], argued that this provision was not engaged:

As a matter of construction of the indenture, amendments to the indenture and the notes were dealt by a specific provision, and that specific provision took precedence over the general provision relied on by Alden;

- In any case, a change of governing law did not "*impair or affect*" the payment rights of the noteholders or the ability to bring proceedings to enforce those rights;
- In any case, on a purposive approach, the purpose of the provision in the indenture relied on by the noteholders was to prohibit judicial scrutiny of debt re-adjustment plans, whereas in this case the change of governing law was made to facilitate a scheme which would be subject to judicial scrutiny by the English Court.

Alden's expert[10] took the contrary position. The Court would therefore have had to determine the point of New York law, on the basis of expert evidence, in order to determine whether the change to English law had been effective. In the event, it was spared this task, as immediately prior to the sanction hearing the 90 per cent threshold of consents to the amendment was passed. The point may, however, fall to be determined in any future scheme based on a change of governing law under a New York law indenture where the amendment has attracted the support of less than 90 per cent of noteholders.

Abusive Changes of Law

In the context of changing governing law, a question which may arise is whether a change of governing law is to be regarded as somehow "abusive" and therefore ineffective. Such questions might be relevant but they are, however, for the original law which governed the relevant liabilities. It is a matter for that law as to whether the change of governing law was effective. In most cases, this will be a question of whether, as a matter of construction of the relevant agreement, the amendment to the governing law was effective (e.g. as to whether or not the requisite majority was obtained). It might also involve consideration of whether there are other principles of law founded outside of the agreement which restrict or regulate the exercise of the power to amend. But, provided that

8/. Section 316(b) of the Trust Indenture Act 1939.
9/. Judge James Peck and Richard Levin, then of Cravath, Swaine & Moore LLP.
10/. Professor George Mann of Columbia University.

the change of governing law was effective in accordance with the governing law, then the Court should proceed on the basis that the liabilities are now governed by English law, in the same way as they would have been if English law had been specified as the governing law from the outset.

A "Step too Far"?

On this analysis, provided that a change to English law is effective in accordance with the original governing law, then the circumstances in which a Court would not sanction a scheme founded on such change should be limited. Once a change to English law is effective in accordance with the original governing law then, under usual principles, the Court will have *jurisdiction* to sanction a scheme in respect of those liabilities. The question is whether there might be any grounds on which it would decline to do so as a matter of *discretion*.

One example might be where it was not made clear to creditors who were asked to consent to the amendment to the governing law provision that the amendment was being sought for the purposes of then pursuing a scheme. There would seem to be a strong argument that this would amount to unfair treatment and arguably make it inappropriate for the court to sanction the scheme.

Apart from that, both Hildyard J in *Apcoa* and Rose J in *DTEK* applied a further test under the rubric "a step too far": "it *seems to me that the onus placed on the court in exercising its jurisdiction to make an order which will be given recognition elsewhere may well require it to be especially wary if, for example, the new choice is of a law which appears entirely alien to the parties' previous arrangements and/or with which the parties had no previous connection; or if the change in law has no discernible rationale or purpose other than to advantage those in favour at the expense of the dissentients; or even more generally, where in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought would be considered a "step too far"."*[11]

'schemes where jurisdiction is founded on a change of the law governing the liabilities to English law have a sound foundation in principle'

It appears that the relevance of these considerations is at the discretion stage of analysis, i.e. whether the court should exercise its discretion to sanction the scheme, rather than at the jurisdiction stage. But, in circumstances where the governing law has been effectively changed to English law, it must be questionable whether any of the considerations identified by Hildyard J would in fact ever be likely to be sufficient to cause the court not to sanction the scheme as a matter of discretion. In particular:

- Once the governing law has been changed to English law, then there is a compelling argument that an English law scheme is appropriate – and perhaps even essential – to effect a restructuring of the liabilities.
- If the change of the governing law is effective as a matter of the original governing law, then it is not clear why the English court should itself then apply any further tests directed at the questions of whether English law is alien or as to the purpose of the change of governing law or at similar questions.
- But, in any case, in most cases it is difficult see why English law would be alien (if a foreign law governed finance agreement includes provision to change the governing law, then it must be reasonable to assume that the parties would have contemplated that one of the likeliest candidates for the governing law to be changed to would be English law). Similarly, it is obviously no bar to the Court sanctioning a scheme based on a change of governing law that the change was made for the purpose of facilitating the scheme (and thereby allowing the majority to impose their will on the minority). This was the position in both *Apcoa* and *DTEK*.

Conclusion

In conclusion, schemes where the jurisdiction of the English court is founded on a change of the law governing the relevant liabilities from a foreign law to English law have a sound foundation in principle. In principle, the sole requirement should be that the change to English law is effective in accordance with the original governing law. That question itself may, however, raise complications, and it seems likely to be only a matter of time before the English court has to determine foreign law questions – presumably on the basis of cross-examination of experts – as to the effectiveness of a change of governing law to English law.

Tom Smith QC and Charlotte Cooke appeared for the scheme company in

11/. Re Apcoa at para. 251.

Case Digests

LLOYD TAMLYN

Two of the cases in the Corporate Insolvency section of this issue's Digest touch on the world of special administration orders (that is, orders made in respect of "investment banks", defined in section 232 of the Banking Act 2009, under the Investment Bank Special Administration (England and Wales) Regulations 2011). One objective of the special administration regime is "to ensure the return of client assets as soon as reasonably practicable". In practice ("practice" for these purposes typically encompassing the complex affairs of an investment bank whose records are in some disarray and a proportion of whose clients, for whatever reason, show little interest in responding to special administrator correspondence), before the administrators can return client assets they need to ascertain client claims against those assets: or in any event ensure that clients who have not established claims against the assets at the point of distribution are unable (successfully) to crawl from the woodwork and seek to upset the distribution, or to sue the special administrators for inaccurately distributing the trust assets.

Eliminating these risks means the imposition of a bar date on client claims: but whilst the Regulations give the special administrators power to impose a bar date, there is no power in respect of client assets subject to the FCA client money rules (the majority of special administration cases). These matters are discussed in *Worldspreads Limited*, in which an FCA modification of its client money rules did not avoid the need for a second court application authorising a distribution process. In *Hartmann Capital*, the Court confirmed that the "carve out" of insolvency proceedings from the Government's reforms of CFA agreements did not extend to the special administration regime.

In the field of personal insolvency, Mrs Justice Proudman has confirmed in *Oraki v Bramston* that a trustee in bankruptcy owes no common law duty of care to a bankrupt, albeit that one of the ingredients of justice found in the overriding objective (common humanity) dictated that a trustee should not ride roughshod over someone who should not have been made bankrupt in the first place, or whom it can be seen has assets greater than liabilities. *In Maud v Aabar Block SARL*, where a creditor's rights depended on the precise date of issue of an insolvency application, the stamp used by court staff at the counter of the Rolls Building came in for significant criticism.

Lloyd Tamlyn

BANKING AND FINANCE

Digested by TOBY BROWN


TOBY BROWN

Tesco Stores Ltd v MasterCard Inc [2015] EWHC 1145 (Ch) (Asplin J, 24 April 2015)

Interchange fees - competition law – summary judgment - ex turpi causa

The Tesco claimants brought a claim for damages against the MasterCard defendants for breach of European and domestic competition law in relation to MasterCard's imposition of multilateral interchange fees (MIFs) in the course of operating its credit card system. They claimed that the MIFs were the result of an anti-competitive agreement or decision of an association of undertakings such that Tesco was overcharged when the MIFs were passed onto it.

MasterCard argued that Tesco Bank, which was not one of the Tesco claimants, carries on its MasterCard business on the basis of the same MIFs, and that the claimants and Tesco Bank promoted the use of Tesco Bank MasterCards and half of the sums claimed relate to MIFs which were in fact paid to Tesco Bank. As such, MasterCard argued the claims were barred by the maxim *ex turpi causa* and therefore they were entitled to summary judgment or that the claim should be struck out. The application raised at least 4 issues for the Court – (i) whether the Tesco claimants and Tesco Bank were part of a single economic entity (ii) whether Tesco Bank was a party to the infringement of competition law (iii) whether the maxim of ex turpi causa applied and (iv) whether Tesco bears a significant responsibility for the infringement. Although in her judgment Asplin J addressed each of these issues, her broad conclusion was that the matter was not suitable to be dealt with by way of strike out or summary judgment. It was not appropriate to decide difficult questions of law at an interlocutory stage where the facts may determine how those legal issues present themselves and the legal issues required not only detailed argument but mature consideration. This was especially the case in a developing area of law such as the present. There was likely to be further evidence which would put the documents in a different light including evidence as to Tesco Bank's relationship with MasterCard and its responsibility for the alleged infringement which would be available to the trial judge after disclosure has taken place. Accordingly, the Court dismissed MasterCard's application.

Bank Mellat v HM Treasury [2015] EWHC 1258 (Comm) (Flaux J, 6 May 2015)

Counter-terrorism banking restrictions – human rights – reflective loss

In 2009, the Treasury made the Financial Restrictions (Iran) Order 2009 under the Counter-Terrorism Act 2008, which had the effect of shutting Bank Mellatt out of the UK financial sector. Following a hearing before a nine-judge Supreme Court, the majority held that the 2009 Order was unlawful and the Treasury failed to comply with the procedural requirements. Before the Commercial Court was a claim by the Bank for damages from the Treasury in particular for future loss of profit, estimated at some $4 billion. Flaux J had to decide three preliminary issues. Firstly, the Treasury argued that it was open to it to contend that it did not act in a way incompatible with a Convention right contrary to s. 6(1) of the Human Rights Act 1998, this being the Bank's cause of action for damages. This was rejected by Flaux J on the basis that it could not be clearer that Lord Sumption considered the 2009 Order unlawful because it was incompatible with Convention rights. Secondly, the Treasury argued that it could contend that the loss caused to the Bank by a diminution in the earnings before taxation generated by a subsidiary was irrecoverable (i.e. the rule against reflective loss). Flaux J decided that the Bank was the only direct victim of the unlawful 2009 Order and therefore the subsidiary could not have brought a claim against the Treasury under the Human Rights Act. The case law of the European Court of Human Rights recognised a general restriction equivalent to the rule against reflective loss, unless there were exceptional circumstances such as that the company could not bring a claim against the wrongdoer. Flaux J held that for the purposes of the Strasbourg jurisprudence there were exceptional circumstances because the subsidiary could not claim against the Treasury, and therefore the Bank was free to pursue its claim for diminution of the value of its shareholding in the subsidiary. Thirdly was a question of whether there was scope for limiting the damages recoverable by reference to what amounted to "possessions" within the meaning of Article 1 of the

first protocol to the Convention. The Judge considered that the Strasbourg case law showed that once unlawful interference with possessions was established, damages were recoverable for whatever loss and damage was suffered as a consequence including future loss of earnings whether or not that loss was itself a "possession". However, he considered that the recoverable damages would depend not on an artificial restriction that loss of future profits could not be a "possession", but rather on issues of causation which were not suitable for determination at the preliminary issue stage.

BNY Mellon Corporate Trustee Services Limited v LBG Capital No. 1 plc [2015] EWHC 1560 (Ch) (Sir Terence Etherton C, 3 June 2015)


JEREMY GOLDRING QC


STEPHEN ROBINS

Enhanced capital notes – redemption – interpretation

During the financial crisis, Lloyds Banking Group needed to improve its capital position. Through its subsidiaries it therefore issued £8.3 billion in bonds known as enhanced capital notes (ECNs), a new form of contingent CT1 capital.

£3.3m of ECNs remained outstanding on which nearly £1 million in interest was payable each day. BNY Mellon, Trustee of the ECNs, sought a declaration that the Issuers could not redeem the ECNs in advance of the contractual maturity dates. The Issuers, however, argued that the ECNs could be redeemed prior to their maturity dates because a capital disqualification event (CDE) had occurred. The trust deeds provided that a CDE would be deemed to occur "if as a result of any changes to the Regulatory Capital Requirements or any change in the interpretation or application thereof by the FSA, the ECNs shall cease to be taken into account in whole or in part (save where this is only as a result of any applicable limitation on the amount that may be so taken into account) for the purposes of any "stress test" applied by the FSA in respect of the Consolidated Core Tier 1 Ratio." The Issuers' position was that due to the changes in regulatory capital requirements in 2013 resulting in Lloyds having to increase its capital, the ECNs were "not taken into account" in the stress test carried out by the PRA in December 2014, and therefore a CDE had occurred. It was common ground they were not taken into account because Lloyds passed the stress test in view of the strength of its capital position without any need to take into account the ECNs.

The Chancellor rejected the Issuers' argument. The definition of a CDE was not looking at the particular strength of Lloyd's capital and the particular composition of its capital at any one moment of time in the context of a particular stress test then imposed by the regulator. Rather, the expression "shall cease to be taken into account" connoted a disallowance in principle of the ECNs on stress testing with continuing effect in the foreseeable future. The Issuers' alternative argument was that a CDE occurred whenever, as a result of changes in the regulatory capital requirements, the ECNs did not perform the purpose of providing regulatory capital so as to enable Lloyds to stay above the pass mark in a stress test. The Issuers contended such a situation had occurred because the effect of changes to the regulatory regime meant it was inevitable that the stress test would always be failed by Lloyds before the conversion trigger for ECNs could occur in the hypothetical stress scenario.

In rejecting these arguments, the Chancellor accepted the Trustee's observations that a stress test does not stop at the point at which it can be seen that the stress test is either passed or failed. The stress test reveals not only whether a bank is able to meet internationally agreed minimum standards but, if it fails to do so, the extent of the shortfall and the most appropriate remedial measures that the regulator ought to require to be taken. The Court held that the definition of a CDE was directed towards the possibility of a regulatory change which would preclude the ECNs any longer fulfilling their role as specified in the offering memorandum. Adapting the offering wording, the ECNs had not ceased to count as core tier 1 for the purposes of the regulator's stress tests when the stress projection shows below 5% core tier 1. The Chancellor accordingly declared that a CDE had not occurred. The Chancellor granted permission to appeal, not because he considered an appeal to have a real prospect of success, but because the matter was one of public importance. The Court of Appeal has expedited the appeal, which will be heard in late August.

[Jeremy Goldring QC; Stephen Robins]

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Petter v EMC Europe Ltd [2015] EWCA Civ 480 (Court of Appeal, 16 April 2015)

Case management orders – damages – expedited hearings

The Court of Appeal held that the Court below had been entitled to order an expedited trial of the issue as to whether a restrictive covenant provided by a contract of employment was enforceable. This was because: (a) the former employee in question needed to know with certainty and promptly whether he could lawfully continue in his new job; and (b) expedition would not prejudice the employer. The Court noted that a case management decision made by a Judge at first instance should be interfered with only in limited circumstances. The Judge would have had to have not merely preferred one imperfect solution over another imperfect solution, but to have applied an incorrect principle in reaching his determination of the point. The principle in this case was not in doubt. The discretion to expedite a trial had to be exercised while taking into account: (a) the overriding objective; (b) the available resources; and (c) the other Court users. The categories of cases that could be expedited were not closed and the reasons for expedition could be many and varied, but the four factors to be considered had been set out in *WL Gore & Associates GMBH v Geox Spa* [2008] EWCA Civ 622, namely: (a) good reason; (b) the level of interference with the administration of justice; (c) the prejudice to the other side; and (d) other special factors. In this case there was real urgency and pressing reasons for an expedited trial of the relevant issue and the Judge was entitled to decide that an expedited trial should be directed.

Hearst Holdings Inc v AVELA Inc [2015] EWCA Civ 470 (Court of Appeal, 23 April 2015)

Security for costs – stifling of appeals

The Court of Appeal held that it was just to make an order for security for costs against a US-based company (A) appealing against findings of trade mark offences. It had asserted that it was insolvent but this assertion was belied by the fact that A continued to trade and to litigate in the US; further A had not attempted to show that the security for costs order would stifle its appeal. The key question for the Court was whether the demand for A to pay security for costs would stifle A's appeal. A argued that it was unable to pay R's costs if ordered such that one or more of the conditions under CPR r.25.13(2) applied and it was unjust for a security for costs order to be made. However R argued that (for the reasons stated above) A's assertion of impecuniosity rang hollow. The Court of Appeal accepted R's argument and considered that A's ability to continue litigating implied that there were individuals behind it who were supporting it financially and there was no evidence that they could or would not assist in financing the appeal.

Actavis UK Ltd v Eli Lilly & Co [2015] EWCA Civ 666, (Court of Appeal, 30 June 2015)

Costs – issue-based costs orders

It fell to the Court of Appeal to determine the question of costs after its granting of an appeal in relation to a European patent for the use of a particular cancer treatment. It was held that X had indirectly infringed the designations of a patent held by L. The issue was then (a) what order should be made in relation to the costs of the trial and the appeal and (b) what should happen to an interim payment of some £1.8m that L had paid on account of the costs of the trial in the Court below. Although L had not won in every respect it was clear that L was the overall winner, on the basis that X had sought but failed to obtain declaration for clearance of its products. The starting point was therefore that L should recover its costs. However L had lost

on certain discrete issues, both on appeal and in the Court below (including the declarations of non-infringement issues). Accordingly it was held that L should pay X's costs of those issues on which L had lost, rather than simply having its own costs award reduced commensurately. It was relevant in this regard that the parties differed widely on the percentage of their costs expended on the relevant issues. Further, the interim payment order was varied downwards, on the basis that interim payments should be cautious particularly where (as in the present case) there was uncertainty as to the final outcome on costs.

Alpha Rocks Solicitors v Alade [2015] EWCA Civ 685 (Court of Appeal, 9 July 2015)

Abuse of process – striking out

The Court of Appeal held that the Judge below had wrongly struck out claims for payment of solicitors' fees on the basis that the solicitors had been guilty of abuse of process by relying on exaggerated claims and fabricated documents. In particular, the Judge had conducted an inappropriate mini-trial without hearing oral evidence, such that he could not properly have been satisfied that there was such serious misconduct on the part of the solicitor claimants that it was an affront to the Court to permit the claims to continue (*Masood v Zahoor* [2009] EWCA Civ 650, [2010] 1 W.L.R. 746 and *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 W.L.R. 2004 applied). In the early stages of a claim, the court should exercise caution in striking out the whole claim on the grounds that part had been improperly or fraudulently exaggerated. This was because of the draconian effect of doing so and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The emphasis should be on the availability of a fair trial. There was an analogy with the approach to relief from sanctions because of the emphasis on the need for litigation to be conducted efficiently and at proportionate cost (*Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926 considered).

COMMERCIAL CASES

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

BV Scheepswerf Damen Gorinchem v Marine Institute, The Celtic Explorer [2015] EWHC 1810 (Comm) (Flaux J, 24 June 2015)

Arbitration – shipping

A shipbuilder applied to set aside an arbitration award made in favour of a buyer under a shipbuilding agreement. The award had not been published until a year after the arbitration hearing had concluded, though neither the shipbuilder nor the buyer had pursued the matter in the meantime or complained about the delay. Although a delay in publishing an arbitral award was not in itself a ground of serious irregularity under section 68(2) of the Arbitration Act 1996, a delay of a year was capable of founding an application to have the award set aside. The party challenging the award did, however, still need to show that the irregularity had caused substantial injustice in that but for the delay, the arbitrator might have reached a decision in its favour. In the context of a lengthy delay, the Court might be more likely to check closely that the arbitrator had dealt with all the issues put before the arbitral tribunal. However, in this case the arbitrator had dealt with all the issues and that Court was not satisfied that, but for the delay, the Court would have reached a decision in the shipbuilder's favour.

Hellenic Petrolium Cyprus v Premier Maritime Ltd [2015] EWHC 1894 (Comm) (Flaux J, 1 July 2015)

Arbitration – shipping

A charterer had taken a vessel but denied that the arrangement constituted a time charter on the basis that it was of no defined duration. The owner maintained that the parties had agreed a two and a half year time charter, which included a London arbitration clause, and commenced arbitration proceedings for breach of the time charter. An award was made in favour of the owner.
The charter made an application to set aside the arbitration award. The arbitration award was set aside. The charterer had not expressly or by conduct accepted the proposed time charter which included the arbitration clause.

Maccaferri Ltd v Zurich Insurance Plc [2015] EWHC 1708 (Comm) (Knowles J, 19 June 2015)

Insurance – notification

In September 2011 a man sustained an eye injury at work when using a Spenax gun to attach wire caging together. He sued his employer and his employer then sought to claim against its insurer. The employer's insurance policy provided that "The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim." The employer was told of the claim in July 2013 and notified the insurer shortly thereafter. The insurer declined to provide an indemnity on the basis that the insured had not given notice as soon as possible after the accident, as required by the aforementioned clause.

It was held that the requirement that the insured notify the insurer as soon as possible after the occurrence of any event likely to give rise to a claim referred to an event with at least a 50% chance that a claim against the insured would eventuate. On the evidence, when the accident occurred, there had not been at least a 50 per cent chance that a claim against the insured would eventuate. The declaration sought by the employer, that the insurer was obliged to indemnify it, was therefore granted.

Barclays Bank Plc v McMillan [2015] EWHC 1596 (Comm) (Popplewell J, 9 June 2015)

Contract – loan – repayment

In October 2007, the Defendant became a partner in a US law firm. In June 2010, the Defendant signed an agreement with the Claimant bank for a partner capital subscription loan, in the sum of US$540,000. The sum was subsequently paid by the bank to the firm. In May 2012, the firm filed for bankruptcy. The bank issued proceedings against the Defendant seeking repayment of the loan (plus interest) on the ground that the agreement provided that the Defendant was personally liable to repay the loan and its recourse against the firm was merely collateral to that obligation.

The Defendant's position was that he was not personally obliged to repay the loan, alternatively his obligation was as guarantor and the firm's liability had been discharged by forbearance or agreement and/or due to non-disclosure. The Defendant also averred that the loan agreement was unenforceable as a sham, that he had never received the loan proceeds, that the bank had impliedly represented that at the time the loan agreement was entered into, there was no un-remedied event of default, which he said was untrue, and that the loan agreement had given rise to an unfair debtor-creditor relationship and should not be enforced pursuant to section 140B of the Consumer Credit Act 1974. He also averred that he had a counterclaim on the basis that the bank had breached its duty of care to advise him. The Court held that Defendant was personally liable to repay the loan and that it was not a sham; the agreement was understood and intended to be for the provision of a loan. The Defendant's argument that he had not received the money also failed as the agreement provided that the loan was to be drawn down by payment to the firm and that was what happened. As to the alleged misrepresentation, it was held that there had been no implied representation and in any event, there had been no un-remedied event of default. Further, the Court did not consider that the relationship was unfair or that the bank had owed a duty to advise the Defendant, so his counterclaim also failed.

COMPANY LAW

Digested by **GEORGINA PETERS**


TOM SMITH QC


GEORGINA PETERS

Sanko Holdings Co Ltd v Glencore Ltd [2015] EWHC 1031 (Ch) (Judge Simon Barker QC, 16 April 2015)

Japan – sale proceeds of vessel – Cross-Border Insolvency Regulations 2006 – company's undertaking

The dispute between the parties originated in the late delivery of a cargo of silicon manganese to New Orleans in 2012. The cargo was being transported on the MV Sanko Mineral, a ship owned by The Sanko Steamship Co, Ltd ("Sanko"), a Japanese company. Glencore originally pursued a claim in relation to this late delivery in the US courts, but shortly thereafter Sanko entered insolvency proceedings in Japan. Glencore therefore filed both secured and unsecured claims in the Japanese insolvency; these claims are currently the subject of proceedings before the Tokyo District Court. The Japanese insolvency proceedings were recognized under the Cross-Border Insolvency Regulations 2006 ("the CBIR") by an order of Mr Justice Newey dated 30 July 2012.

Following a claim by the Bank of Tokyo-Mitsubishi UFJ Limited ("the Bank"), which held a mortgage over the MV Sanko Mineral ("the Vessel"), the Vessel was arrested in England and sold pursuant to an order of the Admiralty Court. As a result of its secured claim, Glencore entered a caution against the release of the sale proceeds and applied for permission from the Companies Court to commence an *in rem* claim against the Vessel. Glencore took these steps to preserve the subject matter of its secured claim in the Japanese insolvency proceedings, pending the determination of that claim by the Tokyo District Court. Before the application to the Companies Court could be heard, Sanko applied to the Admiralty Court for Glencore's caution to be struck out and for payment out of the remaining sale proceeds (the bulk of the sum claimed by the Bank had already been paid out by consent).

Mr Justice Teare heard this application and struck out Glencore's caution on the ground that its cargo claim was contractually time-barred as a matter of English law; Glencore has been granted permission by the Court of Appeal to appeal against this finding. Mr Justice Teare declined to give a view on whether the contractual time bar affected Glencore's claims in the Japanese insolvency. Despite striking out Glencore's caution, Mr Justice Teare was unwilling to order payment out in circumstances where Glencore was pursuing a claim in the Japanese insolvency proceedings, which had themselves been recognized in England as foreign main proceedings under the CBIR, and where foreign representative of Sanko ("the Trustee") had applied for remission of the remaining sale proceeds to Japan under the CBIR. He therefore held that payment out would be subject to Sanko providing an undertaking that the funds would be held in a segregated US dollar account to the order of the Tokyo District Court or the further order of the Admiralty Court pending any subsequent decision of the Companies Court on the Trustee's remission application. Sanko has been granted permission to appeal against this part of Mr Justice Teare's judgment. Before the remission application came on, the Japanese insolvency proceedings were terminated. This led the Trustee, to apply under Article 17(4) to Schedule 1 of the CBIR for continued recognition as a foreign representative under the CBIR in order that he could fulfil his residual obligations. Glencore opposed this application, as there was no longer a foreign proceeding to recognize. Glencore maintained a consequence of dismissing the recognition application was that the Companies Court did not have jurisdiction to order remission under Article 21(2) of the CBIR, as there would no longer be a foreign representative.

The issues before the Companies Court therefore ultimately concerned the treatment of the remaining sale proceeds of the Vessel pending the determination of Glencore's claims in the Japanese insolvency.

HHJ Simon Barker QC accepted Glencore's submissions that under the CBIR it is only foreign proceedings that are recognized, not foreign representatives, whose status under the CBIR is entirely dependent upon the recognition of the foreign proceeding in which they are authorized to act. He therefore held that while Article 17(4) of Schedule 1 to the CBIR could support the construction argued for by Sanko, namely that recognition could be modified, even after termination of the underlying foreign proceedings, this was at odds with commercial common sense. Article 17(4) should therefore be construed such that if the foreign proceedings have ceased to exist, recognition should be terminated.

The Court also held that to hold the funds in England indefinitely could encourage delay. It therefore ordered that the funds in court should be paid out to the trustee unless Glencore were to provide: (i) a cross-undertaking in damages for any loss caused to Sanko by the retention of funds in court; (ii)

an undertaking to progress its insolvency claims before the Tokyo District Court with all due expedition; and (iii) an undertaking to issue an application in Japan within a specified time for an order that the funds be preserved pending the final determination of Glencore's insolvency claims. If Glencore were to provide these undertakings, then the funds would be held in a joint solicitors' account pending a decision of the Tokyo District Court on their preservation. This would provide "adequate protection" to Glencore as required by Article 21(2) to Schedule 1 of the CBIR.

[Tom Smith QC, Andrew Shaw]

Inderjit Singh Bhullar v (1) Jatinderjit Singh Bhullar (2) Bhullar Developments Ltd (3) Bhullar Bros Ltd [2015] EWHC 1943 (Ch) (Morgan J, 7 July 2015)

Breach of fiduciary duty – derivative claims – minority shareholders – permission – prospective

The Court granted permission to a minority shareholder to continue a double derivative claim asserting causes of action on behalf of two companies, against the first defendant company director, alleging dishonest payments and a property transfer by a director. The minority shareholder claimed that the two companies had made payments to another company wholly owned by the defendant director, and that one of the two companies had transferred a property to the defendant director at an undervalue. It was alleged that such payments and property transfer had been conducted without board approval, and in breach of fiduciary duty. The Court held, first, applying the decisions in *Foss v Harbottle* 67 E.R. 189 and *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, that the minority shareholder had made out a *prima facie* case of dishonest breach of duty in relation to the payments and the property transfer. Second, that to fall within the exception in *Foss v Harbottle* the claimant was required to demonstrate actual fraud on the minority, or that there was a benefit or profit to the wrongdoer. In relation to the payments, both a *prima facie* case of dishonesty and a clear benefit to defendant director's company had been established. As to the property transfer, there was a *prima facie* case of wrongdoer control by the first defendant, and an independent board of directors could have reasonably concluded, having regard to the size and strength of the claim, that it was appropriate to sue the director, and should not have declined to do so because of the management time involved or the disruption caused by litigation against a director.

The Court declined, however, to make a pre-emptive costs order for an indemnity out of the company's assets (*cf. Wallersteiner v Moir* (No. 2) [1975] QB 373), as it would give the minority shareholder a considerable advantage. The Court considered that considerable care should be exercised when deciding whether to make such an order, and should have a high degree of assurance that such an indemnity would be the proper order to make following a trial. One factor influencing the Court was that the derivative proceedings before it were a stepping stone towards a negotiation for a formal management split or unfair prejudice petition, such that both parties should be at risk as to costs.

Thomas v Dawson & Anor [2015] EWCA Civ 706 (Arden LJ, Ryder LJ, Briggs LJ, 9 July 2015)

Share purchases – share valuation – unfairly prejudicial conduct – Companies Act 2006, section 996

The Court of Appeal held that a court had discretion to grant an option to purchase a shareholding to a party for a significant sum, as relief on an unfair prejudice petition under the Companies Act 2006, section 996, despite valuation evidence showing that the company was balance sheet insolvent.

The case concerned a residential care home business, which was a quasi-partnership co-owned by the parties to the proceedings. The appellant and respondent each owned a single share in the company and were the only directors. The joint management of the company broke down after each director embarked on a series of unauthorized withdrawals from the company's bank account, resulting in court judgments against each director for recovery of those sums. An interim order was also made finding unfair prejudice under the Companies Act 2006, section 996, on the basis of the respondent's failure to allow the proper financial management of the company and to consent to the appellant receiving proper remuneration for his continuing managerial role. The order provided for the respondent's share to be purchased by the appellant for a price to be valued.

Valuation evidence subsequently produced failed to value the company or the share in question, causing the Judge to order that the appellant should be given the option of

purchasing the respondent's share for £55,000 (comprising the judgment sum owed by the respondent, and a figure representing the capitalization of a specified term of income also taken by the respondent from the company). Provision was also made for the appellant's payment to be made initially to the company and applied in discharge of the respondent's judgment debt to it, the balance being paid to the respondent.

The Court of Appeal upheld the Judge's decision. In particular, the Judge had been correct to attribute a significant positive value to the respondent's share in the company, and was entitled to take into account the value which its acquisition represented to the appellant in obtaining control, so as to be able to enforce the derivative judgment, whilst securing the non-enforcement of the larger derivative judgment against himself. The Court considered that it was entitled to infer from the appellant's vigorous pursuit of the appeal that he wished to obtain ownership and control of the company as something of real value to him. The Judge's solution to the difficult problem of remedy was well within the scope of the statutory discretion afforded to him under section 996.

There was no issue with attributing a capitalized sum for the respondent's former income stream as part of the price, since that income was derived from her shareholding, and would pass to the appellant upon the transfer of her share. The reasoning for regarding the respondent's judgment debt as an item of value appeared to be that access to that debt was directly attributable to the appellant's acquisition of the respondent's share. The Judge's solution could secure a clean break should the appellant choose to avail himself of it, such that he could not complain that conferring a mere option to purchase was unfair to him.

Re Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) (Snowden J, 22 July 2015)


DAVID ALLISON QC

Schemes of arrangement – foreign insolvent company – practice – jurisdiction

The Court considered an application to sanction six linked schemes of arrangement in respect of companies in the VGG group – five companies were registered in the Netherlands with their COMI in the Netherlands and one company was registered in Belgium with its COMI in Belgium.

The Court sanctioned the schemes. There are five points that should be highlighted in relation to the reasoning of the Judge.

First, the Judge stated that the Court, at the sanction hearing, should give detailed consideration to the question of international jurisdiction in cross-border schemes of arrangement, save in circumstances where the issue of jurisdiction had been fully addressed in the Practice Statement Letter and where the Judge at the convening hearing had given a reasoned decision on the issue.

Second, the Judge stated that, on the assumption that the recast Judgments Regulation applied to schemes of arrangement, a clause pursuant to which only the scheme companies submitted to the jurisdiction of the English courts would not fall within Article 25 so as to engage the jurisdiction of the Court.

Moreover, and in contrast to other decisions, the Judge questioned whether scheme proceedings constituted a "dispute" within the meaning of a jurisdiction clause.

Third, the Judge found that there would be jurisdiction under the recast Judgments Regulation in circumstances where one or more scheme creditors were domiciled in England, thereby engaging Article 8. The Judge relied on this provision to satisfy himself that the Court would have jurisdiction under the recast Judgments Regulation.

Fourth, the Judge stated that where a scheme is proposed as an alternative to formal insolvency proceedings, the explanatory statement and the evidence should provide a detailed treatment of the possible alternatives to the scheme and the predicted outcomes for the scheme creditors. It should be noted that the evidence placed before the Court was more detailed than in many schemes as it provided an estimated outcome for creditors in formal insolvency proceedings. Fifth, the Judge was uncertain in relation to the effectiveness of a standard form release provision in a scheme which was intended to operate to release a third party guarantor. The Judge's view was that this should be achieved by way of a separate deed of release. The scheme contained a power of amendment which was relied upon to achieve this situation.

[David Allison QC]

CORPORATE INSOLVENCY

Digested by ADAM AL-ATTAR

Re Hartmann Capital Ltd (in special administration) [2015] EWHC 1514 (Ch) (Newey J, 13 May 2015)


ADAM AL-ATTAR

Special administration

The joint administrators of Hartmann Capital Limited, a firm in special administration under the Investment Bank Special Administration Regulations 2011, sought a declaration which would establish in substance that they were entitled to take advantage of the funding regime which applied in relation to insolvency proceedings generally. The issue arose because the literal wording of the gateway to the funding exception under article 4 of the Legal Aid, Sentencing and Punishment of Offenders Order 2013 was not adequate to except special administration. It referred to "*proceedings brought by a company which has entered administration under Part II of the* [Insolvency Act 1986]".

The administrators had asked the court to adopt a purposive approach. The judge accepted that there could be no sensible reason for excluding the administrators of an investment bank, or administrators appointed pursuant to one of the other specific regimes, from the general exemption for which art 4 of the 2013 order provided regarding insolvency proceedings. He however held that it was not open to the court to achieve the result sought by the administrators as a matter of construction of the relevant regulations. The decision is the subject of an appeal.

[Adam Al-Attar]

Re Worldspreads Ltd (In Special Administration) [2015] EWHC 1719 (Ch) (Birss J, 19 June 2015)


GLEN DAVIS QC

Special administration

In the special administration of Worldspreads Limited, which had operated an online spread-betting trading platform, the judge followed the earlier decision of David Richards J in *In re MF Global Limited (in special administration*) [2013] 2 BCLC 426, which had fashioned a procedure for the distribution of client money by the administrator as agent of the firm as trustee of the client money trust. The essential feature of the client money distribution procedure, which has now been used in a number of cases and the use of which is anticipated in other cases, is that it enables a distribution of trust money on a set of factual assumptions. If the assumptions should later be proved incorrect, the administrator as agent is protected because the trustee itself is protected by distributing under the indemnity of an order of the court. The basis of relief is the inherent jurisdiction of the court, which has long been exercised in relation to estates and testamentary trusts to enable a distribution notwithstanding the 'known unknown' of a missing beneficiary.

Absent further reform by the FCA of its Client Assets sourcebook the adaptation of a *Re Benjamin* order to the modern context of a statutory trust is likely to remain a key practical component of the distribution of client money. **[Glen Davis QC]**

Astra Resources plc v Credit Veritas USA LLC [2015] EWHC 1830 (Ch) (David Richards J, 23 June 2015)

Winding-up petition – abuse of process – collateral purpose

The judge declined to enjoin the presentation of a winding-up petition for abuse of process, on the allege ground of a collateral purpose, because he held that the object of seeking to obtain control of the company by presentation of a winding-up petition as a precursor to a scheme of arrangement or other "*reorganisation plan*" by which control might be obtained, was not an improper purpose. Any such outcome achieved through the process of liquidation would only be achieved if properly proposed by a liquidator, approved by creditors and, as required, sanctioned by the court.

Tchenguiz v Grant Thornton UK LLP and others [2015] EWHC 1864 (Comm) (Mrs Justice Carr DBE, 1 July 2015)

Directive 2001/24/EC on reorganisation and winding-up of credit institutions – Article 1(2)(b) of the Lugano Convention

The Claimants sought to bring claims in England and Wales against the Defendants alleging a tortious conspiracy. One of the Defendants, Kaupthing Bank hf, was and is subject to insolvency proceedings in Iceland, and contended that by virtue of Directive 2001/24/EC on reorganisation and winding-up of credit institutions, and the English Credit Institutions (reorganisation and winding-up) Regulations 2004, a prohibition under Icelandic law against bringing proceedings against Kaupthing was effective in England. The contention succeeded, and the proceedings against Kaupthing were dismissed or stayed. Another Defendant, an Icelandic lawyer and member of Kaupthing's Resolution Committee and then Winding-Up Committee, applied (together with Kaupthing) for a stay or dismissal of the proceedings on the basis that they fell within the "bankruptcy exception" in Art 1(2)(b) of the Lugano Convention. That application was dismissed, on the basis that the tortious claims did not derive directly from the winding-up of Kaupthing, nor were they closely connected with them, the winding-up providing merely the context for the claims (paragraphs 140-158). The Judge reasoned (paragraph 156) that a claim brought against an Administrator (or the company in administration on the ground of vicarious liability) in respect of the sale of an asset of a company induced by a fraudulent misrepresentation of the administrator, would not fall within the bankruptcy exception: the claim is independent of the insolvency process, that process merely providing the context and occasion for the fraudulent misrepresentation.

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM

Gabriel v BPE Solicitors and another [2015] UKSC 39, [2015] 3 WLR 1 Mance, Sumption, Carnwath, Joulson, Hodge LLJ, 17 June 2015)


MATTHEW ABRAHAM

Trustee's Liability for costs of lower court hearings when adopting an appeal

An application was made by a trustee in bankruptcy to determine whether he would be liable for costs at previous stages of litigation in circumstances where he adopted the litigation for the purposes of an appeal.

The appeal that the trustee intended to adopt arose out of litigation between the bankrupt (G) and his solicitors in relation to a specific transaction. Both the Court of Appeal and the trial judge found that the solicitors had been negligent in their handling of the relevant transaction. The difference between the two Courts was that the trial judge awarded the full amount that G would have recovered under the transaction whereas the Court of Appeal awarded nominal damages. As a result the trial judge awarded G his costs for the trial; however this was reversed by the Court of Appeal resulting in G facing a cost order of £469,170.60. Following the order of the Court of Appeal, G was declared bankrupt and the trustee was appointed. The effect was that the right to pursue the appeal against the decision of the Court of Appeal vested in the trustee.

The ordinary rule is that a trustee in bankruptcy is treated as party to any legal proceedings which he commences or adopts, and is personally liable for any costs which may be awarded to the other side, subject to a right of indemnity against the insolvent estate to the full extent of the assets. This was accepted by the trustee in relation to the costs relating to any appeal going forward. The issue that arose for determination was whether, if the appeal failed, the trustee would also be liable for the costs ordered by the Court of Appeal. Lord Sumption, with whom the other JSCs agreed, declared that in the event that the trustee were to adopt the appeal to the Supreme Court, he would not be held personally liable for any costs incurred by G up to and including the order of the Court of Appeal by virtue only of the fact of his office as trustee of G or of his adoption of the appeal: see §19. In a case where the proceedings below had been conducted to their conclusion before the bankruptcy, by the bankrupt himself, to order the trustee to pay the costs below personally would in effect enable the respondent to obtain an unwarranted priority for its claim under the Court of Appeal's costs order.

In coming to his decision Lord Sumption held that the decision in *Borneman v Wilson* (1884) 28 Ch. D. 53, in which the Court of Appeal extended the personal liability of the trustee to cover costs incurred by the other side before his adoption of the proceedings, was no longer good law.

Glenn Maud v (1) Aabar Block SARL (2) Edgeworth Capital (Luxembourg) SARL [2015] EWHC 1626 (Rose J, 8 June 2015)


WILLIAM WILLSON


MARK PHILLIPS QC

Setting aside of a statutory demand

The Applicant sought to set aside a statutory demand served on him by the Respondents in relation to a judgment debt. The Applicant sought to set aside the statutory demand on two grounds. The first was under r 6.5(4)(b) Insolvency Rules 1986 on the basis that the debt had already been satisfied in full by a party that was jointly and severally liable for the original debts which were the subject of the judgment. The second was under r.6.5(4)(d) Insolvency Rules 1986 on the basis that the demand had been issued for a collateral purpose and so was an abuse of process. In relation to the first ground, Rose J held that there was no substantial dispute about whether the judgment debt was due because it was not arguable that the debt had been paid already.
As for the second ground, Rose J found that (1) there was insufficient material to show that the demand was an abuse of process and (2) that there were other grounds to satisfy the court to set aside the statutory demand. In coming to her decision her Ladyship reviewed the case law on collateral purpose. In particular, reference was made to the recent Privy Council decision in *Ebbvale Ltd v Hosking* [2013] UKPC 1. Her Ladyship held, at §29, that that the pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed will amount to an abuse in two situations: (1) where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take; and (2) where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors. Rose J also held that the jurisdiction to dismiss a petition based on an undisputed debt on the grounds of collateral purpose must be exercised sparingly. Bankruptcy proceedings cannot be allowed to become the forum for a detailed investigation into past and present relationships or an exploration of what the petitioner hopes to gain from the insolvency of the company or individual, in financial or personal terms or a consideration of whether those hopes are legitimate or not. **[Mark Phillips QC; William Willson]**

Glenn Maud v Libyan Investment Authority [2015] EWHC 1625 (Rose J, 8 June 2015)

Extension of time to set aside statutory demand – rule 6.5(4)(d) Insolvency Rules 1986

Mr Maud applied, 5 months out of time, to set aside a statutory demand served on him by the Libyan Investment Authority on the basis that payment of the guarantee liability which formed the basis of the demand would constitute a breach of the sanctions regime in place against Libya. Rose J held that time should be extended on the ground of the public interest in ensuring the sanctions regime is observed; and further held that payment of the guarantee liability would breach the regime. The statutory demand was therefore set aside under rule 6.5(4)(d) Insolvency Rules 1986, which gave the Court a residual discretion to set aside a demand where "satisfied on other grounds that the demand ought to be set aside." **[Adam Al-Attar]**

Glenn Maud v (1) Aabar Block SARL (2) Edgeworth Capital (Luxembourg) SARL [2015] EWHC 2093 Glenn Maud v Libyan Investment Authority (Rose J, 15 June 2015)

Time of issue of an application to set aside a statutory demand under rule 6.4 Insolvency Rules 1986

The issue resulted from the two judgments immediately above. The Libyan Investment Authority had presented a bankruptcy petition against Mr Maud, but the statutory demand which preceded the petition was set aside on the basis that payment of the sum demanded would breach the Libyan sanctions regime. Mr Maud's attempt to set aside a statutory demand served on him by Aabar Block SARL and another failed. The court was required to determine whether Aabar Block SARL was entitled to be substituted as petitioner on a bankruptcy petition issued in relation to the debtor by the Libyan Investment Authority.
A statutory demand was served on the debtor by the creditor seeking substitution on 13 June 2014. It was common ground that under the r.6.4(1) Insolvency Rules 1986 the 18-day period in which the debtor could apply

to set aside that demand expired on 1 July 2014. The debtor by his solicitors provided the Court office with four copies of an application to set the statutory demand aside on 1 July 2014. Three copies were date-stamped 1 July, one of which was immediately handed back to the debtor's solicitors.
On 2 July 2014, by way of a paper review a bankruptcy registrar decided that the application to set aside the statutory demand should not be dismissed summarily. The registrar wrote his time estimate for the hearing of the applications and initialled them. The applications where then date-stamped 4 July 2014 and sent to the parties. The date of issue on the court's computer record was 1 July 2014 although the copy of the application that was sent to the creditor seeking substitution was stamped 4 July 2014. As a result of the 4 July stamp, the substituting creditor argued that the debtor's application had been issued out of time. The decision of *Andrews v Bohm* [2005] EWHC 3520 (Ch) was considered by the Court and Rose J held that, on the evidence, the debtor had applied to set aside the statutory demand on 1 July as opposed to 4 July when the application was stamped. The relevant date was the date of issue and this was before the review by the bankruptcy registrar. As a result the creditor seeking substitution was denied substitution. Rose J also stated, in obiter, that the date-stamp used by the court office was not appropriate to signify that an application had been issued. The stamp was more suited to receipt of correspondence. **[Mark Phillips QC, William Willson, Adam Al-Attar]**

(1) Sheida Oraki (2) Ardeshir Oraki v (1) Timothy Bramston (2) Ian Defty [2015] EWHC 2046 (Ch) (Proudman J, 15 July 2015)


JOHN BRIGGS

Professional negligence - duty of Trustee in bankruptcy to bankrupt

The claimants were made bankrupt (on 10 January 2006 and 1 September 2005 respectively) on petitions based on a judgment debt relating to costs of a firm of solicitors. The Claimants received their discharge a year after their respective bankruptcies but continued to challenge the fact that they had been made bankrupt. Following a decision by Mr Robert Ham QC sitting as a deputy judge of the High Court the claimants had their bankruptcies annulled, subject to three conditions, on the ground that they ought not to have been made. One of the conditions of the order was that the claimants should pay the costs and expenses of the bankruptcies. The conditions were not satisfied as the claimants challenged the Trustee's costs and expenses. The action before the Court related to allegations by the Claimants that the Trustee failed in his duty to them in that he carried out his role improperly. In particular, it was alleged that the Trustee mismanaged the bankruptcy estates thereby causing loss and damage to the claimants. The Court in addition to the duty under s.304 Insolvency Act 1986 also had to consider whether a trustee owes any duty at common law to a bankrupt.
Proudman J held, at §34, that there is no common law duty in negligence owed to a bankrupt outside the duty set out in statute. The Trustee owes a statutory duty to the bankrupt in circumstances where the estate proves to be solvent. As to the claims raised by the claimants pursuant to section 304, Proudman J found against them and so dismissed their claim. **[John Briggs]**

PROPERTY & TRUSTS

Digested by ANDREW SHAW

Bellis v Challinor [2015] EWCA Civ 59 (Moore-Bick LJ, Underhill LJ and Briggs LJ, 5 February 2015)


ANDREW SHAW

Resulting trusts – unjust enrichment

This appeal concerned the status of monies paid into the appellant solicitors' ("the Firm") client account made by the Respondents, a group of 21 prospective investors ("the Investors"). These monies had been paid out by the Firm to the Royal Bank of Scotland to reduce the short-term borrowing of a client of the Firm, Albemarle Fairoaks Ltd ("AFL"). AFL was an "off-the-shelf" company which was used as a vehicle for a property investment scheme. This scheme failed and AFL was placed in administration, with little prospect of any distribution to its creditors, among whom were the Investors. The Investors thus looked elsewhere for recompense and issued proceedings against the Firm. The basis of these proceedings was that the monies paid into the Firm's client account by the Investors were only to be paid to AFL on satisfaction of certain conditions, which, in the event, were not met. It should therefore have been held on resulting trust for the Investors. In the alternative, the Investors maintained that the monies were held on resulting trust for them because AFL had neither authorised

borrowing from the Investors nor authorised the Firm to act as its agent. In the further alternative, the Investors asserted a restitutionary claim upon the alternative bases of payment by mistake and failure of consideration.

At first instance, Hildyard J gave judgment for the Investors. He rejected the Investors' allegation that the monies were held on *Quistclose* trust, but accepted that they had been held on an analogous implied resulting trust. Hildyard J also upheld the Investors' claim that the monies were held on resulting trust as the Firm had received the monies without authority from AFL. No finding was made on the restitutionary claim, although the judge indicated that he was sympathetic to it. On appeal, the existence of any *Quistclose* trust, either express or implied, was rejected. Briggs LJ held that since none of the Investors had set out the basis on which it had paid the monies to the Firm orally or in writing, this could only be determined by "*an intense focus upon the terms of the invitation to which* [the Investors] *responded by making those payments, set in its proper context*." Having carried out this exercise, he concluded that the Investors had made payments into the Firm's client account as immediate loans to AFL and on the understanding that the payment of the loaned monies into the Firm's client account was at the direction of AFL. Accordingly, the Firm held the monies on trust for AFL. Briggs LJ emphasised that he did not disagree with Hildyard J's findings in relation to primary facts, although he did differ on the inferences to be drawn from those facts.

The Investors' alternative case was that the monies were held on resulting trust for them by the Firm. This argument was based upon the fact that the engagement letter was signed by a Mr Cummings, who only became the beneficial owner of AFL's shares after the date of the engagement letter, and the engagement letter was not subsequently ratified by AFL.

Briggs LJ rejected this analysis. He held that the intention of the Investors was that the loan monies should belong beneficially to AFL, and it was common ground that at the time of the payments the Firm had become AFL's solicitors for the purpose of handling the acquisition of land, which the loan monies from the Investors indirectly funded. In these circumstances, he considered that payment to AFL by way of the Firm's client account was sufficient to transfer the beneficial title in the loan monies to AFL.

In dealing with the Investors' restitutionary claim, Briggs LJ held that the Firm had not been unjustly enriched because from the moment it had received the payments from the Investors in its client account it had held them on trust for AFL. He also considered that the Firm would have had a change of position defence; this had been rejected by Hildyard J on the ground that the Firms' disbursement of the monies without sufficient certainty as to the basis on which they had been received from the Investors, or as to the Firm's authority to receive the monies, was commercially unacceptable. Briggs LJ disagreed, holding that the payment of the loan monies to the Royal Bank of Scotland by the Firm on behalf of AFL was not commercially unacceptable so as to vitiate a change of position defence because the Firm owed no duties or responsibilities to the Investors. Underhill and Moore-Bick LJJ agreed with Briggs LJ and the Firm's appeal was allowed.

TBAC Investments Ltd v Valmar Works Ltd [2015] EWHC 1213 (Ch) (Keith Prosser QC (sitting as a deputy judge of the High Court), 1 May 2015)

Validity of notices – receivers – summary judgment

TBAC Investments Ltd ("TBAC") acquired the freehold to certain commercial premises (together, "the Property") from Valmar Works Ltd ("Valmar"). The acquisition was funded by a loan from Zurich Bank ("the Bank") secured by a legal mortgage over the Property. TBAC subsequently defaulted on the loan and the Bank appointed Mr Pick and Mr Thomas as receivers over the Property ("the Receivers").

Following the appointment of the Receivers, a contract for the sale of the Property was entered into between TBAC, as seller, Valmar, as purchaser, and the Receivers ("the Sale Contract"). Mr Pick executed the Sale Contract on behalf of the Receivers and also on behalf of TBAC. A clause in the Sale Contract stipulated that in selling the Property, TBAC would be "*acting by the Receivers*". The Sale Contract also stipulated that at any time on or after the defined completion date, any party "*ready, able and willing to complete*" could give notice of that fact to the other party. If completion did not occur within 10 working days of the giving of such a notice, then TBAC could rescind the Sale Contract and keep any deposit. The Sale Contract did not complete on the defined date, which was 15 March 2013, and three days later TBAC's solicitors served a document on Valmar and its solicitors headed "Notice to Complete" ("the Notice") and which purported to give notice that if the sale of the Property did not complete within 10 working days then

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Valmar did not complete the Sale Contract by the stipulated date and consequently TBAC rescinded the Sale Contract and arranged a sale to another party. The completion of this latter sale was thwarted by the entry of unilateral notices against the Property by Valmar, which disputed the validity of the Notice. TBAC then applied for a declaration that the Sale Contract had been rescinded, for the cancellation of the unilateral notices entered by Valmar and for an injunction preventing Valmar entering any other restrictions with the Land Registry in relation to the Property. Valmar counterclaimed for specific performance of the Sale Contract.
The facts were not in dispute between the parties and TBAC sought summary judgment. Valmar resisted this on four grounds:
1/. The Notice was not signed, thus indicating that it was only a draft and so never intended to take effect.
2/. The Notice was not given by Mr Pick, and since the relevant party to the Sale Contract was TBAC, "*acting by the Receivers*" and did not specifically included the Receivers' successors-in-title, the Notice was not valid.
3/. The Notice contained a number of errors which meant it was confusing to the recipient and was therefore invalid.
4/. The completion date in the Notice was erroneously given as 1 April 2012, and so the Notice was confusing to its recipient and thus invalid.
The judge held that if the Notice were construed in a manner consistent with business common sense then its meaning and effect would have been clear to a reasonable recipient. He further held that the party to the Sale Contract who could give notice to complete was TBAC and that phrase, "*acting by the Receivers*" was simply a description of the Receivers function as agents and should not be construed as words of limitation that prevented TBAC from acting directly. Even if TBAC were compelled to act by the Receivers, the term "*Receivers*" in the Sale Contract included their successors-in-title and allowed actions to be carried out by any one Receiver. Accordingly, the Judge rejected each of these assertions, entered judgment for TBAC and dismissed the counterclaim.

SPORT

Digested by **ROBERT AMEY**

Re CJSC Football Club Dynamo Moscow (UEFA Club Financial Control Body, Adjudicatory Chamber, 19 June 2015)


ROBERT AMEY

UEFA Club Licensing and Financial Fair Play Regulations – break-even requirement

Since 2011, the UEFA Club Licensing and Financial Fair Play ("CL&FFP") Regulations have obliged clubs qualifying for UEFA competitions to prove that they do not have overdue payables towards other clubs, their players and social/tax authorities throughout the season. Since 2013, clubs have also been assessed against break-even requirements, which require clubs to balance their spending with their revenues and restrict clubs from accumulating debt.
Dynamo Moscow was referred to the CFCB Adjudicatory Chamber in April 2015 following an investigation by the UEFA Club Financial Control Body. The Investigatory Chamber had discovered a considerable break-even deficit amounting to more than €13 million for 2012 and €23 million for 2013. The investigation had examined the close relationship between the club and JSC VTB Bank, the main shareholder in and principal sponsor of the club, and after adjusting the VTB sponsorship deal to its fair value, determined that the club

had a break-even deficit. As a result, UEFA determined to withhold the revenue obtained by the club in European club competitions for the 2014/15 season. Unusually, the club did not settle the dispute with the Investigatory Chamber, and the dispute proceeded to the Adjudicatory Chamber.

In the Adjudicatory Chamber, the club sought to justify its default on the basis that (1) the Russian television market generates less revenue than comparable television markets in other European states, thereby creating an economic disadvantage for the Russian clubs; (2) the Russian league imposes restrictions on foreign players; and (3) the situation had been exacerbated by exchange rate fluctuations.

The Adjudicatory Chamber rejected the club's explanation, holding that (1) although the Russian television market provided low revenues, this was not a proper excuse; (2) restrictions on foreign players are not unique to Russia and cannot justify overspending; and (3) although the impact of exchange rate fluctuations are a relevant consideration to take into account, the effect in the present case was negligible when compared against the scale of the club's default.

The club then sought to argue that its plans would allow it to fulfil the break-even requirement in the future. The club argued that its new stadium would allow it to generate more revenue, that it could raise cash from a share issue and new sponsorship and retail opportunities, and that new internal guidelines including a salary cap and increased reliance on recruitment from the youth team rather than external player purchases would ameliorate the position. The Adjudicatory Chamber was not persuaded by this, holding that the club's proposals were "*vague in substance and its projections … overly optimistic*".

Imposing a ban from the next UEFA club competition for which the club would otherwise qualify in the next four seasons, the Adjudicatory Chamber noted that the objectives of the FFP Regulations included encouraging clubs to operate on the basis of their own revenues (ensuring the protection of the long-term viability and sustainability of European football) and the principle that all clubs competing in UEFA's club competitions must be treated equally.

Although the sanction was a harsh one, the Adjudicatory Chamber noted that it was "*the only appropriate measure*" in view of the club's serious default.

THE HOME OF DYNAMO MOSCOW FROM 1928 TO 2011, THE HISTORIC DYNAMO STADIUM IN PETROVSKY PARK, CLOSED AND DEMOLISHED IN 2011 TO MAKE WAY FOR THE VTB ARENA DUE FOR COMPLETION IN 2016.

Ex Turpi Causa

so where are we after Bilta?

David Alexander QC and **Marcus Haywood** review where the defence of *ex turpi causa* lies following the Supreme Court's recent decision in *Jetivia SA v Bilta*

On 14 and 15 October 2014 the Supreme Court (comprising Lord Neuberger, President, and Lords Mance, Clarke, Sumption, Carnwath, Toulson and Hodge) heard the case of *Jetivia SA v Bilta (UK) Limited (in liquidation)*. The case related to the principle or rule of public policy known as *ex turpi causa non oritur actio* (a Latin tag meaning "from a dishonourable cause an action does not arise") or, putting it another way, the so-called illegality defence. Judgment [2015] UKSC 23 was given some six months later on 22 April 2015 and comprised four separate judgments: one from Lord Neuberger (with whom Lords Clarke and Carnwath agreed), one from Lord Mance, one from Lord Sumption and a combined judgment from Lords Toulson and Hodge. The judgments run to 215 paragraphs spread over 88 pages.

As explained in further detail below, the Supreme Court was unanimous in its decision to dismiss the appeal holding that the illegality defence could not bar Bilta's claims on the basis that the conduct of the directors could not be attributed to the company. However, there was disagreement between members of the Supreme Court (in particular, Lord Sumption on the one hand and Lords Toulson and Hodge on the other) as to the proper approach to the illegality defence. This article reviews where we are now in relation to this contentious defence.

Background

The *ex turpi causa* defence is of considerable antiquity. One old case that is often cited in support of the principle took place in 1725 (when George I was on the throne). John Everet of the Parish of St James' in Clerkenwell and Joseph Williams went into partnership. Their business was that of being highwaymen, something they appear to have practised in places like Hounslow Heath, Finchley, Blackheath, Bagshot, Salisbuy and Hampstead, removing watches, rings, swords, canes, horses, bridles, saddles and other things from their owners. Perhaps inevitably, Everet and Williams fell out, there being no honour amongst thieves. Everet thought his partner had been getting too much of the profit from their partnership. Somewhat astonishingly Everet presented a bill in equity at the Court of the Exchequer. He claimed discovery, an account and general relief from Williams. The case was dismissed as scandalous and impertinent. The solicitors were arrested and fined £50 each for contempt in bringing such a case before the court (and were committed to the Fleet prison until payment). Williams was arrested and tried. He was hanged at Maidstone in 1727. Everet fared little better. He was hanged at Tyburn in 1730. Finally, one of the solicitors involved in the action, Wreathock, was convicted of robbery in 1735 and sentenced to hang, but his sentence was commuted and he was transported Australia.

Whilst the defence of *ex turpi causa* is an old one, one often-used starting point in relation to it in modern discussions is Lord Mansfield CJ's statement in *Holman v Johnson* (1775) 1 Cowp 341 at 343: "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act". Whilst this is what Lord Sumption described in *Bilta* as an "apparently simple

IN 1725 THE *EX TURPI CAUSA* DEFENCE PREVENTED ONE HIGHWAYMAN FROM SUING ANOTHER

proposition", he went on to say that over the course of the two centuries which followed *Holman v Johnson* this rule of public policy became "encrusted with an incoherent mass of inconsistent authority" mainly because judges decided each case in its own factual and legal context without regard for a broader legal principle.

The late twentieth and early twenty-first centuries have seen a search for such a broader legal principle. We describe some of the key cases below.

Euro-Diam v Bathurst

In 1987 the illegality defence came to be considered by the Court of Appeal (Kerr and Russell LJJ and Sir Denys Buckley) in *Euro-Diam v Bathurst* [1990] 1 QB 1. The Court of Appeal, in the words of Lord Sumption in *Bilta*, treated "the whole body of authority as illustrative of a process which was essentially discretionary in nature". Kerr LJ (who gave the only reasoned judgment) stated that the test was whether "in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts". He also said that this was something which should be approached "pragmatically and with caution, depending on the circumstances". The test thus became essentially a discretionary one.

Tinsley v Milligan

The illegality subject then came to be considered by the House of Lords (Lords Keith, Goff, Jauncey, Lowry and Browne-Wilkinson) in *Tinsley v Milligan* [1994] AC 340. Stella Ruth Tinsley and Kathleen Milligan were, to use the judge's expression, "lovers". They bought a house in Miss Tinsley's sole name using funds generated by a business they ran together running lodging houses. However their understanding was that the property was jointly owned. The purpose of this arrangement was to defraud the Department of Social Security. Over the years that followed Miss Milligan, with Miss Tinsley's help, made false benefit claims. Miss Tinsley also made her

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own false claims. Miss Milligan later confessed her frauds to the DSS. A quarrel broke out between Miss Tinsley and Miss Milligan. Miss Tinsley gave Miss Milligan notice to quit and brought proceedings claiming sole ownership of the house. Miss Milligan counterclaimed for a declaration that the house was held jointly. The judge dismissed Miss Tinsley's claim and allowed Miss Milligan's counterclaim. The Court of Appeal dismissed the appeal on the basis that in the circumstances the public conscience would not be affronted (i.e on the basis of the *Euro-Diam* public conscience test). The House of Lords rejected the *Euro-Diam* test. Their Lordships determined that the illegality defence was based on a rule of law and was not discretionary. Nevertheless, a majority of their Lordships determined that Miss Milligan was entitled to the interest that she claimed because she did not need to rely on any illegality to make her claim. So the test effectively became one of whether the plaintiff/claimant needed to rely on an illegality in order to succeed in his or her cause of action. If so, then the *ex turpi causa* principle applied. If not, it did not.

Stone & Rolls v Moore Stephens

Next came the well-known decision in *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] 1 AC 1391. The Claimant was an English company. It was owned and managed by Mr Zvonko Stojevic, a Croation national, who was its sole directing mind and will. The company employed the defendant as its auditors. After the company had been placed into liquidation, proceedings were brought on its behalf against the auditors for US $174 million. The allegation was that the auditors had been negligent in failing to detect Mr Stojevic's dishonest activities in procuring the company to engage in frauds on banks, particularly one Czech bank. Needless to say, Mr Stojevic benefitted from a large proportion of the funds channelled through the company. Against this background, the auditors applied for summary judgment or for the claim to be struck out.

The judge (Langley J) held that the state of mind of Mr Stojevic was to be attributed to the company. However he went on to find for the company on the basis that the auditors were not allowed to rely on the *ex turpi causa* principle because detection of fraud was the very thing they were engaged to undertake. The Court of Appeal (Mummery, Keene and Rimer LJJ) decided that, since the company was to be attributed with responsibility for the fraudulent activities, the

auditors could rely on the principle of *ex turpi causa*. The appeal was therefore allowed and the claim struck out. The House of Lords (Lords Phillips, Scott, Walker, Brown and Mance), in a judgment running to nearly 150 pages, dismissed the appeal by the company (an appeal on which Jonathan Sumption QC, as he then was, appeared for the auditors) on the grounds that (i) the fraud could be attributed to the company (and that the principle in *Re Hampshire Land Co (No.2)* [1896] 2 Ch. 743[1] did not apply); and (ii) that it was not relevant that the claimant's illegal conduct was the "very thing" that the defendant was under a duty to prevent.

The judgments of the House of Lords in *Stone & Rolls* are, however, confusing and their reasoning varies markedly. In 2010 the Law Commission said in a Report on the illegality defence (one of four produced between 1999 and 2010) that "[i]t is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence", explaining that, in their view at any rate, "there was no majority reasoning" with the members of the committee "reaching different conclusions on how the defence should be applied".

2014

2014 was a busy year for the *ex turpi causa* principle in the Supreme Court. There were no less than three cases which considered the defence there that year. Firstly, at the end of March/beginning of April 2014, the Supreme Court (comprising Baroness Hale, Deputy President, and Lords Kerr, Wilson, Carnwath and Hughes) heard *Hounga v Allen* Secondly, on 10 June 2014 the Supreme Court (comprising Lord Neuberger, President, Mance, Clarke, Sumption and Toulson) heard *Les Laboratoires Servier v Apotex Inc.* Thirdly, on 14 and 15 October 2014 the Supreme Court (comprising Lord Neuberger, President, and Lords Mance, Clarke, Sumption, Carnwath, Toulson and Hodge) heard *Bilta*. Judgment was given in Hounga on 30 July 2014 (so after the argument had taken place in *Les Laborotoires* but before judgment). Judgment was given in *Les Laboratoires* on 29 October 2014 (so after the hearing had taken place in *Bilta* but before judgment). Judgment was given in *Bilta* in April 2015.

Hounga v Allen [2014] 1 WLR 2889

In *Hounga v Allen* the Respondents, Mr and Mrs Allen, offered to employ a 14 year old Nigerian girl, Miss Hounga, as a home help in the UK in return for schooling and £50 per month. To do that the Respondents helped Miss Hounga get a false identify. Miss Hounga then lived in the Respondents' home and looked after the children. She knew it was illegal for her to work in the UK. She was never enrolled at school. And she was never paid her £50 per week. The Respondents then evicted her and dismissed her. Miss Hounga issued proceedings in the employment tribunal claiming unlawful discrimination in relation to her dismissal. The tribunal upheld her complaint. The Employment Appeal Tribunal dismissed an appeal. The Court of Appeal allowed a further appeal. They said that the illegality of the contract of employment formed a material part of the complainant's complaint and that to uphold it would be to condone the illegality. The Supreme Court allowed the appeal. In summary, they appear to have held that the application of the defence of illegality to a claim based in tort was based on the public policy of preserving the integrity of the legal system by not allowing a claimant to profit from wrongful conduct.

There were two reasoned judgments. Firstly, by Lord Wilson (with whom Baroness Hale and Lord Kerr agreed). Secondly by Lord Hughes (with whom Lord Carnwath agreed).

Lord Wilson said that the application of the defence of illegality to a claim founded on contract often has its own complexities. He said that while the defence of *ex turpi causa* will sometimes defeat an action in tort, the circumstances in which it will do so have never been fully settled. He said that the defence of illegality rests on public policy. Rules which rest on public policy are capable of expansion and modification. It is, therefore, necessary to ask two

1/. The Hampshire Land principle may be summarised as follows: where an agent is party or privy to the commission of a fraud upon or misfeasance against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal.

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questions: (1) What is the aspect of public policy which founds the defence and (2) is there another aspect of public policy to which application of the defence would run counter?

As regards the first, Lord Wilson said that the basis of the power to bar recovery in tort lies in the duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern, he said, is in issue where damages awarded in a civil suit would allow the person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty imposed by criminal law. The idea common to these instances, he said, is that the law refuses to give by its right hand what it takes away by its left hand. Lord Wilson then went on to apply that test in the case of Miss Hounga. He concluded that considerations of public policy which militated in favour of applying *ex turpi causa* scarcely existed. He also concluded that there was another aspect of public policy which ran counter to an *ex turpi causa* defence, namely a public policy against trafficking and in favour of protection of victims. He said that the public policy in support of the application of the *ex turpi causa* defence, to the extent it exists at all, must give way to the public policy to which it is an affront. He and Baroness Hale therefore allowed the appeal.

Lord Hughes (who also allowed the appeal as did those who agreed with him) said that a generalised statement of the conceptual basis for the doctrine under which illegality may bar a civil claim has always proved elusive. He said that, given that all were agreed about the result, this appeal was not the time to formulate something which has been so difficult to formulate. He set out what he saw as two principles: First, the law must act consistently and not give with one hand and take with the other. Second, before the *ex turpi causa* defence even operates, there has to be a sufficiently close connection between the illegality and the claim made. However, Lord Hughes was at pains to state that neither proposition was a comprehensive test. Indeed, he said that Lord Mansfield's statement could not itself be treated as a comprehensive test. When the court is looking at illegality, he said, it is essentially focusing on the position of the claimant vis a vis the court from which relief is sought.

Les Laboratoires Servier v Apotex [2014] 3 WLR 1257

In *Les Laboratoires Servier*, Servier was a French pharmaceutical company. It originated a compound for treating hypertension and cardiac insufficiency, perindopril erbumine. Apotex, the Respondent, were a Canadian pharmaceutical group, specialising in manufacturing and marketing of generic products. A number of patents had been granted to Servier. Apotex told Serviver that they intended to market in the UK a generic perindopril. They did that. Servier got an injunction on the usual cross-undertaking as to

damages. The claim was then dismissed and the injunction discharged. An appeal against that decision was dismissed. The court then held an assessment of damages hearing as to how much should be paid under the cross-undertaking in damages. Servier applied to the Judge hearing the assessment to amend to include an illegality defence, namely, it was contrary to public policy for Apotex to recover damages for being prevented from selling a product whose manufacture in Canada would have been illegal (on account of the fact it would have infringed Servier's patent there).

The first point in the case was whether the infringement of foreign patent rights was a relevant illegality. It was unanimously held that it was not. So that in effect was the end of the case. However Lord Sumption dealt with what he called "The Illegality: a rule of law". He did that because the Court of Appeal's (in particular Lord Justice Etherton's) approach had been to say that working out whether the *ex turpi causa* defence applied:

"required in each case … an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality".

Lord Sumption disagreed. He said that, whilst *Tinsley v Milligan* has had its critics, to his mind the present state of the law in England was laid down in it (although he did not refer to the decision in Hounga). Similarly Lord Mance said that the Court of Appeal's reasoning in *Les Laboratoires* did not easily sit with *Tinsley v Milligan*. However, Lord Toulson was not critical of the Court of Appeal for considering whether public policy considerations merited applying the doctrine of illegality to the facts in *Les Laboratoires*. He said that in doing that the Court of Appeal was adopting a similar approach to the majority of the Supreme Court in *Hounga*. He concluded by saying that there might come a case where it was necessary for the Supreme Court to carry out a detailed re-analysis of *Tinsley v Milligan* in the light of subsequent authorities and other materials.

IN STONE & ROLLS V MOORE STEPHENS THE ALLEGATION WAS THAT THE AUDITORS HAD BEEN NEGLIGENT IN FAILING TO DETECT STONE & ROLLS' ZVONKO STOJEVIC'S (ABOVE) DISHONEST ACTIVITIES IN PROCURING THE COMPANY TO ENGAGE IN FRAUDS ON BANKS, PARTICULARLY ONE CZECH BANK, KOMERCNI BANK (RIGHT)

Bilta: The Facts

Bilta was an English company. It was wound up on a petition presented by HMRC. Bilta's liquidators then brought proceedings against two former directors (a Mr Chopra and a Mr Nazir) and against Jetivia, a Swiss company and its Chief Executive (a Mr Brunschweiler). The claim alleged that the four defendants were party to an unlawful means conspiracy to injure Bilta by a fraudulent scheme which involved the two directors of Bilta breaching their duties to Bilta and Jetivia and its Chief Executive dishonestly assisting them. The liquidators, through Bilta, claimed damages in tort from all four defendants. They also claimed, again through Bilta, compensation based on constructive trust. The defendants applied to strike out Bilta's claim on the basis of *ex turpi causa*.

In July 2012 the case came before the then Chancellor, Sir Andrew Morritt. He decided that the defence of *ex turpi causa* did not bar the claims against the first and second defendants for dishonest breaches of their fiduciary duties. He also decided that there was no basis on which the defence could be available to those who had fraudulently conspired and dishonestly assisted in the breaches of the first and second defendants' duties as directors.

In May 2013 the case was heard by the Court of Appeal (comprising Lord Dyson MR and Rimer and Patten LJJ). The Court of Appeal dismissed the appeal.

Bilta: The Decision of the Supreme Court

The Supreme Court unanimously dismissed the appeal. So far as illegality is concerned, they did so on the basis that illegality could not be raised by Jetivia or Mr Brunschweiler as a defence against Bilta's claim because the wrongful activity of Bilta's directors and shareholder could not be attributed to Bilta in the proceedings. In doing this Lord Neuberger said that, with limited exceptions, the time has come for the decision in *Stone & Rolls* to be, as Lord Denning graphically put it in relation to another case, "put on one side and marked 'not to be looked at again'".

Lord Neuberger summarised the Supreme Court's reasoning for its decision in *Bilta* as follows (at [7]): "Where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing, even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings."

However the four separate judgments reveal that there is, at least at present, considerable disagreement even at the highest level as to what the position is in relation to the *ex turpi causa* rule. Lord Sumption remained of the view that the law is as stated in the judgments of the House of Lords in *Tinsley v Milligan* which he followed in *Les Laborotoires Servier*. Lords Toulson and Hodge did not agree. Instead they favoured the approach of the majority of the Court of Appeal in *Tinsley v Milligan*: so they were back to the public conscience test. Furthermore they took the view that Lord Wilson in Hounga supported that approach. At [129] of *Bilta* Lords Toulson and Hodge said as follows in this regard: "It has been stated many times that the doctrine of illegality has been developed by the courts on the ground of public policy. The context is always important. In the present case the public interest which underlies the duty that the directors of an insolvent company owe for the protection of the interests of the company's creditors, through the instrumentality of the directors' fiduciary duty to the company, requires axiomatically that the law should not place obstacles in the way of its enforcement. To allow the directors to escape liability for breach of their fiduciary duty on the ground that they were in control of the company would undermine the duty in the very circumstances in which it is required. It would not promote the integrity and effectiveness of the law, but would have the reverse effect. The fact that they were in sole control of the company and in a position to act solely for their own benefit at the expense of the creditors, makes it more, not less, important that their legal duty for the protection of the interests of the creditors should be capable of enforcement by the liquidators on behalf of the company."

Given those differences of opinion, Lord Neuberger (with whom Lords Clarke and Carnwath agreed and Lord Mance supported in substance) said that the proper approach to illegality is a difficult and important topic on which there can be strongly held contrasting

views. He said that the debate could be seen as epitomising the tension between the need for principle, clarity and certainty in the law on the one hand with the equally important desire to achieve a fair and appropriate result in each case. In these circumstances, Lord Neuberger said that the proper approach to the defence of illegality needs to be addressed by the Supreme Court as soon as appropriately possible. He said it needed to be addressed by a panel that should certainly consist of seven judges and conceivably with a panel of nine judges. He said that *Bilta* was not the case in which the Supreme Court should address that question because the argument in that case had focused on the question of attribution: it would be unwise to seek to decide such a difficult and controversial question in a case where it is not determinative of the outcome and where there had been little if any argument on the topic.

Lord Neuberger said that the question had been addressed in *Les Laboratoires* not because it was necessary to decide the appeal, but because the Supreme Court thought the Court of Appeal had adopted an approach that was inconsistent with *Tinsley*. He said that the question had been addressed in *Hounga* (possibly also when it was not necessary), where it had been subject to argument and Lord Wilson expressed a view with which two of the other four members had agreed. He said that whilst *Les Laboratoires* provided a basis for saying that *Tinsley* had been re-affirmed, it had not been argued in *Les Laboratoires* that *Tinsley* was wrongly decided. Furthermore, the majority decision had been reached without addressing the reasoning in *Hounga*. He considered that there was room for argument that the Supreme Court had refused to follow *Tinsley* in *Hounga*. In any event, he said, given the Law Commission Report (referred to above), the subsequent decisions of the Court of Appeal and the decisions of other common law courts, it is appropriate for the Supreme Court to address this difficult and controversial issue – but only after having heard and read full argument on the topic.

The ambit of or proper approach to the whole topic of illegality, including the *ex turpi causa* defence, remains uncertain

So where are we on *Ex Turpi Causa*?

A number of things now appear to be plain:

1/. In so far as a claim by a company in liquidation against its directors is concerned, where the company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence (even where the directors were the only directors and shareholders of the company). The same is also true of a claim against those who dishonestly assisted the directors or knowingly received property from them.

2/. *Stone & Rolls* will be a very difficult case to deploy in the future. It is a case to be "put on one side and marked 'not to be looked at again'".

3/. The ambit of or proper approach to the whole topic of illegality, including the *ex turpi causa* defence, remains uncertain. Is the proper approach the discretionary test proposed in *Euro-Diam*? Is it the rigid rule propounded by the House of Lords in *Tinsley*? Is it the test preferred by the Court of Appeal in *Les Laboratoires*? Or that preferred by the Supreme Court in *Hounga*? Or is the approach that favoured by Lords Toulson and Hodge in *Bilta*? Indeed, one might add is it a combination of one or more of these approaches or is it something else altogether? Certainly, there appears to be considerable unhappiness with the test laid down by the House of Lords in *Tinsley* and it is at least arguable that *Tinsley* was not followed in *Hounga*.

4/. This an important and a difficult topic which generates strongly-held opposing views even at the highest levels. The case has highlighted the need for a review of *ex turpi causa* in the Supreme Court. However it will probably be a while before an appropriate case works its way up there.

African Farms to African Minerals: developments in common law judicial assistance

Stephen Robins examines the latest case law on cross-border insolvencies and extra-terratoriality

Introduction

This article considers the recent case of *Wormleighton & Anor (Joint Administrators of African Minerals Ltd (In Administration)) v Madison Pacific Trust Ltd* [2015] HKCFI 645, which is the first attempt to apply, in practice, the new rules of cross-border judicial assistance at common law laid down by the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] 2 WLR 971.

Singularis

On the basis of a long line of authorities beginning with *Re African Farms* [1906] TS 373, the majority of the Privy Council held in *Singularis* that the Courts have a common law power to assist foreign office-holders where the relief sought is (i) consistent with the foreign insolvency law under which the foreign office-holder was appointed[1] and (ii) within the scope of the assisting court's inherent powers (including common law powers).[2]

In *Singularis* itself, the second of these requirements was met: Lord Sumption held that the Court has an inherent power to compel the production of documents, as illustrated by the existence of the *Norwich Pharmacal* jurisdiction.[3] Lord Sumption said at [23]:

"The present case is not a Norwich Pharmacal case. The significance of Norwich Pharmacal in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle".

The decision in *Singularis* turned on the first of the two requirements identified above. The insuperable difficulty faced by the Caymanian liquidators in seeking to obtain the auditors' working papers in Bermuda was that such relief would not have been available to the Caymanian liquidators under the laws of the Cayman Islands.[4] Lord Sumption held at [29]:

"It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a

1/. Lord Sumption held at [25]: "It is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed".
2/. Lord Sumption held at [19]: "the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law".
3/. Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133.
4/. Lord Sumption noted at [29]: "The material which they seek in Bermuda would not be obtainable under the law of the Cayman Islands pursuant to which the winding up is being carried out there".

proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law".

African Minerals: The Facts

The case of *African Minerals* involved an attempt to apply the *Singularis* principles.

African Minerals Limited (the "Company") was the owner of shares (the "Shares") in subsidiaries (the "Subsidiaries") which owned an iron ore mine in Sierra Leone (the "Mine"). The Shares were subject to security in favour of a security trustee, Madison Pacific Trust Limited (the "Security Trustee"), which acted on behalf of the major secured creditor of the group, Shandong Steel Hong Kong Zengli Limited ("Shandong"). The intermediate holding company Subsidiaries (the "Holdcos") were incorporated in Bermuda. The operating company Subsidiaries (the "Opcos") were incorporated in Sierra Leone, where the Mine was located. The Security Trustee and Shandong were both incorporated in Hong Kong.

THE TONOKILLI IRON ORE MINE IN SIERRA LEONE WAS OWNED BY AFRICAN MINERALS

The facility agreement between the Company, the Security Trustee and Shandong (the "PXF Facility") was governed by English law and subject to the exclusive jurisdiction of the English court. The share pledges in respect of the Shares (the "Charges") were governed by the laws of Bermuda and subject to the jurisdiction of the Bermuda court.

The Company went into administration in England on 26 March 2015. The English administrators (the "Administrators") concluded that the Company's default under the PXF Facility had been precipitated by the actions of the Shandong group. It also became apparent to the Administrators that the Security Trustee was proposing to take steps to enforce the security by exercising its power of sale of the Shares under the Charges. The Administrators had serious concerns about the proposed sale of the Shares. Among other things, the Security Trustee had provided potential bidders with a period of only one week in which to conduct due diligence, which the Administrators feared would deter potential bidders and reduce the quantum of any bids.

It then became apparent that the Security Trustee was intending to sell the Shares to the Shandong group for a price well below the level of the debt due to the Shandong group under the PXF Facility. However the evidence suggested that the Mine could be worth considerably more than that. The Administrators were therefore concerned that the Security Agent was proposing to sell the Mine to the Shandong group at a significant undervalue.

The Administrators wished to bring a stop to the sale process, so that they could review the evidence and satisfy themselves that any sale would occur at a proper price. However the Administrators were not able to seek an injunction, as they were not in a position to offer a cross-undertaking in damages. The Administrators therefore decided to seek a letter of request from the English court[5] asking the Hong Kong court (the Security Trustee being incorporated in Hong Kong) to grant

5/. The letter of request is the well-established mechanism for the communication of a request for cross-border judicial assistance. The English court has an inherent jurisdiction to issue a letter of request addressed to a foreign court. See Re Nortel Networks SA [2009] BCC 343 per Patten J at para 9: "The High Court has an inherent jurisdiction to issue a letter of request to a foreign court in appropriate circumstances and the only issue which I have to decide is whether I should exercise this jurisdiction in this particular case".

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judicial assistance at common law[6] in the form of a moratorium against the enforcement of the Charges by the Security Trustee.

African Minerals: Stage One

Applying *Singularis*, the first requirement was for the Administrators to show that a moratorium against the enforcement of security over assets situated in Bermuda and Sierra Leone by a security trustee incorporated in Hong Kong – in other words, a moratorium with extra-territorial effect – would be consistent with English insolvency law.

The Security Trustee argued that the moratorium on security enforcement under English law, in paragraph 43(2) of Schedule B1, is strictly territorial in scope, and that it does not have extra-territorial effect, relying on the preliminary view expressed by Stanley Burnton LJ in *Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG* [2010] Ch 187.

On the basis of the Security Trustee's argument, this was a case of the Administrators seeking to achieve in Hong Kong "*something which they could not do even under the law by which they were appointed*" (per Lord Sumption in *Singularis* at [25]).

The Administrators disagreed with this contention and argued that paragraph 43(2) of Schedule B1 has extra-territorial effect as a matter of English law.

The Administrators relied on the fact that paragraph 43(2) prevents the enforcement of "*security over the company's property*" and that the term "*property*" is defined by section 436 to include "*every description of property wherever situated*"[7].

They also relied on the fact that English insolvency proceedings have worldwide effect and that the provisions of the Insolvency Act 1986 in respect of the preservation, collection, realisation and distribution of assets apply extra-territorially.[8]

The Administrators also pointed to the fact that many provisions of the Insolvency Act 1986 and the Insolvency Rules 1986 have been held to have extra-territorial reach, including section 113[9]; section 213[10]; section 236[11]; sections 238 and 239[12]; section 423[13]; and Rule 4.90[14].

Finally, the Administrators argued that *Harms Offshore* was irrelevant, as it is a decision on paragraph 43(6), which prevents creditors from seeking remedies from the Court. Paragraph 43(6) has been held to be limited

6/. Hong Kong has nothing equivalent to section 426 of the Insolvency Act 1986. Further, it has not enacted the UNCITRAL Model Law on cross-border insolvency. Cross-border judicial assistance in Hong Kong is governed by the common law.
7/. On the significance of the words "wherever situated" in insolvency legislation, see Stichting Shell Pensioenfonds v Krys [2015] AC 616 at [14] per Lord Sumption.
8/. As Millett J held in Re International Tin Council [1987] Ch 419 at 446-447: "[In] theory the effect of the [winding-up] order is world-wide. The statutory trusts which it brings into operation are imposed on all the company's assets wherever situate, within and beyond the jurisdiction". Similarly, in Re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, Lord Hoffmann held at para 8: "in theory, such an order operates universally, applies to all the foreign company's assets and brings into play the full panoply of powers and duties under the Insolvency Act 1986 like any other winding up order". See also Stichting Shell Pensioenfonds v Krys [2015] 2 WLR 289 per Lord Sumption at [14]-[15].
9/. See Re Seagull Manufacturing Co Ltd (In Liquidation) [1993] Ch 345 at 354 per Peter Gibson J.
10/. Bilta (UK) Ltd v Nazir (No 2) [2013] 2 WLR 825 per Morrit C at para 44; (a point upheld by the Court of Appeal and the Supreme Court).
11/. Re Mid East Trading Ltd [1998] BCC 726 (CA).
12/. Re Paramount Airways Ltd [1993] Ch 223 at 239 per Sir Donald Nicholls V-C.
13/. Jyske Bank (Gibraltar) Ltd v Spjeldnaes [2000] BCC 16; HMRC v Begum [2010] EWHC 1799 (Ch).
14/. [14] Re Bank of Credit and Commerce International SA (No. 10) [1997] Ch. 213 at 236 per Sir Richard Scott V-C.

territorially, on the basis that Parliament cannot have intended to restrict the powers of foreign Courts.[15] However, this reasoning is inapplicable to paragraph 43(2), which prevents the enforcement of security and is not concerned with court proceedings. *Harms Offshore* does not consider the territorial reach of paragraph 43(2).

As a result of the Administrators' arguments, Newey J held that it was arguable that paragraph 43(2) of Schedule B1 applied extra-territoriality to the property of the Company wherever situated, including any property of the Company situated outside England and Wales.

Accordingly Newey J issued a letter of request addressed to the Hong Kong court, asking the Hong Kong court to "*make Orders in the exercise of its inherent common law and/or equitable powers which produce, in the territory of the Hong Kong Special Administrative Region, the same or substantially the same effect as paragraph 43(2) of Schedule B1 to the Insolvency Act 1986 … on the steps which the Security Trustee is taking and/or proposing to take to enforce the* [Charges]".

African Minerals: Stage Two

The next step was for the Administrators to take the letter of request to Hong Kong and to seek relief from the Hong Kong court to prevent the Security Trustee from enforcing the Charges. In accordance with *Singularis*, it was necessary for the Administrators to show that such relief was within the scope of the Hong Kong court's inherent powers.

The decision of the Hong Kong court in *African Minerals* shows that this area of law is still developing

The Administrators argued that the Hong Kong court has an inherent equitable power to interfere with the enforcement of security rights, as illustrated by the existence of the ability of borrowers to seek relief from forfeiture.[16] Applying Lord Sumption's approach in *Singularis* at [23], the Administrators sought to persuade the Hong Kong court that this inherent equitable power could be exercised by way of judicial assistance in the cross-border insolvency context in order to give effect to paragraph 43(2) of Schedule B1.

Unfortunately for the Administrators, the Hong Kong court was not persuaded by these submissions. Harris J held that the Hong Kong court had no inherent power to prevent the Security Trustee from enforcing the Charges, so as to give universal effect to the English administration of the Company. He held at [12] that the Hong Kong court could grant an injunction "*if it could be demonstrated that the proposed enforcement would improperly prejudice the equity of redemption*" and that the Hong Kong court could grant relief from forfeiture "*if it could be demonstrated that the company after having failed to meet its payment obligations had become able to do so*".

However Harris J held the powers of the Hong Kong court did not go beyond these established categories of relief and that it had no "*power at common law to grant an order that has the effect of restraining the sale of the charged shares to aid the administration in England*".

Whilst recognising that the Privy Council had referred in *Singularis* to the possibility of the development of further common law powers[17], Harris J held that the relief sought by the Administrators would be "*an impermissible extension of the common law principle that requires the court to recognise foreign liquidators and assist them*".

Accordingly, Harris J declined to grant assistance; and the Security Trustee proceeded with the sale of the Shares.

Conclusion

The practical application of the Privy Council's approach in *Singularis* is still being worked out. The decision of the Hong Kong court in *African Minerals* shows that this area of the law is still developing, as the outer limits of the *Singularis* jurisdiction are being explored.

Stephen Robins acted for the Joint Administrators of African Minerals Limited

15/. In Re Oriental Inland Steam Co, Ex p Scinde Railway Co (1874) LR 9 Ch App 557, Mellish LJ said at pp 559–561: "I quite agree that the 87th section of the Companies Act 1862 (25 & 26 Vict, c 89), providing that no action shall be brought without the leave of the court, and the 163rd section, enacting that no execution shall issue, apply only to the courts in this country. Of course, Parliament never legislates respecting strictly foreign courts". This was followed in Re Vocalion (Foreign) Limited [1932] 2 Ch 196, in which Maugham J held that "it is reasonably clear that section 177 [of the Companies Act 1929] has no application to actions or proceedings in foreign Courts".

16/. See, for example, Shiloh Spinners Ltd v Harding [1973] AC 691 at 722 per Lord Wilberforce: "There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty". See also Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd [2013] UKPC 2 at paras 90 to 97, in which the Privy Council held that this inherent equitable power could be exercised to prevent the enforcement of a charge over shares.

17/. Lord Sumption referred in [19] to "proper development of the common law" and Lord Collins held at [38] that "those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law".

Sufficient connection once again: does trouble lie ahead?

Richard Fisher highlights issues of practice and principle rising out of the recent VGG judgment

Those who live and work in the rarefied world of restructuring foreign companies using schemes of arrangements have had a good run. Following a series of successful developments of the scheme jurisdiction, last year's decisions in *Re Apcoa Parking Holdings GmbH* [2014] EWHC 1867 (Ch) and 3849 (Ch) settled, at least at first instance, the question of whether changing the law governing debts owed by a foreign company to English law suffices in and of itself to establish the required sufficient connection between the company and the English jurisdiction. Provided that the change is valid under the law governing the debt at the time that the change is made, a sufficient connection can be established i.e. the Court can be satisfied that the exercise of its jurisdiction would not be exorbitant or inappropriate, or otherwise contrary to international comity.

But a word of warning to English practitioners, and a crumb of comfort for many of our European brethren who are concerned that we have pushed the envelope too far, arises in the form of the judgment of Mr Justice Snowden in the VGG case[1] [2015] EWHC 2151 (Ch) (22 July 2015).

As counsel for the opposing creditor in Apcoa before his elevation to the bench, Mr Justice Snowden is very familiar with the arguments that can be launched against a scheme which a creditor regards as exorbitant or unfair. The VGG schemes were sanctioned. But his judgment serves as a timely reminder of the degree of scrutiny that schemes may be subjected to at what are frequently unopposed or *ex parte* hearings, and the obligations of those who present the scheme to the Court. The decision also highlights some points or expectations on the part of the Judge which potentially differ from the practice currently adopted in this area, and suggests a concern on the part of Mr Justice Snowden as to whether a number of relatively recent decisions relating to sufficient connection based on jurisdiction clauses were correctly decided.

Procedure

Having reminded us of the importance of bringing to the Court's attention all matters potentially relevant to jurisdiction and the exercise of the Court's discretion particularly in cases involving foreign companies ([6]), several remarks were made by Mr Justice Snowden by way of general guidance as to the procedure which should be adopted in future cases ([3]).

First, the extent of the information which should be provided to creditors regarding the alternative outcome if the scheme is not sanctioned (see [22]-[24]). At [24], having indicated that he was prepared to accept that the alternative under a formal insolvency proceeding was likely to be far less advantageous for all concerned, Mr Justice Snowden commented:

"I would, however, indicate for the future that companies that seek the consent of their creditors and the sanction of the court to a scheme of arrangement that is put forward as a more advantageous outcome for creditors than formal insolvency proceedings may be well advised to ensure that greater detail is provided, both in the Explanatory Statement and in the evidence before the court,

1/. Van Gansewinkel Groep B.V. and associated companies. Scheme were sanctioned in respect of 5 Dutch companies and 1 Belgian company, none of whom had their COMI in England, nor any establishment or significant assets in England.

as to the possible alternatives to the scheme and the basis for the predicted outcomes. The provision of such information is likely to be essential if there is a challenge to the scheme."

It is common that the information provided in the Explanatory Statement and supporting evidence is relatively brief. That recorded in the VGG Judgment (taken from the Explanatory Statement) was certainly not unusual in its content, and probably better than many. The principal purpose of such information is usually to satisfy the Court and the creditors that scheme creditors are likely to receive more than they would receive in the alternative if there was no scheme (otherwise the scheme would be inherently unfair: see *Re T&N* [2004] EWHC 2361 (Ch) at [82]). The precise pence in the pound (such as might have been seen in an old style Rule 2.2 Report) tend not to be articulated (or may not even be known to the scheme company: the exercise would be potentially very difficult and very costly in many cases where large groups of companies with interrelated debt are being restructured). Absent a challenge to the proposition that there will be a better outcome, the limited information provided in the Explanatory Statement and evidence is normally the only material relied upon at the sanction hearing.

RICHARD FISHER

Mr Justice Snowden's comments are a clear indication that he considers that greater detail than has previously been included in many schemes is warranted. In light of the judge's extensive experience of dealing with schemes, it will therefore certainly be prudent to try and expand the financial information provided in future schemes, and explain in as much detail as possible how the view has been reached (and by reference to which comparator) that the scheme is likely to lead to a better outcome for creditors. But, ultimately, the question remains whether the Court and creditors can be satisfied that the scheme is likely to lead to a better outcome than the relevant alternative. That is a judgment that has to be made and, in many cases, the financial position of the scheme company is so poor that it will not take much to demonstrate that a scheme (if sanctioned) is likely to lead to a much better outcome for the scheme creditors.

As to the final sentence of [24], it has always been the case that, if a challenge is launched, the company may have to develop the evidence that it is relying on in order to meet the challenge. Such further evidence in relation to the question of comparative outcome will be essential if the challenge is to that proposition. But if the focus of the challenge is on an entirely different issue, it should probably be assumed for now that the usual evidence sufficient to demonstrate that the scheme is likely to lead to a better outcome remains all that is required.

Second, the way in which questions of international jurisdiction have to date been dealt with. Matters going to the general jurisdiction of the Court to sanction a scheme have always given rise to a practical problem because of the potentially huge waste of time and costs which occur if meetings are convened (and a vote is held) only for

The VGG decision provides at least two interesting pointers as to the issues that other schemes relating to foreign companies may face going forward

the Court to conclude at the sanction hearing that it has not got jurisdiction to sanction the scheme. This issue principally arose historically in relation to the question of classes and, for many years, the company was required to run the risk of being shown at the sanction hearing that it had got the constitution of the classes wrong (such that the Court had no jurisdiction to sanction the scheme).

Post *Re Hawk Insurance Co Limited* [2001] 2 BCLC 480, and the criticisms made of this practice by Chadwick LJ, a Practice Statement was issued which aimed to enable the scheme company to give notice to creditors, and ask the court to determine the correct composition of the classes of creditors at the convening hearing rather than at the sanction hearing (see [2002] 1 WLR 1345). Other issues going to jurisdiction have increasingly been raised at the convening hearing and, although the determination of such an issue at the convening hearing cannot entirely preclude the issue being raised at the sanction hearing (as explained by David Richards J in *Re T&N Limited (No. 3)* [2007] 1 BCLC 563 at [20]), the Court is reluctant to revisit such matters unless satisfied that they are clearly wrong.

The decision on classes is, of course, reflected in the convening order. The typical Practice Statement letter identifies for creditors that the question of classes is to be determined at the convening hearing and that good reason will be required if they wish to re-open such a decision at the sanction hearing.

The procedural position as to how best to address questions of international jurisdiction has always been less clear and, it is probably true to say, the practice adopted varies. As observed by Mr Justice Snowden at [31], such an issue is not dealt with expressly in the Practice Statement. International jurisdiction is normally raised (if an issue) at the convening hearing, but often on the basis that it is appropriate to assure the Court that it has jurisdiction and is not making an order in vain. It will also be addressed again at sanction as a matter going to the court's discretion.

What is clear from the judgment of Mr Justice Snowden is that if a scheme company wishes to obtain a determination of the international jurisdiction issue (in a similar sense to the determination of classes) in a manner that will, absent good reason, prevent creditors from raising the issue again at the sanction hearing (unless they are able to satisfy the Court that the decision at the sanction hearing was plainly wrong: see the approach adopted by the Judge to classes at [53]), it will be necessary to (i) draw creditors' attention to this approach in the Practice Statement letter and (ii) ask the Court to record in the order (and probably in a reasoned decision) the determination made (see [32]-[34], and [55]-[56]). Absent such an approach, the Court may consider that it is obliged to revisit the issue in full.

There can be little to complain about in adopting such an approach. Creditors ought to be told if there are issues beyond the constitution of classes that the scheme company is seeking to have determined at the convening hearing. It has always been the case that questions such as effectiveness of the scheme in foreign jurisdictions have been addressed in substance at the sanction hearing, but that they may be mentioned at the convening hearing in order to ascertain whether there is any further evidence that the Court considers it may be assisted by receiving at the sanction hearing. The same approach may well be adopted in future in relation to international jurisdiction unless the scheme company wishes to seek a formal determination of the issue at the sanction hearing. If it does, it will need to make this very clear in the Practice Statement letter.

Sufficient connection

Because Mr Justice Snowden felt compelled to address international jurisdiction in substance, the VGG decision provides at least two interesting pointers as to the issues that other schemes relating to foreign companies may face going forwards, including an issue that many considered settled at least at first instance.

First, jurisdiction clauses. Having noted the various arguments raised to date as to the applicability of the recast Judgments Regulation to schemes of arrangement (see [41]-[44]), Mr Justice Snowden adopted the course of many other judges in this area of analysing what the position would have been if the Judgments Regulation applied. But, having made that assumption, the Judge concluded that the jurisdiction clauses relied upon by VGG were (as a matter of construction) insufficient to constitute a submission to the jurisdiction by the scheme creditors rather than the scheme companies (and therefore that he could not accept the basis on which the arguments had been advanced before Mr Justice Henderson at the convening hearing). This point is notable because it is understood that, at the hearing, the Judge voiced concerns regarding whether the standard form wording in many of the jurisdiction clauses relied on would suffice and, in particular, whether scheme

proceedings would constitute a "*dispute*" within the meaning of the relevant clauses.

If that is right, reliance on standard form jurisdiction clauses for the purpose of establishing a sufficient connection may become much more difficult. It is unclear whether Mr Justice Snowden is of the view (in contrast to comments in cases such as *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433 at [9]) that, even if the clause can be construed to extent to scheme proceedings, non-exclusive jurisdiction clauses in favour of the English Courts would not, without more, amount to a sufficient connection with the jurisdiction although the Judge was prepared to accept that such clauses (including the clause in issue in VGG) could amount to a "*further connection*" with England (see [69]).

The VGG companies were therefore forced to rely on presence of creditors domiciled in England in order to justify jurisdiction if the Judgments Regulation did apply. There was no difficulty in them doing so (see [50] and [51]) and it is notable that Mr Justice Snowden was satisfied that all that was required was at least one creditor domiciled in England in circumstances which rendered it expedient to hear the claims against all other scheme creditors (c/f the reference to 50 per cent of scheme creditors in *Re Rodenstock* [2012] BCC 459.)

Second, change of law. Having noted at [4] that permission to appeal was granted in respect of the decision in *Re Apcoa* [2014] EWHC 3849 (Ch), albeit the appeal was compromised, Mr Justice Snowden described the decision in the following terms at [68]:

"Specifically, this case does not raise any of the more controversial issues which arose in Apcoa as a result of a change in the governing law to English law for no reason other than to persuade the English court to exercise its scheme jurisdiction."

It would not be at all surprising if Mr Justice Snowden gives permission to appeal in due course to any creditor who wishes to challenge the principle established by Apcoa relating to changing the governing law in order to establish a sufficient connection with the jurisdiction.

Guarantees and third parties

Mr Justice Snowden neatly summarised the current position regarding releases of claims held by scheme creditors against third parties (i.e. non-scheme companies) at [63]:

"It is well settled that it is possible, as part of a scheme, to require scheme creditors to give up rights against third parties (such as guarantors) where such a release is necessary to give legal or commercial effect to the compromise or arrangement between the scheme company and its creditors: see eg Re Lehman Brothers (Europe) International [2010] 1 BCLC 496 at paragraph 65."

This approach is used to justify the release of claims held by scheme creditors against guarantors of the debt owed by the scheme company, but may also extend to other claims which could give rise to ricochet claims or which it is necessary to release in order to give effect to the commercial deal embodied in the scheme. What was notable, however, was the concern raised by the Judge as to whether or not the Scheme, in the absence of an ancillary release deed, provided a sufficiently clear release to be granted in favour of a company that was not a party to the scheme. Mr Justice Snowden was of the view that the (relatively standard) terms of the scheme were not sufficiently wide to release the third party. He was, however, content to accept a suitable deed of release being executed under the power conferred on the Scheme Companies to execute any other documents considered necessary or desirable to give effect to the restructuring. Because the Explanatory Statement had made clear that the release was intended, the Judge accepted that it was appropriate to sanction this new or different release which was not currently provided for in the Scheme or ancillary documents.

The current tendency in schemes is to provide a relatively short scheme document conferring the power on an attorney to execute various restructuring documents which will contain the operative provisions amending the creditors' rights. Although some concerns have been raised in the past as to whether it is entirely satisfactory to have the operative provisions contained in the restructuring documents rather than the scheme itself, this method of drafting did not cause Mr Justice Snowden a concern (see [16]). However, his focus (again, quite rightly) on the manner in which the ancillary documents operated, and whether they were effective to achieve the intended compromise, illustrates a potential downside of this approach: by providing a suite of inter-locking documents, the task for the advocates and the Court becomes increasingly complicated to ensure that the new "*Bible*" of documents is effective. The practice sometimes seen of replicating the core elements of the debt compromise in the Scheme as well as the restructuring documents themselves may become more attractive, as well as ensuring that (as in VGG) there is a catch all power to execute any documents considered necessary or desirable to give effect to the wider restructuring.

By providing a suite of inter-locking documents, the task for the advocates and the Court becomes increasingly complicated

Company & Insolvency Law New Legislation

Hilary Stonefrost sets out the significant changes to the Companies Act 2006, the Insolvency Act 1986 and the Directors' Disqualification Act 1986 that have been or will be brought about by the Small Business, Enterprise and Employment Act 2015 and the Deregulation Act 2015.

A significant number of important and diverse changes have recently been made to company and insolvency legislation. It would be easy to miss these changes given that there is no clue in the title of the statutes of the nature or scope of the revisions.

THE SMALL BUSINESS ENTERPRISE AND EMPLOYMENT ACT 2015

The Small Business, Enterprise and Employment Act 2015 (the SBEE Act) became an Act of Parliament on 26 March 2015. The SBEE Act covers eclectic topics including the regulation of pub-owning businesses, the regulation of child care together with new statutory provisions governing insolvency, disqualification of directors and the regulation of companies.

While the title suggests that the statutory provisions are directed at small companies, this is not the case; this statute makes significant changes to company law and the corporate governance of all companies.

Some of the statutory provisions have already come into force; others are coming into force at later dates. There will be secondary legislation and guidance on the new provisions, but these are still in the process of being drafted.

COMPANY LAW

The company law provisions of the SBEE Act, in parts 7 and 8 of the Companies Act 2006 (the 2006 Act).

The main changes to company legislation directed primarily but not exclusively at company transparency, are as follows:

1/. The requirement that company directors are natural persons.
2/. The changes to the definition of and to the scope of the duties of shadow directors.
3/. The creation of a register of people with significant control.
4/. The abolition of bearer shares.

Company directors

The SBEE Act intends to increase transparency about who is acting as a director of a company by restricting the practice of companies acting as corporate directors to limited circumstances by amending the 2006 Act. The existing law requires at least one director to be a natural person (section 155 of the 2006 Act), but imposes no restrictions on corporate directors.

In November 2014 there was a consultation on whether the Secretary of State should make regulations setting out exemptions from the ban on corporate directors. In March 2015 the Department for Business Innovation and Skills (BIS) published a questionnaire on whether there should be a "*principles based exemption*" to the ban on corporate directors. The proposal covered the following issues:

1/. Whether a company could appoint a corporate director if all the directors of the corporate director were natural persons and, if the corporate director is an overseas company, certain details of the individual directors of that corporate director were disclosed in a public register.

2/. Whether a corporate director could be an entity other than a UK incorporated company, for example an overseas LLP, and, if so, whether all of its members would need to be natural persons and if it were an overseas entity who would be the

THE SBEE ACT IS INTENDED TO MAKE IT EASIER TO SEE WHO OWNS OR CONTROLS A COMPANY AND WHO IS MAKING THE DECISIONS ABOUT HOW IT IS RUN.

equivalent of the directors who would have to be natural persons, and what details of these persons would need to be publicly available?

The deadline for response to these proposals was 27 April 2015. The implementation of these restrictions on corporate directorships has been delayed and no revised timetable has yet been announced.

Shadow directors

The SBEE Act applies directors' duties to shadow directors so far as they are capable of applying.

A shadow director, as is well known, is a person in accordance with whose directions or instructions the directors are accustomed to act. A person is not, however, to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity; section 251(1) and (2) CA 2006.

The exclusions that are added by the new legislation are: a person is not regarded as a shadow director if exercising a function conferred by or under a statutory provision; or, if guidance or advice is being given by a person in their capacity as a Minster of the Crown.

The general statutory duties that apply to *de jure* and *de facto* directors under the 2006 Act do not all apply to shadow directors. The 2006 Act states:[1]

"The general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply."

The law, as from 26 May 2015, is that:

"The general duties apply to a shadow director of a company where and to the extent they are capable of so applying."

This provision is subject to any regulations about the application of general duties of directors to shadow directors.[2]

Persons with significant control

The principal change concerning the accountability of companies is intended to make it easier to see who owns or controls the company and

1/. Section 170(5) of the 2006 Act. See also Ultraframe (UK) v Fielding [2005] EWHC 1638 (Lewison J) and Vivendi SA v Murray Richards [2013] EWHC 2006 (Newey J) on the state of the law on duties of shadow directors.
2/. Section 89 of the SBEE Act.

The Government's objective in the introduction of the central register is to increase transparency, to improve trust and increase investment in UK registered companies

who is making the decisions about how it is run.

The main change is that companies are to be required to obtain and hold information on who ultimately owns and controls them. There will be a central registry that records not only ownership of the company but also who influences and controls the company, for example, by being able to vote on shares owned by other people (the PSC register).

Companies will be required to hold and maintain their own PSC register from January 2016 and to file this information with Companies House by April 2016 when they deliver their confirmation statement which is to replace the annual return.[3] The Company is required to confirm this information annually.[4]

A *"person with significant control"* is any individual who:

1/. Owns, directly or indirectly, more than 25 percent of the shares;

2/. Holds, directly or indirectly, more than 25 percent of the voting rights;

3/. Has the right, directly or indirectly, to appoint or remove the majority of the board of directors;

4/. Otherwise has the right to exercise or actually exercises significant influence or control over the company; or,

5/. Has the right to exercise or actually exercises significant influence or control over a trust or firm that is not a legal entity, which in turn satisfies conditions (1) to (4) above.

Where there are corporate groups another group company rather than an individual is likely to satisfy one or more of those conditions and these legal entities which are within the definition of a "*person with significant control*" are called "*relevant legal entities*". Not all relevant legal entities are registrable on the PSC register; for example, where there is a corporate chain each of the companies (other than the company at the bottom of the chain) falls within the definition of a relevant legal entity but only the entity at the top of the chain will be registrable. The purpose of this is to avoid duplication as the information on ownership and control can be tracked through the corporate chain to the registrable relevant legal entity at the top.

The same approach is adopted where an individual holds his interest through a chain of relevant legal entities, all the information about the ownership and control of that group of companies will be registered in respect of the legal entity at the top of the chain.

Under the SBEE Act, for there to be a chain of relevant legal entities, each company in the chain (above the company at the bottom of the chain) must have a "*majority stake*". A *"majority stake"* is defined as holding or controlling the majority of the voting rights; having the right to appoint or remove a majority of the board of directors; or, otherwise having the right to exercise or actually exercising dominant influence or control.

There are companies that already have to provide information about their ownership under other regulatory regimes; the provisions of the SBEE Act allow some companies to be exempted from the disclosure requirements. Under the draft regulations companies that are required to comply with the Financial Conduct Authority's Disclosure Rules and Transparency Rules (DTR5 issuers) are to be exempted from having to keep a PSC register.

Each company that is not exempt from this requirement has a duty to investigate and obtain information and update information on the registrable persons and will commit an offence if it fails to do so. Further if a registrable person knows or ought reasonably to know that their name should be on the PSC register but it is not there, that person has an obligation to notify the company.

The statute requires the Secretary of State to issue guidance on the meaning of *"significant influence or control"*. A working panel of company law experts has been appointed to draft that guidance which is expected to be published in October 2015. In addition a working group was set up in January 2015 to produce non-statutory guidance to assist companies and shareholders to understand their obligations in relation to the PSC Register.

The government has sought views on the draft Register of People with Significant Control Regulations (2015); the deadline for response was 17 July 2015.

The SBEE Act gives private companies the option not to hold the PSC register but where a company makes this choice, the information will still be held at Companies House.

3/. This change is explained further below.

4/. SBEE Act sections 81 and 82 and Schedule 3 thereto, together with a new part 21A and Schedule 1A to the Companies Act 2006.

Abolition of bearer shares

In support of the Government's measures to increase transparency and accountability in corporate governance, the SBEE Act has prevented companies from issuing bearer shares from May 2015. Bearer shareholders have a nine-month period during which they can surrender their bearer shares and have their name entered as a registered shareholder of the company.

Companies with bearer shares were required to have given notice to holders of bearer shares by 26 June 2015 of their right to surrender these shares for registered shares. To push bearer shareholders into surrendering their shares without delay, the statute provides that all the rights attached to the bearer shares will automatically be suspended if the bearer shares are not surrendered by 26 December 2015. Dividends and other distributions will not be paid to the holder but will be paid into a separate bank account.

Companies with bearer shareholders are required to give further notice of the right to surrender by 26 January 2016. If, by 26 February 2016, a company still has bearer shares that have not been surrendered by the holder, the company must apply, within three months of that date, for a "*cancellation order*". The company is required to notify the shareholder of the application. If the court is satisfied that the company has complied with the notice requirements the court must make a cancellation order; if it is not so satisfied, the court will make a suspended cancellation order and the company must notify the shareholder who will then have two months in which to surrender the shares.

Within 14 days of a cancellation order being made, the company must pay into court the nominal value of the cancelled shares, any premium on those shares and any dividends accrued. In the period between six months and three years from the cancellation date the former holder of the bearer shares can apply to claim payment of the sums held in court. In order to receive payment the former holder will have to satisfy the court that there were exceptional circumstances that prevented the holder of those shares from surrendering the bearer shares before 26 February 2016.

This measure will not have any impact on most UK companies. There are only some 2,400 companies which have issued bearer shares; this is only some 0.05% of 2.5 million UK registered companies.

HILARY STONEFROST

Company filing requirements

Companies are no longer required to deliver an annual return to Companies House. A company will be required to deliver a "*confirmation statement*" every 12 months that certain information has been filed with the Companies House and, in this statement, will be required to give notice of any changes in the relevant information (including information on the PSC Register). This is intended to give companies more flexibility to change the date of their annual filing.

There are significant changes made to proceedings brought by office-holders

INSOLVENCY LAW

The provisions in Part 10 of the SBEE Act amend the Insolvency Act 1986. (As to when the provision came into force see footnote 5)[5]

New powers for administrators to bring claims

The SBEE Act introduces statutory provisions to enable wrongful trading and fraudulent trading claims to be brought by administrators. The statutory provisions are the same, *mutatis mutandis*, as those that enable liquidators to bring such claims. This is not yet in force.

New power to assign causes of action

Under the current law, claims that come into existence as a consequence of the company's insolvency and which can only be brought in the name of the insolvency practitioner cannot be assigned; namely, claims for wrongful and for fraudulent trading, transaction at undervalue claims, preference claims and extortionate credit transactions. Liquidators and administrators will be given the power to assign such claims.

The legislation also provides that where a liquidator or administrator recovers proceeds from this type of claim these proceeds will be segregated from the assets available to meet the claims of the holders of any floating charge security and will be distributed to unsecured creditors (after the payment of the expenses incurred in the insolvency). These statutory provisions are not yet in force.

Removal of requirements to seek sanction

Liquidators in voluntary liquidations, under the existing legislation, are required to obtain sanction to exercise the powers in Part I of Schedule 4 of the 1986 Act, which includes the power to bring legal proceedings under provisions of that act. Liquidators in compulsory liquidations were required not only to obtain sanction to exercise powers in Part I but also Part II of Schedule 4, which gave liquidators powers to defend legal proceedings and to carry on the business of the company so far as it may beneficial for the winding up. The legislation makes all the powers exercisable by a liquidator in Schedule 4 to the 1986 Act, whether in a creditors' voluntary liquidation or a compulsory winding up, without sanction. This provision came into force on 26 May 2015.

The change to the position of creditors

This legislation will remove the requirement to hold creditors' meetings save in certain circumstances.

The starting point is that the decision may be made by *"any qualifying procedure P thinks fit"*, where "P" is the person seeking a decision about any matter from the company's creditors or contributories, save that the procedure cannot be used if the requisite minimum value/number of creditors ask for a meeting. The requisite minimum for a creditors' meeting to be convened is 10% in value of the creditors; 10% in number of the creditors; or, 10 creditors.

As an alternative, the *"deemed consent procedure"* may be used instead of the *"qualifying decision procedure"* (unless the rules provide otherwise or the court orders the decision to be made by the *"qualifying decision procedure"*). This procedure may be used where the relevant creditors are given notice of the following: a matter about which they are to make a decision, the decision that is intended should be made, the effect of fewer than the "*appropriate number*" of creditors approving the decision, the fact that decision can be deemed to be made and the procedure for objecting to the decision. If fewer than the appropriate number of relevant creditors object to the proposed decision, the decision is deemed to be approved.

Relevant creditors are defined as those who, if decisions were to be made by a "*qualifying decision procedure*" would be entitled to vote in the procedure. The *"appropriate number"* of relevant creditors is 10% in value of creditors.

Schedule 8 to the 1986 Act, which sets out provisions capable of

5/. Section 164 of the state provides for specified provisions to come into force "at the end of the period of two months beginning with the day on which this Act is passed". The provisions that came into force on 26 May 2015 relate to the removal of requirements to seek sanction; administration; small debts; and, voluntary arrangements. The Small Business, Enterprise and Employment Act 2015 (Commencement No. 1) regulation 2015 provides that on 26 May 2015 the provisions on registration of people with significant control, and the provision on the position of creditors (the abolition of the requirement to hold meetings and the provison enabling creditors to opt-out) came into force for the purpose of enabling the exercise of any power to make provision by regulations, rules or order made by statutory instruction or to prepare or issue guidance but are not yet in force otherwise. The legislation concerning proceedings by office-holders; the power to assign proceedings that can be brought by office-holders; and, the regulation of insolvency practitioners have not come into force in any respect as yet. These provisions will come into force on such dates as the Minister of the Crown may, by regulations, appoint.

inclusion in the Insolvency Rules, is amended to enable rules to be made governing the decisions by creditors and contributories, including prescribing procedures by which creditors and contributories may make decisions and authorising the use of other procedures to make decisions if those procedures comply with prescribed requirements.

Similar provisions in respect of individual insolvency are included in the legislation.

Creditors can opt not to receive certain notices

Where a creditor chooses not to receive notices from the office-holder the rule requiring the office-holder to give notice to creditors does not apply in relation to those creditors, save in relation to a notice of distribution or proposed distribution. There is also provision to permit the court to require notice to be given to all creditors.

Administration

The period of office of an administrator, which under the 1986 Act can be extended by consent for six months, can be extended by one year. This is in force.

The administrators' powers are amended. Schedule 1 to the 1986 Act gives the administrator the power to sell, hire out or otherwise dispose of the property of the company by public auction or private contract. The amendment provides that this power is subject to any regulations that may be made by the Secretary of State and the Secretary of State is given the power to make provision for prohibiting or imposing requirements or conditions in relation to the disposal, hiring out or sale of property of a company by the administrator to a "*connected person*". A *"connected person"* is a *"relevant person"* in relation to the company or a company connected with the company. A person is a *"relevant person"* if they are a director or other officer or shadow director of the company; a non-employee associate of such a person; and a non-employee associate of the company. This is in force.

Changes of this kind are to be expected to have a significant effect on the process that needs to be followed for there to be a sale of a company's business to the company controlled by the company's directors, in particular where the sale is by way of pre-pack.

Creditors with small debts

The statute provides that the Insolvency Rules can be amended to make provision for a creditor who has not proved a small debt to be treated as having done so for the purposes of distribution of a company's property or an individual's property. "*Small debt*" is to be defined in the prescribed rules. This in in force.

Individual voluntary arrangements

There is a new time limit for challenging individual voluntary arrangements. The time limit is changed in section 262(3) (a) of the 1986 Act. At present the legislation provides that an application to challenge an individual voluntary arrangement cannot be made: *"after the end of the period of 28 days beginning with the day on which the report of the creditors' meeting was made to the court…"* The legislation substitutes, from *"the report"* to the end: *"the creditors decided whether to approve the proposed voluntary arrangement or, where a report was required to be made to the court under section 259(1) (b) on the day the report was made."* [6]

Fast-track individual voluntary arrangements have been abolished. Both these changes came into force on 26 May 2015.

Recognition of professional bodies

The most significant provisions are:
1/. The recognised professional bodies are to continue to licence insolvency practitioners, however, the continuation of the professional bodies is in the context of the Secretary of State now having a reserve power to introduce a single regulator of insolvency practitioners.
2/. The Secretary of State will no longer licence individual practitioners, but has the power to apply to court for sanctions against individual insolvency practitioners.
3/. Statutory regulatory objectives are introduced, which include having a system of regulating insolvency practitioners that secures fair treatment for persons affected by their acts and omissions and ensures consistent outcomes.
4/. The Secretary of State, with oversight of the recognised professional bodies, can impose sanctions on the recognised professional bodies, in the form of financial penalties and reprimands. The Secretary of State can also revoke the recognition.

The Secretary of State is also given the power to apply to the court for direct sanctions against an individual insolvency practitioner if the Secretary of State considers that it would be in the public interest for such an order to be made. These provisions are not yet in force.

DISQUALIFICATION OF DIRECTORS

The provisions of Part 9 of the SMEE Act amend the Company Directors'

6/. The requirement to report to the court only applies where the meeting is summoned under section 257 of the IA 1986 (see section 259(1) of that statute).

Disqualification Act 1986 (the CDDA). (As to when these statutory provisions come into force see footnote 7)[7]

New reporting requirements for insolvency practitioners

There are new requirements to be imposed on liquidators, administrators and administrative receivers for the reporting of misconduct by directors. The office-holder is required to submit a report in respect of every director of an insolvent company, not only those in respect of whom the office-holder decides to make a report. These reports are required to describe any conduct that may assist the Secretary of State to decide whether to apply for a disqualification order against that director and must be submitted within 3 months of the "*insolvency date*".

The period of time during which the Secretary of State is required to apply for a disqualification order has been increased from two years to three years.

The Secretary of State may require "*any person*" to provide information in proceedings brought under section 6 of the CDDA.

New grounds for disqualifying a director

There are to be two new grounds for disqualification:

1/. Where a person has been convicted of a company-related offence overseas, for example an offence committed in connection with the promotion, formation, management, liquidation or striking off of a company which corresponds to an indictable offence under the law in this jurisdiction; and,

2/. Where a person has instructed a disqualified director. A person who gave directions or instructions to a director which resulted in the conduct that led to the director being disqualified can also be disqualified. This could enable the court to make disqualification orders against persons who nominate a director.

Determining unfitness matters to be taken into account

The court is to be required to have regard to a broader category of conduct in determining whether a person is to be disqualified and the period of the disqualification.

This is reflected in amendments to the statute and the revisions to Schedule 1, Part 1 of the CDDA which sets out matters to be taken into account. The misconduct is now expressed in more general terms and now includes conduct in relation to other companies, including overseas companies.

The court will be required to take into account in all cases the extent to which a person was responsible for the failures of the other failed companies or overseas companies and the extent to which loss or harm was caused by that person's conduct. Where the person against whom the application is made is or has been a director of such companies, the court is also required to take into account whether there was a breach of any fiduciary duty, a breach of any legislative or other obligation and the frequency of such conduct.

Directors of solvent companies can be disqualified

Pursuant to section 8 of the CDDA a person who was a director of a solvent company could only be disqualified if there was "*investigative material*" that was such as to satisfy the court that the director was unfit to be concerned in the management of a company. This restriction is removed by the provisions of the SBEE Act such that the Secretary of State no longer needs to rely on "*investigative materials*". This change to the legislation will allow the disqualification of a director of a solvent company on grounds of unfitness.

Persons instructing unfit directors subject to disqualification

The new legislation permits a disqualification order against a person where a person, referred to as the main transgressor, who is or has been a director of a company (but not a shadow director) has been disqualified or has given an undertaking and that person has exercised the requisite amount of influence over the main transgressor. A person exercises the requisite amount of influence if any of the conduct for which the main transgressor was disqualified: "*is the result of the main transgressor acting in accordance with the person's directions or instructions.*" The giving of advice in a professional capacity is expressly excluded as not falling within the "*requisite amount of influence*".

The ability to disqualify a person who has exercised the requisite amount of influence exists irrespective of whether the disqualification was under section 6 or section 8 of the CDDA.

Civil compensation

The SBEE Act gives the court the power to make a compensation order against a person who has been disqualified under the CDDA or who has given an undertaking not to act as a director and his conduct has caused loss to one or more creditors of an insolvent company of which he was a

7/. None of the provisions of Part 9 of the SMEE Act came into force under the commencement provisions of section 164 of that statute, The Small Business, Enterprse and Employment Act 2015 (Commencement No. 1) Regulation 2015, which was made on 20 May 2015, states that the provisions in Part 9 came into force on 26 May 2015, but they came into force only for the purpose of enabling the exercise of any power to make provision by regulations, rules, or order made by statutory instrument or to prepare and issue guidance but they are not otherwise in force.

director. The Secretary of State also has the power to accept a *"compensation undertaking"* as an alternative to obtaining an order. A compensation undertaking/order is an order that requires a person to pay an amount specified in the order to the Secretary of State for the benefit of creditors specified in the order or to a class or class of creditors so specified or to make a contribution to the assets of the company. As to the date on which these provisions come into force see footnote 9.

It is surprising that the statute appears to permit a distribution other than in accordance with *pari passu* principles that apply to distribution in insolvent liquidations. Furthermore, the prospect of there being a financial penalty as well as disqualification may deter a number of directors from giving undertakings where they do so to avoid incurring costs of litigation if the consequence of so doing is likely to result in a claim for civil compensation.

OTHER LEGISLATION

The Deregulation Act 2015 is of much less importance as it is primarily intended to reduce burdens resulting from legislation for business and to repeal legislation that is no longer of practical use. The changes to insolvency and company law are summarised below.[8]

Deeds of Arrangement Act 1914. The legislation abolishes this statute. As to when these statutory provisions come into force, see footnote below.[9]

Administration. There are two changes. First, so far as the appointment of administrators are concerned, the legislation expressly states that where notice of intention to appoint administrators is filed by directors the appointment of the administrators is not prevented if a winding up petition is presented after the notice of intention to appoint has been filed. Second, administrators are entitled to be released without the approval of unsecured creditors where there has been no distribution to them other than of the prescribed part.

Winding-up. There are also two changes. First, the statute removes the court's power to order a person who owes money to the company to pay that money into an account with the Bank of England. Second, where a winding-up order is rescinded, the person who is liquidator at that time is released with effect from such time as the court may determine.

Disqualification for unfit directors of insolvent companies. First, the Secretary of State's powers to obtain information from officeholders in respect of a person's conduct as a director and to produce or permit inspection of books, records and papers relevant to that person's conduct as a director pursuant to section 7 of the CDDA is expanded to permit the Secretary of State to obtain information from *"any person"*. Second, the conduct about which information can be required to be given is no longer *"any person's conduct as a director of the company"*, but is expanded to *"that person's or another person's conduct as a director of a company which has at any time become insolvent (whether while that person was a director or subsequently"*.

Bankruptcy. There are three changes. First, an extension of the court's power to appoint an insolvency practitioner as an interim receiver, who could later be appointed as a trustee. Second, it is no longer a mandatory requirement for a debtor to produce a statement of affairs. Third, this change provides some protection to bankers from claims by trustees where the trustee has not served notice on the banker that he (the trustee) has a claim in respect of after-acquired property in order to facilitate the operation of bank accounts for undischarged bankrupts.

Insolvency practitioners. The authorisation of nominees and supervisors in relation to voluntary arrangements is repealed as is the provision for authorisation of insolvency practitioners to be granted by competent authority.

Liabilities of administrators. This amendment deletes the words *"wages or salary"* for the purpose of determining the liabilities of Administrators/Administrative Receivers for expenses and priorities to bring the insolvency legislation in line with employment law.

CONCLUSION

In this article I have tried to draw attention to the recent changes that have been made and to the main changes that are to be made to company and insolvency law. It could be all too easy to miss the fact that the SBEE Act is intended to bring about some significant changes.

8/. Section 19 and Schedule 6 of the Deregulation Act. There are also amendments to the requirements of company law in relation to proxies, but this is merely directed at repealing unnecessary legislation.

9/. Section 115 of the Deregulation Act provides that some of these provisions are to come into force at the end of the period of 2 months beginning with the day on which the Act was passed, but only so far as necessary for enabling the exercise on or after 26 March 2015 of any power to make subordinated legislation. The provisions that came into force for this purpose on 26 May 2015 are: the provision stating that an administration order can be made notwithstanding a winding up petition has been presented after the notice of intention to appoint but before the appointment; the minor amendments bringing the coverage of expenses in administration in line with employment law. The Deregulation Act 2015 (Commencement No. 1 and Transitional and Saving Provisions) Order 2015 did not bring any futher provisions of Schedule 6 of the Deregulation Act into force. The present position is that the other changes will be brought into force on such date or dates as the Secretary of State may by statutory instrument appoint.

INSOL International Bermuda One Day Seminar

William Willson reports from INSOL's recent one day seminar in Hamilton, Bermuda and found delegates grappling with the 'common law in all its splendid inadequacy'

This year's INSOL International One Day Seminar on 4 June was the first of its kind to be held in the beautiful islands of Bermuda. Hosted at the impressive Fairmont Hamilton Princess on Hamilton harbour, the conference was attended by 110 delegates, with some 50 per cent flying in from the Caribbean, the US, the UK and the Channel Islands.

South Square was there in force, with Gabriel Moss QC, William Trower QC, David Alexander QC, Hilary Stonefrost, Richard Fisher and William Willson all in attendance.

This show of numbers from Chambers underscores our continuing commitment both to INSOL and to our friends/colleagues in Bermuda, where many of us have spent considerable amounts of time over the years.

This year's sponsors were: ASW Law and Hurrion & Associates Limited (platinum); and Appleby and Deloitte (gold).

The conference kicked off with a session called "Statutory Star Trekkers v Common Law Dinosaurs". Chaired by Ian Kawaley, Chief Justice of the Supreme Court of Bermuda, the panel speakers included South Square's Gabriel Moss QC, James Farley (McCarthy Tétrault), the Hon Arthur Gonzalez (New York University) and Nicholas Segal (Grand Court of the Cayman Islands). The panel debated various approaches to cross-border insolvency cooperation, drawing on last year's decision of the Privy Council in *Singularis* – a case particularly close to the hearts of the chair and at least one panel member (as, respectively, the first instance judge and the Leading Counsel for the unsuccessful liquidators). Though the approach

THE FAIRMONT WAS THE VENUE FOR THE INSOL SEMINAR

HIS HON MR. JUSTICE IAN KAWALEY, JAMES FARLEY QC, GABRIEL MOSS QC, NICK SEGAL AND THE HON ARTHUR GONZALEZ

of the "pointy-eared" Privy Council came in for some robust criticism, the conclusion drawn was that the common law dinosaurs needed "*to look for positives [in the Singularis decision]*", "*move on*" and "*find a different path*".

The second session, "Onshore/Offshore – where should the restructuring take place?", was chaired by DLA Piper's Craig Martin, and used an intricate case study to illustrate determining factors when deciding where to undertake the restructuring if business operations are onshore and the domicile is offshore. The panel was made up of Sidley Austin's Jessica Boelter, Freshfields' Neil Golding and Deloitte's Stu Sybersma. The session was excellent: clinically prepared, clearly presented and full of pragmatism.

After a well-earned networking lunch, the first afternoon session "Alternative Reinsurance – Alternative Restructuring Solutions", looked at the various products/instruments available in a market said to have grown to a size of $60 billion in 2014. Chaired by KPMG's Mike Morrison, panel speakers included Jonathan Cogan (Kobre & Kim), Peter Ivanick (Hogan Lovells), Jess Shakespeare (Duff & Phelps) and Laura Taylor (Nephila Capital). The structures under consideration included "cat bonds" and "sidecars" and the panel considered the cases of *Camp Re*, *Mariah Re* and *Lehman Re*, where loss events have hit these structures leading to disputes and insolvency events. As one panel member pithily put it: "*Bad things happen to nice people's collateral*".

The closing session, "Change is as good as a rest", considered recent case law developments in the Cayman Islands, Bermuda, BVI and the US, drawing in on the perspectives of Greg Grossman (Astigarraga Davis, US), Keiran Hutchison (EY, Cayman), Martin Kenney (Martin Kenney & Co, BVI), Julie Nettleton (Grant Thornton, UK) and Jan Woloniecki (ASW Law, Bermuda). In the wake of last year's decision in Fairfield Sentry on shareholder redemptions from Madoff feeder funds, the panel considered competing solutions based on commercial certainty on the one hand and commercial reality on the other. The session ended where the seminar had started in the morning – with, as one panellist described it, "*the common law in all its splendid inadequacy*".

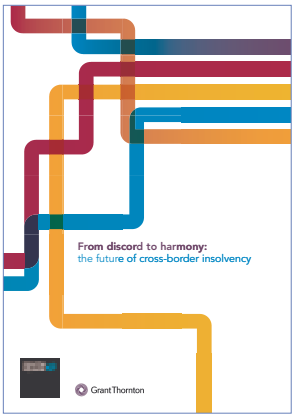
With the technical sessions complete, a large number of us repaired to the Fairmont's poolside bar, 1609, to discuss the day's events (and enjoy the new infinity pool). The delegates then hopped on board a ferry for a short ride across the harbour and a fabulous sunset dinner at the stylish Beau Rivage restaurant. Many thanks to Conyers Dill & Pearman and KMPG for generously sponsoring this and hosting us all so lavishly.

We look forward to seeing many of you again in Guernsey for INSOL's Insolvency and Trusts One-Day Seminar on 9 September.

Finally, many thanks to Penny Robertson for organising another successful conference.

WILLIAM WILLSON

From discord to harmony:
the future of cross-border insolvency



New report published by South Square and Grant Thornton UK LLP

How is it possible to improve the co-ordination and effectiveness of cross-border insolvencies involving offshore jurisdictions in the future? Which offshore jurisdictions are perceived to be high performers? What can be learned from these jurisdictions as well as those that are perceived as less successful? These questions and others were asked of UK and offshore senior lawyers and other professionals at the forefront of cross-border insolvency. Their responses form the basis for a new report *From discord to harmony*.

South Square joined with Grant Thornton UK LLP to commission this research. The resulting report explores the factors regarded by participants as shaping the attractiveness of an offshore jurisdiction, and to what extent different jurisdictions are perceived as meeting these criteria. *From discord to harmony* explores strategies for fostering greater collaboration between jurisdictions to improve cooperation and consistency, and ends by focusing on the following eight offshore jurisdictions: Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Hong Kong, Ireland, Isle of Man and Jersey.

South Square and Grant Thornton are extremely grateful to all participants who took part in the online research, and particularly to those who gave up additional time to provide further input and assistance with this project.

Summary of findings

Six important headlines emerge from the research:

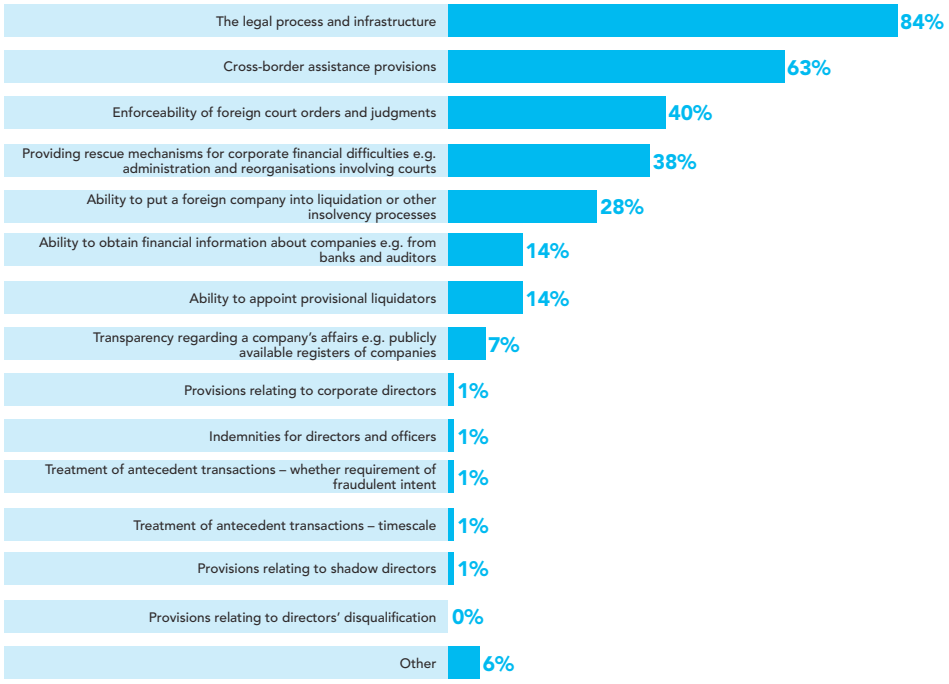
1. Cross-border insolvency practitioners anticipate an increase in future activity in offshore centres.
63% of respondents think that the number of insolvencies involving offshore jurisdictions will increase over the next three years. One in five of the respondents (19%) suggest that the level of activity will 'increase considerably' over this period. It is, perhaps unsurprisingly, predicted that an up-surge will largely be driven by an increase in activity in the financial services sector.

2. Jurisdictions need to ensure that their basic legal process and infrastructure is fit for purpose.
Getting the basics right is critical for effective cross-border insolvency proceedings, yet respondents expressed the view that these basics are not consistently provided by offshore centres at the moment. Legal process and infrastructure is cited by two-thirds (67%) of respondents as the most important factor contributing to the attractiveness of an offshore jurisdiction. On average the respondents score the current performance of offshore centres as less than (and sometimes considerably less than) seven out of 10.

Figure 1.

Which of the following are the three most important factors when evaluating the attractiveness of a jurisdiction's insolvency legal framework? – Aggregated top three factors

Legal process and infrastructure is cited as one of the top three factors for evaluating the attractiveness of offshore jurisdictions by more than four out of every five respondents.



3. The Cayman Islands emerges as a preferred jurisdiction.

Among all the offshore jurisdictions explored in this research, the Cayman Islands is most frequently identified by respondents as the jurisdiction with the most effective insolvency laws. Almost two-thirds of respondents (63%) place the Cayman Islands among the three most effective offshore jurisdictions, followed by the British Virgin Islands (48%) and Hong Kong (37%).

4. Singapore is a very strong location for cross-border insolvency, but those with no experience of its processes are not aware of its strengths.

Three-quarters (75%) of respondents with direct experience of undertaking multi-jurisdictional insolvency in Singapore place it among the three most effective offshore jurisdictions. However, Singapore is not scored so highly by respondents who provided feedback on the jurisdiction without direct experience there. This suggests a significant perception gap exists and that Singapore might have a PR battle to wage.

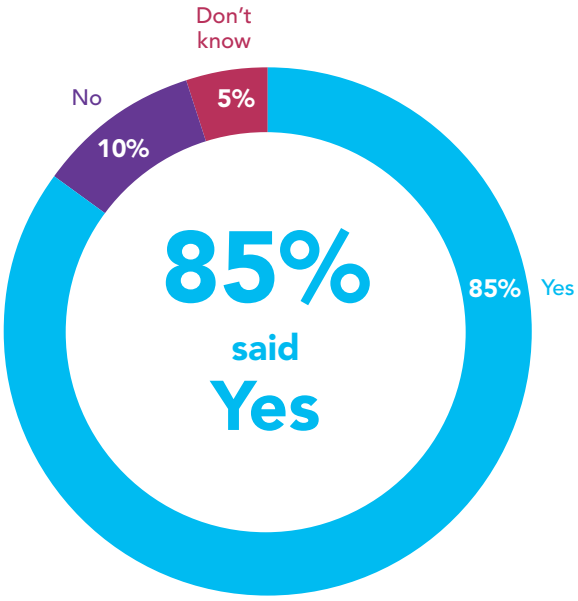
5. All jurisdictions have room for improvement, with perception scores noticeably low.

It is clear that no single jurisdiction has got everything right, with each offshore location demonstrating both strengths and weaknesses according to research respondents. When asked to rate each jurisdiction against a range of different attributes the average scores received are noticeably low, and in most cases below 6 out of 10.

Figure 2.

Do you think that the courts in different jurisdictions should collaborate more to make multi-jurisdictional insolvencies a fairer, more efficient process?

An overwhelming majority believe that courts in different jurisdictions should collaborate more.




FELICITY TOUBE QC


STEVE AKERS

6. Respondents want to see collaboration rise further up the agenda for offshore jurisdictions.
85% of respondents say that courts in different jurisdictions should collaborate more to make multi-jurisdictional insolvencies fairer and more efficient. (It is, perhaps, surprising that this did not get a 100% vote in favour, and even more surprising that 5% of respondents did not know whether there should be or not). Suggestions for fostering further collaboration range from formal mechanisms such as enacting the UNCITRAL Model Law, through to informal channels for greater dialogue and information sharing between judges.

A trigger for wider debate

The research project was led by Felicity Toube QC of South Square and Steve Akers, Head of Complex and International Insolvency at Grant Thornton UK LLP.

Commenting on the report, Felicity Toube QC says: "*From discord to harmony* provides interesting and useful insights into the perceptions of leading practitioners on undertaking cross-border insolvencies in major offshore jurisdictions. We hope our research will be a trigger for wider debate about how all those involved in the legislative and judicial process might learn from each other and work more closely together to improve consistency and collaboration across offshore jurisdictions. We look forward to discussing the findings with our clients and other colleagues in the international insolvency community."

For more information and a copy of the full report, contact Joanna Colton at joannacolton@southsquare.com

About the research
South Square and Grant Thornton UK LLP commissioned independent consultancy Meridian West to conduct the research among lawyers and other insolvency professionals with experience of conducting multi-jurisdictional insolvencies involving offshore jurisdictions. In total, 81 people based around the world took part in the online research, together representing views from 50 of the leading firms involved in cross-border insolvency. This online research was supported by a series of in-depth interviews.

Richard Sheldon QC retires

Richard Sheldon QC retired from the Bar, and as a full member of Chambers, on 31 July 2015. He will now become an Associate Member of South Square.

Richard joined Chambers in 1980 and has had a long and successful career as a barrister. He was called to the Bar in 1979, was appointed Queen's Counsel in 1996 and has sat as a Deputy High Court Judge since 2003. He is a Bencher of Gray's Inn.

Richard was involved in most of the major insolvency cases in the past quarter of a century, starting with the collapse of BCCI in 1991, and including Maxwell, Barings, Landsbanki, Madoff and Lehman Brothers. He worked on major restructurings, including the Bank of Cyprus, Sea Containers, MyTravel, Global Crossing and Telewest. His practice also covered work offshore notably in the Cayman Islands and Bermuda. Richard, a loyal supporter of Arsenal, also became involved in football club litigation with Portsmouth FC.

Richard has always been a key member of South Square. He was generous with the time that he devoted to the internal running of Chambers, and his sound judgement, fair-mindedness and sense of humour were invaluable in reaching a sensible solution to the various management issues which arose.

Always keen to share his experience with more junior barristers, Richard helped to form the careers of numerous junior members of Chambers. Each year those who had been led by him, or who had assisted him with book writing, were invited to a dinner cooked (at least in part) by him. Helen, his wife, always played an important role in the proceedings. The delicious food was always accompanied by great wine from Richard's impressive wine cellar. The dinners which had become a tradition were always terrific fun. It is a shame for the junior members of Chambers that there will now be no more of them.

RICHARD SHELDON QC

Richard is not cutting his ties with the law completely. He intends to continue his role as a visiting professor at Nottingham Trent University and will also retain his position as general editor of the leading publication Cross-Border Insolvency which now bears his name.

We will miss Richard very much. But happily for him he will now have more time to spend not just with his family, but also on his other great passions: music and mountains.

EU/EEA LAW UPDATE

Robert Amey and Andrew Shaw look at EU/EEA developments.

ROBERT AMEY

ANDREW SHAW

Recast Insolvency Regulation

The Recast Regulation ("RR") entered into force on 26 June 2015 (RR Article 92). Plenary sessions of the Parliament on the 7 and 20 May 2015 adopted the "first reading position" of the Council, and the legislative process was completed by the formal act of signing by the respective Presidents of the Parliament and of the Council, which duly took place on the same day, namely 20 May 2015. The RR was published in the Official Journal on 5 June 2015 as Regulation (EU) No.2015/848. The RR will only be applicable to insolvency proceedings opened on or after 26 June 2017. The previous Insolvency Regulation is repealed by RR Article 91 but continues to apply to insolvency proceedings which fall within its scope and which were opened before 26 June 2017.

C-649/13 Comité d'entreprise de Nortel Networks SA and others v Rogeau

Prior to 2008, the Nortel Group ("Nortel") was one of the world's leading providers of telecommunications network solutions. The Canadian company Nortel Networks Limited ("NNL") held the majority of Nortel's worldwide subsidiaries, including Nortel Networks SA ("NNSA"), a company incorporated under French law. Nortel engaged in extensive research and development ("R&D") activities, which it pursued through specialist subsidiaries ("R&D centres'). NNSA was one of those subsidiaries. Almost all the intellectual property resulting from Nortel's R&D activities was registered (mainly in North America) in the name of NNL as the legal owner. NNL granted the R&D centres exclusive licences to exploit Nortel's intellectual property. The R&D centres also retained beneficial ownership of that intellectual property, in a proportion based on their respective contributions to the research and development activities.

In 2008, following serious financial difficulties, Nortel decided to arrange for the opening of insolvency proceedings simultaneously in Canada, the United States and the European Union. By order of 14 January 2009, the English High Court opened main insolvency proceedings in respect of all the companies in the Nortel group situated in the European Union, including NNSA, pursuant to Article 3(1) of the Insolvency Regulation. On 28 May 2009, on the application of NNSA, the tribunal de commerce de Versailles opened secondary proceedings in France.

On 7 July 2009, industrial action began at NNSA, and was brought to an end on 21 July 2009 by the signing of a memorandum of agreement settling the action by NNSA, the comité d'entreprise ("Works Council") of NNSA and representatives of the striking employees. That agreement provided for the making of a severance payment, of which one part was payable immediately and another part, known as the deferred severance payment ("deferred SP"), was to be paid, once operations had ceased, out of any sale proceeds after full payment of the administration expenses. It was provided that the amount of the deferred SP would depend on the amount of funds available.

In order to secure a better price for Nortel's assets, the liquidators in the various insolvency proceedings throughout the world agreed that those assets would be sold on a global basis. It was agreed that NNL's subsidiaries would at the appropriate time waive their industrial and intellectual property rights relating to the activities being sold, that all the proceeds from the sale of the group's assets at world level would be placed in escrow accounts in the United States and that none of the sums held in those accounts could be distributed outside an agreement concluded by all the relevant entities in the group. In accordance with this agreement, NNSA's assets were sold and the proceeds (around US$7.2 billion) were placed in escrow in the United States.

The Works Council subsequently sought declarations from the French court to the effect that the secondary proceedings relating to NNSA had an exclusive and direct right over a share of the overall proceeds from the sale of the Nortel group's assets. The French insolvency proceedings were secondary proceedings. Accordingly, the Insolvency Regulation provided the effect of the French proceedings would be "be restricted to the assets of the debtor situated in [France]" (Article 3(1) and Article 27). Furthermore, Article 2(g) provided rules for determining in which Member State assets were situated.

The French court referred two issues to the ECJ, asking (1) whether it

had jurisdiction to rule on what assets fell within the scope of the secondary proceedings (and whether it shared this jurisdiction with the English court as the court seised of the main proceedings) and (2) if it had jurisdiction, what law it should apply to determine where the relevant assets were situated.

The ECJ, following the opinion of the Advocate General, held as follows. A court seised of secondary proceedings must be competent to determine whether it has jurisdiction over certain assets. Accordingly, although the French proceedings were limited to assets situated in France, the French court was competent to determine whether assets were situated in France in the first place. However, the court seised of main proceedings also had concurrent jurisdiction to determine the matter, and to avoid inconsistent judgments, the first in time would prevail (see Article 25, which would require the second court to recognise a judgment which had been handed down previously by a different court). In determining whether assets are situated within the court's jurisdiction, the French court should apply the rules in Article 2(g) of the Insolvency Regulation, and consider where the assets were situated at the date that the French proceedings were opened.

Tchenguiz & Others v Grant Thornton & Others [2015] EWHC 1864 (Comm)

This was an application by the fourth defendant, Kaupthing Bank hf ("Kaupthing"), and the fifth defendant, Jóhannes Jóhannsson ("JJ") a member of Kaupthing's winding up committee seeking dismissal or a stay of proceedings brought against them in England by the claimants. These proceedings concerned various torts alleged to have been committed by the defendants in relation to an abortive investigation into Vincent Tchenguiz and related entities by the Serious Fraud Office ("the English proceedings").

The first ground relied upon by Kaupthing was that the Claimants were barred from bringing proceedings in England because of the effect of Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions ("the 2001 Directive") as enacted in England by the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 ("the 2004 Regulations"), which is to give direct effect in England to Icelandic insolvency law. The provisions of Icelandic insolvency law include a stay of court proceedings against an insolvent bank such as Kaupthing ("the insolvency ground").

The second ground, relied upon by both Kaupthing and JJ was that the English courts had no jurisdiction under the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Lugano Convention") because the English proceedings fell within the exception at Article 1(2)(b) of the Lugano Convention, which excludes "*bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangments, compositions and analogous proceedings*" from its scope ("the jurisdiction ground").

The claimants argued that the English proceedings were clearly within the Lugano Convention and, where the Lugano Convention applied, the 2001 Directive only applied to proceedings which fell within the scope of its Article 1(2)(b). They further disputed that the effect of the 2001 Directive and the 2004 Regulations was to give Iceland exclusive jurisdiction in relation to the winding up of Kaupthing.

Carr J held that the effect of the 2001 Directive was to give Iceland exclusive jurisdiction to wind up Kaupthing and that Icelandic law governed the effects of those winding up proceedings on individual creditors, relying in particular on the judgment of Gloster J in *Lornamead Acquisitions Ltd v Kaupthing Bank hf* [2013] 1 BCLC 73. She further held that the 2004 Regulation had implemented the 2001 Directive in England and so the Icelandic stay would have effect in England

In dismissing the claimants' contention that the 2001 Directive only applied to proceedings within Article 1(2)(b) of the Lugano Convention. Carr J drew a distinction between the concepts of jurisdiction and choice of law. While the EC Regulation No 1346/2000 on Insolvency Proceedings ("the Insolvency Regulation") and the Lugano Convention dovetailed as regards jurisdiction, there was no reason to suppose that such dovetailing also applied to questions of choice of law. The choice of law rules imposed by the Insolvency Regulation and other insolvency instruments played no part in the Lugano Convention. Accordingly, Kaupthing succeeded on the insolvency ground.

Recognising that to fall within the scope of Article 1(2)(b) of the Lugano Convention, proceedings must derive directly from the bankruptcy or winding up and be closely connected with the insolvency proceedings, Carr J considered that on the facts the English proceedings did not meet this requirement. The English proceedings did not derive directly from the winding up of Kaupthing, nor was their principal subject matter. The claimants did not rely in the English proceedings on any insolvency aspect of the winding up and nor did they rely upon any breaches by JJ of his duties in his capacity as a member of the winding up committee. Although the claims were connected with the winding up proceedings, the connection was not a close one. Thus the English proceedings were within the Lugano Convention and JJ and Kaupthing failed on the jurisdiction ground.

CoA case timetable updated for first time

The Court of Appeal (CoA) has revised the guidelines for hear-by dates for the first time in over 10 years.

The updated timetable will extend the average waiting time for cases to be heard and give lawyers a "reliable timescale" for hearings.

Lawyers have increasingly complained about the long delays on CoA hearings.

The CoA has now amended the current hear-by dates to ensure "efficient management of the work of the court" and to "reflect a 67 % increase in permission to appeal applications since the last practice note was issued in 2003".

The time extension will vary depending on the type of case and whether permission to appeal was granted in the lower court.

Cases will be ranked in order of priority and the CoA will continue to expedite urgent matters.

Hear-by dates are measured from the date an appellant's notice is issued in the CoA to the date the appeal is likely to be heard. The new hear-by dates will come into effect on 1 August 2015 and apply to all cases filed after 31 July 2015.

CBA votes to refuse new legal aid work

The Criminal Bar Association (CBA) voted to refuse new legal aid work, supporting solicitors' strike action against the government's cuts to legal aid.

The industrial action is an attempt to reverse the 8.75 per cent cut to solicitors' fees, introduced on 1 July.

Fees have been reduced by 17.5 per cent over the last 15 months.

There are approximately 14,000 barristers in England and Wales, around 4,000 of whom are members of the CBA (which voted in favour of action by 982 votes to 795).

Justice Secretary Michael Gove said he was "disappointed" with the result.

Increase of UK litigants in London's Commercial Court

The UK accounted for 37 per cent of the total number of commercial court litigants this year, up from 23 per cent the preceding year, according to figures disclosed in consultancy service Portland's annual report, *Who Uses the Commercial Court?*

The court heard 207 cases in total, an increase of 88 from the previous year.

Idil Oyman, head of Portland's legal disputes practice, said: "We'll have to see in 12 months' time if the resurgence of UK litigants is a one-off or whether this is the start of a longer-term reversal of the dominance of foreign litigants in the Commercial Court".

Outside of Europe, Eurasia, the Middle East and North Africa topped the list.

Judicial Appointments

■ Simon Derek Picken Esq QC was appointed to be a Justice of the High Court with effect from 8 June 2015, assigned to the Queen's Bench Division. His appointment follows the retirement of Mr Justice MacDuff. Simon Picken was called to the Bar by Middle Temple in 1989, taking Silk in 2006. He was appointed a Recorder in 2005.

SIMON PICKEN QC

■ Alistair MacDonald QC was appointed as a High Court Judge with effect from 2 June 2015 to sit in the Family Division. His appointment follows the retirement of Mr Justice Griffith Williams. Alistair MacDonald was called to the Bar by the Inner Temple in 1995. He took Silk in 2011 and was appointed a Recorder in 2009.

ALISTAIR MACDONALD QC

Silvio Berlusconi convicted but spared jail time

Silvio Berlusconi was sentenced to three years in jail and banned from holding public office for five years having been found guilty of bribery charges by a Naples court in June. However, the former Italian Prime Minister, who denied the charges, will not have to serve his sentence because a statute of limitations comes into effect later this year before an appeal can be held. Berlusconi issued a payment of 3m euros to Sergio De Gregorio, then a senator from the anti-corruption Italy of Values Party, to switch to his People of Freedom party. The disgraced politician, found guilty of tax fraud last year, is currently appealing against a prison sentence for having sex with an underage prostitute.

BERLUSCONI FREE FOR NOW

UAE approves bankruptcy law

The United Arab Emirates' cabinet has approved a draft financial regulation law which is expected to help bail out businesses at risk of bankruptcy.

UAE Prime Minister and Ruler of Dubai, Sheikh Mohammed said in a statement on Emirates news agency WAM: "The draft law aims to regulate accumulated debts, eases restructuring of companies as well as support troubled businesses."

"The draft law aims to mitigate risk of bankruptcy and ensure a safe and attractive business environment in the UAE that nurtures and supports investments," he continued.

The new law was drawn up following in-depth consultation with local and international experts in the field of bankruptcy and financial restructure.

"In light of its global investment position, the UAE government seeks to provide incentives to investors to invest in the country by ensuring a supporting environment and benefits to develop businesses in the UAE," Sheikh Mohammed said.

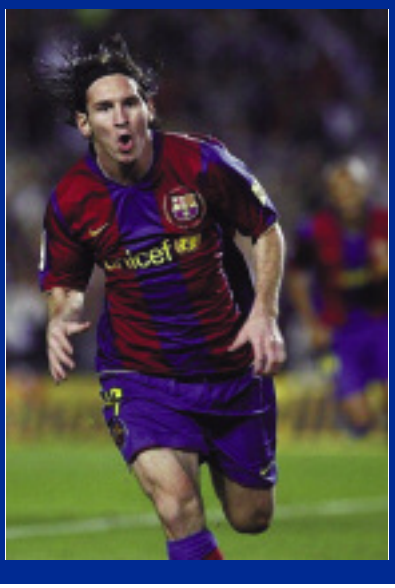
The next stage is for the draft law to go to the Federal National Council for approval. If it is passed, it will be then be referred to the rulers of the seven emirates before obtaining final approval from UAE President, Sheikh Khalifa bin Zayed bin Sultan Al Nahyan.

Messi to face €4.1m tax fraud trial

A Spanish high court has rejected Lionel Messi's latest appeal, paving the way for the Argentina and Barcelona footballer to stand trial for alleged tax fraud later this year.

The provincial high court in Barcelona said it believed there was evidence that Messi, whether knowingly or not, had benefitted from a complex network of companies which kept €4.1m from Spanish tax authorities between 2007 and 2009.

Messi's father, Jorge Horacio Messi, is accused of selling the footballer's image rights using shell companies in Uruguay, Belize, Switzerland and the UK to avoid reporting earnings in Spain.



Save the dates

South Square is once again holding a **Litigation Forum** with Mourant Ozannes. The 2015 Forum will take place on Wednesday 4 November (12.30-5.30pm followed by networking drinks) at Dexter House in London. The focus of this year's event will be key developments in financial litigation.

RISA Conference - Tuesday 24 November

RISA is holding a conference in association with South Square on Tuesday 24 November (2-5pm followed by a drinks reception) at the Ritz-Carlton in Grand Cayman. Michael Crystal QC will be moderating the event.

Programme and speaker details for both events will be available soon. For more information, contact joannacolton @southsquare.com.

Osborne's budget - tax avoidance and evasion crackdown widens

Increased hostility towards those who avoid or evade paying what HM Revenue & Customs deems to be the "right amount" of tax is not going to drop down the government's agenda as it seeks to recover £5bn a year.

The scope of crackdown is now set to widen – HMRC is expected to raise £7.2bn from closing in on tax fraud, offshore trusts and the hidden economy, which will be funded with £800m of additional investment. This will cover "imbalances" to the tax system that disproportionately benefit certain groups or structures.

The removal of the climate change levy exemption for renewable electricity marks the largest single item in the clampdown, which will yield up to £910m a year.

Tax-motivated incorporation is another "imbalance" the chancellor is set to tackle in a bid to raise a further £2bn over the course of the parliament, in addition to the £2bn a year tax dividend increase.

A measure to stop capital gains tax avoidance by private equity firms is expected to recover £1.8bn over the next five years.

OSBORNE: CLOSING IN ON TAX FRAUD

Pro bono walkers raise £2,500

South Square's London Legal Walk team would like to extend their thanks to all those who sponsored us this year. Richard Sheldon QC, Lloyd Tamlyn, Hilary Stonefrost, Charlotte Cooke, Toby Brown, Robert Amey, Joanna Colton, Hannah Pini, Orietta Bergamo and Oberon Kwok participated in the 5k walk alongside more than 9,000 fellow fundraisers, raising more than £2,500 for the Bar Pro Bono Unit, the Free Representation Unit and the London Legal Support Trust.

UP TO 9000 TOOK PART IN THE PRO BONO WALK

Glen Davis QC and Felicity Toube QC Appointed to IICM

INSOL International has appointed qualified mediators Glen Davis QC and Felicity Toube QC among the first members of the new INSOL International College of Mediation (IICM) Panel, which was launched on 1 July.

The IICM will focus on the resolution of insolvency, restructuring and related disputes that emerge in the course of insolvency proceedings. The Panel is composed of mediators from a number of different jurisdictions, all of whom have particular insolvency and restructuring expertise as practitioners or as judges.

Glen and Felicity are the only barristers and English-based lawyers to have been appointed to the 14-strong panel. They are available to mediate domestic and international insolvency disputes.

GLEN DAVIS QC

FELICITY TOUBE QC

Director disqualifications double

New figures released by the Insolvency Service show that the number of company directors disqualified for criminal activity has almost doubled in the last year.

In the last financial year, 119 directors were struck off by the Insolvency Service for wrongdoing including fraud and false record keeping. This marks an 83 per cent increase on the previous year and is more than double the figure for 2013, which witnessed 53 director disqualifications.

50 Cent the latest celebrity to file for Bankruptcy

American rapper 50 Cent filed for bankruptcy in July, just days after being ordered to pay $5m to a woman who claimed he posted her sex tape online without permission. The 40-year-old musician, real name Curtis James Jackson III, filed for Chapter 11 protection in the US Bankruptcy Court for the District of Connecticut. He listed both his assets and debts as worth between $10m and $50m. Jackson, also known as Fiddy, burst onto the music scene in 2003 with his gangsta rap anthem "In Da Club". He subsequently released five commercial albums and carved out a successful film career. Forbes noted his wealth in 2007, ranking him second behind Jay-Z in the rap industry.

The Sunday Times recently reported the route of 50 Cent's woes was the vast Connecticut mansion he bought from his idol, former heavyweight boxing champion, and fellow bankrupt, Mike Tyson. Tyson had tried to warn Fiddy off the purchase of the property, the upkeep of which had effectively led him to bankruptcy.

50 CENT (INSET) AND THE MANSION HE BOUGHT THAT RUINED MIKE TYSON

Swooping seagull alert at RCJ

"CAUTION. BEWARE. NESTING/SWOOPING SEAGULLS," read the warning signs dotted around the Royal Courts of Justice in July. The alert came in response to reports of defensive gulls protecting a chick which had found its way onto an enclosed, paved outdoor area in the courts' complex.

A SEAGULL, AND SEAGULL JNR

The news hit the Metro and the Evening Standard, which reported that a barristers' society based near the courts now deploys a falconer to scare the offending birds away.

Law firm in North Korea blunder

A Scottish law firm was left red faced last month having erroneously announced on Twitter that it was the honorary consulate for North Korea.

At a ceremony attended by SNP Leader Nicola Sturgeon, the Edinburgh office of Gillespie Macandrew was in fact named the honorary consulate for the Republic of Korea, otherwise known as South Korea. The firm was quick to replace the misleading tweet and issued an apology to the Korean embassy.

It is understood Nicola Sturgeon and North Korea have yet to strike up diplomatic relations, despite reports of Kim Jong Un's effusiveness for Scottish independence.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the August 2015 edition of the Digest. This time all you have to do is work out what the eight clues represent and what connects them. Please send your answers to kirstendent@south-square.com or by post to Kirsten at the address on the back page. To the winner, if necessary drawn out of the wig tin, goes the usual magnum of champagne and a South Square umbrella. Good luck.
Answers by Friday 9 October 2015 please.

David Alexander QC

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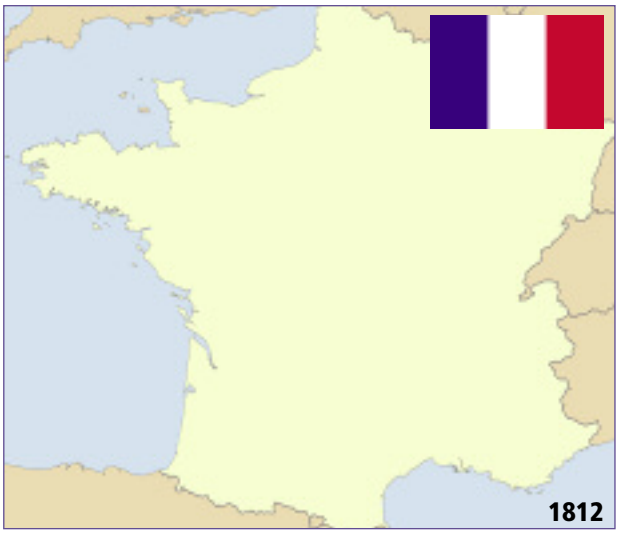

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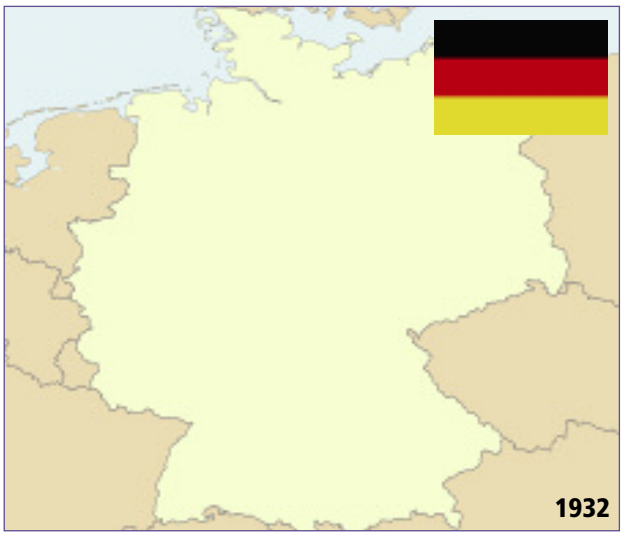

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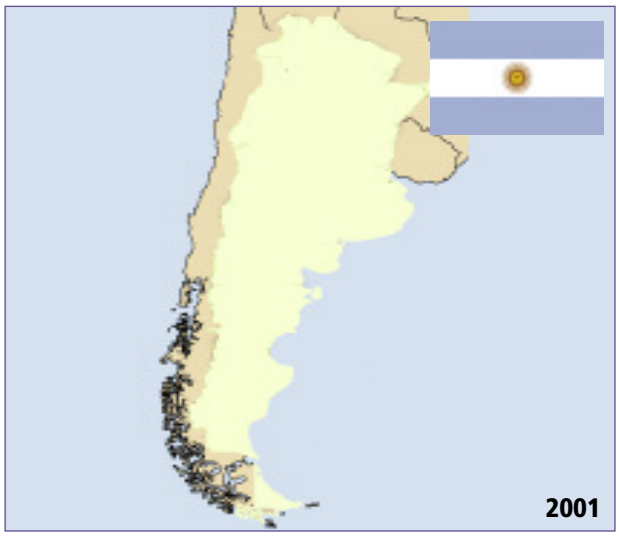

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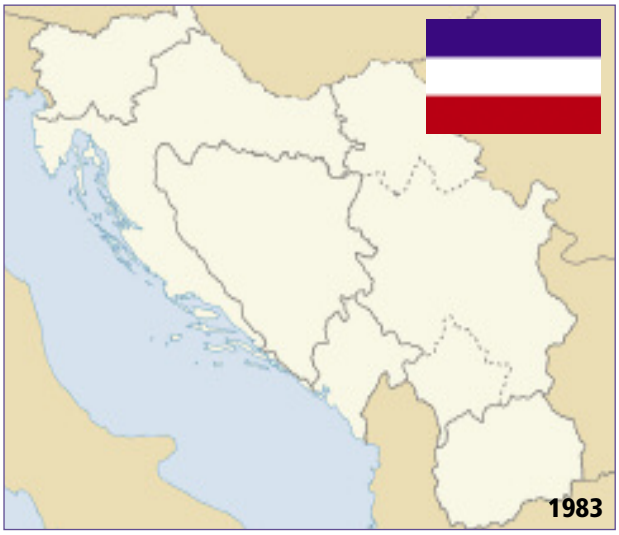

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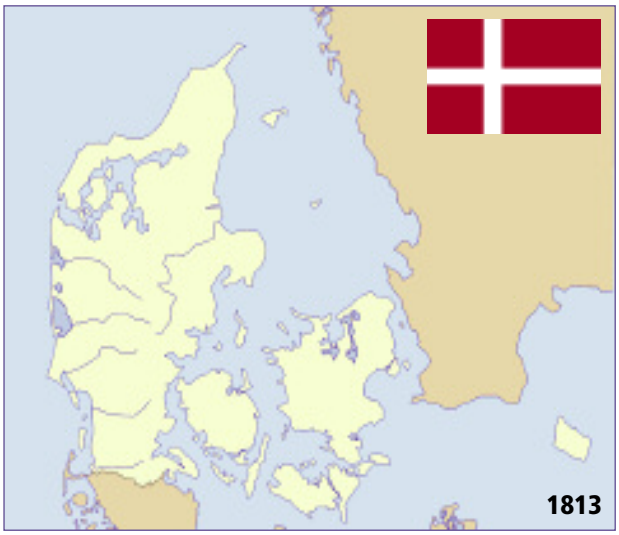

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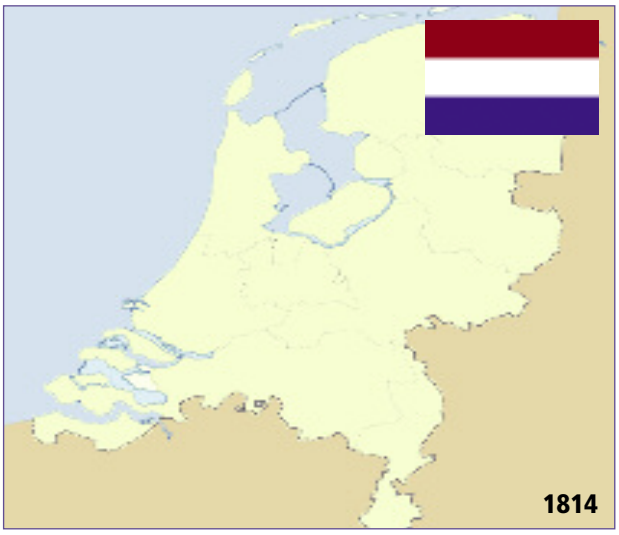

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And the connection is?

JUNE CHALLENGE

The correct answers to the June 2015 South Square Challenge were:-
1/. Re English Scottish and Australian Charter Bank. 2/. Re Hawk Insurance. 3/. Re Drax Holdings Limited. 4/. McCarthy & Stone PLC
5/. Re Hellas Telecommunications (Luxembourg). 6/. Re Rodenstock. 7/. Bluecrest Mercantile NV v Vietnam Shipbuilding Industry Group
8/. Zodiac Pool Solutions SAS. The connection is Schemes of Arrangement.
The winner was Andrew Goodson of Griffins to whom go our congratulations, a magnum of champagne and a South Square umbrella.

Diary Dates

South Square members will be attending, speaking at and/or chairing the following events:

INSOL International Insolvency & Trusts One Day Seminar
9 September 2015 – The Duke of Richmond Hotel, Guernsey

INSOL Europe Annual Congress
1-4 October 2015 – The Maritim Hotel, Berlin

Pinsent Masons Restructuring and Insolvency Conference
6 October 2015 – The Brewery, London

RISA Conference in association with South Square
24 November 2015 – The Ritz-Carlton, Grand Cayman

INSOL Dubai Annual Regional Conference
24-26 January 2016 – The Madinat Jumeirah Hotel, Dubai

INSOL 2017 Tenth World International Quadrennial Congress
19-22 March 2017 – Sydney

South Square also runs a programme of in-house talks and seminars – both in Chambers and onsite at our client premises – covering important recent decisions in our specialist areas of practice, as well as topics specifically requested by clients. For more information contact events@southsquare.com or visit our website www.southsquare.com

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David Alexander QC
Antony Zacaroli QC
Glen Davis QC

Barry Isaacs QC
Felicity Toube QC
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Jeremy Goldring QC
David Allison QC
Tom Smith QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Daniel Bayfield
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Stephen Robins
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Henry Phillips
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Matthew Abraham
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