SOUTH SQUARE DIGEST

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

Cayman focus

Redemption Claims in investment funds

Cayman Islands as a restructuring centre

Ocean Rig opens the door

British Virgin Islands

Open for business

South Square and Alchemy

Round table

Leeds v Lemos

The rights of privilege in bankruptcy

NOVEMBER 2017

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CHAMBERS & PARTNERS COMPANY/INSOLVENCY SET OF THE YEAR 2018

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FROM THE EDITOR

MARK ARNOLD QC

'Let them be lions'

Welcome to the November edition of the South Square Digest, the last of 2017.

What a difference a year makes. Readers will need no reminding that, this time last year, judges had been labelled "enemies of the people". At a touch more than snail's pace – but not much more – the Lord Chancellor of the day rallied to their defence, sort of, appearing a little less than resolute and unflinching. Speaking in Cambridge last month, Lord Falconer, himself a former Lord Chancellor and one of the architects of the Constitutional Reform Act 2005, reminded us that s. 2(1) provides that: "A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience". In appointing that, her first, Lord Chancellor, Lord Falconer considered that the Prime Minister had acted unlawfully, and said so. Clearly not a fan.

LORD CHANCELLOR, DAVID LIDINGTON MP - A CHANCELLOR ON TOP OF HIS BRIEF

A year later, things are looking much more positive. Speaking at the affirmation of Sir Ian Burnett as the new Lord Chief Justice of England and Wales, David Lidington MP, the new Lord Chancellor, said the following:

"Our courts **...** are grounded in the Rule of Law; and our law is a breathing, living entity **...** Our law does much more than establish and govern a legal system. It is at once part of the fabric of history and also the beating heart of modern society: it is synonymous with quality and incorruptibility. As impartial and fearsomely independent judges, acting under the leadership of the Lord Chief Justice, it is your task to preside over this law so that, with our support, citizens, institutions, investors and businesses can have faith in the future **...** [W]ithout you all – without that tradition and practice of judicial independence, the Rule of

Law would be but an empty shell **...** Judges allow us to live in a society where no individual and no government is above the law, where executive power is balanced by a strong judiciary and a scrutinising legislature."

Bravo! This Lord Chancellor has clearly mastered his brief.

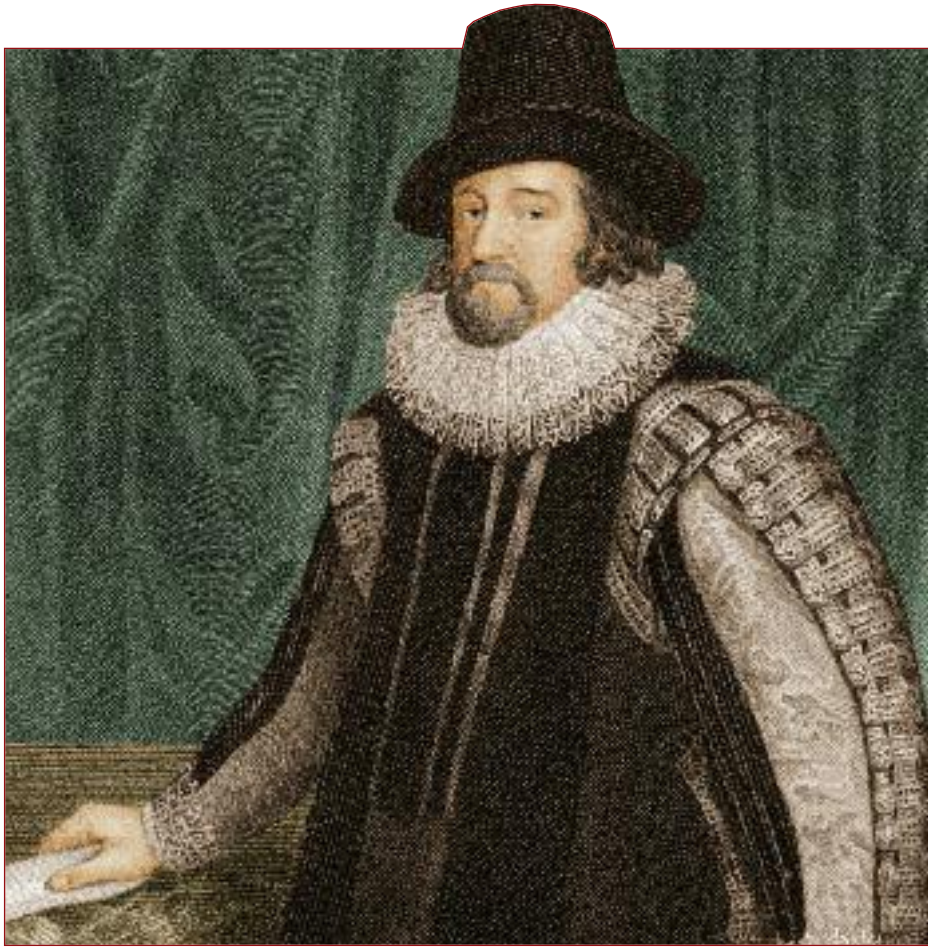
The Lord Chancellor spoke disparagingly of one of his predecessors in office, Francis Bacon, the 1st Baron Verulam. Quite right too. Speaking of the judges and their function in Stuart England, Bacon had said:

"Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty."

Fortunately, he did not get his way: as we know, the Stuarts submitted to the Rule of Law, after a bit of a struggle. As for Bacon himself, he was impeached on charges of bribery and, although the inscription on his statue in South Square will not tell you so, caught a chill while investigating how to refrigerate a chicken, and died. The chicken, it is said, haunts Pond Square, Highgate, although it has not been seen of late.

One person who has been looking down on Francis Bacon for years – literally, from his room overlooking South Square – is Antony Zacaroli QC, recently named Chambers and Partners Company and Insolvency Silk of the Year, 2017. He will do so no longer. As he takes the judicial oath and becomes the Honourable Mr Justice Zacaroli, he becomes the newest member of the judicial pride assigned to the Chancery Division and moves to the Rolls Building. With enviable turn of phrase, Martin Pascoe QC pays tribute to Tony in the pages immediately following this editorial. We congratulate him on his appointment and wish him all the very best.

And, finally, our grateful thanks. First, to all our clients, friends and colleagues, without whose support South Square could not have been named as Chambers and Partners Company and Insolvency Chambers of the Year, 2017: thank you.



FRANCIS BACON: PHILOSOPHER, JURIST, STATESMAN, AUTHOR AND SCIENTIST - DIED AFTER STUFFING A CHICKEN WITH SNOW

Secondly, to William Trower QC as he steps down as Head of Chambers. He has skippered us with consummate skill, and considerable charm, over many years. Although it is time for others to take the helm, I can say without fear of contradiction that his successors are delighted that William, to whom Jeremy Goldring QC pays tribute in this edition, will remain a fully-functioning member of South Square and is going nowhere!

Thirdly, to all our contributors. We extend a particularly warm welcome to our guest contributors:- Rocco Cecere, Chris Duncan and Jamie Bell of Mourant Ozannes, Nick Herrod of Maples & Calder and Jeremy Childs and Peter Ferrer of Harneys. A glance at the contents page will tell you that there is much to enjoy in this edition, which has a Caribbean flavour. Happy reading!

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Antony Zacaroli QC

South Square is immensely proud to announce that 15 November 2017 will see the swearing-in of Antony Zacaroli QC as one of Her Majesty's High Court Judges, to be assigned to the Chancery Division (if it should be found still to exist following the creation of the Business and Property Courts of England and Wales).

Tony began his practice at the Bar in 1988 in chambers at Queen Elizabeth Building, but joined us soon after and since then has had a truly glittering career at South Square. A quick glance at his CV will show the breadth and depth of his practice – a leading role in all the major insolvencies of the last decade, insolvency silk of the year in both 2010 and 2017, important cases in a wide range of other disciplines, frequent appearances at the highest level of courts, a substantial offshore practice, and ranked as a leading silk in more practice areas by more directories than most of the rest of Chambers put together. He also of course was pupil master and mentor to our newer recruits, and most of the juniors and junior silks in chambers owe much of their own practices to the work ethic he instilled in them and the care and humour, as well as unstinting time, that he devoted to them during their seats with him and afterwards as they began their careers.

As well as his enormous practice Tony also somehow found the time to engage in a wide range of other activities, including a broad career in music. He is an accomplished tenor, appearing with and recording for the Elysian singers, a talented pianist and composer of a range of works, and also the keyboard backbone of a thrash metal/progressive rock band. In earlier years he devoted a significant part of his leisure time to restoring narrow-gauge steam railways in Wales, and continues to maintain an interest in all things steam driven.

He will bring to the Bench his formidable intellect coupled with a modest and approachable judicial manner that will make him a delightful if demanding tribunal but also ensure that appearing in his Court will be a challenging yet thoroughly rewarding experience for all advocates, and particularly those from South Square. His departure leaves a huge hole, but Chambers' loss is truly the Chancery Division's gain.

ANTONY ZACAROLI QC

Martin Pascoe QC

William Trower QC – an appreciation

William stepped down as Head of Chambers in September 2017

JEREMY GOLDRING QC

William took the reins in managing chambers in 2000, becoming Head of Chambers in 2008. In 2000, when William started, Tony Blair was in his first terms as Prime Minister, George W Bush had recently replaced Bill Clinton as President, and Nasser Hussein was England cricket captain. Lehman Brothers still had eight years to live as one of the largest investment banks in the world, while mortgage-backed securities and collateralised debt obligations were phrases known only to coteries dotted around the world's financial centres. In short, William has been managing Chambers for a very long time.

William has qualities other than longevity, however. For seventeen years, assisted by a revolving and varied cast of characters, he has spent hours, days and weeks keeping the show on the road, with the calm and good humour that are his trademarks. For this all involved in Chambers, and members in particular, must be eternally grateful. However rough the waters, William has retained his grace under pressure, his room overlooking South Square almost always a haven of sanity and tranquillity.

Amongst William's few predecessors as head of chambers are the late Muir Hunter QC (who served in the role in the from the 1960s until the early eighties) and the very much alive Michael Crystal QC (who was head from 1984 to 2008). Like William, each brought his personality, strengths and visions to the role. Muir was the leading bankruptcy practitioner of his generation, famous cross-examiner of John Poulson, producing what remains the leading text book on personal insolvency (now edited by John Briggs and Christopher Brougham QC). Michael was amongst the visionaries who developed corporate insolvency law as a field of practice of the highest calibre, both in England and across the world, with Chambers playing a leading role. William has led Chambers through a period of huge developments in the financial markets and world economy, which have left the worlds of restructuring and finance almost unrecognisable.

Like Muir and Michael before him William has always juggled his time devoted to Chambers with a busy practice, like them acting in many of the leading insolvency cases of the day, from HIH to Nortel to Lehman. Members, however, will remember how, for all that, he was never too occupied to deal with the whole range of issues that arise in an organisation made up of independently minded practitioners, from the seemingly trivial upwards. No wonder he requires two replacements, in the form of David Alexander QC and Mark Arnold QC.

WILLIAM TROWER QC

Finally, there is a danger that appreciations like this have the tone of an obituary. It is important to emphasise, to the contrary, that William remains alive and well, and in full time practice from South Square. No doubt that is a comfort both to members, staff and clients alike.

WAKEFIELD, 1972 - THE LEARNED GENTLEMEN LEAVING ONE OF THE HEARINGS OF POULSON'S PUBLIC EXAMINATION ARE, FROM LEFT TO RIGHT, (AS THEY THEN WERE): MICHAEL CRYSTAL, DAVID GRAHAM, MUIR HUNTER QC, AND MR LEONARD SAFFMAN, POULSON'S SOLICITOR

Redemption Claims in investment funds

Following the recent Privy Council decision in Pearson v Pimeo Fund, **Tom Smith QC** and **Rocco Cecere** of Mourant Ouzannes, Cayman Islands, consider the proper classification and priority of investor claims against funds impacted by fraud

Introduction

The global financial crisis of 2007 and 2008 flushed out a large number of frauds, the largest of which was almost certainly Bernard Madoff's now infamous Ponzi scheme. It had catastrophic consequences for investors and most of the funds invested in Madoff went into liquidation. Many of those liquidations are now considering distributions to their stakeholders and this has given rise to a number of important decisions in respect of the proper classification and priority of investor claims against funds impacted by fraud.

In practice, one of the key issues concerns the relative priority in the liquidation of a fund of those investors who did not redeem their investments and those investors who had sought to redeem but who had not been paid out by the fund before its collapse.

The recent decision of the Privy Council in *Pearson v Primeo Fund*[1], which involved two Madoff feeder funds, has now definitively determined when an investor in a Cayman fund becomes a creditor and the priority of the resultant creditor claim *vis-à-vis* ordinary or trade creditors and remaining unredeemed investors. The Privy Council's *dicta* has also shed light on the priority of investors who unsuccessfully sought to redeem before the winding up but who enjoy the statutory priority pursuant to s.37(7) of the Cayman Companies Law (**Law**).

Given the very large number of funds incorporated as Cayman companies, the decision provides very helpful clarity and guidance for investors in funds and those concerned with managing the liquidations of such funds.

Background and s.37(7) of the Law

Primeo, a Cayman Islands open-ended fund, invested in Madoff indirectly though Herald, also a Cayman fund. Herald placed effectively all its assets with Madoff for management. In November 2008, Primeo submitted a US$155 million redemption request to Herald, which was accepted and Primeo was redeemed pursuant to the terms of Herald's articles on 1 December 2008. Shortly afterwards, as news of Madoff's fraud become public, Herald suspended its dealings and Primeo never received its redemption moneys.

On ordinary principles, Primeo ceased to be a shareholder in respect of the redeemed shares once the redemption was effective under the articles and became a creditor for the redemption proceeds which claim, in the ordinary way, would rank ahead of the claims of remaining unredeemed investors to a distribution in respect of their shareholdings.

1/. [2017] UKPC 19.

THE PEARSON V PRIMEO FUND DECISION PROVIDES HELPFUL GUIDANCE GIVEN THE VERY LARGE NUMBERS OF FUNDS INCORPORATED IN THE CAYMAN ISLANDS

Herald's liquidator however argued that the shares subject to Primeo's redemption fell into s.37(7)(a) of the Law, so that Primeo did not have a creditor claim in respect of the unpaid redemption moneys. Section 37(7)(a) essentially provides that the redemption of shares which *are to be redeemed* or *are liable to be redeemed* but have not been redeemed before the commencement of the liquidation, may only be enforced if:

(a) the terms of the redemption provided for it to take place at a date earlier than the commencement of the winding up (**Proviso 1**); and

(b) the company could have lawfully distributed the redemption proceeds prior to the commencement of its liquidation (**Proviso 2**).

An investor falling within s.37(7)(a) but whose claim does not satisfy one or both of the Provisos cannot enforce the terms of their redemption and will be treated as a shareholder. However, an investor who can satisfy both Provisos (**s.37 Creditor**) enjoys the benefit of a priority as set out in the waterfall prescribed in s.37(7)(b), which is discussed below. Specifically, such an investor ranks ahead of remaining unredeemed investors.

The argument advanced by Herald's liquidator was that Primeo's shares had been not been "redeemed" for the purposes of s.37(7)(a) since the payment of the redemption proceeds, which was a necessary part of the overall redemption process, had not taken place. Further, Primeo's claim did not satisfy the two Provisos. As a result, it was said, Primeo's redemption claim ranked alongside, and not ahead of, the claims of remaining unredeemed investors to a distribution on their shares.

Are redeemed investors creditors?

The parties agreed that Primeo's shares had been redeemed under Herald's articles of

association and that s.37(7)(a) did not apply to shares which had been redeemed. However, Herald's liquidator argued that redeemed for the purposes of s.37(7)(a) did not mean redeemed under the articles of association, but rather meant the entirety of the redemption process which was only completed when the redemption proceeds were paid.

However, the difficulty with this argument is that the process of redemption of shares is a process which is governed by the terms of the company's articles of association. The power given in the Law to a company to issue and redeem redeemable shares has always been to do so "in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association". Accordingly, the nature of the redemption process, and the question of when shares are to be regarded as "redeemed", is governed by the articles.

As to this, Herald's articles were in a relatively conventional form for a Cayman open-ended fund. They envisaged a redemption process whereby an investor submitted a redemption request for a specified redemption day. Provided the request was valid and submitted in time, the investor would be redeemed at that redemption day, by reference to the fund's prevailing net asset value (**NAV**), with the redemption proceeds being paid subsequently.

In *Strategic Turnaround Master Partnership Limited v Culross Global SPC Limited*[2], in considering a similar set of articles of another Cayman open-ended fund, the Privy Council had already determined that redemption in that context denoted the time at which the investor ceased to be a shareholder in the company. Redemption did not depend on payment of redemption moneys, which was held to be a matter of supplementary procedure. The Privy Council stressed the importance of upholding the bargain struck between investor and fund and the importance of certainty for the funds industry.

Consistently with this, in *Pearson v Herald* the Privy Council held that the payment of the redemption proceeds is, as a matter of general principle, clearly not an inherent element of the redemption or purchase by the company of its own shares. Rather, the essence of redemption is the surrender of the status of shareholder, with all attendant rights, just as the essence of purchase is the transfer of property. Redemption occurs on surrender of the status of shareholder, rather than on payment of the redemption proceeds.

Redemption occurs on surrender of the status of shareholder, rather than on payment of the redemption proceeds

The question of when the status of shareholder has been surrendered is a matter to be determined by the provisions of the articles. It might be possible for articles to provide that a redeeming shareholder would retain the status of shareholder until the redemption proceeds had actually been paid. However, Herald's articles followed the conventional approach for Cayman funds whereby the investor ceased to be a shareholder on the relevant redemption day with the redemption proceeds to be paid subsequently. As the Privy Council observed, in this context, the delay in paying the redemption proceeds was nothing more than the grant of a short period of credit by the (now redeemed) investor to the company.

Fictitious profits

One of the arguments made by Herald's liquidator was that it would be unfair for Primeo to be admitted as a creditor for its redemption claim. That was because the redemption claim was based on the NAV issued by Herald at the time – 30 November 2008. It was now known that this NAV was based on the fictitious and fraudulent profits being falsely reported by Madoff, and it was said that it would be unfair for Primeo to prove in the liquidation on the basis of a NAV which was not known to have been based on fraudulent information.

This argument was, however, given short shrift. The Privy Council had in *Fairfield Sentry Limited (in liquidation) v Migani*[3] stressed the importance of certainty in dealings between

2/. [2010] 2 CILR 364
3/. [2014] UKPC 9

TOM SMITH QC

investors and funds in relation to redemptions. In that case, which concerned another Madoff feeder fund, the fund's liquidator had sought to recover redemption proceeds paid to investors on the basis that the underlying NAVs were not binding because they were affected by the Madoff fraud. The Privy Council held that the NAVs were binding.

It was pointed out that dealings between investors and funds in relation to redemptions depend on certainty and finality as to the redemption price, which would be undermined if the NAV, by reference to which the redemption price had been fixed, could be reopened by a liquidator many years later. In the case of many funds – including Herald and Fairfield – the certainty and finality of the NAV will be bolstered by provisions in the articles which provide for the NAV as certified by the fund's directors at the time to be final and binding (subject sometimes to carve outs for fraud by the fund itself or manifest error).

Late and Later Redeemers

A further issue the Privy Council had to consider was the status of what were termed the Late Redeemers and the Later Redeemers, both of whom intervened in the proceedings. The Late Redeemers were those investors who submitted redemption requests after the 1 December 2008 redemption day but prior to Herald suspending its dealings and payment of redemption proceeds. The Later Redeemers were investors who submitted redemption requests after the suspension.

It was accepted that the Late Redeemers fell within s.37(7)(a) (i.e. they had not been redeemed) but the question was whether they could satisfy the Provisos. The Privy Council held that they did not satisfy Proviso 1 because the suspension suspended both the determination of NAV for future redemption dates and the redemption on those dates. Because the suspension remained in effect at the time of the commencement of Herald's liquidation, the Late Redeemers did not satisfy Proviso 1, were not permitted to enforce the terms of their redemption against Herald, and therefore fell to be treated as shareholders. By the same reasoning, a similar fate befell the Later Redeemers.

Priorities

The next question was as to the priority of a claim by a redeemed investor for unpaid redemption proceeds. Such an investor was a creditor for the redemption proceeds, but how did that creditor claim rank in the liquidation? As to this, section 49(g) of the Law (the equivalent of s.74(2)(f) of the Insolvency Act 1986, previously s.212(g) of the Companies Act 1948) deals with the priorities of certain types of claims and provides:

no sum due to any member of a company in his character of a member *by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment*

In Pearson v Primeo Fund the Privy Council made what are perhaps the first judicial comments on the s.37(7) Waterfall

of the rights of the contributories amongst themselves (emphasis added).

The Privy Council, following a line of English cases[4], held that the term *member* in s.49(g) had an extended and extraordinary meaning of current and former member, and therefore applied to Redemption Creditors such as Primeo. Therefore, by the operation of s.49(g), redemption creditor claims are subordinated to ordinary third party creditor claims. However, such claims will rank in priority to the return of equity to shareholders. This is because the subordination provided for by s.49(g) only applies so long as the redemption claim is in competition with the claims of ordinary third party creditors.

In practical terms, this means that a claim by a redeemed investor to unpaid redemption proceeds ranks behind the claims of third party creditors (which might include professional fees and monies owed to any leverage providers) but ahead of the claims of remaining unredeemed investors. This does emphasise that a timely redemption request may well make all the difference as to the return which an investor can expect to receive from a subsequent liquidation of a fund.

But, in Cayman, this is only part of the story in relation to priorities. There is a further difficult issue which arises where a claim does fall within s.37(7) since one must then also consider the effect of the priority waterfall set out in s.37(7)(b) of the Law (**s.37(7) Waterfall**). The Privy Council held neither Primeo, the Late Redeemers nor the Later Redeemers fell within s.37(7)(a) (i.e. they were not s.37 Creditors) and was not required to make any determinations about the operation of the s.37(7) Waterfall. However, the Privy Council made a number of *obiter* comments which, as far as we are aware, are the first judicial comments on the s.37(7) Waterfall.

Section s.37(7)(b) provides:

There shall be paid in priority to any amount which the company is liable by virtue of paragraph (a) to pay in respect of any shares-

(i) all other debts and liabilities of the company (other than any ***due to members in their character as such****); and*

(ii) if other shares carry rights whether as to capital or as to income which are preferred to the rights as to capital attaching to the first mentioned shares, any amount due in satisfaction of those preferred rights,

but subject to that, any such amount shall be paid in priority to any ***amounts due to members in satisfaction of their rights*** *(whether as to capital or income)* ***as members*** (emphasis added)

The Privy Council noted that the effect of the s.37(7) Waterfall is that a s.37(7) Creditor:

1. would rank behind *all other debts and liabilities of the company (other than any due to* ***members*** *in their character as such)* (i.e. in s.37(7)(b)(i));
2. but ahead of *any amounts due to* ***members*** *in satisfaction of their rights (whether as to capital or income) as members* (i.e. the last sentence of s.37(7)(b)) (emphasis added)

The Board then considered the meaning of the term *member* in (1) and (2) above. It rejected Herald's arguments that *member* means former and current member in both (1) and (2) because it would lead to the unacceptable result that a redemption creditor (who had fully redeemed prior to the commencement of the winding up) would be subordinated to a s.37(7) Creditor (who was not redeemed prior to the commencement of the winding up but was, by virtue of s.37(7)(a), permitted to enforce the terms of their redemption). It also requires giving the term

4/. *In re Anglesey Colliery Co* (1866) 1 Ch App 555; *In re Consolidated Goldfields of New Zealand* [1953] Ch 689 (Roxburgh J); *In re Compania de Electricidad* [1980] Ch 146, 170B-C per Slade J

member the extended, extraordinary meaning[5] given to it in s.49(g) (i.e. current and former member) rather than its normal meaning (i.e. current member) as defined in s.38 of the Law.

The Privy Council concluded that there are two possible constructions of the s.37(7) Waterfall. The first construction is that *member* in both (1) and (2) is given its usual meaning, as defined in s.38 of the Law, of current member. This would mean that s.37 Creditors are subordinated to redemption creditors but take ahead of shareholders. It is suggested, for the reasons set out above, that this is the correct construction.

The Board noted that, alternatively, member in (1) means current and former member but only current member in (2). This would mean that s.37(7) Creditors takes *pari passu* with redemption creditors.

Conclusions

The Privy Council's finding on s.49(g) and obiter comments on the s.37(7) Waterfall further clarifies the statutory waterfall in Cayman which can now be stated as follows:

(1) The rights of fixed charge creditors (section 140(2))

(2) The claims of preferred creditors[6] (section 140(2), section 141(1))

(3) The claims of floating charge creditors (section 140(2), section 141(1))

(4) The expenses of the liquidation including the liquidator's remuneration (section 109(1))

(5) The provable debts owed to creditors who are not existing or former shareholders (i.e. Ordinary or Trade Creditors) (section 140(1))

(6) Statutory interest on (5) (section 149(2))

(7) Any non-provable liabilities owed to Ordinary or Trade Creditors

(8) The debts[7] of the unsecured creditors of the company which are subordinated in right of payment (section 49(g) and section 37(7)(b)) which can be broken down further as follows[8]:

ROCCO CECERE, MOURANT OZANNES

a. debts owed to former members claiming in their capacity as members (i.e. Redemption Creditors) (section 49(g) and section 37(7)(b)) and statutory interest on those debts;

b. the rights of preferred members to capital or income pursuant to s.37(7)(b)(ii);

c. debts owed to Section 37(7) Creditors (section 37(7)(b)) and statutory interest on those debts;

d. debts owed to current members claiming in their capacity as members (e.g. current members claiming declared but unpaid dividends) (section 49(g) and section 37(7)(b)).

(9) The return of capital to shareholders in respect of their shareholdings as at the commencement of the winding-up (section 140(1))

The priority *inter se* of the claims bracketed at 8(a) to (d) above remains undecided.

5/. As noted by the Board, *In re Consolidated Goldfields of New Zealand* [1953] Ch 689, Roxburgh J made it clear that the extended meaning of member in s.49(g) is an exceptional, rather than ordinary, meaning. Indeed, Roxburgh J accepted that the ordinary meaning would apply under the English equivalents of section 49(a) and (b)

6/. As to the categories of preferred debts, see Schedule 2 to the Law. By virtue of section 141(2), preferential debts rank in priority over claims of secured creditors which are secured by a charge which, as created, was a floating charge but not over the claims of fixed charge creditors

7/. Provable debts are defined in section 139(1)

8/. The decision in *Pearson* makes it clear that Redemption Creditors have provable (and not deferred) debts. Moreover, the Privy Council's discussion of the operation of the section 37(7)(b) waterfall suggests that Section 37(7) Creditors also have provable debts

Leeds v Lemos

The rights of privilege in bankruptcy

On 17 July 2017, His Honour Judge Hodge QC (sitting as a Judge of the High Court) handed down his extempore judgment in the case of *Leeds and another v Lemos and others* [2017] EWHC 1825 (Ch), in which Felicity Toube QC appeared for the Applicants. **Rose Lagram-Taylor** provides a review

The case revisited the question of whether a trustee in bankruptcy can use documents subject to legal professional privilege belonging to the bankrupt. The Applicants, in their capacity as trustees in bankruptcy (the "**TIBs**"), had applied for directions in relation to the use of such privileged documents which they had obtained from the former solicitors of the bankrupt, as evidence to support a claim brought under section 423 of the Insolvency Act 1986 (the "**IA 1986**") concerning the bankrupt's alleged transactions to defraud creditors. The TIBs also sought an order in the alternative to compel the bankrupt to waive his privilege in the documents, pursuant to sections 333 and 336 of the IA 1986, to enable them to rely on the documents which in turn would allow them to discharge their duties as trustees in bankruptcy effectively.

However, in confirming what the Judge viewed as the effect of the Court of Appeal's decision in *Shlosberg v Avonwick Holdings Limited* [2016] EWCA Civ 1138, HHJ Hodge QC concluded that the right to waive privilege in documents relating to the assets of a bankrupt as well as his liabilities is not property of a bankrupt which is capable of being vested in a trustee in bankruptcy. As a result, the Judge prevented the TIBs from using the privileged documents as evidence in support of the section 423 IA 1986 claim.

In so doing, HHJ Hodge QC also concluded that the principle expounded in *Crescent Farm (Sidcup) Sports v Sterling Offices* [1972] Ch 553, namely that legal professional privilege enured for the benefit of a successor in title, had no continuing application in bankruptcy cases, which in turn cast doubt on the High Court's previous decision in *Re Konigsberg* [1989] 1 WLR 1257, in which the *Crescent Farm* principle had been applied in the passing of property to a trustee in bankruptcy.

Further, HHJ Hodge QC held that a bankrupt could not be compelled to waive privilege. The Judge reached this conclusion on the basis that the IA 1986 did not expressly provide that a bankrupt must waive privilege if requested to do so, and that there were no exceptional circumstances in which the duties imposed by sections 333 and 363 of the IA 1986 could be relied on to override the bankrupt's fundamental human right to assert privilege.

As explained at the end of this article, this decision has narrowed still further the ability of the trustee in bankruptcy to use documents free from privilege, leaving trustees in a considerably worse position than their corporate counterparts. Unless the courts can be persuaded to depart from this decision, the legislature may need to step in.


FELICITY TOUBE QC

Background

Mr Lemos, the First Respondent, was adjudicated bankrupt on 11 March 2015. He secured his discharge from bankruptcy on 12 March 2017.

Prior to his bankruptcy, Mr Lemos's sister had issued proceedings against him in the Royal Court in Jersey, alleging that she was entitled to recover sums totalling USD18 million that she had entrusted to Mr Lemos to invest on her behalf, but which she said had been misapplied by him in a failed shipping business. A without-notice freezing injunction was also obtained from the English High Court by Mr Lemos's sister restraining dealings by Mr Lemos with his assets and any dealings by offshore trustees in relation to the London property in which Mr Lemos and his wife continue to reside (the "**Property**"). The Property is registered in the joint names of a Bermudian trustee company and one of its directors. However, the offshore trustees, as well as Mr and Mrs Lemos, contended that the Property was held on trust for Mrs Lemos alone.

After Mr Lemos's failure to defend the proceedings brought against him, his sister obtained judgment in default for USD17.9 million. It was on this basis that Mr Lemos successfully petitioned for his own bankruptcy. The TIBs were accordingly appointed on 1 April 2015.

The freezing injunction was successfully lifted at first instance by an application made by the offshore trustees in May 2015. However, Mr Lemos's sister obtained permission to appeal, with the injunction being reinstated pending the hearing of the appeal. During this time, Mr Lemos's automatic discharge from bankruptcy was also suspended for one year as a consequence of his refusal to cooperate with the TIBs.

With the appeal hearing pending, the TIBs became aware that the law firm Withers had previously acted for Mr Lemos, and obtained their files. Certain of the documents were provided to Mr Lemos's sister to use in the appeal. In applying for permission to rely on those documents, the Court of Appeal admitted the evidence, and held that there was a good arguable case that the transaction resulting in the Property becoming held by offshore trustees constituted a transaction defrauding creditors as per section 423 of the IA 1986. It was subsequently held by the Court of Appeal that the injunction should remain in place pending the outcome of the proceedings under section 423 of the IA 1986 (the "**section 423 Proceedings**").

The section 423 Proceedings are accordingly being pursued for the benefit of the bankruptcy estate, with any recoveries being payable to the TIBs. Although Mr Lemos is now a discharged bankrupt, there remain significant debts in the bankruptcy estate together with limited recoveries. The TIBs had therefore made an agreement with Mr Lemos's sister requiring her to consent to their substitution as claimants in the section 423 Proceedings, or else to their joinder as co-claimants with her. The ability to use the documents obtained from Withers was viewed as significant for the benefit of the section 423 Proceedings.

Nevertheless, a dispute arose between the TIBs on the one hand and Mr and Mrs Lemos on the other, with regards to the former's ability to

ROSE LAGRAM-TAYLOR

rely and make use of the Withers documents in the section 423 Proceedings. In particular, both Mr and Mrs Lemos objected to the use of the documents on the basis that they claimed they were privileged.

Legal Issues

The Court had to consider the extent to which legal professional privilege enjoyed by a bankrupt passed to his or her trustee, and the extent to which the trustee could waive that privilege without the consent of the bankrupt, or third parties, who shared the benefit of the privilege.

As categorised by the TIBs, there were essentially two questions which the Court had to ask itself:

(1) The *Avonwick* initial question: Assuming for the purposes of the application that some or all of the Withers documents were privileged, and that privilege belonged to Mr (and/or Mrs) Lemos, were the TIBs entitled to deploy those documents without the consent of Mr (and/or Mrs) Lemos?

(2) The section 363 IA 1986 initial question: Assuming that some or all of the Withers documents were subject to privilege belonging to Mr Lemos, and assuming that the TIBs were not automatically entitled to use those documents, could Mr Lemos be ordered to waive his privilege, such that the documents could be used by the TIBs in the section 423 Proceedings?

Accordingly, the application required close consideration of the true meaning and effect of the decisions of Mr Justice Arnold at first instance in *Shlosberg v Avonwick Holdings Limited* [2016] EWHC 1001 (Ch), and of the Court of Appeal affirming Mr Justice Arnold's decision in the same case, [2016] EWCA Civ 1138.

This in turn required the Court to determine (i) whether the principles formulated in *Crescent Farm* continued to apply to bankruptcy, and (ii) whether the decision in *Re Konigsberg* remained good law.

Avonwick

Given the centrality of the *Avonwick* decisions, it is important to note the facts of both the first instance and Court of Appeal cases.

The bankrupt, Mr Shlosberg had applied for an injunction to restrain a firm of solicitors from continuing to act both for the major creditor in his bankruptcy, Avonwick, and his trustees in bankruptcy. Despite the bankruptcy, Avonwick were continuing to bring proceedings against Mr Shlosberg alleging conspiracy. It was Mr Shlosberg's case that because the solicitors had been acting for both parties, those that were representing Avonwick had seen a large number of documents which were subject to privilege belonging to him. Therefore, as solicitors acting for an adverse party had seen privileged documents to which they were not entitled, the firm should cease to act for that party.

There were three categories of documents at issue. Category A documents related to an asset of the bankruptcy, being a County Court award to Mr Shlosberg due to an attack on his cat. Category B documents related to liabilities of

the bankrupt, namely certain statutory demands. Category C documents also related to liabilities arising from a claim brought by Avonwick.

At first instance, Mr Justice Arnold held that the trustees in bankruptcy acquired the benefit of Mr Shlosberg's privilege in the Category A documents because those related to an asset of the bankrupt. This was on the basis of the previous decisions in *Crescent Farm* and *Re Konigsberg*, it being common ground that *Re Konigsberg* was based upon *Crescent Farm* because the privilege related to an asset which had vested in the trustee in bankrupt. However, this was not the case with the Category B and C documents, where the trustees in bankruptcy did not acquire the benefit of the privilege over those documents because those related to liabilities rather than assets of the bankrupt.

The Court of Appeal did not deal with the Category A documents (no appeal being issued in relation to those documents by Mr Shlosberg). However, in relation to the Category B and C documents, the Court of Appeal largely upheld Mr Justice Arnold's decision in relation to documents regarding liabilities. The main argument advanced by Avonwick was that the Category B and C documents, and the privilege attaching to them, were property which formed part of the bankrupt's estate which vested in the trustees in bankruptcy on their appointment. Nevertheless, whilst the Court of Appeal noted the importance of the policy that trustees in bankruptcy should be able to realise and distribute the bankrupt's estate, this was trumped by the policy that a litigant should also be able to consult a lawyer in privacy and therefore be able to exert and retain his privilege.

Thus, the Court of Appeal decision suggested that the *Crescent Farm* principle did not assist in relation to documents relating to the liabilities of the bankrupt, holding that where such documents are concerned, although the privileged documents do pass to a trustee on bankruptcy (who could therefore see them), the trustee must protect the privilege, the right to waive it remaining with the bankrupt (and therefore the trustee could not use them against third parties). This conclusion was founded on the belief that an individual's right to privilege is a fundamental human right, entrenched in common law. It was held that the only circumstance in which privilege could be waived by the court was where there was an express statutory power to waive it. There was no such power contained in the IA 1986.

An individual's right to privilege is a fundamental human right, entrenched in common law

The Parties' Submissions in the Lemos case

Submissions for the TIBs focused on the distinction created in the first instance judgment of Avonwick between assets and liabilities. It was contended that Mr Justice Arnold's decision in relation to the Category A documents was an orthodox statement of the law and a familiar application of the Crescent Farm principle. It was also emphasised that whilst the Avonwick decision was problematic for documents relating to the liabilities, the documents which the current TIBs sought to rely on related to an asset (i.e. the Property and the section 423 Proceedings), and so they should be entitled to use them in accordance with the Avonwick decision on the Category A documents.

It was also submitted that the Court of Appeal decision did not in any event alter the conclusions reached in the first instance judgment on privilege attaching to documents relating to the assets of the bankrupt, the appeal only being concerned with the Category B and C documents. It was said that this meant that the Court of Appeal decision should not be taken as reaching a different view to Mr Justice Arnold, and should not be taken as disapproving of the *Crescent Farm* principle and *Re Kongsberg's* application of it.

However, the submissions for the First Respondent emphasised the propositions that (i) privilege is a right to resist the compulsory disclosure of information, (ii) privilege is a fundamental human right, (iii) although privilege can be abrogated by statute, this requires express words or necessary implication, and (iv) the courts presume that even the most general words were intended to be subject to the basic rights of the individual.

Further, it was contended that the decision of

The key question was whether the statutory bankruptcy code had involuntarily deprived the bankrupt of his fundamental right to assert privilege

the Court of Appeal was binding authority that (i) privilege is not property of the bankrupt which automatically vests in a trustee in bankrupt such that *Re Konigsberg* was no longer good law, and (ii) although a trustee in bankruptcy is entitled to take possession of documents for the statutory purpose of realising a bankrupt's estate, he is not entitled to do so in a way that would amount to a waiver of privilege without a bankrupt's consent.

As to the distinction between documents relating to assets and liabilities it was submitted that the Applicant's argument was misconceived, with the main purpose of the Court of Appeal judgment being to decide whether privilege attaching to information and documents of a bankrupt were property which vested in a trustee in bankruptcy, and what use might be made of such information and documents by the trustee in bankruptcy, so as to mean there is no clear distinction between documents relating to assets and documents relating to liabilities. Further, it was said that no significance could be attached to the fact that the *Avonwick* appeal was not concerned with the Category A documents because given the content to which the documents related, they were not viewed as important. In any event, it was submitted that Mr Justice Arnold's decision on the Category A documents was only reached due to a concession by counsel, which in light of the Court of Appeal judgment, could now be viewed as wrong.

Decision

In giving judgment, HHJ Hodge gave consideration to the five questions raised by the TIBs in their reply submissions:

(1) What did *Avonwick* decide at first instance about documents relating to assets?

(2) Was its decision in that regard overruled by the Court of Appeal?

(3) As a result of *Avonwick*, does the *Crescent Farm* principle still apply in bankruptcy?

(4) If there are documents about assets that have passed to the trustees, can the trustees waive privilege in those documents?

(5) Are documents relating to the Property covered by the *Crescent Farm* principle?

In answering these questions, HHJ Hodge held that it had been made clear in the first instance decision of *Avonwick* that it was not relevant to consider whether privilege had been abrogated, it only being argued that privilege had been transferred to the trustee in bankruptcy.

HHJ Hodge rejected this approach, asserting that the Court of Appeal emphasised that from a bankrupt's perspective, the key question was whether the statutory bankruptcy code had involuntarily deprived the bankrupt of his fundamental right to assert privilege. Even where privilege is only transferred, this would still amount to abrogation from the bankrupt's perspective.

Further, although HHJ Hodge acknowledged that the documents referred to in the Court of Appeal judgment related only to the Category B and C documents, he took the view that the Court of Appeal nevertheless concluded that from the point of view of the bankrupt, he was being involuntarily deprived of his fundamental right to assert privilege over documents. There was therefore no distinction between assets and liabilities.

This meant, according to the Judge, that the *Crescent Farm* principle did not apply in bankruptcy. Moreover, it was held that the principle had only been accepted with reservations by Mr Justice Arnold because the contrary had not been argued. HHJ Hodge further held that, on the basis that the Court of Appeal did not endorse the view of Mr Justice Arnold that the involuntary transfer of privilege did not involve an abrogation of privilege, this meant that the first instance judgment in *Avonwick* could not be taken as authority for the *Crescent Farm* principle.

In any event, HHJ Hodge held that all that had been decided in *Crescent Farm* was that the right to assert privilege could voluntarily pass to a successor in title. It did not decide that a successor in title could waive the privilege. Therefore, it was confirmed that the principle could have no application in bankruptcy, even in relation to assets. This in turn meant *Re Konigsberg* was wrong in law.

Overall, this led to HHJ Hodge to reach the

conclusion that as privilege was a fundamental right, it could only be overridden by statute if the applicable legislation did so expressly. Here, the IA 1986 gave no such authorisation. Therefore, whilst it was accepted that the TIBs should have access to documents in which the bankrupt enjoyed privilege under section 311 of the IA 1986, this did not extend to the ability to waive that privilege, the privilege remaining with the bankrupt.

As to whether the bankrupt could nevertheless be ordered to waive his privilege in applying sections 333 and 363 of the IA 1986, HHJ Hodge held that he could not, preferring the First Respondents' submissions which again focused on privilege being a fundamental right, which in line with the jurisprudence of the European Court of Human Rights, could only be overridden in exceptional circumstances. As per HHJ Hodge, there were no such exceptional circumstances here.

Comment

The practical effect of this judgment is that trustees in bankruptcy cannot use privileged documents where the privilege belongs to the bankrupt, regardless of whether those documents relate to an asset or a liability. A trustee in bankruptcy retains the right to see the privileged information where necessary to enable his duties to be carried out with regards to the bankrupt's estate. However, that privilege can no longer be waived without the bankrupt's consent. Further, the court has made it clear that there is no express authority in the IA 1986 to compel a bankrupt to waive his privilege.

The problem for the TIBs in this case lay in the *Avonwick* decision in the Court of Appeal. In the light of that precedent, they were driven to maintain that in the context of bankruptcy and privilege documents relating to assets were different from those relating to liabilities. The Court of Appeal had not been persuaded that trustees in bankruptcy were in the same position as their corporate analogues (where privilege undoubtedly does pass).

Avonwick was a difficult case, relating to conflicts of legal advisers. It is possible to see how the Court of Appeal reached its conclusion on the facts of that case, and moreover there is much to be said for the fundamental human right of a person in being able to consult his lawyer. Nevertheless, insolvency lawyers might be surprised to see that in personal insolvency that fundamental right trumps the rights of creditors. There is some basis for that conclusion. However, *Avonwick* only related to the use of a bankrupt's privileged documents against third parties; *Lemos* goes further, denying a trustee the ability to use such documents even against the bankrupt.

The practical effect is that trustees in bankruptcy cannot use privileged documents where privilege belongs to the bankrupt

The judgment in *Lemos* is therefore another nail in the coffin of the ability of trustees in bankruptcy to bring proceedings relying upon privileged documents. There is a distinct oddity in the fact that a trustee is expressly empowered by the Insolvency Act to look at a document that shows a claim (or for that matter makes it clear beyond doubt that a bankrupt is not subject to an asserted liability) but that he cannot rely upon it.

There is therefore much to surprise and concern an insolvency lawyer in this case:

(1) The Judge did not maintain the distinction between assets and liabilities, even though the Court of Appeal did not consider the Category A ("asset" documents) in *Avonwick*.

(2) The Judge held that *Crescent Farm* did not apply in insolvency, even though the Court of Appeal had not said so, nor did the Court of Appeal expressly overrule *Re Konigsberg*.

(3) The Judge reached the conclusion that *Crescent Farm* is authority only for privilege passing to a successor in title, rather than also allowing the successor to waive it. There is an oddity in suggesting that privilege passes for only one purpose but not for any other.

(4) The Judge took the view that neither section 423 of the IA 1986 (nor, it appears, transactions at an undervalue or preference claims) are property of the bankrupt's estate.

An appeal is not to be pursued in the *Lemos* case. It remains to be seen whether the Court of Appeal (or, in due course, the Supreme Court) will revisit this issue of the conflict between the fundamental right to consult a lawyer and the powers of trustees in bankruptcy to gather in the assets of a bankrupt. Ultimately this may be a decision for the legislature.

CASE EXTRA

Agrokor: Extraordinary Administration recognised under the CBIR

Introduction

On 9 November 2017, judgment was handed down in *In the matter of Agrokor dd*, and recognition was granted under the Cross-Border Insolvency Regulations 2006 ("**the CBIR**") in relation to the extraordinary administration proceedings ("**Extraordinary Administration**") which are currently ongoing in Croatia in respect of Agrokor and affiliated companies. Though applications for recognition of foreign insolvency proceedings under the CBIR have been described as "something of a "tick-box" exercise" (*Re Transfield ER Cape Ltd* [2010] EWHC 2851 (Ch), Warren J), the judge noted that this was "anything but", and the application was vigorously opposed by Sberbank of Russia ("**Sberbank**"), which is Agrokor's largest creditor. The application was heard in the Business and Property Court over the course of 4 days, and included cross-examination of expert witnesses on Croatian law.

Background

The Agrokor group carries on business in agriculture, food production and retail, and related industries. In late 2016 and early 2017, the Agrokor group encountered financial difficulties. The Croatian government therefore introduced the Extraordinary Administration Law ("**the EAL**"), which provided for a special administration procedure for companies, such as Agrokor, which have systemic importance for the Croatian economy. Agrokor subsequently sought recognition in England (where Sberbank had commenced two substantial arbitrations against Agrokor) of the Extraordinary Administration under the CBIR.

Arguments and Findings

Sberbank's principal ground of opposition to the application was that the Extraordinary Administration was not a '*foreign proceeding*' because it failed to satisfy several elements of the definition provided for in the CBIR i.e. "*a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation*".

First, Sberbank placed reliance on the fact that the Croatian proceeding involved not only Agrokor, but also many affiliated companies. Sberbank submitted that the Croatian proceeding was not "*collective*" because it was not a proceeding between a single debtor and its own creditors. Second (and relatedly) Sberbank argued that the UNCITRAL Model Law had not purported to apply to the recognition of group proceedings. However, the Judge concluded that (i) this was not the sense in which a proceeding was required to be "*collective*" (rather, the CBIR required that a proceeding involve all the creditors and assets of the debtor, as distinct from (for example) a receivership conducted for the benefit of a single creditor); and (ii) he found that there was nothing in the CBIR to prevent recognition in England of a proceeding involving a particular debtor, even if the foreign proceeding concerning that debtor was a group proceeding involving other debtors (relying also on two American cases: *Re Rede Energia SA* 51 BR 69 (SDNY 2014) and *Re OAS SA* 533 BR 83 (SDNY 2015)).

Thirdly, Sberbank contended that the EAL was not "*for the purpose of reorganisation or liquidation*", because it identified as its purpose protecting the sustainability of companies which were of systemic importance to the Croatian economy. The Judge concluded that this purpose was not inconsistent with the purpose of restructuring, which was the means through which the company was enabled to continue as a going concern.

Fourthly, it was argued that the EAL was not "*a law relating to insolvency*", because it provided for Agrokor's affiliates to be included in the proceeding even if they were not insolvent. The Judge concluded that a law may "*relate to insolvency*" if insolvency is one of the grounds for bringing proceedings under the law, even if insolvency is not demonstrated in the case before it (consistent with authority from United States and Australia), and the fact that an affiliated company may be solvent does not alter this position.

Conclusions

The judgment provides valuable guidance on the meaning of a "*foreign proceeding*" within the CBIR. Significantly, it confirms that a wide range of foreign proceedings will be granted recognition by English courts. This is consistent with the intention that the Model Law and the CBIR facilitate insolvency proceedings with a cross-border element.

Tom Smith QC and William Willson appeared for the applicant

David Allison QC and Adam Al-Attar appeared for Sberbank

Case Digests

MARCUS HAYWOOD

This edition of the Digest includes a number interesting cases, many involving members of Chambers. In *Burlington Loan Management Ltd v Lomas* [2017] EWCA Civ 1462 the Court of Appeal decided various issues in the so-called 'Waterfall II' litigation in relation to the distribution of the surplus in the estate of Lehman Brothers International (Europe). In particular, the Court of Appeal held that Insolvency Rule 2.88 provided a complete code for statutory interest in administration proceedings, pursuant to which dividends were to be attributed first toward principal and only then toward interest. There was no lacuna in Rule 2.88 that might be filled by the so-called '*Bower v Marris* approach', by which interest was paid first. Robin Dicker QC, Antony Zacaroli QC, David Allison QC, Tom Smith QC, Daniel Bayfield QC, Richard Fisher, Stephen Robins, Adam Al-Attar, Henry Phillips, Robert Amey all appeared before the Court of Appeal.

Meanwhile, in the context of schemes of arrangement, the Grand Court of the Cayman Islands has sanctioned four separate interlinked schemes, compromising over US$ 3.69 million of New York law governed debt, in relation to the Ocean Rig Group, a leading international contractor of offshore deep-water drilling services. Daniel Bayfield QC and Adam Al-Attar acted for the scheme companies, and Antony Zacaroli QC and Riz Mokal for the Ad Hoc Group which held in aggregate the majority of the Group's debt.

In the domestic context, in *Re Algeco Scotsman PIK S.A.* [2017] EWHC 2236 (Ch) Hildyard J sanctioned a cross-jurisdictional scheme of arrangement of a finance company in the Algeco Scotsman Group. The company was incorporated in Luxembourg and the scheme related to the restructuring of a 'PIK Loan Agreement' governed by New York law and containing a jurisdiction clause in favour of New York. The scheme involved the amendment of the governing law of the PIK Loan Agreement to English law, the amendment of the jurisdiction clause to submit the parties to the non-exclusive jurisdiction English courts, and that certain restrictions under the agreement be waived to permit the Company to take steps to establish a sufficient connection with England, including shifting its COMI. David Allison QC and Adam Al-Attar appeared for the company.

Marcus Haywood

BANKING & FINANCE

Digested by TOBY BROWN


TOBY BROWN

VR Global Partners LP v Exotix Partners LLP v CVI EMCVF Lux Securities Trading SARL [2017] EWHC 2620 (Comm) (Mr Justice Robin Knowles CBE, 20 October 2017)

Back-to-back LMA trades – Unwinding of trades via multilateral netting agreement – Good faith – Implied terms

In 2007, a $55m loan facility arranged by Citibank was made available to Ukrainian borrowers known as Interpipe. Loan Star was a participant in the facility and in 2013 transferred a portion of its commitment to the third party ("CVI"). In 2014, by back-to-back trades documented in two trade confirmations, a $10m portion of the loan ("the Traded Portion") was sold to the Defendant ("Exotix") who in turn sold it to the Claimant ("VR"). The sales were subject to terms which included, in summary, that (a) the trade was subject to the issuance by the National Bank of Ukraine of an amendment or supplement to a registration certificate reflecting the relevant transfers ("the NBU Registration"); (b) if the NBU Registration was not received by 30 November 2014, then the "*trade may be unwound at [VR's] option*", or the parties "*may agree that a further review period be set*"; (c) if VR elected to unwind the trades, the three parties were to enter into a multilateral netting agreement "*with the intention of returning the parties, to the extent possible, to the positions they were in prior to the Trade Date*"; and (d) the parties were required to act in good faith towards each other in relation to any such unwinding. In the event, no NBU Registration was received by 30 November 2014 and the parties did not agree a further review period. The market moved against the Traded Portion and VR elected to unwind the trade. VR's entitlement to do so and the consequences were the subject of the present claim issued by VR.

Following a 6-day trial heard in May 2017, Mr Justice Robin Knowles CBE held that VR succeeded in its claim and Exotix succeeded against CVI. In short, the Judge held that the option to unwind the trade had been validly exercised. Amongst other issues, the Judge, having heard witness evidence, found that no criticism was warranted of VR or Exotix. He further held that on the true construction of the relevant provision, no party was under an obligation to agree to extend the November 2014 deadline; nor was there an implied term that VR was required to take reasonable steps to agree a "further review period".

As to the express provision relating to good faith, the understanding of the option to unwind was to be derived objectively from the words and context of the transaction. The Judge was satisfied that Exotix and VR acted at all times in good faith and dealt fairly. CVI argued that the trade confirmation with Exotix contained an implied term of cooperation towards obtaining the NBU registration. However, the Judge did not need to reach a conclusion on the implication of such a term because he found that Exotix and VR did co-operate towards, and did not hinder, the obtaining of NBU Registration.

Finally, CVI argued that the parties could not be returned to the position they were in prior to the trade because the market moved against the Traded Position after the trade date and prior to exercise of the option. It argued that VR should bear the risk of this, including because the relevant clause referred to unwinding "*to the extent possible*". This was rejected by the Judge, who held that the position prior to the trades was that CVI owned the asset and Exotix and VR owned the purchase monies, whilst the option in practice cancelled the sales where the ultimate seller did not deliver NBU Registration on time. Further, on the evidence the Judge was satisfied that CVI fully appreciated the risk it took.

[Tom Smith QC, Robert Amey]

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Goldtrail Travel Ltd (In Liquidation) v Aydin [2017] 1 WLR 3014 (Supreme Court, 2 August 2017)

Civil appeals – Impecuniosity – Access to justice

The Appellant had appealed against the imposition of a condition on its appeal against a judgment and the refusal of the Court below to discharge that condition.

The Respondent obtained judgment against the Appellant for £3.64 million plus interest and the Appellant obtained permission to appeal. However, that permission to appeal was made conditional upon the Appellant paying the judgment sum into Court by a particular date. When the Appellant failed to comply with this condition the Respondent sought to have the appeal dismissed and the Appellant cross-applied for the condition to be discharged, arguing that it could not comply and that its appeal was thereby being stifled. The Court below, taking into account the financial relationship between the Appellant and its wealthy owner, refused to discharge the condition, concluding that the owner had decided not to fund the payment into Court, and dismissed the appeal.

The Supreme Court allowed the appeal (Lords Clarke and Carnwath dissenting), and held that the following principles applied to a case such as this:

(a) If an appellant had permission to bring an appeal, it was wrong to impose a condition which had the effect of preventing him from bringing it or continuing it.

(b) If a proposed condition was otherwise appropriate, the contention that it would stifle the appeal needed to be established by the appellant on the balance of probabilities.

(c) Where an appellant appeared to have no realisable assets of its own, a condition for payment would not stifle its appeal if it could raise the required sum. However, when the respondent suggested that the appellant raise money from its controlling shareholder, the Court needed to be cautious. The shareholder's distinct legal personality had to remain at the forefront of the analysis. The question should always be whether the company could raise the money, not whether the shareholder could raise the money.

(d) The Court was wrong to express its reasoning in terms of whether the owners could make payment themselves (*Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, [2002] C.P. Rep. 21 disapproved). The correct test was whether the appellant company had established, on the balance of probabilities, that no such funds would be made available to it so as to enable it to satisfy the requested condition.

(e) Where a company and its owner claimed that funds could not be made available, the Court should not take the claim at face value. Rather, it should judge the probable availability of the funds by reference to the underlying realities of the company's financial position.

Chelsea Bridge Apartments v Old Street Homes Ltd (Deputy Master Cousins, Chancery Division, 4 August 2017, unreported)

Relief from sanctions – Particulars of claim – Delay

The Court rejected an application for relief from sanctions by Claimants found to be in "*serious and substantial*" default by serving their particulars of claim three months late.

In reaching his judgment, Deputy Master Cousins considered the legal principles set out in *Denton v TH White* [2014] EWCA Civ 906 and *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537. As to the first stage of the *Denton* test, the Claimants had been ordered to serve their particulars of claim by 6 January 2017, but did not do so until 30 March 2017, with no application being made for an extension of time until 22 March 2017. This, it was held, amounted to a serious and significant failure on the part of the Claimants.

As to the second stage of the *Denton* test and the reasons for the default, Deputy Master Cousins was minded to the fact that the Claimants had been litigants in person between 6 January 2017 and 7 February 2017. However, they were represented by solicitors after 7 February which did not account for the continued delay. Further, and in any event, it was held that even as litigants in person, the Claimants should have appreciated the requirement to serve the particulars of claim by a certain date,

and their failure to do so was not a sufficient reason for their default.
On the third stage of the *Denton* test, in considering all the circumstances of the case, the Claimants had not conducted the litigation efficiently or at proportionate cost. They had refused mediation, and had previously embarked on an unmeritorious without notice application for a freezing order, with their overall lack of action causing substantial disruption on the progress of the case.
The Court therefore adopted the framework under CPR r.3.9 in refusing to grant relief from sanctions. Further, in exercising his discretionary powers under CPR r.3.1(2)(a) Deputy Master Cousins refused to extend the time for compliance, concluding that on the case as presented, the Claimants could not be said to have reasonably good prospects of success.
This case therefore serves to highlight (i) the importance of compliance with dates for serving statements of case, (ii) the need to make applications for any extensions to those dates promptly, and (iii) the requirement to run claims efficiently and at proportionate cost.

Woodburn v Thomas (Senior Courts Costs Office, Master McCloud sitting as a Deputy Costs Judge, 11 August 2017, unreported)

Costs management – Costs budget – Detailed assessment

This case concerned the question of how bills of costs should be drafted in detailed assessment in cases which are subject to the costs budgeting regime of CPR Pt 3 and CPR PD 3E.
Here, the Claimant's costs lawyer set out in the CMC phase of the bill all the CMC costs which did not relate to costs budgeting. He provided a separate "non-phase" part of the bill in which all the costs relating to costs budgeting and costs management were set out, comprising (i) costs for drafting the Precedent H under CPR PD 3E 7.2(a) which were capped at the higher of £1000 or 1% of the approved budget, and (ii) costs of budgeting which did not fall within (i) and therefore arguably fell within the 2% cap in CPR PD 3E 7.2(b). This meant that the bill's CMC phase excluded some items of costs which related to budgeting which were required to be included in the Precedent H under both CPR PD 3E and the Precedent H Guidance.
The Defendant submitted that the "non-phase" costs were costs which had actually been budgeted in the CMC phase of the Precedent H and should have appeared in that part of the bill. However, the Claimant submitted that it was correct to separate out the costs of costs budgeting in line with the unreported decision of *P v Cardiff and Vale University Local Health Board* (17 August 2015) where Master Gordon-Saker stated that on a detailed assessment it was "*both necessary and convenient that the bill be divided*" to identify the costs of initially completing Precedent H and the other costs of costs budgeting "*unless those costs can be clearly identified in some other way*".
The Court, therefore, identified that there was tension between the requirement in CPR PD 3E to follow the Precedent H Guidance, and the guidance provided in *P v Cardiff and Vale University Local Health Board*.
In delivering judgment, Master McCloud warned that costs lawyers should follow the Precedent H Guidance as "*an unspecified sanction could presumably result from breach if the costs judge disapproved of a departure from the guidance*".
However, it was admitted that it was difficult to get to the bottom of what the correct approach should be.
Accordingly, Master McCloud set out her approach which specified that a costs lawyer must follow the Precedent H Guidance as to which costs of costs budgeting were included in the CMC phase. In this case, it was directed that the items in the "non-phase" part of the bill which fell within the CMC phase of Precedent H should be treated as though pleaded in the CMC phase of the bill and that all other costs of costs budgeting and costs management should remain in the non-phase part of the bill and be subject to the appropriate 1% or 2% caps.
In adding that this approach was not ideal, Master McCloud suggested, obiter, that it would be useful for the Civil Procedures Rules Committee to consider whether the Precedent H Guidance should be amended, to provide the simple solution that costs referable to costs budgeting and costs management should not be included in Precedent H, other than for the purposes of the 1% and 2% caps on budgeting costs. If this approach were followed, this would therefore mean that CMC budgets would, as their name suggests, simply be budgets for the case management conferences and case management, rather than for the costs management aspects of the case. Whether this suggestion will be followed remains to be seen.

Watt v Dignan [2017] EWCA Civ 1390 (Court of Appeal, 5 October 2017)

Statements of case – Amendments – Pleadings

This was an appeal against a decision requiring the owner of a unit on an industrial estate to pay damages to the owner of a neighbouring unit after the Appellant had demolished certain toilet facilities to which the Respondents' predecessor in title had been granted a right of use.

At trial the Appellant had argued that the Respondents were estopped from asserting their easements and that he had been entitled to demolish the toilet block. The Recorder found for the Respondents and ordered the Appellant to pay damages.

On appeal the Appellant's case was that, prior to purchasing the unit, there had been a complete estoppel as between his predecessor in title and the Respondents (or their predecessors in title), with the Appellant's purchase of the unit with a view to demolition being the detrimental reliance (alternatively, there was an inchoate estoppel at the time of the purchase which crystallised upon purchase).

The Appellant's case on appeal was fundamentally different from his case at first instance, where the case pleaded and advanced by the Appellant had been that the Respondents' own conduct had given rise to the estoppel and that the Appellant's demolition of the toilet block had been the detrimental reliance. The Respondents' evidence and submissions had been tailored to that case and not to the new case advanced by the Appellant on appeal.

The Court of Appeal dismissed the appeal. There was nothing in the Appellant's written or oral submissions at first instance which would have justified such a radical departure on appeal from his case at first instance (*Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 376, [2017] 1 All E.R. 815, considered). Moreover, there was no evidential foundation for the case the Appellant now advanced on appeal.

Whalley v Advantage Insurance Co Ltd (Kingston upon Hull County Court, District Judge Besford, 5 October 2017, unreported)

Part 36 offers – Fixed costs – Delay

The Claimant brought a personal injury action arising out of a road traffic accident. They went on to make a Part 36 offer. However, the Defendant did not accept the offer until after the offer had already expired. Accordingly, the issue for the Court was whether the Claimant's costs were limited to fixed costs for the entire action, or whether the Claimant was entitled to either assessed costs or indemnity costs for the period between the time of the expiry of the offer and the acceptance of the offer.

The case therefore addressed the tension between Part 36 dealing with offers, and Part 45 on fixed costs, in circumstances where there is no express rule addressing the consequences of the late acceptable of a Part 36 offer.

Importantly in reaching judgment for the Defendant, Judge Besford overruled his previous decision in *Sutherland v Khan* (21 April 2016) where he held that the late acceptance of a Part 36 offer automatically entitled the Claimant to an award of indemnity costs, and thus escaped fixed costs. Instead, in the current case, Judge Besford held, after considering other circuit judge appeals on the point, that unless there were exceptional circumstances or conduct justifying indemnity costs, the Part 45 fixed costs regime would apply to the acceptance of Part 36 offers out of time, his previous judgment not being supported by a detailed analysis of the rules and case law.

This case may therefore be good news for defendants. However, it is unlikely that this will be the last time this issue is discussed, with further clarification from the higher courts being eagerly awaited.

COMMERCIAL CASES

Digested by MADELEINE JONES


MADELEINE JONES

Chudley v Clydesdale Bank Plc (t/a Yorkshire Bank) [2017] EWHC 2177 (Comm) (HH Judge Hancock QC, 24 August 2017)

Contracts – Contracts (Rights of Third Parties Act 1999) – Negligent misrepresentation

Four investors (Cs) paid money to a company, Arck, for investment in an offshore property development. Arck was run by fraudsters and the Cs lost their money. The fraudsters had an account at the defendant bank (D). The bank's customer relationship manager (X) had signed a letter of introduction (LOI) for the fraudsters stating that any investment money would be held in a segregated client account. However, funds were not in fact segregated, but were held in a general account. The Cs believed that X was complicit in the fraud. They brought several claims for damages against D, each of which failed.

Firstly, the Cs submitted that the bank were in breach of their contract with Arck as they did not segregate the funds. They claimed for damages under the Contracts (Rights of Third Parties Act 1999). Judge Hancock QC held there was no contract to this effect – the LOI contained a condition precedent that funds would be held in a segregated account, and this condition precedent had not been satisfied: the contract had therefore not been concluded.

Furthermore, even if there had been a contract, there would not have been sufficient proximity for a claim under the 1999 Act, whereby a third party may claim for damages for breach of a contract term which purports to confer a benefit on him, where the term is not intended to be enforced by the third party and the third party is identified expressly by name, as a member of a class or by description. The LOI only referred to Arck, the D and a solicitor giving an undertaking. However, the Cs claimed that the reference to a "segregated client account" was sufficient to identify a class of persons whom it was reasonably foreseeable might rely on the LOI. However, the judge held this did not satisfy the requirement in the 1999 Act to expressly identify the class of persons benefitted by the contract. There could therefore be no claim under the 1999 Act.

For similar reasons, the judge also held that there was insufficient proximity between C and the Ds for a duty of care to arise, so that D was not liable to the Cs for negligent misrepresentation.

The judge also rejected the Cs' equitable claims. They argued that there had been a Quistclose trust of the funds deposited. However, the judge held that Arck had not intended to create a trust, and even if it had, the Cs would have been a stranger to it. X's behavior did not meet the standard of dishonesty required to make out a claim for dishonest assistance. Finally, a claim in restitution failed because the Cs had not in fact relied on the LOI before investing, but had only seen it after they had done so. In any case, there was no evidence that the bank had been enriched by receipt of the funds, since it had a corresponding liability to the customer.

UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH [2017] EWCA Civ 1567 (Gloster LJ; Lord Briggs JSC; Hamblen LJ, 16 October 2017)

Attribution – Dishonest assistance - Rescission

This appeal concerned several complex derivative contracts entered into between a bank (A) and its customer (R), a German municipal water company. Under the contracts, R would have been liable to A in circumstances of default by entities in the derivatives portfolio. Defaults in fact occurred, and A sought payment. However, it was discovered that R's financial advisers had bribed R's managing director to enter into the contracts. A was unaware of this bribe. However, A had itself procured the financial advisers to advise R to enter into the contracts. At first instance, Males J held that the contracts were to be rescinded because of bribery and a conflict of interests.

The majority (Lord Briggs and Hamblen LJ, Gloster LJ dissenting) held that the advisers had not, contrary to Males J's finding, acted as A's agent in giving the bribe. A had assisted the advisers in their breach of their fiduciary duty towards their clients, including R, but this did not amount to agency. The justices, at [90], approved the analysis of whether a business person introducing transactions to a potential lender may be regarded as the lender's agent given in an Australian case, *Tonto Home Loans Australia Pty Ltd v Tavares* [2011]

NSWCA 389. Agency is characterized by "*authority to affect the principal's relationships with third parties [and] fiduciary duty or control by the principal"; if any of these is absent this is "a significant pointer away from the characterisation of a particular relationship as one of agency, even though there may be rare exceptions.*" Here, the advisers had been acting for their own benefit, and had not been in a fiduciary relationship with A. They were not its agents.

However, the majority held that the bribe made the debt obligations unenforceable, as A had dishonestly assisted the advisers' breach of fiduciary duty to R. Its conscience had been affected by assisting the advisers in abuse, and it could not be allowed to benefit from that abuse, even though it did not know of the bribe.

Furthermore, rescission was justified by the advisers' undisclosed conflict of interest. The knowledge of the managing director of R of the fraud was not to be attributed to the company in circumstances where R was claiming against the advisers on the basis of the adviser's assisting the managing director's breach of his fiduciary duty to R. This was clear from the Supreme Court's analysis of the law of attribution in *Bilta (UK) Limited v Nazir* [2016] AC 1 .

For the same reasons, and also because A had not suffered any loss, R was not liable to A in deceit. Rescission was not disproportionate in the circumstances.

Gloster LJ dissented on several points, and on the disposition of the appeal, on the basis that "*it is impracticable and unreal to introduce into commercial transactions the moral standards of the vicarage – or, put in legal terms, to impose on counter-parties the obligations of a trustee.*"

COMPANY LAW

Digested by **EDOARDO LUPI**


DAVID ALLISON QC


ADAM AL-ATTAR


EDOARDO LUPI

Re Algeco Scotsman PIK S.A. [2017] EWHC 2236 (Ch)

Schemes of arrangement – Sanction hearing – Forum shopping

Mr Justice Hildyard sanctioned a cross-jurisdictional scheme of arrangement in relation to Algeco Scotsman PIK SA (the "Company") under Part 26 of the Companies Act 2006. The Company served as a finance company in the Algeco Scotsman Group. The Company was incorporated in the Grand Duchy of Luxembourg, where it also had its registered office.

The scheme related to the restructuring of a lending agreement known as the 'PIK Loan Agreement', which was scheduled to mature in May 2018. The PIK Loan Agreement was governed by New York law and contained a jurisdiction clause in favour of New York. The scheme's purpose was to effect a compromise arrangement in respect of the lenders under the PIK Loan Agreement by cancelling the loan in exchange for a pro rata portion of: (i) an aggregate amount of cash consideration in the sum of US$95 million, subject to an early tender fee; and (ii) equity in a newly incorporated intermediate entity in the restructured Algeco Scotsman Group.

The Company's indebtedness under the PIK Loan Agreement was structurally subordinate to senior debt which ranked in priority to it (the "Existing Senior Indebtedness"). A comparator analysis concluded that the estimated recoveries in either a distressed sale outside a formal insolvency process, or following the realisation of assets through an insolvency process would be less than the amount outstanding in respect of the Existing Senior Indebtedness. Therefore, the anticipated recovery for the lenders under the PIK Loan Agreement in either scenario would be nil.

In order to open the gateway to the English court's jurisdiction, the Company had proposed that the governing law of the PIK Loan Agreement be amended to English law, that the jurisdiction clause thereunder be amended to submit the parties to the non-exclusive jurisdiction of the courts of England, and that certain restrictions under the agreement be waived to permit the Company to take steps to establish a sufficient connection with England, including shifting its COMI.

Mr Justice Hildyard referred to the convening hearing before Barling J, noting that at that hearing his Lordship had directed a single scheme meeting to be convened. Hildyard J also noted that jurisdictional matters were canvassed before Barling J, who had reserved judgment on that occasion, but that the sanction hearing had come on before the reserved judgment was delivered.

Following the convening hearing, 98.7 per cent by value and 97.56 per cent by number of all scheme creditors entitled to vote had voted to approve the scheme. As to the matter of overall fairness, Hildyard J noted at [38] that, "*it is very rare for the court, if ever, to question the overwhelming majority views of persons who could be expected to be the best judges of their commercial*

situation, provided it is satisfied that they have been provided with proper information by reference to which to vote".

Turning to the questions of jurisdiction and discretion, his Lordship considered that there was no jurisdictional impediment nor any discretional reason to refuse to sanction the scheme by virtue of its cross-border element.

First, the judge accepted that the steps taken by the Company had resulted in its COMI shifting to England from Luxembourg, such as to satisfy the stricter jurisdictional test. The other steps taken in the form of the change to the governing law and jurisdiction clause also went to the sufficiency of connection with this jurisdiction. Second, turning to the provisions of the Brussels Regulation Recast, Hildyard J adopted the pragmatic course taken in other cases, namely, to consider whether jurisdiction would exist under chapter II on the assumption that the Brussels Regulation applied. His Lordship concluded that the court would have jurisdiction under Article 8 and/or Article 25, but left it to the reserved judgment of Barling J to elaborate on this point. Third, as to the likelihood of recognition of the scheme in the relevant foreign courts, Hildyard J accepted expert opinions that the US court and the Luxembourg court would give effect to the English scheme.

Commenting on the particular steps taken by the Company that had been designed to open the jurisdictional gateway to the English court's scheme jurisdiction, Hildyard J said at [57]: *"As it seems to me, the resort to the English Court in these circumstances is appropriate as well as understandable, given what I have been given to understand are the lack of any viable or efficient alternatives. The aim and object of the scheme is not sectional, nor for personal advantage. A scheme has been propounded and the jurisdiction has been invoked because the general body of creditors requires the reconstruction for the protection of their interest and for the future business of the company and the group. The English scheme jurisdiction offers a salutary and fair solution. In those circumstances, I take the view that it is an example, if one has to use the phrase, of "good forum shopping".*

Finally, as to the early tender fee in the sum of 2 per cent of the principal of the amount of the scheme creditor's PIK loans, Hildyard J was satisfied that the fee was offered generally and not to a select few, that the fee was not beyond the norm, and that the fee did not raise the question as to whether it would purchase consent where otherwise it might be refused. Accordingly, his Lordship sanctioned the scheme.

[David Allison QC and Adam Al-Attar]

Re Ocean Rig UDW Inc. & Ors. (Unrep.)


RIZ MOKAL

Opposed scheme of arrangement – Class Issues – Fairness – Offshore

The first part of Parker J's judgment in this matter related to a contested convening hearing in relation to four interconnected schemes of arrangement, whilst the second part concerned the sanctioning of the schemes. Each hearing had taken place over 3 days.

The four scheme companies were part of the Ocean Rig Group (the "**Group**"), which was an offshore ultra-deepwater drilling contractor that is publicly listed on the NASDAQ. The four scheme companies were the Group's Cayman incorporated holding company, Ocean Rig UDW Inc. ("**UDW**"), and three Marshall Islands subsidiaries directly owned by UDW (the "**Silo Companies**"). The vast majority of the Group's value was held in the Silo Companies. Each of the four companies had been placed into provisional liquidation in the Cayman Islands.

The scheme companies were promoting four separate interlinked schemes to compromise over US$ 3.69 billion of New York law governed debt. UDW's own indebtedness consisted of US$ 131 million in respect of unsecured notes (the "**2019 Notes**"), as well as its liability under guarantees in respect of the Silo Companies' debts totalling some US $3.56 billion.

The proposed scheme was supported by the Joint Provisional Liquidators of the four companies, and by an Ad Hoc Group which held in aggregate the majority of the Group's debt. 90 per cent of the scheme creditors had already agreed to a restructuring support agreement in advance of the convening hearing.

The Convening Hearing

Funds managed by Highland Capital Management LP ("**Highland**") opposed the UDW scheme but not the schemes in respect of the Silo Companies. Highland held 56.5% of the unsecured notes issued by UDW, which represented circa 2% of UDW's total indebtedness. Highland's essential contention was that the holders of the 2019 Notes ought to form a separate class to the UDW guarantee claims creditors.

As to its class composition objections, Highland relied on a draft Complaint alleging fraudulent conveyances in respect of UDW and/or its subsidiaries pursuant to New York Debtor and Creditor Law. The effect of the UDW scheme, Highland argued, was to remove its status as a creditor of UDW, and hence its ability

to bring those claims. Highland objected to a Preserved Claims Trust ("**PCT**") suggested by the Joint Provisional Liquidators as a way of dealing with these claims. Further, Highland argued that the UDW guarantee claims creditors were offered inducements in the form of consent fees that were not being offered to holders of the 2019 Notes. Highland also contended that the schemes granted creditors of two of the Silo Companies security over unencumbered assets but not to the 2019 Notes holders.

Rejecting Highland's arguments, Parker J convened a single meeting of creditors in each scheme, reminding himself that in applying the relevant test as to the dissimilarity of creditors' rights, "*The test that has to be applied is as to rights against the scheme company, not as against third parties and not as to interests*".

Parker J accepted that the UDW scheme class was not fractured by the security of the UDW guarantee claims creditors because their security over the shares of the Silo Companies was of no value due to each of those companies' insolvency. Further, the court is only concerned to look at the rights of a creditor as against the scheme company, not its interests in respect of third parties. Parker J also accepted that the proposed PCT would adequately protect Highland and enable any claims to be investigated and, if appropriated, prosecuted. Further, the inducements not offered to Highland but offered in the context of the Silo Companies' schemes were commonplace and insufficiently material to fracture the UDW scheme class.

Finally, bolstering his rejection of Highland's arguments, Parker J observed that Highland was structurally subordinated to UDW's guarantee claims creditors, given that it was a holder of unsecured notes only, whereas the other creditors had direct claims against the entities in which the bulk of the Group's value lay.

The Sanction Hearing

Following the convening hearing, the three schemes in relation to the Silo Companies were unanimously approved. Only Highland objected to the UDW scheme. Highland had in the meantime advanced a proposal seeking to modify the UDW scheme to the effect that Highland would be carved out from the UDW scheme, thus preserving its rights as a creditor and its entitlement to pursue the fraudulent conveyance claims. The carve out would be in return for Highland agreeing not to collect any sums due under the 2019 Notes, or any scheme consideration. If the Court was unable or unwilling to direct the amendment of the UDW Scheme, then Highland invited it to refuse to sanction the UDW scheme. The judge held that any modification of the scheme was not open to the court even if the court were to think (which in the present case it did not) that Highland's proposal would be fairer. The court's role was to approve the scheme actually put to creditors, not some other scheme.

The judge rejected the various arguments said by Highland to militate against the fairness of the UDW scheme meeting. As to a further argument that the voting at the meeting had been unrepresentative and/or affected by special interests, Parker J held that there was no evidence or reasonable inference to be drawn that the creditors had voted against the class.

In summary, the UDW scheme was an arrangement an honest and intelligent creditor acting in its interest might reasonably approve. Accordingly, the UDW scheme and the remaining three schemes were sanctioned. In conclusion, Parker J noted that the tests on a sanction hearing, "*should not be applied to enable minority creditors who have strongly opposing views to "hold to ransom" or "hold out" against the majority to prevent a scheme from proceeding, or to force a modification of it, or indeed to opt-out.*"

[Daniel Bayfield QC and Adam Al-Attar for the Scheme Companies, and Antony Zacaroli QC and Riz Mokal for the Ad Hoc Group]

CORPORATE INSOLVENCY

Digested by RYAN PERKINS AND RIZ MOKAL

Monarch Airlines Ltd v Airport Coordination Ltd, Administrative Court (Gross LJ, Lewis J), 8 November 2017


RYAN PERKINS

Judicial review - Airport slots - Decision of regulator not to allocate

The Administrative Court considered Monarch's application to judicially review the decision of the slot coordinator ("ACL") not to allocate Monarch's take-off and landing slots at airports for the Summer 2018 season. The Court granted Monarch permission to apply for judicial review, but dismissed its claim for an order compelling ACL to allocate the Summer 2018 slots to Monarch. The Court found that the key facts were are follows: (i) Monarch was placed in administration by an order of the Court dated 2 October, 2017; (ii) Monarch's Air Operator Certificate ("AOC") was provisionally suspended by the CAA on 2 October 2017; (ii) Monarch no longer has any aircraft at its disposal through ownership or a dry lease agreement; (iii) Monarch has

no pilots – other than, at most, 3 historically retained pilots, currently holding management positions; (iv) the CAA had commenced proceedings (a) to revoke, alternatively suspend, Monarch's Operating Licence ("OL") and (b) to revoke Monarch's AOC; (iv) having regard to the reasons advanced on Monarch's behalf for being placed in administration and, amongst other things, the letter of its solicitors of 1 November, 2017, there was no more than a theoretical possibility of Monarch emerging as a going concern or resuming the operation of air services.

In these circumstances, the Court rejected Monarch's claim that ACL was under a duty to allocate the Summer 2018 slots to Monarch by reason of grandfather rights under Article 8(2) of Council Regulation (EEC) No. 95/93 ("the Slots Regulation"). The Court found that, on the facts as summarised, (i) any such duty would not accord with the purpose underlying both Slots Regulation and Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 which addressing licensing; and (ii) Monarch fell outside the language of the Slots Regulation, read in context. **[David Allison QC]**

Re Chesterfield, BVI High Court of Justice (Commercial), 27 July 2017 (Wallbank J)

Liquidators - Power to compromise - Challenge to their decision

Prior to its entry into liquidation, Chesterfield had purchased a series of complicated financial instruments from Deutsche Bank. The purchase of these instruments was ultimately funded by Kaupthing.

Chesterfield and Kaupthing both brought claims against Deutsche arising from the sale of the financial instruments. Chesterfield brought claims in England. Kaupthing brought claims in England and Iceland.

In 2016, the Joint Liquidators caused Chesterfield to enter into global settlement package involving linked settlements between (a) Chesterfield and Deutsche; and (b) Chesterfield and Kaupthing. In addition, Kaupthing and Deutsche also entered into a linked settlement.

After learning of the settlement, Mr Stanford (who was neither a creditor nor a member of Chesterfield, and was at most a shareholder of one of the shareholders of Chesterfield) applied pursuant to section 273 of the BVI Insolvency Act 2003 to reverse the decision by the Joint Liquidators to enter into one element of the global settlement package, namely the settlement of claims between Kaupthing Iceland and Chesterfield. Wallbank J dismissed the application on all grounds, finding that Mr Stanford did not have standing to bring the application (since he was neither a creditor nor a member of Chesterfield) and that there was no proper factual basis to challenge the Joint Liquidators' exercise of discretion in entering into the settlement. **[David Allison QC]**

Burlington Loan Management Ltd v Lomas [2017] EWCA Civ 1462 (Gloster and Patten LJJ and Lord Briggs of Westbourne, 24 October 2017)

Administration – Payment of interest from surplus in insolvency estate – Interest under Insolvency Rule 2.88

The Court of Appeal decided a number of issues in the so-called '*Waterfall II*' litigation in relation to the distribution of the surplus in the estate of Lehman Brothers International (Europe) ('**LBIE**'). First, the Court held that Insolvency Rule 2.88 provided a complete code for statutory interest in administration proceedings, pursuant to which dividends were to be attributed first toward principal and only then toward interest. There was no lacuna in Rule 2.88 that might be filled by the so-called '*Bower v Marris* approach' by which interest was paid first. Second, where a debt would bear a compounding rate of interest apart from the administration, no such compounding occurs once the principal is discharged in full by payment of dividends. Third, there is no common law right to compensation out of the surplus in an estate for late payment of statutory interest. Fourth, statutory interest on a contingent debt runs from the date of administration, not from the date of occurrence of the contingency. Fifth, neither a rate of interest applicable to a foreign judgment actually obtained by a creditor, nor a rate that would have been applicable to a judgment that could have been but was not in fact obtained, is relevant to the calculation of the statutory rate of interest. Sixth and finally, where the interest rate applicable to a debt as at the date of administration – be it actual, future, or contingent, though ignoring foreign judgments not obtained as of that date – exceeds the Judgments Act rate, it is that higher rate that is applicable to the debt pursuant to Rule 2.88(9). In this respect, this sub-Rule constitutes "*a clear but limited departure from the emerging principle…that the process of proof of debt and dividend in insolvency…replaces and extinguishes creditors' previous contractual rights*" (para [77] of the Court's judgment). **[Robin Dicker QC, Antony Zacaroli QC, David Allison QC, Tom Smith QC, Daniel Bayfield QC, Richard Fisher, Stephen Robins, Adam Al-Attar, Henry Phillips, Robert Amey]**

Re Webinvest Ltd [2017] EWHC 2446 (Ch) (Arnold J, 24 October 2017)

Common officeholder in connected estates – Material obtained using officeholder's statutory powers – Material disclosed in one set of proceedings – Material subject to legal professional privilege

The applicants were three insolvency practitioners, of whom one was a joint liquidator of a company ('**Webinvest**') as well as a joint trustee in bankruptcy of the company's erstwhile owner and controller ('**MS**'). The other two applicants were the other joint liquidator and joint trustee, respectively. The law firm Dechert was advising all the applicants, while the firm Moon Beever was advising the other joint trustee exclusively. The evidence suggested that Webinvest's and MS's affairs had been closely intertwined prior to their insolvencies, which had occurred when Webinvest defaulted on a loan and MS on his personal guarantee of that loan. The applicants were pursuing several proceedings against MS and/or entities allegedly controlled by him. In this context, MS questioned the use of three categories of material. First, the trustees had obtained material by use or threat of their compulsory powers under the Insolvency Act 1986, and the question arose whether they might share this material with the liquidators. The Court confirmed that such material could only be used for the purposes for which the compulsory power was conferred, and that the person obtaining the material is under a duty of confidence to the person providing it. In relation to the Insolvency Act powers to compel production of material, the Court held that the material may be used for the beneficial pursuit of the insolvency proceedings in which it was obtained. Where there is a real prospect of recovery from the insolvency estate of a company for the estate of that company's parent or shareholder, material obtained by the latter's officeholders may be shared with the officeholders of the former. The same holds where such sharing would facilitate the unearthing of dishonesty or other malpractice. The second category of material was that to be disclosed to the liquidators in proceedings to which they were party. MS objected on the basis that there was a risk, given the common officeholder in the two estates, of unconscious use of that material in proceedings being brought by the trustees. Such use would be contrary to Civil Procedure Rule 31.22(1). The Court rejected this argument on the basis that the common officeholder was an experienced insolvency practitioner advised by experienced solicitors, and that this was not a situation of trade secrecy or commercial competition in which there might be a real risk of unconscious collateral use. The third and final category of material was that subject to MS's legal professional privilege. The Court approved a segregation protocol by which any material that might fall into this category was placed beyond the access by the common officeholder and Dechert, and assessed by the other joint trustee advised by Moon Beever. Only material found not to be subject to MS's privilege would be provided to the common officeholder and to Dechert.

[Antony Zacaroli QC, Riz Mokal]

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


MATTHEW ABRAHAM

Evans v Carter [2017] EWHC 2163 (Ch) (HHJ Hodge QC, 18 July 2017)

After-acquired property – Bankrupt's estate – Causes of Action

This case was an appeal from the decision of a district judge sitting in Portsmouth in relation to whether the proceeds of a cause of action pursued by a bankrupt was after-acquired property thereby falling outside the bankruptcy estate.

Prior to her bankruptcy, one of the secured creditors of the matrimonial home had secured a possession order against both the bankrupt and her husband. The bankrupt appealed against that possession order on the footing that the charge should be set aside as against her alone as it had been procured by undue influence. Whilst that appeal was pending, the bankruptcy order was made against the bankrupt and her husband. During that period, there was an exchange of correspondence between the bankrupt's solicitors and the joint trustees in bankruptcy where the solicitors wanted confirmation that they could continue to act for the respondent notwithstanding that her interest in the house had vested in the trustees. The bankrupt was automatically discharged from bankruptcy after a year.

Following her discharge, the bankrupt was successful in setting aside the bank charge on the basis of undue influence; therefore the bank could not proceed against her half of the house. She told the trustees in

bankruptcy and contended that, as she had been successful after her automatic discharge from bankruptcy, her half-share in the house did not fall into the bankruptcy. The trustees did not accept that her share was after-acquired property; they said that her beneficial interest had been vested in her at the time of the bankruptcy order, and their interest was unchanged by the setting aside of the possession order. The trustees issued applications in respect of both bankrupts for a declaration regarding their interest in the house.

The district judge's decision was that the respondent's share which had vested in the trustees had revested in her by reason of the unjust enrichment that otherwise would occur. He found that, on the evidence of the correspondence, the trustees in bankruptcy had not made it clear to the respondent that they would have the benefit of her action, if successful, and that she would not have pursued it if she had not been sure that she personally was going to benefit.

The principal issue on appeal was whether it was legally unjust for the trustees in bankruptcy to retain the benefit of the bankrupt's successful claim. The joint trustees also argued that the district judge's decision could be upheld on the alternative basis of the rule in *Re Cordon Ex p. James* (1873-74) L.R. 9 Ch. App. 609.

The High Court allowed the appeal by the joint trustees in bankruptcy.

(1) The Court found that the district judge had erred in his approach to the evidence. In particular, the district judge should have focused on whether the trustees in bankruptcy should have known whether the bankrupt was pursuing the appeal because she expected to benefit from its success. It is this knowledge that would have supported a claim in unjust enrichment founded upon free acceptance (see paragraph 50 of the Judgement). Instead the district judge held that because the trustees in bankruptcy failed to make their position clear to the bankrupt.

(2) The Court held that given its finding that there was not claim for unjust enrichment the rule in *Ex parte James* had no application. In particular, the Court held that: "*it cannot be said that it would be in any way unfair to prevent the trustee in bankruptcy from asserting a claim to Mrs Carter's interest in the property when she had never made it clear to the Official Receiver, their predecessor in office, that she was pursuing the appeal in the belief that she would thereby secure the re-vesting in herself of her interest in the property if the appeal was successful. It does not seem to me that the enforcement of a claim to the vested interest in the property of Mrs Carter by the present appellants is contrary in any way to natural justice, or is in any way unfair, or would be pronounced to be obviously unjust by all right-thinking, right-minded men or women.*" (paragraph 52 of the Judgment).

PROPERTY & TRUSTS

Digested by ANDREW SHAW


ANDREW SHAW

JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426 (Ch) (Birss J, 11 October 2017)

Discretionary trusts – Beneficial ownership

This was a claim by a Russian bank in liquidation (the "Bank") that Mr Pugachev was the beneficial owner of assets held by five New Zealand discretionary trusts and that, in consequence, the Bank was entitled to those assets. The Bank was a judgment debtor of Mr Pugachev.

The Claimants advanced their principal claim on two bases: first, that on the proper construction of the trust deeds, the trusts did not effectively divest Mr Pugachev of the assets placed into them and were therefore "illusory trusts"; and second, that the trust deeds were shams. If, however, the trusts did divest Mr Pugachev of beneficial ownership of the assets they contained, then the Bank contended that transfers into the trusts were transactions defrauding creditors under section 423 of the Insolvency Act 1986.

Birss J considered the case law on so-called illusory trusts and, in particular, the decision of the New Zealand Supreme Court in *Clayton v Clayton* [2016] NZSC 29. He concluded that, while the label "illusory" was unhelpful, illusory trusts where the terms of the trust deed were given effect but were nonetheless ineffective to deprive the settlor of beneficial ownership were distinct from sham trusts. Whether a trust was a sham depended upon the subjective intentions of the relevant parties; whereas whether a trust was "illusory" was dependent upon the true construction of the trust deed.

Birss J held that the critical issue was whether or not the powers given to a trust protector were fiduciary or purely personal, by which he meant that the power could be exercised for the protector's "*own selfish interests*". He considered that in the present case, any power that was conferred on the protector for a purpose that took into account the interests of the discretionary beneficiaries as a class was a fiduciary power. Birss J concluded that whether a power

conferred by a trust deed was fiduciary or purely personal depended upon the construction of the trust deed to determine for whose benefit the power had been conferred.

Mr Pugachev was not only the settlor and a discretionary beneficiary of the trusts but was also a protector. The various trust deeds granted the protector wide powers including a power to remove trustees "*with or without cause*" and a power to vary the discretionary trustees.

Accordingly, Birss J held that the powers conferred on Mr Pugachev as protector were purely personal and were not constrained by the need to consider the interests of the discretionary beneficiaries as a class; the powers were conferred to give the protector the ability to act in his own best interests. Birss J therefore concluded that on their own terms the trusts did not divest Mr Pugachev of the beneficial ownership of the assets he had placed in them.

In relation to the Bank's claim that the trusts were a sham, Birss J found that at all material times Mr Pugachev had regarded the trust assets as belonging to him and intended to retain ultimate control; the aim of the trusts was not to cede control of the assets to a trustee but to conceal Mr Pugchev's ownership of them. The role of protector was the means by which Mr Pugachev would exercise control. Given his conclusion that the true effect of the trust deeds was to allow Mr Pugachev to retain control of the trust assets, Birss J held that the trusts were not shams as they fulfilled Mr Pugachev's intention to retain control of the trust assets.

However, if he had found that on the proper construction of the trust deeds the protector's powers were fiduciary, he would have held that the trusts were shams.

Having determined that the court should not give effect to the trust deeds, Birss J did not consider the section 423 claim in any detail.

SPORT

Digested by ROBERT AMEY


ROBERT AMEY

Ipswich Town Football Club Company Limited v The Chief Constable of Suffolk Constabulary [2017] EWCA Civ 1484

Special police services – Liability of football club to pay for policing services on public highway outside football ground

Ipswich Town Football Club play at Portman Road. On match days, fans gather on Portman Road and Sir Alf Ramsey Way (both of which are public highways) as they wait to enter the ground. Upon the club's application, the local authority had issued a Traffic Regulation Order banning vehicles from both roads (the "**TCO Area**") on match days, from 90 minutes before kick-off to 30 minutes after the final whistle. The physical barriers which block the road are put in place by the club's own stewards, not police.

The terms of Ipswich Town's safety certificate (issued under the Safety of Sports Grounds Act 1975) obliges the club to have a police presence inside the stadium for certain matches. In practice, there would often be a police presence in the TCO Area outside the stadium too. Under section 25 of the Police Act 1996, the club is liable to pay for "*special police services*". For a number of years, the club paid a fee to the police in respect of policing both inside the stadium and the TCO Area. However, in *Leeds United Football Club Limited v Chief Constable of West Yorkshire Police* [2014] QB 168, the Court of Appeal held that there was no liability to contribute in respect of policing services on public land outside a football stadium, since policing services on public land were part of ordinary policing functions. Ipswich Town therefore argued that they had been overcharged, and sought restitution of fees paid in respect of policing the TCO Area.

At first instance, Green J distinguished the *Leeds* case on the basis that Ipswich Town had "*a high degree of de facto control over the TCO Area*", such that, although it was technically public land, it was not public land in the same way that the relevant area in the *Leeds* case had been public land. Accordingly, the Judge held, policing within the TCO Area constituted special police services, in respect of which a fee was payable.

The Court of Appeal unanimously overturned the Judge, holding that the present case was indistinguishable from *Leeds*. That the club had a degree of de facto control over the TCO Area was not a relevant factor, and even if it had been, the Judge had given it too much weight. The correct test (and the one which provided simplicity and predictability of outcome) was whether the relevant land was public or private. Although there was something to be said for requiring football clubs to pay for policing on public land immediately outside their stadiums, any change in the law was a matter for Parliament.

The Cayman Islands as a restructuring centre

Ocean Rig opens the door

Daniel Bayfield QC and **Nick Herrod** of Maples and Calder, primarily through the lens of the Ocean Rig restructuring, but also with reference to the CHC case, explore the circumstances in which the Cayman Islands may be the jurisdiction of choice in which to restructure the debts of multi-national groups

The complex and fiercely contested Ocean Rig cross-border restructuring is one of the largest ever effected through schemes of arrangement. It created a number of Cayman Islands firsts, including being the first occasion on which the Cayman Islands court has sanctioned schemes of arrangement promoted by foreign incorporated companies.

The Ocean Rig Restructuring

The Ocean Rig group is an international offshore drilling contractor, specialising in the ultra-deepwater and harsh environment segment of the industry. As a result of difficult market conditions (in particular, the fall in the price of oil from US$100 per barrel in March 2014 to below US$30 per barrel in February 2016) and an unsustainable debt burden, the group's ability to continue to trade was in jeopardy.

The restructuring, which was implemented through four inter-linked Cayman Islands' schemes of arrangement, affected approximately US$3.7 billion of New York law governed debt, the majority of which was swapped for equity. The Cayman Islands was selected as the jurisdiction within which to implement the restructuring primarily because: (i) a Chapter 11 was seen as potentially too expensive with greater litigation risk; and (ii) English schemes may have resulted in adverse tax consequences because of the need to shift the scheme companies' centre of main interests ("**COMI**") to the UK (to create a sufficient connection with the jurisdiction and/or to ensure that the scheme proceedings would be recognised in the US under Chapter 15).

The four schemes were proposed by the Cayman Islands registered parent (the "**Parent Scheme**") and three of its Marshall Islands incorporated subsidiaries (the "**Silo Schemes**"). To ensure that creditors could not ignore the release of their New York law governed rights orders were obtained from the U.S. Bankruptcy Court (under Chapter 15 of the U.S. Bankruptcy Code) recognising the schemes and giving them full force and effect.

The restructuring and the schemes were substantially pre-packaged, having been pre-negotiated between the scheme companies and an ad-hoc group of lenders. More than 90

THE OCEAN RIG CROSS-BORDER RESTRUCTURING IS ONE OF THE LARGEST EVER EFFECTED THROUGH SCHEMES OF ARRANGEMENT

per cent by value of the scheme creditors of each of the four companies had entered into a restructuring support agreement, locking-up to support the scheme, prior to the convening hearing.

Prior to the launch of the schemes, joint provisional liquidators (the "**JPLs**") were appointed to the four scheme companies who immediately took steps to obtain a temporary restraining order (the "**TRO**") from the U.S. Bankruptcy Court. These steps allowed negotiations to take place with groups of opposing creditors, sheltered by the moratorium on creditor action achieved in both the Cayman Islands (through the appointment of the JPLs) and in the U.S. (through the TRO). The JPLs were appointed to create a breathing space for the scheme companies and to ensure that the restructuring received independent scrutiny from officers of the court.

The JPLs' appointment had the added benefit of introducing an independent party into the negotiations. This undoubtedly helped the scheme companies to strike a deal with one group of dissenting creditors. Further, the JPLs were able to give the court comfort that the schemes were considered fair by the officers appointed by it to consider the merits of what the scheme companies had proposed.

One group of noteholder creditors ("**Highland**") opposed the restructuring every step of the way but the restructuring and the Cayman Islands scheme jurisdiction more generally held up to scrutiny.

The composite judgment dealt with the issues argued at both the convening hearing

The Cayman Islands scheme jurisdiction was heavily stress tested in Ocean Rig.

and the sanction hearing (*Re Ocean Rig UDW Inc. and others* (Unreported, Grand Court, 18 September 2017)).

The ingredients for a successful restructuring jurisdiction

Where consensual deals with creditors are not possible, a viable restructuring jurisdiction needs to facilitate, in appropriate circumstances, the "cramming down" of dissenting creditors. As demonstrated by their use in England over the last ten years, schemes of arrangement are a powerful company restructuring and rescue tool - despite the requirement to secure, when compared to a Chapter 11, a higher level (75 per cent by value, and a majority in number, of those voting) of support from each class of scheme creditor.

Schemes are on the statute book in the Cayman Islands (section 86ff of the Cayman Islands Companies Law (2016 Revision) (the "**Companies Law**")); the statutory provisions being substantially the same as those contained in Part 26 of the UK Companies Act 2006. The Cayman Islands, therefore, follows scheme case law from England and the many other common law jurisdictions whose scheme legislation is also modelled on the UK Companies Acts.

The Cayman Islands scheme jurisdiction was heavily stress tested in Ocean Rig. Class composition, the representative nature of the vote and fairness issues generally were all the subject of lengthy written and oral submissions; Highland taking every conceivable argument in an attempt to bring down the restructuring. Notably, the decision of the Cayman Islands court in Ocean Rig confirmed that Cayman Islands law on class composition, blots, lock-ups and consent fees, cross-holdings, modifications to schemes and the approach to the sanction test are the same as in England - providing relative certainty as to legal outcome.

A light-touch provisional liquidation had already been used in the Cayman Islands as a way to protect a company from hostile creditor action during the negotiation phase of a scheme (although the moratorium does not prevent the enforcement of security). The Ocean Rig experience suggests that it can work most effectively and less disruptively than, for example, a UK administration proceeding. Particularly in a contested situation, a light-touch provisional liquidation can provide a helpful wrapper to the scheme process, while not adding significantly or at all to the length of the process.

A restructuring centre needs more than an established and certain rulebook. Trusted legal and court systems and professionals who embrace the benefits of a rescue culture are also required. The Cayman Islands ticks these boxes.

- The legal system is an English common law system – a system that is one of the most established and respected in the world.
- The courts are experienced in handling large multi-national financial disputes. Owing to the nature of the Cayman Islands as an offshore jurisdiction, the vast majority of business that flows through the Islands is of a cross-border nature. Further, the judiciary contains a number of highly respected practitioners who have experience of cross-border restructurings in both the English and U.S. markets.
- The professionals are largely made up of experienced ex-City solicitors, barristers and insolvency practitioners who have handled many large and complex restructurings. The professionals' default setting is not to liquidate but to rescue.

The Cayman Islands is, therefore, a jurisdiction which can be trusted with complex and high-value restructurings as the Ocean Rig case well demonstrates.

Cayman Islands cross-border schemes

Schemes of foreign incorporated companies – a Cayman Islands first

It has become common place over the last ten years for the English courts to "scheme" foreign companies. Ocean Rig highlights the fact that, in the right circumstances, the Cayman Islands offers a viable alternative jurisdiction. In Ocean Rig, the Cayman Islands

court confirmed that it has jurisdiction to scheme foreign incorporated companies and will do so in appropriate circumstances.

The test in England and Wales and the Cayman Islands

England and Wales

The English courts have jurisdiction to sanction a scheme in relation to a foreign incorporated company where that company is liable to be wound up by the English court. The English courts will only exercise the scheme jurisdiction in relation to a foreign company where there is a sufficient connection with the jurisdiction, such as the scheme company's COMI being in the UK. As the law has developed in England, the bar for sufficient connection has been gradually lowered; with the English courts now taking jurisdiction in circumstances where the only connecting factor to England is that the governing law of the debt to be schemed is English and is subject to the non-exclusive jurisdiction of the English courts. This is the case even where those features result from pre-scheme contractual variations (not necessarily consented to by all scheme creditors) designed to satisfy the sufficient connection test[1].

Where a foreign company's COMI is located outside of the UK and a COMI shift is impossible or impractical, absent an English governing law clause or the extreme forum shopping involved in the accession of a UK registered company as a co-obligor to promote the scheme[2], there will be challenges in meeting the sufficient connection test (and the effectiveness of the scheme may, in any event, be in doubt).

Cayman Islands

The Cayman Islands court also has jurisdiction to sanction a scheme in respect of a company that is liable to be wound up by the Cayman Islands court. In England, the ability to wind up a foreign incorporated company derives from the fact that the court has jurisdiction to wind up unregistered companies (a foreign incorporated company being treated as an unregistered company). Under Cayman Islands law, specific legislative provisions govern when a foreign incorporated company is liable to be wound up by the Cayman Islands court. Section 91 of the Companies Law provides that the Cayman Islands court has jurisdiction to wind up a foreign company which: (i) has property located in the Cayman Islands; (ii) is carrying on business in the Cayman Islands; (iii) is the general partner of a limited partnership; or (iv) is registered as a foreign company with the Cayman Islands Registrar of Companies.

Accordingly, simply registering the foreign

DANIEL BAYFIELD QC

1/. See, for example, *Re Apcoa Parking Holdings GmbH* [2015] BCC 142.
2/. See, for example, *Re Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch).

Prior to Ocean Rig, companies' COMI have been shifted to Cayman by the provisional liquidator or liquidator once in office

company in the Cayman Islands creates the jurisdictional hook for a Cayman Islands scheme of arrangement. As in England, the Cayman Islands court will, as a matter of discretion, need to be satisfied that it should exercise its jurisdiction. One question is whether the Cayman Islands court, in order to exercise its discretion, will, in addition to registration as a foreign registered company, require more. This point was untested in Ocean Rig because, as a result of a shift of the scheme companies' COMI to the Cayman Islands (see below) each scheme company had a substantial nexus to the Cayman Islands (including assets in the jurisdiction). Accordingly, the weight of the connection to the Cayman Islands required to invoke the discretion of the Cayman Islands court remains an area of Cayman Islands law to be developed. However, given that it is expected that most Cayman Islands restructurings will involve New York law governed debt and therefore would likely require a COMI shift or the creation of an establishment (which of itself creates a jurisdictional nexus), circumstances where there is limited connection with the Cayman Islands at the time schemes are filed are currently expected to be few and far between.

Forum shopping for the most effective restructuring jurisdiction

The Cayman Islands was deliberately selected as the jurisdiction within which to implement the Ocean Rig restructuring. The scheme companies did not have longstanding connections with the jurisdiction. This is not unusual in the restructuring context – restructuring lawyers seek the jurisdiction within which to implement a restructuring in the most efficient and effective manner while returning the greatest possible value to creditors. As the Marshall Islands had no restructuring procedure and both Chapter 11 and English scheme proceedings were unattractive (Chapter 11 because of cost, likely implementation time and litigation risk; English schemes due to adverse tax consequences of a COMI shift) the Cayman Islands was selected as the jurisdiction within which to implement the restructuring.

Creation of the Cayman nexus

The parent was continued[3] to the Cayman Islands from the Marshall Islands in April 2016 for reasons unconnected to any restructuring of the group's debt. Following the continuation, the parent became a Cayman Islands exempted company. The three Marshall Islands subsidiaries were registered in the Cayman Islands as foreign companies in October 2016 and the COMI of each of the scheme companies was shifted to the Cayman Islands between October 2016 and early February 2017.

The Cayman Islands court adopted the approach of the English court that forum shopping is not abusive where it is carried out with a view to achieving the best possible outcome for creditors – this was found to be the case with the Ocean Rig restructuring.

In recognising both the provisional liquidation and the scheme proceedings, the U.S. Bankruptcy Court reached the same conclusion as the Cayman Islands court. It was held that, while the scheme companies purposefully moved their COMI to the Cayman Islands before filing for recognition of the provisional liquidation and scheme proceedings, those actions were taken for legitimate reasons, motivated by the desire to maximise value for creditors and to preserve assets. This was good, as opposed to bad, forum shopping.

Pre-filing COMI shift to the Cayman Islands – another first

Ocean Rig involved the first *pre-filing* COMI shift to the Cayman Islands. While companies' COMI have previously been shifted to the Cayman Islands, the shift has always been

3/. Continuation allows a company incorporated in one jurisdiction to be seamlessly transferred to the Cayman Islands. There are a number of requirements that need to be fulfilled before a company can be "continued" to the Cayman Islands which are beyond the scope of this article.

effected by the provisional liquidator or liquidator once in office. The activities of the provisional liquidator or liquidator (notably communications with creditors and decision making) naturally shift COMI to where the office-holder undertakes his or her activities. Given that: (i) the debt to be compromised was governed by New York law; (ii) there were pending events of default under the credit instruments to be compromised; and (iii) certain creditors were likely to be hostile to the restructuring, a moratorium was required in the U.S. from the time that the scheme companies were placed into provisional liquidation in the Cayman Islands. This required shifting the scheme companies' COMI to the Cayman Islands (in a similar manner as for an English scheme of arrangement of New York law governed debt). Further, the application for the appointment of the JPLs was on a "without notice" basis so as to prevent hostile creditor action being taken (as had been threatened) in the U.S. prior to the JPLs applying for a TRO.

The steps taken to shift the scheme companies' COMI ensured that their head office functions were conducted from the Cayman Islands and that this was objectively ascertainable to third parties (in particular creditors). As another Cayman Islands first, a Cayman Islands restructuring subsidiary was established to perform, pursuant to a Cayman Islands law governed services agreement, a number of the head office and front-office administrative functions of the scheme companies in the Cayman Islands.

In recognising the provisional liquidation and the scheme proceedings, the U.S. Bankruptcy Court expressly confirmed that Cayman Islands exempted companies can have their COMI in the Cayman Islands – accepting that exempted companies can be managed from the Cayman Islands (management of the business being a crucial COMI factor). Therefore, any historic doubts in this regard have finally been laid to rest.

Will the schemes be substantially effective?

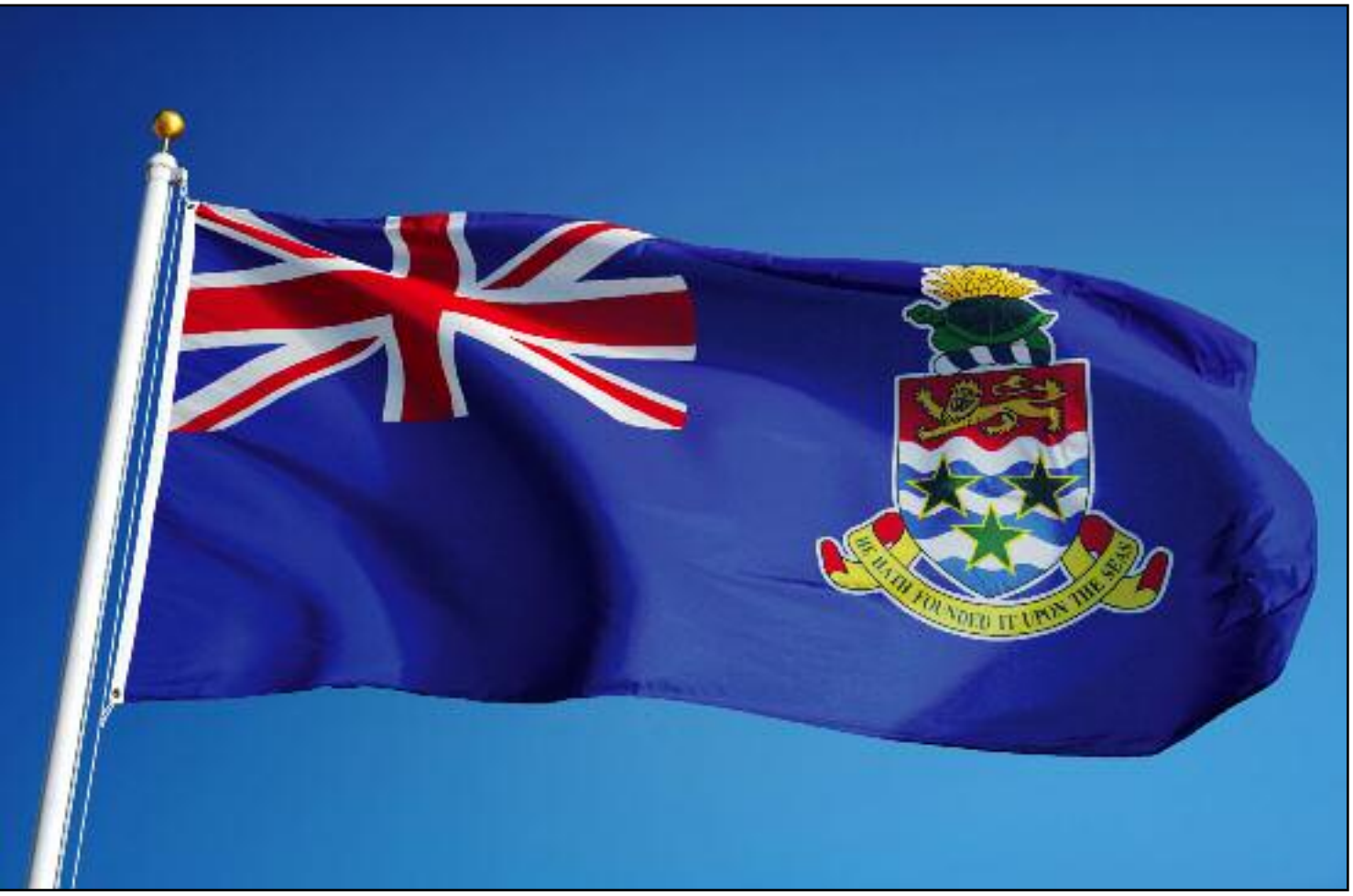
As with the English courts, the Cayman Islands courts will not act in vain. It will need to be shown that a scheme will be substantially effective in the jurisdictions which matter – in particular, in the jurisdiction where the scheme company is incorporated and in the jurisdiction which governs the liabilities which are to be varied by the scheme. In the same way as in England, this can be demonstrated by expert evidence from the relevant foreign jurisdictions.

NICK HERROD OF MAPLES AND CALDER

Litigation trusts

One tactic which can complicate (and even derail) a restructuring is for a dissenting creditor to allege that claims exist which would create value for the creditors. The question then becomes how such claims should be treated in the restructuring. In Chapter 11 proceedings, a common way of dealing with such allegations is to create a litigation trust. The restructuring moves forward and the claims are assigned into a trust to be dealt with by a trustee – if claims are successfully pursued the recoveries benefit all creditors.

Due to the limitations of English law purpose trusts, litigation trusts do not readily feature in English restructurings. As a general rule, it is not possible for an English law trust to be constituted to carry out a non-charitable



OCEAN RIG PUTS THE CAYMAN ISLANDS ON THE MAP AS A RESTRUCTURING JURISDICTION

purpose (e.g. the investigation and potential prosecution of causes of action).

A Cayman Islands STAR trust governed by Part VIII of the Cayman Islands Trust Law (2017 Revision) allows for a trust, the object of which is a mix of persons and purposes. As such they are an ideal tool with which to form a litigation trust.

As yet another Cayman Islands first, the STAR trust mechanism was used in the Ocean Rig restructuring to create a trust into which claims that Highland alleged the parent company (and two of its non-scheme subsidiaries) had against third parties were assigned. All the Parent Scheme creditors were beneficiaries under the trust. A corporate trustee company was created of which the JPLs (not in their capacity as such) were the directors. So that the claims could be properly investigated the trust was funded, by the parent company, with US$1.5 million.

The restructuring could therefore proceed on the basis that each Parent Scheme creditor was treated fairly and would recover rateably should any of the claims be successfully brought to fruition. This allowed the restructuring to move forward in the required time period. The litigation trust avoided Highland being able to argue that, in dollar terms, the liquidation outcome might be better than the scheme outcome because a liquidation may result in the claims being pursued by a liquidator whereas (Highland would doubtless have contended) the parent would not pursue them.

Putting a value on litigation is notoriously difficult and it would have been expensive, time consuming and unsatisfactory for the Cayman Islands court to have been diverted by having mini-trials of the claims to enable it to form a view as to their merits and value. Placing them into a litigation trust meant that, whatever the value of the claims (if any), their value would be enjoyed by the creditors in a liquidation or, if the schemes became effective, through the litigation trust. That

parallel dictated that there was no need for the court to ascribe any particular value to the claims because their inclusion on both sides of the liquidation outcome versus scheme outcome cancelled themselves out.

The decision in Ocean Rig to use the provisional liquidation wrapper was an important, defensive, strategic decision

Wrapping a scheme within a restructuring provisional liquidation

Specific statutory provisions exist in the Cayman Islands enabling a provisional liquidation to be used to shelter a proposed restructuring. Where a winding-up petition has been presented, provisional liquidators may be appointed under section 104(3) of the Companies Law where the company: (i) is, or is likely to become, unable to pay its debts; and (ii) intends to present a compromise or arrangement to its creditors. This allows a restructuring of the company to be pursued with the benefit of the moratorium on creditor action (although there is no stay on the enforcement of security as there is in English administration proceedings). The restructuring may take the form of a scheme of arrangement (as was the case in Ocean Rig) or a consensual deal with creditors. Further, where a stay on creditor action in the Cayman Islands may be beneficial a provisional liquidation may be used to support restructuring efforts in other countries, for example, a plan of reorganisation in Chapter 11 proceedings (as occurred in *Re CHC Group Ltd* (Unreported, Grand Court, 24 January 2017) ("CHC"), where a Cayman Islands provisional liquidation supported a Chapter 11 proceeding – see below).

The court has a broad discretion as to what powers to grant a provisional liquidator and as to the scope of his or her role. In the restructuring context it would be usual to allow the existing management to remain in control of the company's affairs (subject to the supervision of the provisional liquidator). The order will be tailored to the requirements of the case.

The decision in Ocean Rig to use the provisional liquidation wrapper was an important, defensive, strategic decision. While the debtor companies' management remained in possession, the JPLs were able to provide an independent voice in negotiations with dissenting creditors (assisting one of the silo scheme companies to strike a deal with one group of creditors who could otherwise have vetoed that silo scheme). Further, the JPLs were, as officers of the court, able to provide confirmation that, having subjected the schemes to independent scrutiny (in particular having vetted the liquidation comparator and scheme allocation methodology) that the schemes were fair and should be sanctioned. This meant that the bar for the challenging creditor to surmount was a higher one than if the provisional liquidation wrapper had not been used.

Accessing the restructuring provisional liquidation regime

A feature of Cayman Islands law is that, before provisional liquidation proceedings can be commenced, a winding up petition must be filed. Under the Companies Law (as interpreted most recently by the Grand Court in the case of *Re China Shanshui Cement Group Limited* [2015] (2) CILR 255), the directors cannot present a petition for the winding up of a company unless expressly authorised to do so under the company's articles of association or by a shareholder's resolution. This is known as the *Emmadart* rule, because the relevant provisions of the Companies Law provide statutory recognition of the principles set out in *Re Emmadart Ltd* [1979] Ch 540.

The rationale for the *Emmadart* rule is that directors only have the authority to manage the business. While the object of management is continuing the company's business, winding-up causes the death of the company. Directors, therefore, need additional authority to commence a procedure that terminates the company's business. The rule in *Emmadart* no longer applies in England having been over-ruled by statute.

In *China Shanshui*, the company's directors had presented a winding-up petition (without a shareholder resolution or express authorisation in the company's articles of association) and applied for the appointment

Ocean Rig sets a precedent for the use of the Cayman Islands for modern, complex cross-border restructurings

of provisional liquidators with a view to restructuring the company's debts. The Cayman Islands court dismissed the application on the basis that the directors had no authority to present the winding-up petition, which was a pre-requisite to the application for the appointment of provisional liquidators.

CHC confirms the Emmadart work around

CHC was the Cayman Islands registered holding company of a multinational helicopter group which was subject to Chapter 11 proceedings. As part of the coordinated effort to successfully restructure the group, provisional liquidation proceedings in respect of CHC, followed by a validation order application relating to transfers of assets to be made pursuant to the Chapter 11 plan, were considered necessary. However, CHC's articles of association did not expressly authorise the directors to present a winding-up petition and a resolution had not been obtained from its shareholders and, as a matter of practical reality, could not be obtained.

The proposed solution was for a subsidiary of CHC (which was owed money by CHC) to file a "friendly" creditor's winding-up petition and, thereafter, for CHC's directors to cause CHC to apply for the appointment of provisional liquidators.

In these circumstances, the Cayman Islands court held that the *Emmadart* rule did not apply. The rationale underpinning the *Emmadart* rule (that the directors have no authority to bring about the destruction of the company's business) has nothing to do with applications for the appointment of provisional liquidators under section 104(3) which does not ordinarily, **or of itself,** bring about the destruction of the company's business. Such an application is made for the purpose of saving the business of the company. While this work around (i.e. having a creditor file the petition underpinning the provisional liquidation, not the company) cuts across the wording of Order 4, Rule 6 of the Companies Winding Up Rules (2008) (as amended) (which provides that where a winding up petition has been presented by the company, *the company* may apply for the appointment of a provisional liquidator), it has, for some time, been recognised by the Cayman Islands legal profession as potentially being available. The CHC case is the first time that the Cayman Islands court has confirmed its validity.

A stand-alone restructuring moratorium?

While the restructuring provisional liquidation wrapper has served the Cayman Islands well, it can suffer optically – it is counter-intuitive to initiate a liquidation proceeding in order to facilitate a restructuring. For this reason (and others), reforms to introduce a stand-alone restructuring moratorium to replace the light-touch restructuring provisional liquidation are on the agenda. Importantly, the new proceeding will not be connected to the winding up regime. A qualified insolvency practitioner (restructuring officer) will take on an equivalent role to that currently performed by a provisional liquidator appointed under section 104(3). The *Emmadart* rule will not apply to the stand-alone restructuring moratorium and the moratorium will: (i) apply from the date of filing (rather than the date that restructuring officers are appointed by the court); and (ii) be expressed to be extra-territorial.

It is, as matters stand, hoped that the reforms will be passed into Cayman Islands law in the first half of 2018.

When to select a Cayman Islands restructuring

It is clear that the Ocean Rig restructuring sets a precedent for the use of the Cayman Islands as a centre within which to conduct modern, complex cross-border restructurings. But when will a Cayman Islands scheme be the right tool in the toolbox for the restructuring lawyer to reach for?

Given the rule in *Gibbs* (broadly that English law debt can only be compromised through an English proceeding) it is likely that Cayman Islands schemes will be most appropriate in

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order to amend or compromise New York law governed debt. It is unlikely (but not impossible) that it will be commercially palatable to change the governing law of the debt from English to Cayman Islands law.

A restructuring of New York law debt requires recognition and enforcement pursuant to U.S. law. This is likely to require a Chapter 15 filing. Accordingly, either the COMI of the debtor will need to be shifted or an establishment created. Shifting COMI to England (or creating an establishment in England) is likely to result in adverse tax consequences. The Cayman Islands is a tax neutral jurisdiction - there are no Cayman Islands tax consequences of a Cayman Islands COMI shift; indeed if the debtor is paying tax in its current jurisdiction there may be a tax benefit to the COMI shift. This means that where the debtor is either in a no or low tax jurisdiction, a Cayman Islands scheme of New York law debt may be particularly attractive.

Chapter 11 is the other likely alternative. While there are advantages to Chapter 11 (notably that, in particular situations, it permits the cramming down of a class) the cost of a Chapter 11 case tends to be very substantial and the greater ability of creditors successfully to stall progress may militate in favour of looking elsewhere.

As the success of the Ocean Rig restructuring demonstrates, a Cayman Islands scheme, with or without a restructuring provisional liquidation wrapper, is a restructuring tool that, in the right circumstances, offers a real alternative and should not lightly be discounted.

Daniel Bayfield QC and Maples and Calder acted for the successful scheme companies in Ocean Rig and Daniel also acted for CHC.

British Virgin Islands
Open for business

Jeremy Child, Partner, Harneys

As most readers will already be aware, on 6 September this year the BVI suffered a direct hit from Hurricane Irma, a category 5 hurricane. The eyewall (the part of a hurricane with the strongest winds) passed directly over Tortola, the main island of the BVI. Unsurprisingly, Irma caused widespread damage to property and, tragically, even some loss of life. The physical effects will be felt by the BVI for years to come. The press response to this natural disaster was somewhat delayed, but eventually the scale of the destruction was recognised, and a helpful UK government response was also mustered.

Since the BVI has now slipped from the headlines, these reports might have wrongly left some with the impression that the BVI has been forced to suspend its operation as a vital part of the global economy and a significant centre for international litigation. In fact, nothing could be further from the truth.

It has been tremendously impressive to see how the BVI has coped with the sudden arrival of these immense challenges. The first promising signs that the BVI would simply not allow the 'open for business' sign to be blown away, came in the immediate days following the hurricane when the BVI Financial Services Commission rapidly confirmed that it had been

ST LUCIA IS HOSTING THE TEMPORARY BVI COURT

able to restore its online company registration portal, VIRRGIN.

Not to be out-done, the Eastern Caribbean Supreme Court (of which the BVI is a part) soon announced the temporary relocation of the Commercial Division of the High Court to St. Lucia, where the headquarters of the Court of Appeal is based. Upon relocation, the Court immediately set about hearing applications for freezing orders, Norwich Pharmacals, petitions to wind up companies, directions hearings and a plethora of other applications. The Court list has been maintained and is now proceeding almost as if no disruption had occurred. Both Leading Counsel from London and advocates from the BVI are now regularly attending Court whether by telephone, video conference or in person. The Court has taken a pragmatic approach to ensure that cases get heard without any unnecessary delay and a full rosta of Judges is available to hear applications and trials.

We at Harneys have set up a new litigation base in St Lucia which is currently staffed by some of our most dogged courtroom advocates, incidentally all veterans of Hurricane Irma, and various other law firms have done likewise.

The Eastern Caribbean Supreme Court has also published Practice Direction 69B(I) which addresses Commercial Division Emergency Measures for the BVI. The Practice Direction establishes that all Court filings are now to be made electronically and sets out the steps which need to be taken to complete filings. All law firms operating in the BVI are required to establish escrow accounts from which issue fees and other necessary payments can be made. Sensible provision has also been made for service of documents upon Legal Practitioners by email and for proof of service by this method to be provided by affidavit exhibiting the relevant email.

New procedures have also been brought in by the Practice Direction to ensure that applications can now be made for admission as a Legal Practitioner without personal appearance where the Court directs. For the first time, the Practice Direction explicitly states that the Court may accept undertakings as appropriate in respect of production of necessary documents, signing of the Court Roll and receipt of the necessary payment.

Our impression of the new arrangements and of the re-located Court is that they are both working highly efficiently and that disruption to the functioning of the BVI Court has been successfully minimised.

HURRICANE IRMA CAUSED WIDESPREAD PROPERTY DAMAGE

We do, however, need to acknowledge that Irma has caused real suffering in the BVI and across the region. As ever, those who are hardest hit are often those who can least afford it. If you are interested in helping the relief efforts, various appeals have been set up. Harneys (as well as supporting various other local efforts) is contributing to the Virgin Unite Relief Appeal and the British Red Cross Hurricane Irma Appeal. We know from the large number of inquiries we have had, that many of the BVI's friends in London and around the world will want to do likewise.

www.virgin.com/unite/supporting-bvi
www.redcross.org.uk/irma

JEREMY CHILD, PARTNER, HARNEYS

The Pacific Andes saga: forum shopping, Chapter 11 and just and equitable winding up

Peter Ferrer, Counsel, Harneys

'Forum shopping' is the practice of choosing the most favourable jurisdiction in which a claim could be heard. It is often used as a pejorative, a form of jurisdictional gamesmanship, but, in principle, there is nothing wrong in seeking to have the case heard in the forum which is most favourable to the client. It can however lead to some fierce jurisdictional battles particularly in insolvency where the choice can be stark between debtor and creditor friendly procedures.

That is precisely the scenario with which the BVI Commercial Court has been wrestling over the past 10 months in a series of liquidations of subsidiaries of the troubled Pacific Andes Group. Is it best for a national court to decline to apply its own insolvency procedures in favour of another jurisdiction and if so in what circumstances?

To recap, Pacific Andes Resources Development Limited (Bermuda) (***PARD***) is a public company incorporated in Bermuda and listed on the Singapore Stock Exchange. Pacific Andes International Holdings Limited (***PAIH***) is also incorporated in Bermuda and listed on the Hong Kong Stock Exchange though trading in the shares is suspended.

At one stage the Pacific Andes Group was said to hold the 12th largest fishing fleet in the world. PARD together with its subsidiary, China Fisheries Group Limited and 14 other subsidiaries after several difficult years filed for Chapter 11 protection in July 2016. Substantial sums are involved not least the US$650 million in unsecured loans to the Club Lenders. It is estimated that some US$2.8 billion in value needs to be generated to repay the creditors and the equity holders.

The circumstances under which the Group filed for Chapter 11 are noteworthy. By filing for Chapter 11, the Pacific Andes Group, according to the Club Lenders, breached various undertakings and removed the Chief Restructuring Officer appointed by agreement between the Lenders and the Group. In an audacious move, the Group simultaneously filed for Chapter 11 protection in relation to 16 Group entities having deliberately concealed its intention from the Lenders and the Chief Restructuring Officer.

The Group had no trading connection with New York or the US generally. None of the Debtors were incorporated in the US and the only asset in New York was the lawyers' retainer for the obtaining of the relief itself. There was no other connection with the US save for the Group's desire to take advantage of the debtor friendly environment. A fundamental tenet of Chapter 11 is that the debtor remains in possession and the process therefore enables the debtor to retain management control while it formulates a plan for creditors. The Club Lenders had however lost all confidence in the ability of the Chapter 11 debtors to manage the business. Despite opposition from the Group, the Lenders succeeded in appointing a trustee in bankruptcy in the Chapter 11 proceedings.

In the meantime, one of the BVI entities, Pacific Andes Enterprises (BVI) Ltd, became the focus of an investigation in connection with allegations of trade finance fraud. The central allegation is that Pacific Andes Enterprises (BVI)

Ltd falsified trading records in order to obtain trade finance. The BVI insolvency process does not involve the debtor remaining in possession. Instead, the BVI Insolvency Act provides for the appointment of liquidators if the creditor can demonstrate either that the company is (a) cash flow or (b) balance sheet insolvent or (c) that it is just and equitable to appoint a liquidator. The appointment of a liquidator is often but not necessarily the death knell of a company. The liquidator provides independent oversight and supervision of the company to obtain the best outcome for creditors which in some rare circumstances might include bringing the company back to financial health.

The Club Lenders were however faced with the difficulty that the filing of a Chapter 11 could be done electronically from anywhere in the world at the press of a button. The Club Lenders therefore decided to apply for the appointment of provisional liquidators before the hearing of the full petition in order to hold the ring. The appointment of provisional liquidators would prevent the filing of Chapter 11 and ensure that there was a level playing field at the time of the petition.

The tactic succeeded and provisional liquidators were appointed over Pacific Andes Enterprises (BVI) Ltd prior to the hearing of the petition. At the petition the Group strongly argued that a holistic restructuring was essential and that it was best for the restructuring to take place in the context of Chapter 11 rather than piecemeal under the supervision of a liquidator.

That submission was wholly rejected by the BVI Commercial Court judge. Apart from the fact that the companies were BVI entities regulated by BVI Company law and therefore it was appropriate for the BVI Courts to have jurisdiction over the companies, the appointment of a liquidator was not inconsistent with the Chapter 11 process. An independent officer of the court was not prevented from engaging in the Chapter 11 process if there was a holistic restructuring on the table which would result in value for the creditors. Indeed, since the appointment of liquidators over the various BVI entities, the liquidators, FTI Consulting, has kept a line of communication open with the Chapter 11 Trustee as noted in his latest report in April 2017.

The appointment of provisional liquidators would prevent filing of Chapter 11 and ensure a level playing field

Just as the newly adopted JIN Guidelines seek to set out a flexible procedure to assist cross border insolvency, the pragmatic approach of the BVI Commercial Court ensured that the rights of creditors were protected while recognising that international co-operation might be necessary and appropriate under the right circumstances. The form of order which was granted by the BVI Court permitted the liquidators to enter into international protocols to enable them to liaise with foreign insolvency officers subject to the Court's approval.

There have been two common themes running through the several Pacific Andes Group company liquidations which have been granted in the BVI namely (a) the Group's argument that the better outcome for all creditors would be a holistic restructuring plan and that the BVI Commercial Court should await the outcome of that restructuring under Chapter 11 and (b) a lack of documentation to provide credible support that the companies were solvent.

As to the first theme, the BVI Commercial Court has consistently held that it is a matter for the BVI Court as the place of incorporation to regulate those companies which are insolvent or

PETER FERRER, COUNSEL, HARNEYS

Mr Justice Kaye's findings in relation to just and equitable winding up are of particular note

otherwise should be regulated by a court appointed officer while recognising that the court appointed liquidator should have the power to liaise with foreign insolvency proceedings if appropriate.

As to the second theme, this was particularly apparent in the application to appoint liquidators over one of the subsidiaries of PAIH, Richtown Development Limited in June 2017. This was described by the Group as a treasury company. In similar fashion to Pacific Andes Enterprises (BVI) Ltd, provisional liquidators were appointed in order to prevent the company filing for Chapter 11. The petition itself was brought by a related creditor company in liquidation. The application for the appointment of a liquidator was made on three grounds, namely that (1) Richtown was cash flow insolvent (2) balance sheet insolvent and (3) that the circumstances, once properly taken in account, were such as to justify a winding up on just and equitable grounds.

Mr Justice Kaye QC held on 2 June 2017 that the application succeeded on all three grounds. His findings in relation to just and equitable winding up are of particular note.

A winding up petition on just and equitable grounds is a rare event but as Farara J (ag) noted in *Wang Zhongyong and Union Zone Management Limited* (BVIHCMAP 2013 no. 0024), it is "impossible to conceive of the plethora of circumstances and most undesirable to limit the categories" of claims where just and equitable winding up might be appropriate.

The reason why it was just and equitable to wind the company up as found by Mr Justice Kaye QC was that the justifiable lack of confidence in the conduct and management of the company's affairs. The judge found that the directors were under a duty pursuant to section 98 of the Business Companies Act 2004 to maintain records sufficient to show and explain the company's transactions and which will at any time enable the financial position of the company to be determined with reasonable accuracy.

Instead the judge found that there was no explanation of the multiplicity of transactions and that the failure to maintain the documents so as to give raise to an allegation of fraud was serious misconduct on the part of the directors triggering the just and equitable jurisdictional ground. The judge emphasised that he was not making a finding of fraud on the part of the company but in circumstances where the allegation of fraud had been circulating for some time, it was incumbent on the directors to make sure that they had sufficiently accurate records to provide to the court when so ordered.

The Court's pragmatism has also been evident in its reaction to Hurricane Irma. Within days, the decision had been taken to transfer the Commercial Court to St Lucia, electronic filing was introduced and a system instituted for payment of fees via an escrow account as opposed to the previous system of paying by stamp. Hearings have been undertaken by telephone and video link. These have been very positive developments in terms of improved efficiency and ease of use for the consumers of court services. It is hoped that some of these emergency measures will become standard practice going forward.

One difficulty which the Court has faced since Irma is how to deal with the advertising requirements under the Insolvency Act 2003. Section 165(1) of the Act provides that unless the Court otherwise orders, an application for the appointment of a liquidator shall be advertised not less than seven days after service of the application on the company and not less than seven days before the date set for the application to be heard. Rule 31(1) of the Insolvency Rules 2005 (the ***Rules***) provides that without limiting any specific requirement to advertise contained in the Act or the Rules, where a person is required by the Act or Rules to advertise any application, order notice or other document, he shall, within the time specified in the Act or Rules, ensure that a copy of the application, order, notice or other document or matter concerned is delivered to the Gazette Office for Advertisement.

On two Pacific Andes related liquidations, advertisement of the notices have not been made according to section 165(1)(b) of the Act and Rules 31(1) due to the disruption of Hurricane Irma on publication services. Advertising had taken place in Hong Kong but had not specified

PACIFIC ANDES GROUP WAS AT ONE TIME SAID TO HOLD THE 12TH LARGEST FISHING FLEET IN THE WORLD

that the hearing of the matter would be in St Lucia. The Court ordered that the matters be re-advertised specifying the new venue and adjourned the matter to the next liquidation day.

However pursuant to section 170 of the Insolvency Act 2003, the Court may appoint a provisional liquidator on the application of a creditor where an application for the appointment of a liquidator has been filed but not yet determined and provisional liquidators are required in order to maintain the value of assets owned or managed by the company. In both of those matters, there was an impending deadline to submit proofs of claim in the US Chapter 11 proceedings. By the time the adjourned application was due to be heard, the deadline would have passed and the opportunity to preserve the value of the asset, the claims in the Chapter 11 proceedings, lost.

Faced with those circumstances, the applicant successfully applied for a provisional liquidator to be appointed in order to preserve any claims which the companies may have in the Chapter 11 proceedings. The court accepted that the appointment of Provisional Liquidators was necessary to preserve the claim and that there was sufficient to justify the Provisional Liquidators having access to the books and records of the companies.

Insofar as forum shopping is concerned therefore, to paraphrase Lord Denning, the BVI is a still good place to shop in. Irma has undoubtedly been the most challenging event ever to be faced by the BVI. The pragmatic approach of the BVI Commercial Court is to be commended both in terms of the way in which it has dealt with the immediate aftermath and the way in which it has dealt with the competing demands of the parties. It has ensured that to the extent a BVI company is affected by a Chapter 11 restructuring, the court appointed liquidator has the power to liaise and agree protocols if the plan is likely to achieve value for the creditors. It has demonstrated that the BVI Commercial Court will not merely delegate its supervisory powers. The power of the provisional liquidator to ensure a level playing field and prevent a company entering into Chapter 11 is a useful protective power in the appropriate circumstances. Finally, the BVI Commercial Court has demonstrated that it will not shy away from placing a company into liquidation on just and equitable grounds if it is appropriate to do so including a new category namely where there has been a failure on the part of a director to maintain proper records.

Mourant Ozannes and South Square Litigation Forum 2017

Rose Lagram-Taylor, together with Chris Duncan and Jamie Bookless of Mourant Ozannes, reports on the fifth joint Litigation Forum, which this year focused on key developments in financial litigation and insolvency and restructuring

September 27 2017 marked the fifth year of South Square and Mourant Ozannes joining forces to host their annual Litigation Forum. As in previous years the event brought together prominent figures in financial litigation, insolvency and restructuring to discuss, question and analyse the key developments which have taken place both within and beyond those areas during the preceding year.

As South Square's William Trower QC, co-chair of the forum, commented in his opening address, it is surprising how much has changed within the space of one single year: November brought with it the election of Donald Trump, a President who recently seemingly declared war by tweet; in December, normal service was disrupted in the Supreme Court when their Lordships and Ladyship were asked to grapple with the Government's right to trigger Article 50, leading to the catchily titled *European Union (Notification of Withdrawal) Act 2017*; springtime saw the Prime Minister take the decision to call for a general election whilst on a walking holiday, which may not have brought with it the result many expected, but did see the replacement of the now former Lord Chancellor who had failed in one of her many duties to stand up for the judiciary after media coverage of the Brexit case; and more recently, the summer has seen the rise of populist parties, bringing with it a new democratic order.

Within this rather tumultuous time, William expressed he had been hoping to say that the offshore world has been a haven of tranquillity. However due to the catastrophic destruction caused by this year's hurricane season, this is unfortunately no longer true. Condolences were, and are, expressed to all those affected by the devastation. However, as pointed out, it is a great show of strength that it took only 19 days for the BVI court to set up in St. Lucia, with normality continuing as best it can.

Looking to the offshore world more generally, over the past year it has continued to grapple with some of the most demanding litigation in the world, with many being aware of its numerous mega cases which it has seen; ***Saad*** in the Cayman Islands, and ***Carlyle*** in the Channel Islands being key, but not exhaustive, examples. Closer to home, we now have the first female President of the Supreme Court, with Lord Justice Briggs, a distinguished expert within our own field of law, also being appointed to the Supreme Court.

In the closing remarks of his address, William pointed to the front page of this year's programme, depicting Elizabeth Tower in all its might. Whilst Big Ben may have fallen silent, both tower and bell remain staunch symbols of our common law prowess and mark what remains one of the finest dispute resolution centres in the world. And so, whilst change has been afoot over the past year, it is fair to say that some things never change.

Session 1: The Primeo Fund Liquidation: A Whistle Stop Case Study

The first session of the afternoon provided an opportunity to learn what exactly has been

happening over the past few years in the Primeo Fund liquidation from, so to speak, the horse's mouth. The session was presented by members of the team representing the Primeo Fund; Gordon MacRae, Managing Director at Kalo and Joint Official Liquidator of the Fund, Peter Hayden, Partner at Mourant Ozannes, and South Square's Tom Smith QC and Richard Fisher.

As we all settled in our seats for this whistle stop tour, the mood was set as the Mission Impossible theme tune accompanied an on-screen animated depiction of the events leading up to the appointment of Primeo's liquidators. Although, as opposed to Mission Impossible, this presentation was titled with the more optimistic "Primeo Liquidation: Mission Possible", leaving us with the question whether this team could achieve the unachievable in the same vein as the heroic character played by Tom Cruise.

Richard Fisher kicked things off by providing a background to the Fund itself. For those readers who do not know, it was established by the Bank of Austria in 1993 as an investment fund incorporated in the Cayman Islands. Its purpose was to give exposure in the US equity market to Austrian and European investors. Originally it was set up as a fund of funds. However, as time went on it became increasingly interested in Bernard L Madoff Investment Securities LLC ("**BLMIS**") due to the consistent returns BLMIS were making, with the Fund's managers deciding to focus principally on it. This led to Primeo very quickly becoming an exclusive BLMIS feeder fund. Initially most investments were made directly with BLMIS, although from 2003 investments began to be made indirectly, first through Alpha Prime Fund Limited ("**Alpha**"), and later in 2004 through Herald Fund SPC ("**Herald**"). In 2007, following a restructuring of its investments, Primeo's investments were all made indirectly through Herald which continued up until the time Madoff's fraud was discovered.

Peter Hayden continued by informing us that following the arrest and confession of Madoff on 11 December 2008, Primeo came to realise the true extent of its losses. On 12 December 2008, most, if not all, of the Madoff feeder funds suspended the calculation of NAV, subscriptions and redemptions. This included Primeo, and importantly Herald. As at 12 December 2008, Primeo had pending redemption requests in Herald and believed it was owed US$155 million. This became one of the issues that the team had to deal with over the course of the subsequent litigation.

RIGHT TO LEFT: RICHARD FISHER, TOM SMITH QC, GORDON MACRAE (KALO) AND PETER HAYDEN (MOURANT OZANNES)

Following this, on 4 January 2009, Primeo went into liquidation, initially as a voluntary liquidation, and subsequently under court supervision from April 2009. However, for the liquidators, Gordon MacRae explained it was a far from perfect start with no cash, no records, limited assistance and low prospects. It is fair to say they had their work cut out. Whilst many of us would be like rabbits in headlights if we were faced with the situation the liquidators found themselves in, Gordon, in his calm and collected manner, told us it is important in such scenarios not to become paralysed by the enormity of the task. This is a message we can all take away.

For Gordon and his colleagues, the first step in this mammoth undertaking was to get the handbrake off, strategise, prioritise, and importantly, unlock some cash. They succeeded in this by first acquiring a limited pool of money held by Primeo in a UK bank following successful litigation against a group company in Luxembourg, and then through borrowing from a stakeholder, enabling the liquidators to issue applications in the Cayman Islands for the delivery up of documents. This was a slow start but a start non-the-less.

Tom Smith QC then took up the mantle, continuing the tour by telling us that, from that

JAMIE BOOKLESS, COUNSEL, MOURANT OZANNES

point onwards, things went from bad to worse in light of claw back claims brought by the Madoff trustee in the US. BLMIS, Tom explained, had been put into what is known as a SIPA liquidation, with a trustee under this process having very extensive powers under US law, enabling claw back claims to be brought. The key issue for Primeo was the fact that the threshold for these claims is much lower than other transaction avoidance claims that we are more familiar with both in England and in Cayman; an intention to prefer being necessary to prove in Cayman, in contrast to merely demonstrating constructive knowledge or constructive fraud in the US. In light of this, the Madoff trustee's arguments focused on the fact Primeo should have realised, or at the very least suspected, that BLMIS was fraudulent. Primeo therefore had to decide whether to submit to the jurisdiction in the US to defend this claim or simply to ignore it. In the post-***Rubin*** world, any default judgment obtained by the BLMIS trustee would be non-enforceable (referring to the Supreme Court's judgment of ***Rubin v Eurofinance*** [2012] UKSC 46). However, as it was likely Primeo would need to do a deal with the trustee in the future, they submitted.

Skipping through to 2010, we were informed by Gordon MacRae that a real breakthrough occurred when the Madoff trustee successfully obtained a recovery from one of Madoff's largest beneficiaries, Jeffrey Picower, which brought US$7.2 billion into the estate. This had the effect of igniting interest in bringing claims against the estate. However, for Primeo, as its investments in BLMIS had been made as indirect investments through Herald, it did not have any direct claims to bring. Therefore, it became evident to the Primeo liquidators that their strategy had to focus on unlocking value in Herald. Some headway was made in the selling of Herald shares to a perceptive distressed trader who shared the view about the ultimate value in Herald. In doing so, this provided some of the much-needed funding to defend the action brought by the Madoff trustee in the US.

Concurrent to all the happenings in the US, the Madoff trustee had also brought actions against Primeo in the Cayman Islands, specifically an avoidance action under both US and Cayman law. However, as Tom Smith QC explained, the position in Cayman is interesting because, unlike in other jurisdictions, it has not implemented the UNCITRAL model law on cross-border insolvency, so the position is not the same as in the US and UK. Instead, Cayman has its own bespoke provision, which is modelled on the old section 304 of the US Bankruptcy Code, i.e. the predecessor to what is now Chapter 15. This meant that Primeo were able to successfully argue that there was no ability to apply US law in the Cayman courts. However, they were less successful at arguing the Cayman law claims should also fail, the court holding that it was able to apply Cayman avoidance actions in support of a foreign insolvency, even though there was no insolvency afoot in the Cayman Islands. Nevertheless, the defeat of the US law claim was seen as a significant win for Primeo, because the advantage of only having the Cayman law claims meant that the Madoff trustee was required to meet a test of proving there was an intention to prefer, which as Tom stated, was always going to be difficult.

In the background to all this litigation, Peter Hayden reminded us, was the simple fact that Primeo's liquidators' primary aim was to make a recovery for its stakeholders. As well as settling the claims with the Madoff trustee, one option to do this was by focusing attention on the Fund's

service providers. Given the losses sustained, this meant that initial focus was on the investment manager. However, as is no doubt already very apparent, nothing was ever straight forward and simple with the Primeo liquidation. In this respect, Primeo's investment manager from inception to May 2007 had been a Bank of Austria subsidiary. However, when the subsidiary ceased to be Primeo's advisor, it was liquidated in the BVI, dissolved and removed from the register meaning it was essentially a shell entity with no assets. Needless to say, this did not look like a promising option for Primeo to pursue. Instead, Primeo's investment advisor from May 2007, Pioneer, a subsidiary of Unicredit, provided Primeo with a more promising prospect of recovery. This led to proceedings being issued against Pioneer in July 2011, principally based on allegations of breach of duty, through failing to fulfil sufficient due diligence, monitoring and supervision of Primeo's investments in BLMIS.

Herald, as already stated, was another line of possible recovery which the liquidators wished to pursue, taking the view that it was critical for Herald to be placed in the hands of independent liquidators. Up until this point, as Gordon MacRae explained, Herald had actually followed its own strategy outside of liquidation, remaining under the control of its management. However, for Primeo, it was imperative to change this, which led to a challenge being brought against Herald in the form of a winding up petition, principally based on loss of substratum, along with what were deemed other compelling reasons. Although this petition was fiercely contested, and in fact was the most vigorously contested petition Gordon had worked on (him providing us with the image of being thrown into the lion's pit at the Coliseum) Primeo were successful and a winding up order was made against Herald in June 2013. Principal and Additional Liquidators were subsequently appointed, the Additional Liquidator being appointed because of Herald's argument that the liquidators nominated by Primeo had a conflict of interest by virtue of being nominated by them. Practically this meant that the Additional Liquidator had a mandate to resolve issues between Primeo and Herald. From Gordon's perspective, this was unfortunate as it created an environment in which the Additional Liquidator were empowered to pursue a train of litigation against Primeo. Nevertheless, the most important thing for Primeo at the time was the fact it had successfully placed Herald into liquidation.

Richard Fisher continued by shining a light on how HSBC became involved in the Primeo story, stating "we all like defendants with deep pockets". Accordingly, when the Primeo team were working out who they might have causes of action against, they fell upon two HSBC entities, Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA, who had acted as Primeo's administrator and custodian. Focus was given to the duties owed by these parties, and whether Primeo could formulate a claim based on allegations that those duties had not been fulfilled. This led to the part of the story we are all slightly more familiar with and the recent trial against HSBC in the Cayman Islands, of which judgment was handed down on 23 August 2017 by Mr Justice Andrew Jones QC.

Broadly speaking, Primeo's claim was that the custodian had appointed BLMIS as its sub-custodian, and so owed duties to look after the assets and ensure the sub-custodian had implemented safeguards over those assets, but given BLMIS was a Ponzi scheme, it had failed in this. Also, with regards to the administrator, Primeo's allegations centred on its breach of duties to exercise reasonable care and skill when calculating NAV, relying only on data received from BLMIS rather than confirming this data was accurate. Very generally, Primeo's line of argument was that had the custodian and administrator carried out their duties effectively, Primeo would have ceased putting money into BLMIS. The claim sought damages of around US$2 billion.

With the beginning of the HSBC claim, Primeo had litigation running on 4 different fronts. As a common theme for the liquidators, Gordon MacRae informed us that the funding tank was once again running low. Whilst there was always the option for Primeo to sell further Herald shares, as Herald itself did not have an admitted claim in the SIPA liquidation in the US, full value for such shares would never be attained. Therefore, it was critical for Primeo to make a recovery elsewhere. Fortunately, a recovery was obtained from Pioneer before the Fund ran out of gas completely through a settlement agreement which had a publicly disclosed figure of US$100 million.

An even bigger breakthrough came with a settlement with the Madoff trustee, following a

CHRIS DUNCAN, SENIOR ASSOCIATE, MOURANT OZANNES

successful mediation with the liquidators of Herald and Primeo. The biggest skill of the mediator, we were told, was never to have the parties in the same room at the same time, which seemed to facilitate a settlement which saw Herald with a US$1.6 billion agreed claim in the SIPA liquidation.

However, as Tom Smith QC informed us, the situation between Herald and Primeo still had to be resolved. This, according to Tom, was one of the most interesting parts of the overall liquidation, the questions being how to deal with Primeo's remaining interest in Herald, and how to make good, firstly its redemption claims, and secondly its remaining shares in the company. To this, Herald raised 3 challenges; (i) a challenge to the redemption claim, (ii) a challenge to Primeo's *in specie* subscription in Herald following the 2007 restructuring, and (iii) the method of any distribution.

The outcome to these challenges is similarly threefold. Firstly, in relation to the redemption claims, Primeo argued that it should be classified as a creditor, meaning it had priority in the waterfall of payments out of the liquidation, whilst Herald took the position that a redeemed yet unpaid investor was not a creditor and ranked alongside shareholders. Both the Cayman courts and the Privy Council upheld Primeo's analysis, on the basis that the sums owed to shareholders were subordinated to third party creditors. Secondly, with the *in specie* subscription, Herald's Additional Liquidator attempted to restate the consideration for the subscription and effectively reduce the amount of shares Primeo was entitled to from US$465 million to US$149 million, a reduction of around 70%. This was said to be on the basis of common mistake. However, the Additional Liquidator's case completely collapsed on the very first morning in court, the judge quickly realising their challenge was premised on an incorrect analysis. Thirdly, with regards to the distribution matter, the issue before the court was whether it had the power to rectify the register, and if so, using what methodology. Although the Grand Court in Cayman rejected the approach suggested by Herald, the judge devised his own methodology in which the register was restated on the assumption that all the NAVs were set at the initial offer prices of the shares. Primeo appealed this decision, and the judgment of the Court of Appeal is eagerly awaited.

Whilst these technical issues were underway, Richard Fisher explained the real commercial litigation against HSBC was at full steam ahead. The 4-month trial began in November 2016 in the Cayman Islands, with the issues at stake revolving around the types of duties owed by custodians and administrators within the fund industry more generally, and more specifically in circumstances like that of Madoff. The judgment, as Richard described, was a bit of a mixed bag from the liquidator's perspective, which was essentially a polite way of saying they lost. Generally speaking, it was held that it would not have made any difference had any breaches of the custodian and administrator not occurred, the judge deciding that in all likelihood Primeo would have continued with the same investment strategy into Madoff feeder funds in any event. As many readers will be aware, this judgment has now been appealed by Primeo on points of loss, limitation, contributory negligence and causation, and so the story does not end here. As Gordan MacRae concluded, the last chapter has yet to be written.

Session 2: Directors' Duties: The View from the Coal Face

The panel discussion was hosted by Mark Arnold QC from South Square and the first topic for consideration was cyber and data security in relation to companies.

Richard Sinclair, General Manager of Talk Talk, suggested that this was an issue which affected all businesses in the modern age, with the retention of the integrity of data representing a constant challenge. He felt the reputational damage which follows an incident inevitably leaves those involved asking whether they could have done more to prevent it, particularly when there may be allegations of negligence. He noted that the question of whether to spend on general data protection presents a serious dilemma and may well depend on the financial health of the business.

Libby Elliot, a Partner at Stephenson Harwood, considered the sort of advice a director might need and as a starting point highlighted two of the codified directors' duties which she felt were of particular relevance to data security. The first of those was the duty to act in good faith and promote the success of the company for the benefit of the members as a whole. The second was the duty to act with reasonable skill, care and diligence.

Libby indicated that directors have to understand the impact of failing to put adequate protections in place. She confirmed that Richard was considering the right issues and there was always a careful balancing act to carry out. It is not enough to rely on just your own knowledge and as such it is appropriate to divide and delegate the work, as well as potentially instructing external advisers. Libby made the point that it may well be negligent not to get expert assistance with digital security. She confirmed however that there is a need to supervise and appraise work done by others and it is not just a case of standing back and letting them deal with it. The directors must ensure that what is being done is correct and they cannot abrogate that responsibility.

Mark Shaw, a partner at BDO was then asked to consider, what claims could be made against a company were it all to go wrong and it to end in administration. He indicated that in his view it is only a matter of time until a cyber-crime brings down a major business. As the Administrator of a company in these circumstances he confirmed he would want to do everything he could to swell the asset base and thus, with the assistance of his legal advisers, would look at potential claims against the directors and whether they were worth advancing.

Abel Lyall a partner at Mourant Ozannes then considered the possible types of claims which might be available against directors. Abel made the point that where something has gone wrong it should always be borne in mind that commercial errors of judgement do not inevitably mean an award of damages is due. Exercising reasonable skill, care and diligence is an objective test and there will invariably be a high burden of proof on the Administrator to show that a reasonable director exercising skill, care and diligence would reach the same decision. Acting in the company's best interests and promoting its success is subjective, therefore it's a question of what the individual honestly believed was in the best interests of the company. The circumstances have to be examined and a variety of factors considered on a case by case basis. Abel suggested it is hard to mount a challenge in this area as you have to look at conduct which could be considered outside the norm. That said, he confirmed that it should always be considered whether the company took professional advice and whether that advice was followed.

The second topic of discussion was regulatory risk faced by companies today. Mark Arnold QC pointed out that regulatory claims and investigations were a rising trend and therefore posed the question of what directors should be doing in respect to compliance.

Richard confirmed that regulatory matters were of the utmost importance and therefore should always be at the forefront of directors' minds. He suggested that the prioritisation of resources in relation to this will weigh heavily on the minds of the board, particularly given the risk of personal sanction. He felt that directors have to exercise their judgement to ensure they are acting in the interests of all stakeholders.

Abel highlighted that regulatory compliance is not an absolute requirement as it always has to be balanced against the requirement to act in the company's best interests. He pointed out that in the recent judgment of the Royal Court in Guernsey in ***Carlyle Capital Corporation Limited (in liq) and Ors v Conway and Ors*** (Guernsey Judgment 38/2017) the judge had left open the question of choosing the duty to act in the company's best interests over its compliance

LEFT TO RIGHT: MARK SHAW (BDO), ELIZABETH ELLIOT (STEPHENSON HARWOOD), MARK ARNOLD QC, RICHARD SINCLAIR (TALK TALK), ABEL LYALL (MOURANT OZANNES)

requirements. He confirmed that the board always needs to understand the regulatory environment they are working in and should obtain as much information as is required in order to make an informed decision taking every relevant factor into account. While directors will be conscious of the risk of personal sanction that should not be the only basis for decisions they take.

Mark Shaw confirmed that as an insolvency practitioner there is often conflict between competing interests where a Regulator is concerned. He advised that he has to fully understand the regulatory issues at play and thereafter work out a way to navigate through them while ensuring full compliance. He confirmed it is often hard to get directors to focus on regulatory issues where their livelihoods are at stake.

Libby reiterated the need to fully understand the legal and regulatory framework within which a company operates, particularly when looking at directors' conduct in the lead up to insolvency. The question of what part the breach played has to be asked and claims against a director have to show that any loss is attributable to that regulatory breach. If a fine has been issued for example then the loss is clear, however, in a lot of cases it is hard to establish a quantifiable loss which flows from the breach. Libby highlighted that parties should always be mindful of limitation periods.

Abel then considered the position in Jersey and Guernsey with regard to limitation periods. While there was no local authority on this issue in either jurisdiction, there is now an English High Court decision relating to Jersey which confirms the limitation period there is 10 years (***O'Keefe and another (as liquidators of Level One Residential (Jersey) Ltd and Special Opportunity Holdings Ltd) v Caner and others*** [2017] EWHC 1105 Ch). Abel confirmed that in Guernsey it was likely to be six years although there is no direct authority on the point as yet.

The third and final topic was on the question of the point in time at which directors require to take account of the interests of creditors in the run up to an insolvency event.

Richard confirmed that this was something directors were always conscious of, not least because businesses generally want to be regarded as good trading partners. He indicated that it was difficult though to identify at precisely what point it takes effect.

Mark Shaw confirmed his view that when it arises it is very much fact specific and depends on a variety of factors such as, for example, whether the company is trading or a holding company. He felt that judges tend to err towards dates close to the insolvency.

Libby confirmed that in England it was questionable as to whether or not there was a workable test on this point. She pointed out that there have been lots of formulations in cases such as "doubtful solvency" and "on the verge of insolvency" while the "real and not remote test" from the Australian case ***Kalls Enterprises Pty Ltd (in liq) & Ors v Baloglow & Anor*** [2007] NSWCA 191 had been cited with approval in English cases. However, in the recent ***BAT Industries v Sequana SA & Windward Prospects Ltd*** [2016] EWHC 1686 (Ch) case she highlighted that Mrs Justice Rose considered that the "real and not remote" test actually set a much lower threshold and that, although each case depended on its own facts, the more pessimistic language of "on the verge of insolvency" was prefereable.

Abel in turn confirmed that in the ***Carlyle*** judgment the judge had emphasised the need to show immediacy in terms of the impending insolvency and she had as a result chosen the "brink of insolvency" test as reflecting the position in Guernsey.

Richard concluded what was an excellent discussion by confirming that, while sensible companies actively manage risk, they may in some instances be more focused on the bottom line than as creditors.

Session 3: Lessons in Litigation: Tips from Recent Cases

The panel discussion, "Lessons in Litigation: Tips from Recent Cases" chaired by Simon Dickson of Mourant Ozannes and Felicity Toube QC of South Square, considered some of the panellists' observations and experiences in recent litigation and the practical lessons that might be gained from those matters.

Edward Allen of Enyo Law was the first to share his experiences from the litigation involving the Libyan Investment Authority (the "**LIA**") and its claims against Goldman Sachs (***The Libyan Investment Authority v Goldman Sachs International*** [2016] EWHC 2530 (Ch)) and ***Société Générale S.A. and others (The Libyan Investment Authority v Société Générale S.A. & Ors*** [2017] EWHC 1155 (Comm)). Edward acted for the LIA in both of these claims.

He began by telling us the background to the case. In 2014, the two chairmen of the LIA acted together to issue claims alleging undue influence,

Edward Allen, Enyo, gave us five key lessons learnt from the Libyan Investment Authority Litigations

unconscionable bargain and bribery against Goldman Sachs and Société Générale S.A with regards to certain disputed trades. An application was made by the LIA to the English commercial court for a receiver to be appointed in order to pursue the interests of the LIA in this litigation. This was described as a brave decision by Mr Justice Flow given the underlying political issues in Libya at the time, who granted the receivership order. This led to the appointment of BDO to act as the receiving manager to conduct the two necessary sets of proceedings.

Edward continued by informing us that this arrangement initially functioned very well with progress being made towards trial. However, the SocGen case, which was set for a 13-week trial, settled on the eve of trial, with the Goldman Sachs case being heard over a 7-week trial in the Chancery Division. The LIA lost the latter at first instance and the Court of Appeal was considering the LIA's leave application when the receivership order was challenged on two grounds.

The first of these grounds, we were told, centred on who the English court determined to be the true government of Libya, because this in turn determined the rightful appointment of the receiver. It was argued this issue needed to be determined first because of its international importance, and the likelihood of any judgment being appealed which could delay the main actions. The defendants argued they were disadvantaged by the receivership because the LIA had not properly given its authority and if it was later found that the receivership and the parties behind it had no authority to conduct the proceedings, the defendants would have no recourse.

The second ground involved an argument of *res judicata*, on the basis that a future LIA chairman may later disavow the decisions made by the current receiver manager meaning further litigation would ensue.

Accordingly, on the basis of these challenges, an expedited trial was listed before Mr Justice Blair. However, on the eve of trial, the Foreign and Commonwealth Council intervened for diplomatic reasons, asserting that it would be

unhelpful diplomatically for the English court to determine who controls the LIA. Mr Justice Blair did not need much persuading to adjourn the matter on a permanent basis stating that it would be entirely inappropriate for the court to intervene.

Following this, the defendants also sought to adjourn the main outstanding trial, although Mr Justice Blair was unconvinced by their arguments. Failing this, they also applied in the receivership for a direction to determine what was, at that stage, a three-party chairmanship issue, which they contended was prejudicial. However, this too was dismissed by Mr Justice Blair on the basis that the defendants were better protected with the receivership in place given the dynamic situation in Libya, and because the defendants had been awarded adequate security of costs.

After this brief overview of some of the events which occurred during these cases, Edward provided us with five key practical lessons.

Firstly, he stressed the importance of spending time and effort crafting the original order to get, as he termed it, the blueprint right. He explained that by getting the correct mechanism up and running, any future issues can be dealt with much more quickly and easily.

Secondly, Edward advised the need to get a reserve judge (and the right reserve judge). This is because it can make an enormous difference in having a judge who is familiar with the issues of the case and knows the background material. This not only means the judge will be clued up on the facts, but it can also mean any hearing is carried out in a much quicker and efficient way.

Thirdly, it is also important to get the right receiving manager. We were told that such a person requires energy, experience and focus.

Fourthly, maintaining good relationships with the parties. We were reminded that just because authority may have been delegated to a receiving manager, the parties are still involved in every step of the process, and their assistance will be required for disclosure, for witness statements, and for the myriad of other issues that always arise in complex litigation.

Finally, Edward's last piece of advice stressed the need for a good team structure, because without this, the whole case can fall apart.

Lynn Dunne of Ashurst subsequently took up the mantle, by entertaining the audience with her recent experiences with litigants in person. In particular, Lynn focussed on a case in relation to the Credit Suisse building in Canary Wharf owned by a BVI company called Havergate. Havergate was ultimately owned by Brian O'Donnell, a well-known solicitor in Ireland, at one time managing one of Ireland's most successful law firms, and his wife Mary O'Donnell. As part of the O'Donnell's dispute with the Bank of Ireland, who were seeking to bankrupt them (and did), they were left owing the Bank of Ireland €70 million which was seeking to try and recoup assets all-around the globe, including from the Credit Suisse building.

Havergate, Lynn informed us, had five ordinary shares in 1492 Limited and through a number of disenfranchisement events, the sole control of the company devolved to the investors that she represented. This was not disputed until some four years later, when it was agreed that the property would go up for sale. It had been valued, a Hong Kong listed buyer found and the sale was to take place by way of a share sale, with a SPA agreed and in final form. However, three days before the SPA was due to be signed, the Bank of Ireland got a receivership order over Havergate in the BVI, whereby any proceeds of sale from the sale of the property would be held for the Bank of Ireland pending the resolution of ongoing litigation in Ireland. Having got that receivership order, Blake O'Donnell, Brian O'Donnell's son and a director of Havergate and 1492, refused to sign the share sale forms to frustrate the Bank of Ireland's wish to try and get hold of these assets.

Due to the state of the post-Brexit market, a decision was made to proceed with the sale but by way of an asset sale rather than a share sale, although that had the attendant consequences that not only was the price negotiated to be lower, there was also a hefty stamp duty bill as well.

As to this, the O'Donnell's initially complained that the sale should have been by way of the share sale rather than the assets, even though they had prevented it happening in that manner. However, at the very last minute, the O'Donnell's raised various other claims, including that they were actually the ones who were in control of the company, alleging fraud on the part of Lynn's clients.

Lynn then told us of the various actions taken by the O'Donnell's, many of which seemed quite incredible. They included, (i) going to the

company's bank and asking to take control of the accounts, (ii) writing to Companies House, asserting they were directors and secretary, and alleging that the registered address of the company had changed, (iii) writing to the court and stating that Ashurst had come off the record, and (iv) writing to the company's auditors threatening they would injunct them if they acted on any instructions from Ashurst. On this basis, there was little option but to injunct the O'Donnell's themselves in order to prevent any further disruptive conduct on their part.

For the audience's and now reader's benefit, Lynn highlighted a number of features of the litigation, which were particular to the case given the involvement of Mr Brian O'Donnell acting as a litigant in person.

First, three return dates were required in order to hold the injunction despite the applicant having £55 billion of assets under management, offering solvency certificates on the cross undertaking and offering undertakings from the general partners (not just the limited partners). The main points which the Judge fixated on were (i) whose money it was that was being used for the undertaking, (ii) whether the investors had a proprietary right to the money and, (iii) whether it would be a breach of the limited partnership agreements involved to indemnify the funds' directors if they were not guilty of misconduct. Unsurprisingly much advice was required in support of the case. This, together with having to respond to a bombardment of allegations, both personal and professional, raised by the O'Donnell's led to costs being very high and continuing to spiral.

Secondly, another interesting aspect of the case was the fact that Brian O'Donnell's son, Blake, who was qualified as both an Irish and English solicitor and acted as a sole practitioner, had his name on the court record. However, in practice, Brian O'Donnell would sit behind Blake in court, and feverishly write very long scripts which Blake would then read out. We were told that in the event that Blake missed out an important point Brian would stand up, walk around to his son and whisper very loudly what he wanted Blake to say. This, as I'm sure readers already know is not something that would normally be accepted in court. However, here, we were told, it seemed to have no impact, with no words of warning being issued by the judge for inappropriate behaviour.

Thirdly, Lynn expressed the difficulties which her and her team had in making it clear to the judge that Brian O'Donnell was a professional and sophisticated litigant in person. It was well publicised that Brian O'Donnell had taken the Bank of Ireland to court no less than 70 times in Ireland, including going to the Supreme Court, and all without representation. Despite this, this also had little impact on proceedings, with the judge seemingly failing to take this on board.

Accordingly, after having to deal with such a difficult litigant in person, Lynn suggested, as a practical tip, that a good way of limiting both costs and damage to a client's reputation is to limit correspondence as much as possible. Even though this may go against one's natural instinct to try and correct every point that is wrong, in the case of professional litigants in person, it is better to try and rise above the allegations that may be thrown at you.

As a final point, Lynn noted that unfortunately the O'Donnell's are not anomalies and institutions are seeing a lot more claims from people who believe that they can push institutions to a certain level and then try and obtain a settlement before trial. This is being precipitated in part at least by the rise of social media, crowd funding and, to a degree, litigation funding. This therefore clearly seems to be something we all need to watch out for.

Lastly, Andrew Wilkinson of Weil Gotshal & Manges LLP discussed the long running ***Paragon*** litigation.

Paragon involved an oil and gas restructuring with a UK Plc holding company listed on the New York stock exchange and which had public shareholders who traded shares throughout the restructuring.

Andrew noted that at the outset there was the usual debate as to whether the restructuring should occur through a New York Chapter 11 or through a UK scheme of arrangement and administration. In this case, the Chapter 11 route was picked. This was for two reasons, (i) because under Chapter 11 you can force the senior secured bank debt into the deal without their consent (to avoid having to pay them a consent fee) and, (ii) in this case, the senior secured bank debt was extremely cheap. The Chapter 11 route was initially a good plan and it almost worked save for the US bankruptcy court wanting to know more about the equity component.

That meant backing up as it became clear that

Chapter 11 could not be used to deal with the equity piece of the plan to give the entire issued share capital of the company to the creditors. Andrew noted that in the restructuring world there are three ways to deal with shareholders in the restructuring context. First, you can put the company into administration. However, there are often reasons why you do not want to do that. Second, the directors can transfer all of the assets to a new company and issue equity in the new company to the shareholders, but the listing rules say you cannot do that without shareholders consent meaning you would normally have to de-list the company. And third, you can ask the shareholders for consent and give them some sort of 'tip', as the American's say, to consent to the restructuring.

In Paragon, there was a very strong view from the US creditors against having a shareholder's meeting because, by this stage, the company's shareholders had formed an action group saying it was all wrong. That led to thinking of alternatives. It was very common to have schemes of arrangement coupled with administrations but less common to have a Chapter 11 coupled with an administration (albeit it really does the same thing). Nevertheless, the view was taken to go to court and say the administrators will be appointed to implement the Chapter 11 in exactly the same way they would if it were a creditors' scheme of arrangement. The creditors would all be bound, but they would be bound through the Chapter 11 instead of the scheme of arrangement.

That approach led to some interesting practical considerations.

First, it meant acting reasonably quickly. This was because the shareholders of an English public company can, during the restructuring, requisition a general meeting and at the meeting pass a resolution to fire the directors. In Paragon, this almost happened given the speed at which the shareholders were sending in requisition notices. Obviously, if such a meeting were to go ahead this would have caused a public spectacle with lots of press, and would have been disastrous for the directors. Had the directors been replaced, this would have caused further uncertainty as the new board might have taken a completely different view of the implementation of the plans. Accordingly, the court was informed of this, and the creditors' opposition to a shareholder meeting, as a reason why an administrator should be appointed.

Secondly, it required being aware of the rules and specifics of Chapter 11 as distinct from schemes of arrangement and administration, given the inherent differences between the two. An example provided by Andrew relates to the valuation rules, and the fact that the requirements for showing a company is insolvent under Chapter 11 is different to that required under administration. In Paragon, there had been a working assumption that the group was insolvent, which necessitated a shift to establishing that the company itself was insolvent.

Thirdly, we were informed that the biggest practical issue of having a Chapter 11 and an administration simultaneously, was that the US stakeholders, which establish the committees of creditors and who usually all have their own advisors, are incredibly US centric and are not familiar with administration. As such, to ensure the junior creditors were going to approve the revised plan, it had been necessary to make sure they were briefed well in advance, had been through the issues and knew what was coming. That involved liaising with the various advisors to avoid being divided by common language with the US creditor group.

In closing, Simon Dickson asked Andrew for the logic of getting an administration order without first seeking the permission of the Chapter 11 court, referencing his own experience of Chapter 11 provisional liquidations in the Cayman Islands where you would normally be extremely nervous taking any steps which the Chapter 11 Judge has not approved.

Andrew explained that they wanted to avoid asking the UK court to recognise the Chapter 11 plan because there was not actually a plan at that stage and they did not want to become the test case on recognition of Chapter 11. Further, the plan in the US did not involve formally having to ask the judge to back the administration application. Instead, emails were sent to his chambers briefing the judge, and explaining how the shareholders were to be treated in the administration. This meant the judge knew the administration was coming and he was able to leave it to the administrators without having to make an order.

As both Simon Dickson and Felicity Toube QC concluded, this was both an informative and eye-opening session. We can only hope that faced

with similar situations, we too would be able to find the solutions to move forward, as our speakers were able to in their own respective cases.

Keynote Session: David Aaronovitch

David Aaronovitch, journalist, broadcaster and author for The Times shared his insights on Trump, Brexit, and the state of current politics in this year's keynote session.

He began by telling us to cast our minds back to the pre-historic age. As we all began picturing cave men and woolly mammoths, he informed us that what he actually meant by this was to think back to 2015. This raised a wry smile from the audience, as did David's message that given the speed and scale of changes we have undergone in the past two years we really need to prick ourselves to make sure we are in reality.

Trump and Brexit were obvious examples of such change. However, as David pointed out, the main factors which resulted in these outcomes, were not necessarily about economic status, something which has previously been the driving force behind such revolutionary change. Instead, David pointed to other correlations that saw splits between generation, education and even stances on capital punishment.

Using Brexit as the example, David set out how in Britain there is now a real generational divide, the young no longer voting as their parents did (pointing to the fact that a remain vote was more likely to be given by the younger generation, in contrast to a leave vote which was primarily voted for by the older generation). As to education, the fact that those who did not attend university and are seen more typically as the 'working class' voted to leave, suggests that Labour can no longer be seeing as the 'working class party', with many of its archetypal supporters voting in complete contrast to its official stance on Brexit. The further interesting correlation pointed out by David was the fact that those who are in favour of capital punishment were more likely to have voted to leave the EU. Whilst David was quick to say this did not mean all Brexit supporters are also supporters of the death penalty, he did suggest that what these correlations suggest is that we are currently living in a crisis of identity. He tentatively suggested that the 2008 economic crisis and the 2015 refugee crisis were factors leading to, what he thinks, is a loss of governmental control, and accounts for this current state of affairs.

DAVID AARONOVITCH: BREXIT ILLUSTRATES A GENERATIONAL DIVIDE.

David proposed that these tumultuous times simply boil down to the need for a mass psychological escape from modern problems such as an increasing cost of healthcare alongside an increasing ageing population, as well as the many issues abroad. This, it was suggested, has let political extremists thrive, where our attentions are pointed elsewhere rather to the answers to these problems. An example given is the recent culture war in the USA, over stances taken on statues, flags and anthems, where society is asked to think about what makes us patriotic, rather than how we are going to care for our ageing loved ones.

Unfortunately, David had no solutions or answers to the problems that persist. However, he left us with the message that it is what drives the world we live in that is important, and as long as we understand why we are doing something, we can hopefully reach some sensible end point.

Conclusion

Closing comments were provided by Mourant Ozannes' Jeremy Wessels, who thanked all the speakers for their insightful and engaging presentations, as well for all those attending this year's highly successful forum. All that is left now is to look forward to see what 2018 and next year's litigation forum may bring.

South Square and Alchemy

Special Opportunities round table discussion

Rose Lagram-Taylor report on the first in a series of round table discussions that South Square will be holding with a number of leading practioners

On 20 September 2017, members of South Square and Alchemy, an investor specialising in distressed and undervalued or underperforming businesses and other special situations through debt and equity across Europe, gathered together for a round-table discussion on Special Opportunities. Joining them were Partners from Allen & Overy, Freshfields, Cadwalader, Wickersham & Taft, Latham & Watkins and Ashurst, for what proved to be a lively and insightful debate.

As with the current trend, Brexit was at the fore, as we battled with what the restructuring world may soon look like for Britain. In doing so, matters were kicked off with a presentation on the current and predicted state of the credit market by Alchemy partners Ian Cash, who has over 18 years' experience in European distressed debt and special opportunity investing, and Alex Leicester, who joined Alchemy from Deloitte where he worked in the restructuring advisory team on a number of UK and European financial restructurings and turnarounds. This was followed by talks from the South Square team on the choice of English law as the governing law of debt presented by Richard Fisher, the issue of changing the governing law presented by Marcus Haywood, and the enforcement of judgments and what might be done post-Brexit discussed by Riz Mokal. Matters were then opened to the floor, or perhaps more aptly the table, to grapple with the Brexit conundrum and to raise questions, queries and concerns, and even to suggest tentative answers to the uncertain times we currently live in.

The current and predicted state of the credit market: Alchemy's Ian Cash and Alex Leicester

The purpose behind Ian Cash's and Alex Leicester's presentation was to provide us with some food for thought based on Alchemy's experiences in the credit market.

Matters began with an insight into how Alchemy looks at the restructuring world, with their observations over the past 15 years being that distressed trends tend to be on a sector-wide scale, caused by some underlying primary driver, rather than simply being on an individual company basis. For example, the distressed nature of the housing sector was brought about by the economic cycle, with the gaming and leisure sector underperforming due to regulatory change.

However, it was pointed out that there are often multiple independent and uncorrelated factors leading to a particular sector becoming distressed. As to this, reference was made to the recently published Deutsche Bank report entitled 'The next financial crisis', demonstrating the shared view with Alchemy of their currently being multiple risks to growth and stability.

Three out of eleven of these risks were explored in further detail; Europe, China and Brexit. In Alchemy's opinion, these risks have been evident for many years, contained by monetary policy resulting in and fuelling a distortion of asset markets.

Beginning with Europe, we were shown a variety of charts depicting the risk that Europe presents. In particular, (i) the Eurozone's underperformance in comparison to the US and UK, with no growth being seen in the Eurozone since 2007, (ii) Europe's structural, persistent, and high levels of unemployment, (iii) Europe's household, non-financial, corporate and government debt being at record highs, and (iv) the undercapitalised nature of European banks, in contrast to the US.

On China, it is its excesses which are causing most concern. An example of this excess being the fact that it poured more concrete between 2005 and 2015 than the US in the entire 20th century. The reason for this concern is because it is the credit market which has been supporting this excess. In a graph illustrating the amount of credit as a percentage to GDP, we were vividly shown that China has reached levels previously demarking breaking points, namely the Spanish housing crash, the bursting of Japan's bubble, and the US sub-prime crisis. It therefore only seems a matter of time until the same breaking point is reached in China.

Turning to Brexit, whilst Alchemy refrained from predicting the outcome, we were shown a variety of graphs illustrating its effects thus far on the market, including (i) the low rate of Sterling, it being the

LEFT TO RIGHT - TOM SMITH QC, IAN CASH, ALEX LEICESTER, RIZ MOKAL, ANTONY ZACAROLI QC & RICHARD FISHER

lowest rate against the Euro since the Euro was introduced, and the lowest rate against the US dollar for 31 years, (ii) the rising levels of inflation, with the UK CPI nearing 3%, leading to a squeeze on consumer spending, and (iii) the underperforming nature of the UK economy in comparison to Europe.

A sense of foreboding was achieved when we were informed that any one of these risks could trigger the next financial crisis. The way such risks have been countered thus far has been by an ever-loosening monetary policy, with global policy rates remaining zero, whilst the central banks' balance sheets continue to expand. By way of example, the Swiss National Bank alone has over USD80 billion worth of stocks on their balance sheets, which is the equivalent of USD10,000 for every man, woman and child in Switzerland. A further interesting illustration of this point being the fact that the Bank of Japan is a top 10 shareholder in every listed stock on the Japanese stock-market. These central banks have therefore made huge investments in risky assets.

Monetary policy, as previously mentioned, is fuelling a distorted asset market. To demonstrate this, Alchemy used 3 examples; (i) the return on 10 year government bonds being on a steady decline over the past 20 years to the extent that if you lent EUR100 to the German government today, you would receive a return of EUR103.40 in 10 years' time, which accounting for inflation would in fact only be worth EUR85-90 today, meaning you would be signing up to a guaranteed loss, (ii) the cyclically adjusted price-earnings ratio of valuing equity markets demonstrating that in 120 years stocks have only been more expensive twice before, and (iii) the European high yield debt now being tighter than US Treasuries, which, we were told, is absurd.

Against this backdrop, Alchemy informed us that, companies are issuing as much leveraged finance as they can. This is increasing supply and creating more and more risky finance, with the amount of senior leverage recently exceeding the previous 2007 peak, whilst the number of covenants has correspondingly reduced providing decreased levels of protection to borrowers.

Alchemy ended their presentation by leaving us with their thoughts on the retail sector. This is a sector that is likely to soon be distressed based on its lack of assets, it being operationally geared, and its cyclical nature. Given the sector's typical business model, this has meant it is a popular target for private equity, a selection of PE owned retailers including the likes of Cath

ROSE LAGRAM-TAYLOR

Kidston, Hobbs, Mountain Warehouse and TM Lewin. The reason for this attraction is the fact the sector often demonstrates growth, with easy strategies to roll out this including increasing prices and opening further stores in European markets. However, this ultimately has the effect of adding more risk to an already risky business, which accordingly leads to regular defaults and restructuring.

In the closing remarks, we were presented with two examples to watch out for; New Look and Pizza Express (the casual dining market being under a similar pressure). Their low levels of EBITDA growth, coupled with high leveraging, mean it is likely both will soon reach the predicted default and subsequent restructuring stage.

As Antony Zacaroli QC, our co-chair along with Tom Smith QC, summarised, this presentation was both fascinating and worrying in equal measure.

The choice of English law as the governing law of debt: Richard Fisher

'Whatever'. This was the opening remark given by Richard Fisher as a response to those predicting that Brexit will be fatal to the restructuring world as we know it. In his refreshingly positive stance, Richard told us that he wanted to be positive about Brexit and that it was highly likely that there would remain a need for English proceedings to ensure the effectiveness of restructurings, where parties had chosen English law as the governing law of a debt.

In answer to why so optimistic, Richard explained that English law is a magnet, and in his view, will remain as such, English law being reliable and accurate, with legions of lawyers on-hand and ready to deal with all the documentation and litigation involved in a restructuring. Therefore, if a party chooses English law as the governing law of a debt, they will also have to enforce this.

This is in line with the law in Gibbs, derived from the Court of Appeal's 1890 decision of Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399 which provides that the discharge of an English law governed debt can only occur effectively if it is discharged by English law. This simply boils down to the point that in a post-Brexit world where we are no longer parties to the Insolvency Regulation, if you want the English courts to recognise a restructuring that has discharged an English law governed debt, then an English process will likely be required in order for this recognition.

Whilst Richard pointed out that there is of course criticism over Gibbs, the principle is consistent with a party's choice of law, with most private international laws recognising that this choice of law should be respected. Indeed, Richard went so far to say that Brexit causes no difficulty for restructurings where debts are governed by English law. Indeed, he informed us that the position is even better than that, because in England we do not practice what we preach. By this Richard was referring to the fact the English courts are not unwilling to accept jurisdiction for a restructuring where the governing law of a debt is not that of English law, and is instead, for example, US law. The approach our courts take is by proceeding on the basis that its restructuring will have universal effect, with the only question


RICHARD FISHER

being whether that restructuring will be recognised as effective in the relevant jurisdictions. Gibbs therefore does not provide a barrier to restructurings with English law governed debts, and doesn't provide a barrier to foreign law governed debts. Instead, what Gibbs does do is provide a barrier to recognition in the UK of a foreign restructuring that has sought to restructure English governed law debts.

Nevertheless, a word of warning was raised by Richard, questioning whether it is sensible to proceed on the basis that Gibbs will remain good law. This slight shadow on an otherwise positive outlook is caused by, Richard explained, the recent decision of the Singaporean High Court in Pacific Andes Resources Development Ltd [2016] SGHC 210 where an additional rule has been developed. This rule provides that even where parties to a commercial agreement have agreed a choice of law, if one of those parties is the subject of insolvency proceedings in a jurisdiction where he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must have entered into the parties' reasonable expectations at the time of contracting. This means the relevant debt can be discharged according to the law of that jurisdiction, as opposed to in accordance with their choice of law. In practice, this could mean that where a contract provides for an English governed debt, but the company has its COMI in, for example, Singapore, that company could be restructured in Singapore, thus affecting the English law governed debt even where the parties had chosen English law to be the relevant law.

Whilst it is understandable that this judgment may raise concerns, Richard gave us three reasons why we should be cautious in expecting that the English courts will follow a similar approach. Firstly, because it is difficult to see how a variation in the law in Gibbs could be varied without any legislative guidance on how COMI should be taken into account. Secondly, we should question the assumption upon which this new 'rule' is based upon, i.e. why should a party, where it has specifically chosen English law to be the governing law, suddenly be assumed to have expected another law to govern the debt? This, Richard pointed out, is even more the case where a company has changed its COMI after entering into contractual arrangements with the creditor, as why should the creditor be expected to agree to the debt being discharged in accordance with the law of wherever the debtor happens to be situated at that moment in time? Thirdly, even if the assumption is made that the parties did have the expectation that the debt could be discharged in accordance with the law of where the debtor's COMI is, should this apply to all restructurings? Whilst the reasoning may be suitable to where a scheme is being used as an alternative to a distribution in a liquidation, the rationale may not hold true where the restructuring is simply a restructuring of contractual obligations. The long and short of it is, if the parties have chosen English law, why should this choice ever be abrogated?

The issue of changing the governing law: Marcus Haywood

Marcus Haywood continued discussions with the topic of schemes of arrangements and the conferring of jurisdiction by changing the governing law. As many readers will already know, schemes of arrangement are increasingly being used by companies that have either shifted their COMI to England, or have shown a sufficient connection to England to justify to the English courts the use of a scheme. It is a simple fact that foreign companies are able to use an English jurisdiction to affect their scheme even where they do not have any major assets in England, do not have an establishment in England, or even have a COMI in England, as long as they do have a sufficient connection to this country.

One of the main ways in which this sufficient connection can be shown is where a company's liabilities are governed by English law. This principle was taken a step further by the decisions in Re Apcoa Parking Holdings Gmbh [2015] BCC 142 and Re DTEK Finance B.V [2015] EWHC 1164 (Ch) where English jurisdiction was established through a change of law governing those companies' respective liabilities.

To refresh readers' minds, DTEC concerned a Netherlands incorporated finance vehicle which formed part of a Ukrainian energy group, whose Notes were governed by New York law. At first blush, it is easy to suppose that the options for how to turn those Notes into English governed liabilities were limited. However, in this case, the terms of the


MARCUS HAYWOOD

Notes enabled a change in the governing law if supported by a certain majority. This was achieved, and an English scheme was sanctioned, it not mattering that English law was not the original governing law, or that it had been changed simply to allow for English jurisdiction. All that mattered was that the change to English law was effective.

Although being able to change the choice of law in this way is therefore now well founded, Marcus proceeded by raising three issues that can give rise to problems or limitations to the use of such schemes:

(1) The Loan Market Association's recommendation for the need for lender consent to a change in governing law. This could, in Marcus's opinion, significantly limit the number of loans in which schemes, through change of law alone, would be available.

(2) The reference made by the judges in both Apcoa and DTEC to "a step too far" relating to the need for English judges to be alert to abusive changes of law, especially where English law is alien in respect of the parties' previous dealings. Although, this is likely to be the case only in limited and exceptional cases, especially as it is difficult to see how a change in law in circumstances where the loan documentation provides for such a change, would not be in the reasonable contemplation of the parties at the time of contracting.

(3) Where loan documentation is already governed by English law and the parties want to change the governing law to foreign law to enable a foreign restructuring or to prevent any future English restructuring. The question that then might arise, according to Marcus, is whether that change of law is effective under English law. In principle, if such a change was brought about by the requisite majority, then there should be no problem. However, this may be different where it could be said that the change of law is entirely alien to the parties' previous dealings. In such circumstances, there could be grounds for a minority creditor, who objected to the change in law, to raise arguments against this on the basis that the change is so fundamental that it is not capable of being effective under English law.

Marcus concluded by leaving us with two questions to ponder, (i) whether such a change in law from English law to a foreign law is a realistic possibility, and (ii) if so, whether such a change would be open to a challenge on the basis as discussed. I leave readers with this same opportunity.

The enforcement of judgments and what might be done post-Brexit: Riz Mokal

The desire to gaze into a crystal ball to discover what the impact of Brexit is going to be is something we all share, and thanks to Riz Mokal, we were treated with such a chance, with the assistance of the UK government's Future Partnership Papers which have been published recently.

To begin with, Riz stated, we have to be realistic about where we are going to stand in the post-Brexit restructuring world in terms of priorities. According to Britain's former ambassador to the EU, insolvency and restructuring did not feature in the top 100 priorities of the UK government, and he was in fact being generous in this estimate. However, given the multitude of tasks to complete on the 'leaving the EU to-do list', this is hardly surprising.

However, according to Riz, this is no bad thing. There is an importance to being unimportant, and the UK may benefit from this in terms of insolvency and restructuring, especially in being saved from the front pages of the tabloid press.

Nevertheless, the three things our field is looking for answers to as the UK does leave the EU are (i) what the applicable law will be, (ii) which courts will have jurisdiction, and (iii) how judgments will be recognised and enforced.

Some of the answers, or at least options which we currently have thanks to the Future Partnership Papers were summarised by Riz.

On choice of law, the UK government has confirmed unilaterally that it will give domestic force to the Rome I and II Regulations which governs contractual and other applicable law.

On jurisdiction, the obvious and easy possibility is to become a party to the Lugano Convention, which as in Riz's words, could give us the same sense of serenity as looking at Lake Lugano itself. Another option is to bilaterally agree with the EU to give effect to the Insolvency Regulation enabling continued reciprocal recognition, with the idea also being canvassed for voluntary references to the European Court of Justice where questions of interpretation arise, despite their being no direct jurisdiction of the Court of Justice. Whilst this seems reasonably discernible from the UK's position, should the EU not be prepared for us to preserve all of the Insolvency Regulation, there would be an argument to preserve the notion of 'safe harbours', allowing for the application of English law to apply to certain issues arising within insolvency proceedings taking place in France, Germany, etc.

However, the UK could also take a more competitive stance, presenting UK law as the most appropriate way to restructure debt obligations, by extending the sufficient connection test, permit British courts to apply foreign law, and permit debt discharge and modification on the basis of COMI rather than just governing law, in line with the Singaporean decision in Pacific Andes Resources Development. From Riz's point of view, seeing as

RIZ MOKAL

DISCUSSION, DEBATE AND DELIBERATIONS

restructuring is all about interfering with contractual agreements, parties should be aware that certain provisions could fall by the way side should a party be subject to insolvency proceedings. The message here for both listeners and now readers seems to be that we should not be afraid of treating ourselves as a competitive force.

We will therefore have to wait and see what the future holds.

Discussion, debate and deliberations

The session ended with the opportunity for participants and attendees to air their own views on the matters discussed. Tom Smith QC led the debate, raising questions on Gibbs, whether it is right to vary the governing law of a contract, and what the main hurdles for UK schemes of arrangement now are in light of Brexit.

On Gibbs there was an overwhelming view that the direction of international travel was anti-Gibbs, with much of this movement being politically fuelled, hence the decision of the Singaporean High Court, and the fact that the US Bankruptcy Court already ignores Gibbs. With this in mind, Brexit seemed irrelevant, with the trend already being set. This, as pointed out by Riz Mokal, was even more the case in the context of group proceedings, with UNCITRAL moving towards introducing provisions to enable such proceedings, which could mean Gibbs will soon be repudiated in any event. Nevertheless, such views remained balanced by the more moral standpoint and the question of whether it is right for contracts to be varied where parties' have agreed a governing law. The answer to this might just well be on a postcard.

With regards to hurdles for UK schemes, one of the main worries demanding attention was the questions of recognition. As Ian Cash pointed out, from an investor's point of view, they are looking for predictability and clarity and without any certainty on recognition, this could fundamentally change investment decisions. However, on a reassuring note, Alchemy retain confidence that English governed debts will still be able to be restructured under English law, with no trend currently for a move away from England as the choice of law.

However, as Tom Smith QC concluded the session, the bottom line seems to simply be that we have lots to think about. Indeed, we can only hope that Brexit will not prove to be, as the R.E.M song goes, "the end of the world as we know it".

Singapore Insolvency Conference

Adam Al-Attar and Edoardo Lupi report from the Singapore Insolvency Conference 2017

The Singapore Insolvency Conference 2017 took place over two days last August in the eye-catching Marina Bay Sands complex overlooking downtown Singapore. The conference was well attended by local and regional practitioners, as well as by practitioners form further afield, including two members of South Square, Adam Al-Attar (a panel speaker at the conference) and Edoardo Lupi.

The main topic of discussion was, naturally, Singapore's recent enactment of the Companies (Amendment) Act 2017 which, in addition to incorporating the UNCITRAL Model Law on Cross-Border Insolvency, made extensive amendments to the Singaporean scheme of arrangement jurisdiction under Part VII of the Companies Act (Cap 50 of the 2006 Revised Edition) (the "**Revised Act**"). Interesting developments were also considered in the field of judicial co-operation in cross-border insolvency matters by judges in attendance from a number of international jurisdictions.

The Conference

The conference began with a welcome by Sushil Nair of Drew & Napier LLC, which was followed by a keynote address by the Minister for Home Affairs and Minister for Law, Mr K. Shanmugam. A former lawyer with Allen & Gledhill LLP in Singapore, Mr Shanmugam reflected on the recommendations of the Committee to strengthen Singapore as an International Centre for Debt (the "**Committee**"), which led to the enactment of Companies (Amendment) Act 2017. Amongst other matters, the Minister addressed the key policy considerations underlying the Singapore government's decision to take swift steps to implement the Committee's recommendations.

The Revised Act

The conference's various plenary sessions helpfully unpacked the recent amendments to the Singaporean insolvency legislation.

At an initial plenary session entitled, '*Singapore as an International Centre for Debt Restructuring*', chaired by the Honourable Justice Kannan Ramesh of the Supreme Court of Singapore (one of the Committee's co-chairs), panellists discussed the headline changes to the Revised Act.

ADAM AL-ATTAR

These included the automatic stay which now takes effect upon an application for a scheme of arrangement. Delegates were particularly interested to understand the extraterritorial effect of the automatic stay, which is nevertheless expressly subject to the Singapore court's *in personam* jurisdiction. Other features of the new legislation considered by the panel included a new power to approve a cross-class cram-downs in the scheme context, and the introduction of super-priority rescue funding subject to a number of safeguards.

Many of these changes were inspired by Chapter 11 of the US Bankruptcy Code. The views of two US lawyers sitting on the panel (Dennis Dunne of Milbank, Tweed, Hadley & McCloy LLP and James Sprayregen of Kirkland & Ellis LLP) regarding the effect of importing these debtor-friendly Chapter 11 concepts into the more creditor-friendly scheme jurisdiction were, therefore, of particular interest.

Breakout Sessions

Amongst the various breakout sessions, South Square's Adam Al-Attar sat as a panellist on a session entitled, '*Alternative Capital Providers/Distressed Investors in Restructuring Situations with a Focus on the Role, Opportunities and Challenges/Issues*'. Chaired by Angela Ee of Ernst & Young and Manoj Pillay Sandrasegara of WongPartnership LLP, the panel considered debtor-in-possession ("**DIP**") financing, a concept now embraced by Singapore following its introduction of super-priority rescue funding under the Revised Act. The US and the UK positions with regard to DIP financing were also discussed.

Adam said that in the UK the absence of

DIP financing was not sorely felt in circumstances where most restructurings were creditor-led, and the lion's share of restructurings were in respect of group finance companies. In the UK, a restructuring might take the form of a pre-pack administration or a scheme of arrangement, neither of which involved the debtor company attempting to trade out of its difficulties. All of this rendered the absence of DIP financing provisions in the UK of less obvious significance than it might in other jurisdictions which did not, or could not, make use of these options. Indeed, Adam considered that in England the majority of respondents to a consultation launched by the Insolvency Service in May 2016 entitled, '*A Review of the Corporate Insolvency Framework*', disagreed with the introduction of super-priority funding provisions, with some respondents replying that lack of rescue finance rarely prevents business rescue given that, if a business truly remains viable, there is rarely a shortage of such finance. The value destruction that was likely to result from trading in an insolvency process, even with the benefit of DIP financing, was a key motivator to look to solutions that did not involve trading in an insolvency process.

Judicial Co-operation

A mock trial held at the beginning of the second day of the conference provided a vivid demonstration of the '*Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*' approved by the Judicial Insolvency Network (the "**JIN Guidelines**"). In May 2017, the Chancellor, Sir Geoffrey Vos, approved the incorporation of the JIN Guidelines into the Chancery Guide (see para 25.29 ff. of the Chancery Guide). The JIN Guidelines have been adopted by a number of jurisdictions, including the BVI, the Cayman Islands and the US (Delaware and the Southern District of the New York). The mock trial was an opportunity for many of us to see the Joint Hearing protocol under the JIN Guidelines in action for the first time.

The mock hearing problem envisaged the parties arguing contested recognition applications under the UNCITRAL Model Law in both Singapore and in New York. The hypothetical parties had agreed to the application of the JIN Guidelines, in particular to a protocol for Joint Hearings pursuant to Annex A thereunder. Annex A para (iii) envisages each court in the parallel proceedings being able "*simultaneously to hear the proceedings in the other court,*" with the parties being invited to consider "*how to provide the best audio-visual access possible.*"

MARINA BAY SANDS, SINGAPORE

EDOARDO LUPI

The mock hearing in Singapore was presided over by the Honourable Justice Kannan Ramesh and in New York by a retired US bankruptcy judge formerly of the Southern District of New York. The New York proceedings were live-streamed via video link to Singapore and vice versa. The mock hearing demonstrated the potential practical applications of the JIN Guidelines to cases involving parallel cross-border insolvency proceedings. After hearing well-constructed oral arguments from distinguished counsel in Singapore and New York, each judge proceeded to give an independent judgment. The point was stressed that the JIN Guidelines do not divest or diminish any court's respective independent jurisdiction over the subject matter of proceedings.

A closing plenary session saw judges from China, Hong Kong, Australia, India and Singapore address further issues relating to the role the courts play in relation to cross-border restructuring and insolvency. Difficulties like language barriers between the courts and the effect this might have on the uptake of protocols under the JIN Guidelines were also discussed.

The Singapore Insolvency Conference 2017 was a great success and a fine advertisement for this jurisdiction's plans to establish itself as a global restructuring hub. Watch this space.

EU/EEA LAW UPDATE

ROBERT AMEY

Robert Amey reviews the latest developments in EU/EEA case law

C-106/16 Re Polbud - Wykonawstwo sp zoo

Polbud was a company registered in Poland. It wished to move its legal seat to Luxembourg, but had no intention to transfer the place in which it actually carried on its economic activity. Polish law permits a company to move its legal seat within the EEA without losing its legal personality, but also requires a company to be liquidated before it is removed from the Polish commercial register.

Polbud obtained registration in Luxembourg, and then sought its removal from the Polish commercial register. Removal was refused on the basis that Polbud was unwilling to file the necessary evidence that it had been liquidated. Polbud appealed all the way to the Polish Supreme Court, which referred to the ECJ the question whether EU freedom of establishment rules (in particular, those in articles 49 and 54 TFEU) preclude the application of Polish law rules requiring a company to be liquidated in Poland before it can move its seat to another member state. What set this case apart from previous, similar cases was that Polbud merely wished to change its legal seat, without changing the place in which it carried out economic activity.

Advocate General Kokott opined that the rights to free establishment in articles 49 and 54 TFEU were only engaged where a company intended to move its seat for the purpose of pursuing genuine economic activity in a different member state. However, the ECJ disagreed with her. It did not matter, the Court said, that Polbud had no intention to change its 'real' head office - articles 49 and 54 TFEU were engaged nonetheless. Moreover, Polish domestic law requirements to liquidate a company before moving its statutory seat (supposedly in order to protect creditors, minority shareholders and employees) were an infringement of the right of free establishment, and were disproportionate and unlawful as a matter of EU law.

Bank Leumi (UK) plc v Screw Conveyor Ltd [2017] CSOH 129

Screw Conveyor Limited was incorporated and registered in England, but had its centre of main interests (COMI) in Scotland. Bank Leumi petitioned the Scottish Court of Session for an administration order, arguing that, since the EU Insolvency Regulation conferred insolvency jurisdiction on the courts of the Member State in which the debtor had its COMI, and since the debtor's COMI was in Scotland, the Scottish court had jurisdiction to make an order.

The court held that it did not have jurisdiction. The Member State in which the debtor had its COMI was the United Kingdom, and so the courts of the UK had jurisdiction to make an administration order. The question of which court within the UK had jurisdiction was a question of UK law, not EU law. The Insolvency Act 1986 provides that companies registered in England and Wales are to be wound up in the English Court. Accordingly, Screw Conveyor Ltd could not be put into administration by the Court of Session.

C-90/16 The English Bridge Union Limited v Commissioners for Her Majesty's Revenue & Customs

In this case, the ECJ finally answered the vexed question of whether a 'sport' must involve some element of physical skill.

HMRC charges VAT on the entry fees for bridge tournaments. The English Bridge Union argued that this was contrary to an exemption in the relevant directive for "*the supply of certain services closely linked to sport or physical education ... to persons taking part in sport or physical*

education". The EBU argued, in essence, that bridge was a sport, and so the entry fees for bridge tournaments should be exempt from VAT. The dispute reached the Upper Tribunal, which referred the question whether bridge is a sport to the ECJ. Advocate General Spuznar noted that there was no definition of 'sport' in the relevant directive, or in EU law generally. He quoted Wittgenstein's *Philosophical Investigations,* and reviewed the definition of 'sport' (and its foreign language equivalents) in English, Polish, French and German dictionaries, before concluding that 'sport' did not necessarily always involve some physical element. According to the Advocate General, bridge and chess were both sports, since they had the common elements of requiring effort (whether physical or mental) to overcome an adversary, and of improving the mental and physical health of the players.

The ECJ disagreed. The exemptions from VAT are to be construed narrowly, and 'sport' is generally understood to involve a non-negligible physical element. An activity does not become a sport simply because it has the effect of improving a player's mental and physical health: rest and relaxation have that effect, but are not sports. Accordingly, for the purposes of VAT at least, bridge is not a sport.

BRIDGE: NOT A SPORT

NEWS in brief

Double win for South Square

On Thursday 26 October Chambers and Partners held their Bar Awards at the London Hilton on Park Lane.

We are delighted that South Square was once again awarded Set of the Year for Company/Insolvency law, and Antony Zacaroli QC was awarded Company/Insolvency Silk of the year.

We would like to thank all our clients and friends who have contributed to our continued success.

L TO R ARE JIM COSTA, MADELEINE JONES, JAMES COWDELL (C&P EDITOR), ANDREW DE MESTRE (4 STONE BUILDINGS), ANTONY ZACAROLI QC, ROSE LAGRAM-TAYLOR AND MARK ARNOLD QC.

Raising the red flag

At the end of October Standard & Poor's, the credit rating agency, warned that the size of the consumer debt pile in the UK is approaching a peak last seen in September 2008 of £208 billion.

Annual growth rates in UK consumer credit of 10 per cent a year, largely a result of car finance, personal loans and credit cards, have hugely outpaced household income growth, which is closer to two per cent.

Standard & Poor's warned that such credit growth is unsustainable and should raise "red flags" for the major lenders whose losses could be "sharp and very sudden" in an economic downturn and may be exacerbated as interest rates rise.

The warning came as research by data firm Moneyfacts showed that credit card rates were at their highest level in 10 years at 23 per cent and warned that customers might not be able to keep moving from one interest rate-free period to another.

Standard & Poor's said these interest rate-free periods had increased to 28 months and had been "contributing to overall household indebtnesss". Low interest rates and "benign economic conditions" had helped to keep high debt manageable but "past experience shows that lenders find it hard to avoid inherent cyclicality in consumer credit and the impact can be severe".

The 2008 peak in consumer debt came on the eve of the collapse of the Lehman Brothers bank.

Student creator of chatbot lawyers raises £840,00

A London-born computer science student who hopes to "take down" lawyers with artificial intelligence (AI) chatbots has raised $1.1 million (£840,000) in backing from SIlicon Valley investors.

Joshua Browder, a student at Stanford University, California, is the brains behind an AI system called DoNotPay. Launched in 2016, the site provides 24-hour free legal advice to the public in areas including parking fines, delayed flights and payment protection insurance (PPI).

"Divorce, immigration, small claims, property tax and more corporate takedowns are on their way, and perhaps the last app that everyone downloads is the one that solves all of their problems for free," says Browder.

Saudi opens Commercial Courts to boost investment programme

In the last few months Saudi Arabia has launched commercial courts in Riyadh, Dammam and Jeddah in a move aimed at easing investment to reduce the kingdom's reliance on oil by diversifying its economy.

Justice Minister Walid Al-Samaani said that the specialist courts, along with appeal centres in other cities, would promote a business climate built on trusts and help expedite the resolution of commercial disputes.

This is a clear departure from decades of tradition, where judges have used their own personal readings of Islamic texts to rule on cases that range from complex commercial disputes to murder. The move came before the recent spate of arrests of major Saudi investors including Prince Alwaleed bin Talal in a claimed corruption crackdown by Crown Prince Mohammed bin Salman.

The Saudi system of sharia law is not codified and has no system of precedent. Whilst most commercial cases are now handled through arbitration and business tribunals, foreign investors and local business alike have indicated that they would welcome a stronger legal framework for setting disputes.

RIYADH WILL BE ONE OF THREE CITIES HOSTING COMMERCIAL COURTS

RISA Cayman Conference 2017

South Square is once again collaborating with the Restructuring and Insolvency Specialists Association (RISA) in Cayman on the RISA Conference 2017. This year's half-day event will be held on Monday 20 November at the Ritz-Carlton, Grand Cayman. The three panel sessions will cover Redemption claims in the winding up of funds, Merger fair value appraisals: recent developments, and Fund structures: what can and should be expected from fund service providers, and who carries the can when it goes wrong?

South Square speakers – Barry Isaacs QC, Felicity Toube QC, David Allison QC, Tom Smith QC and Richard Fisher – will be joined by panellists Matt Goucke (Walkers), Michael Pearson (FFP), Peter Hayden (Mourant Ozannes), Gordon MacRae (Kalo Advisors), Nick Hoffman (Harneys), Andrew Jackson (Appleby), Rupert Bell (Walkers), Ronan Guilfoyle (Calderwood), Rachael Reynolds (Ogier), Mark Goodman (Campbells), and Russell Smith (BDO CRI).

Felicity Toube QC will be chairing the event this year, and a number of other South Square barristers will also be attending. We look forward to seeing our Caymanian colleagues there.

BARRY ISAACS QC

FELICITY TOUBE QC

DAVID ALLISON QC

RICHARD FISHER

Playing the Trump Card

According to the Federal Election Commission filings, the Trump team have spent more an US$1m on legal fees in the last three months alone.

Numerous payments have been made to law firms including $237,924 to Alan Futerfas on behalf of Donald Trump Junior, as the investigation into the possible interference by Russian in the 2016 presidential election continues.

The 2017 Special Counsel investigation, led by former FBI Director Robert Mueller as Special Counsel, has been set up to explore any collusion between Donald Trump's 2016 presidential campaign and the Russian government as part of the Russian interference in the 2016 United States elections, and related matters that arise in the course of this investigation. Trump has not been accused of any wrongdoing by the investigation, while focus has also turned on the activities of the Clinton team on Washington law firms in the run up to the 2016 election.

UK business at risk in insolvency storm

Official figures from the end of October 2017 revealed that there were 25,749 individual insolvencies between July and September in England and Wales – a rise of 10.6 per cent on the previous quarter and an increase of 7.7 per cent on the same quarter in 2016.

Begbies Traynor's "Red Flag Alert" report for the second quarter of 2017 shows that 329,834 companies in Britain — mostly small and medium enterprises — are experiencing some form of financial trouble. Again, this is 25 per cent increase on the numbers of companies in significant distress in the same quarter in 2016.

Ric Traynor, Begbies Traynor's executive chairman, said in a statement: "Our Red Flag research shows that a recent loss of momentum in the economy is putting increased financial pressure on UK businesses, with SMEs bearing the brunt of this rising distress, as businesses contend with uncertainty over Brexit negotiations and an inconclusive election result, alongside rising costs."

Julie Palmer, a partner at Begbies, said "I think we will see more businesses go out of business. This feels like the calm before the storm".

Construction and property companies have seen the biggest spike in financial troubles, with rises of 22 per cent and 32 per cent respectively. Accounting firm Moore Stephens warned separately on Monday that one in five estate agents are at risk of going bust.

Begbies Traynor's report comes at a time when Britain's economy is starting to feel the impact of the decision to leave the European Union last June. GDP growth slowed to just 0.2 per cent in the first quarter of 2017, climbing slowly to 0.3 per cent in the second quarter.

Interest on the rise

On 2 November 2017, for the first time in more than 10 years, the Bank of England raised interest rates from the historic low of 0.25 per cent to 0.5 per cent. According to Bank of England governor Mark Carney, interest rates are likely to rise twice more over the next three years.

The move reverses the cut in August of last year, made in the wake of the vote to leave the European Union. Almost four million households face higher mortgage interest payments after the rise, with the main losers being households with a variable rate mortgage.

It had been hoped that the interest rate hike would give savers a modest lift in their returns.

However, so far Britain's high street banks are refusing to pass on the first increase in interest rates for a decade. Lloyds, Barclays and Halifax defied a call from the Bank of England governor to increase returns for customers.

MARK CARNEY: MORE HIKES TO COME

Pay your own way

Barclays Bank has told four of its former employees accused, along with the bank itself, of fraud over its £11.8 billion of emergency funding from investors including Abu Dhabi and Qatar in 2008, that they could be liable for their own legal expenses in the event of conviction. The four, all of whom deny conspiracy to commit fraud by false representation are John Varley (former chief executive of Barclays), Roger Jenkins (a 'star' investment banker in the Middle East), Richard Boath (who led Barclays' Middle East fuding operation), and Tom Kaaris (who ran the bank's wealth division). The trial is due to start in January 2019.

Who wrote Florence Foster Jenkins?

The award-winning musical comedy film was the story of a New York socialite and amateur soprano who was notoriously mocked for her flamboyant performance costumes and notably poor singing ability. Now another opera singer, Julia Kogan, is locked in a High Court battle with her former boyfriend, film writer Nicholas Martin, over who wrote the script to the Hollywood blockbuster. Miss Kogan claims she contributed "comedic dialogue", "a theme of 'loveliness'" and "terminology that was used hilariously from the opera world". Mr. Martin, on the other hand, contends that Miss Kogan was "simply a supportive girlfriend" and that her contributions were mostly "guff" and nowhere near enough to "promote her into an author". Judge Richard Hacon reserved his judgment will give his ruling at a later date.

Flying into administration

At 4 a.m. on Monday 2 October Britain's longest-serving airline brand, Monarch Airlines, announced it had been placed into administration. David Allison QC and Adam Al-Attar appeared at the administration hearing.

The administration gave rise to the UK's biggest peacetime repatriation to bring 110,000 customers home from their holidays on specially chartered planes, with a further 750,000 told that their bookings had been cancelled. Civil Aviation Authority chief executive, Andrew Haines, said: "This is the biggest UK airline ever to cease trading".

Monarch was kept aloft in 2014 through a series of pay cuts and redundancies following a take-over by the investment firm Greybull Capital. However, the fall in value of sterling following the EU referendum left

MONARCH ADMINISTRATION

Monarch paying £50m a year more for its fuel and aircraft, paid for in the international market in dollars: Sterling has fallen 10% against dollar since the referendum. Monarch had also placed an order for Boeing 737 Max planes worth more than $3bn, again to be paid for in dollars.

Uncertainty around Brexit, including questions whether British carriers will still have the right to operate freely in Europe, is said to have deterred potential buyers from rescuing Monarch. Administrators have said there have been no realistic offers for the airline as a whole, but easyJet is believed to be interested in parts of it, especially landing slots that would allow it to offer more flights out of Gatwick and Luton. IAG, the owner of British Airways, and Wizz Air may also be interested in buying landing slots. Monarch's leased planes are currently unable to fly due to the administration process.

On 8 November, the Administrative Court dismissed Monarch's claim for the reversal of the decision of the regulator not to allocate Monarch its Summer 2018 take-off and landing slots. Monarch had intended to exchange these slots with other airlines for value for the benefit of its creditors. David Allison QC appeared at the judicial review hearing. He is advising the administrators alongside Adam Al-Attar and Alexander Riddiford.

New Cybercrime Court planned

Plans have been announced for a new court in London, designed to tackle the rise of fraud and cybercrime, both of which are having a significant impact on the banking and finance community. The proposed 18-courtroom building will replace the existing civil courts and the City of London magistrates' court on Queen Victoria Street.

The City of London Corporation said: "The court's close proximity to some of the world's leading technology, financial and professional services firms in the Square Mile will enable the judiciary to be at the forefront of tackling criminal activity and resolving disputes. It would also benefit from its position near the Rolls Building, the Royal Courts of Justice, Old Bailey and Inns of Court."

The new court would be a clear sign that the UK is moving to modernise and expand capacity in order to guard its pre-eminence as an international legal centre. Dominic Raab, justice minister, said the court would reinforce the City's "world-leading reputation as the number one place to do business and resolve disputes" and called it "a terrific advert for post-Brexit Britain".

The focus on economic crime reflects the increase in recent years in prosecutions by the Serious Fraud Office as well as the introduction of legislation such as the Criminal Finances Act, which came into force on 30 September 2017. The new act creates a new offence of the facilitation of tax evasion and gives Britain's economic crime fighting agencies new powers to tackle the sources of hidden wealth.

The number of cyber attacks on businesses in the UK has also increased dramatically. Last November — and shortly after Tesco Bank was hit by a cyber bank robbery affecting tens of thousands of customers — Amber Rudd, the home secretary, labelled economic crime a national security threat.

Britain's judges have moved to counter the perception that by leaving the EU Britain will lose ground to other jurisdictions. In July, Lord Neuberger, the former president of the Supreme Court, said Brexit "does not alter the fact that lawyers and judges in the UK are as internationally minded and expert as they ever have been".

SOUTH SQUARE CHALLENGE

Welcome to the November 2017 South Square Challenge. All you have to do is look at the pairs of picture clues, work out what it is they are clues for and then identify the link between the seven answers. The prize for the winner (who's name will be drawn from the wig tin if there is more than one correct entry) is a magnum of champagne and a much-coveted South Square umbrella, ready for the winter rains! Please send your answers by e-mail to Kirstendent@southsquare.com, or by post to Kirsten at the address on the back page. Entries to be in by 7 January 2018 please. Good Luck.

Stephen Robins

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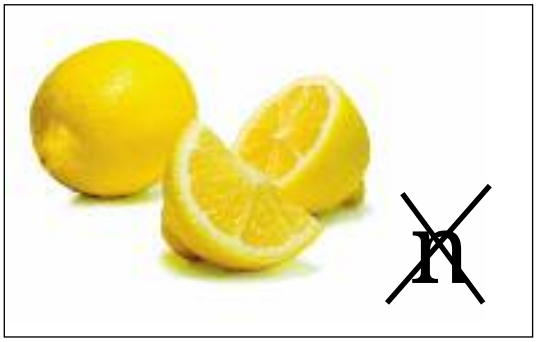

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AUGUST CHALLENGE

The answers to the August 2017 challenge were: 1/. Rt Hon Lady Justice Arden. 2/. Lady Justice King. 3/. Lady Justice Gloster. 4/. Rt Hon Lady Justice Hallett. 5/. Lady Justice Black. 6/. Lady Justice Macur. 7/. Rt Hon Lady Justice Rafferty. 8/. Rt Hon Lady Justice Thirlwall. 9/. Rt Hon Baroness Hale of Richmond. The connection is all have been female English judges of the Court of Appeal.
The lucky winner drawn from the wig tin was Anne McIlwraith a trainee solicitor at Withers LLP.
Many congratualtions to Anne to whom goes a Magnum of Champagne and a South Square umbrella.

Diary Dates

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

RISA Conference 2017 in association with South Square
20 November 2017 – The Ritz Carlton, Grand Cayman

INSOL International Kuala Lumpur One Day Seminar
28 November 2017 – Hilton Hotel, Kuala Lumpur, Malaysia

Chancery Bar Association 2018 Annual Conference
19–20 January 2018 – London

R3 Annual Dinner 2018
22 March 2018 – 8 Northumberland Avenue, London

ILA Academic Forum and Annual Conference 2018
20–21 April 2018 – London

INSOL New York Annual Regional Conference
29 April–1 May 2018 – Grand Hyatt Hotel, New York

Restructuring Insolvency & Turnaround Association of New Zealand (RITANZ)
10 May 2018 – New Zealand

International Insolvency Institute 18th Annual Conference
23–25 September 2018 – New York

International Bar Association Annual Conference 2018
7–12 October 2018 – Roma Convention Centre La Nuvola, Rome

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

CHAMBERS & PARTNERS COMPANY/INSOLVENCY SET OF THE YEAR 2018

SOUTH SQUARE

CHAMBERS & PARTNERS COMPANY/INSOLVENCY SET OF THE YEAR 2018

Michael Crystal QC
Christopher Brougham QC
Gabriel Moss QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC
Antony Zacaroli QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC

Mark Arnold QC
Jeremy Goldring QC
David Allison QC
Tom Smith QC
Daniel Bayfield QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Richard Fisher
Stephen Robins
Marcus Haywood
Hannah Thornley
William Willson

Georgina Peters
Adam Al-Attar
Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown
Robert Amey
Andrew Shaw
Ryan Perkins
Riz Mokal
Madeleine Jones
Edoardo Lupi
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