SOUTH SQUARE DIGEST

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

Schemes of arrangement and Chapter 11

European Banking Regulation

Unitranche finance

the impact of *Apcoa*

Unintended Consequences

Erste Group Bank

INSOL Dubai

DECEMBER 2015

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SOUTH SQUARE DIGEST

'THE DEPTH OF ITS OFFERING AND ITS COMBINED EXPERIENCE IS UNPARALLELED, AND THE BARRISTERS ARE RIGHT FOR ANY GIVEN SITUATION'

December 2015

SOUTH SQUARE

'STILL UNQUESTIONABLY THE LEADING RESTRUCTURING AND INSOLVENCY SET IN THE MARKET'

Chambers & Partners 2016

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FROM THE **EDITOR**

DAVID ALEXANDER QC

What a ghastly war

Welcome to the December 2015 edition of the Digest, the last one for 2015. Sadly, however, this is the second issue of the Digest in 2015 (following the February issue in relation to the attack at Charlie Hebdo) when a review of the previous few months means that terrorist attacks in Paris feature in the editorial after the recent truly horrendous slaughter of so many totally innocent people there. That coming very quickly on the back of an attack in Beirut, a plane blown up on the way back from Sharm El Sheikh with the loss of all on board and the attack in Ankara in Turkey in October. All the attacks have either plainly been by or are being put down to Islamic State, with whom France is now openly at war, with IS not only seemingly becoming bolder but also apparently stepping up the intensity of its actions. There are not many easy problems to solve in the world at the moment. But this one has to be at the top of the list. The world does not feel a very safe place for as long as it remains unresolved.

SSI PLANT, EUROPE'S BIGGEST, VICTIM OF LOW STEEL PRICES

So what else has been happening. Frankly, there is plenty more bad news. The situation in Syria seems only to deteriorate, and the resulting migrant problem has all European leaders perplexed. The VW scandal was pretty shocking, and we have a crisis in the British steel industry with thousands of jobs being lost at a combination of Tata, Caparo Industries and SSI, the last of which ran the largest blast furnace in Europe. Many are blaming cheap exports from China, with excess Chinese steel being sold cheaper than it costs to make it in China let alone the UK.

And we have not, so far, mentioned the elephant lumbering over the horizon – the Referendum on the EU, where some appear to have a feeling that Brexit might just be coming a little bit closer.

In other news, no one can have missed the new Labour leader, the MP for Islington North, Jeremy Corbyn. To many it is amazing that he should have won. However, what he has done since becoming leader of the Labour Party has seemed, to some, even more amazing. One suspects this is all good news for the Conservative Party who, one has to imagine, cannot believe that Christmas has come so early. Probably not good for the country however. Every country needs a strong, united and effective opposition. But it is good news for beard lovers. And there have been some very favourable comparisons – Obi-Wan Kanobi in the original Star Wars movie for example under the headline "Help me Jeremy Corbyn – you're my only hope". Maybe he is …

So what has been happening in the insolvency world? Two events of note. Firstly, various insolvency related provisions of the Deregulation Act and the Small Business, Enterprise and Employment Act came into force with effect from 1 October 2015 (e.g. the extension of the power to bring wrongful and fraudulent trading to administrators and provisions enabling office holders to assign such actions, as well as actions under the antecedent transaction provisions). Secondly, the whole issue of the insolvency litigation exemption from the civil justice reforms has been raised by Lord Justice Jackson who on 16 October 2015 delivered the 2015 Mustill Lecture arguing strongly that the exemption, given a temporary reprieve in April 2015, must go (see further pages 46-47).

Turning to this issue of the Digest, what do we have in store for you? An article by Antony Zacaroli QC and Alexander Riddiford on schemes of arrangement and Chapter 11 of the US Bankruptcy Code. Articles by Tom Smith QC, on litigation arising out of collapsed banks under the European Banking Recovery and Resolution Directive, and by William Trower QC and Ryan Perkins on the interaction between unitranche facilities and schemes of arrangement. There are also articles by Jeremy Goldring QC on Este Group Bank and the dangers of submission to a foreign insolvency, Hilary Stonefrost on the disclosure of a company's confidential information to a nominee director's appointor and Felicity Toube QC on the decision of the Supreme Court in Gabriel v B.P.E Solicitors. In addition there is a report by John Briggs on the INSOL International Insolvency and Trust Seminar in Guernsey, and we look forward to INSOL International's Annul Regional Conference in Dubai. There is also a summary of what the newly-released directories (Chambers & Partners and the Legal 500) made of South Square and its members, as well as the usual case digests. Finally we have news-in-brief, diary dates and the South Square Challenge.

ONCE AGAIN PARIS SUFFERED TERRORIST ATROCITIES AT THE HANDS OF ISLAMISTS.

We hope that you enjoy this edition of the Digest. As always if you details have changed or you would like to be added to the list please do email kirstendent@southsquare.com and we will do our best to get you the next edition. In the meantime all at South Square wish you all the best for the remainder of 2015.

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Schemes of arrangement and Chapter 11 of the US Bankruptcy Code: a comparative view

Antony Zacaroli QC and Alexander Riddiford compare the US Chapter 11 and English schemes of arrangement restructuring processes in light of recent English case law

Given the slew of recent decisions by the English High Court relating to the scope of the English Court's jurisdiction to sanction schemes of arrangement promulgated by overseas companies or corporate groups, it is timely to consider afresh the respective strengths and weaknesses (from the points of view of both companies seeking to restructure their debts and those companies' creditors) of the English scheme of arrangement and the restructuring processes available under Chapter 11 of the US Bankruptcy Code[1].

The international effectiveness of a restructuring will often be a critical consideration for those corporate groups with multinational operations, and for this reason (among others) the US and English Courts are often considered the most attractive forums in which to promulgate the restructuring of a multinational corporate group.

Accordingly, this article presents a broad overview of the pros and cons of the two restructuring processes from the points of view of debtor companies and their creditors, with particular reference to the jurisdictional thresholds required for each process (an area where the English law has developed markedly in recent years).

Schemes/Chapter 11 in the broader restructuring landscape

In comparing schemes and Chapter 11 reorganisation, it is useful to keep in mind that, while they share common features, they perform significantly different functions within the context of their different legal systems. Indeed, a full comparison of the English and US reorganisation procedures would require, on the English side, administration and corporate voluntary arrangements to be brought into the picture. That is because, in the US, the Chapter 11 procedure combines moratorium, debtor-in-possession management, reorganisation and restructuring of creditors' rights. The same ends in England are ordinarily achievable only via a combination of an administration and a scheme or voluntary arrangement. In this article we are concerned to compare those aspects of Chapter 11 that correspond to the English scheme jurisdiction.

It is particularly important to keep in mind the broader functions of Chapter 11 when comparing the jurisdictional thresholds for the two systems. The fact that Chapter 11 is what may be termed a 'full service' reorganisation procedure means that the jurisdictional threshold focuses on connections between the debtor and the US, in particular on the presence of assets within the jurisdiction. A scheme, on the other hand, is not

1/. It is emphasised that the authors are not qualified US law attorneys and so do not purport to give any expert view on any substantive issue of US law.

necessarily an insolvency procedure at all (hence its foundation in a section of the Companies Acts, and its use by solvent as well as insolvent companies), and the jurisdictional threshold reflects this. Whilst a scheme of arrangement can in theory be used as a means of compromising the claims of all creditors of a trading company, it is rarely so used. The relatively recent (10-15 years) growth in the use of schemes of arrangement as a restructuring tool of choice is largely confined to 'financing' companies, being those companies within a larger group that transact with the longer term financial creditors, and then on-lend the money raised to the wider group. Such companies tend to have no significant creditors other than the financing creditors and the legal rights of all such creditors are generally found in a suite of documents (senior loan, junior loan, security deed, intercreditor deed) governed by a single system of law. In these circumstances the main, if not the entire, focus of a scheme of arrangement is on the amendment of the contractual rights of the creditors, as contained in those documents. The courts have for a long time recognised the ability of a company to enter into a scheme of arrangement with some only of its creditors, provided that there is a sound commercial justification for the choice: see PT Garuda Indonesia (2001) WL 1171948, per Lloyd J: "I do not particularly see why the company should not be free to determine in a way which is not merely arbitrary what is the particular group or body of creditors with whom it wishes or needs to deal by a statutory procedure."

Jurisdictional thresholds

The generous jurisdiction assumed by the US Courts under Chapter 11 of the US Bankruptcy Code over multinational corporate groups is well established. Section 109(a) of the US Bankruptcy Code permits a Chapter 11 filing in a US bankruptcy court by a person, defined to include a corporate person, "*that resides or has a domicile, a place of business, or property in the United States*".

The US Courts have long relied on the "*property*" limb of section 109(a) as an anchor for a broad jurisdiction over foreign corporations, and have taken a broad approach as to what constitutes sufficient property for this purpose. For example in *In re Global Ocean Carriers Ltd* 251 B.R. (Bankr. D. Del. 2000), the Delaware Court heard a Chapter 11 petition filed by a shipping company headquartered in Greece (along with 15 of its subsidiaries) and, overruling a motion to dismiss brought by a minority creditor and a minority group of members, held that it was sufficient to establish jurisdiction under section 109(1) for

GARUDA AIRLINES: THE ABILITY OF A COMPANY TO ENTER INTO A SCHEME OF ARRANGEMENT WITH SOME ONLY OF ITS CREDITORS HAS LONG BEEN RECOGNISED BY THE ENGLISH COURT

ANTONY ZACAROLI QC

the debtor company to hold a few hundred US$ in a bank account in the United States. The meaning of the statute was clear, so as to "leave the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States."

A note of warning was, however, sounded in *In re McTague*, 198 B.R. 428, 432, in which it was said that placing property in the US for the sole purpose of being eligible to make a voluntary Chapter 11 filing (where that eligibility would not otherwise exist) may be treated as evidence of "*bad faith*" justifying the dismissal of a filing on that basis.

Further, the broad jurisdiction conferred by section 109(1) is subject (inter alia but in particular) to: (a) whether there are already foreign proceedings pending (section 305(a)(2)); and (b) the "*best interests*" test under section 305(a)(1), which provides that the Court may dismiss or suspend all proceedings in a case if the interests of both creditors and the debtor[2] would be better served by such dismissal or suspension. The case of *In re Aerovias Nacionales de Colombia SA Avianca* 303 B.R. 1 (Bankr. S.D.N.Y. 2003) represented an early decision in which a US Court had to weigh up these section 305 factors in the context of a voluntary Chapter 11 filing by a foreign company (a Colombian airline). The Court relied on the fact that there was no proceeding pending in a foreign Court, and placed weight (inter alia) on the creditors' willingness to submit themselves to the US jurisdiction, and on this basis the Chapter 11 filing was successful.

By contrast, although the basis of jurisdiction in England stems from a similar root, namely sufficient connection between the company and this jurisdiction, and although the English Courts have also adopted a broad approach to what constitutes sufficient connection, they have done so in a markedly different way. The origins of the sufficient connection test in English law are found in cases concerned with insolvency proceedings proper, for example liquidation. The three-fold test applied there requires i) that the company had a sufficiently close connection with England usually, but not invariably, in the form of assets within the jurisdiction; (ii) that there was a reasonable possibility of benefit accruing to creditors from the making of a winding up order; and (iii) that one or more persons interested in the distribution of assets were persons over whom the English court could exercise jurisdiction.

In the context of a scheme, it is the first limb which is generally critical. An early application of the sufficient connection test in the case of a scheme of arrangement was in *Re Heron International NV* [1994] 1 BCLC 667, where the English Court sanctioned a

2/. For the need to satisfy both requirements, see for example In re Eastman, 188 B.R. 621 (B.A.P. 9th Cir. 1995).

scheme promulgated by an overseas entity, accepting jurisdiction on the basis that the company held substantial assets in England.

Since the introduction of the concept of centre of main interest (COMI), the existence of COMI in England will invariably be sufficient to establish sufficient connection for the purposes of a scheme of arrangement. However, in recent years, in those cases where the purpose of the scheme is to restructure financing debt (as opposed to compromise the debts of a trading company) the English Court has considerably expanded its reach in the scheme context, not by a liberal approach to what constitutes sufficient assets (as in the US) but by concluding that there is sufficient connection with England if the law governing the debt to be restructured is English law. These developments are a relatively recent phenomenon. In May 2011 Briggs J held in *Re Rodenstock GmbH* [2012] BCC 459 that the English Court had jurisdiction to sanction a scheme of arrangement proposed by an overseas company where the relevant liabilities were governed by English law and subject to English jurisdiction. In June 2013, in *Re Vietnam Shipbuilding Industry Group* [2014] 1 BCLC 400 the Court clarified that there was a "*sufficient connection*" between the overseas company and the English jurisdiction where the only connection was that the company's liabilities were governed by English law. Things were taken a step further in November 2014 when Hildyard J held that it could be (and was on the facts before him) enough, for the purposes of establishing the "*sufficient connection*" required to establish the English Court's jurisdiction, for the governing law of an overseas company's liabilities to be changed to English law so as to enable the English Court to take jurisdiction (see *Re APCOA Parking Holdings LmbH and others (No 2)* [2014] EWHC 3849 (Ch)).

In some respects the English Court's jurisdiction is now more expansive than that of the US Court

This latter point does depend, however, on it being established that the change in governing law is valid and effective under the relevant system of law, from which it is sought to make a change. This issue arose in *DTEK Finance* [2015] 1164 (Ch), where it was contended that the change of law from New York law to English law was, as a matter of New York law (which was the old law governing the indenture) ineffective. The matter was resolved immediately before the sanction hearing by the 90 percent threshold of consents being achieved, and so no decision needed to be made on the point. This is an area where further guidance from the English court is likely to be forthcoming before long.

The difference in approach between the US and England on the jurisdictional threshold question reflects the fact that a scheme, although sharing many of the characteristics of a plan of reorganisation under Chapter 11, is focused solely on amending the terms of the debt between the company and its creditors. For an amendment of an English law contract (forced on a dissenting minority by the majority rule embedded in the statutory provisions governing schemes of arrangement) to be effective worldwide, it is generally accepted that it must be one that is valid and effective as a matter of English law.

In some respects the English Court's jurisdiction is now even more expansive than that of the US Court. For example, whereas a deliberate engineering of the circumstances which would give a debtor company standing to make a voluntary Chapter 11 filing has been ruled as bad faith (and the filing dismissed on that basis)[3], the English Court has not baulked at accepting jurisdiction where it is clear that the company has deliberately promulgated a change in the governing law of its liabilities with a view to obtaining the benefit of the English scheme jurisdiction (see *APCOA*). Moreover, a change of COMI in favour of England, undertaken with a view to taking advantage of English insolvency procedures, is also recognised and given effect to, provided that it is a sufficiently permanent change.

Procedure and relief

In terms of procedure, an English scheme of arrangement is promulgated in two stages: (a) first, by way of a convening hearing (at which the debtor applies to the Court for permission to convene meetings of identified classes of creditor and in some cases members); and (b) secondly, by way of a sanction hearing (once the statutory voting majorities have been obtained for all classes of creditor and, where applicable, member). At the convening hearing the Court considers (principally) the terms of the proposed scheme, the accompanying explanatory statement and the way in which the debtor proposes the scheme classes should be constituted. At the sanction hearing the Court has a discretion whether or not to sanction the scheme, taking into account (inter alia) whether all of the procedural requirements have been

3/. See In re McTague, 198 B.R. 428, 432, referred to above.

A Chapter 11 filing may be made without a reorganisation plan having been fleshed out by the company in advance

met and whether the creditor classes were fairly represented by those that attended the meetings.

By contrast, the initiation of a voluntary Chapter 11 process is rather more straightforward. Upon making a voluntary Chapter 11 filing the debtor company must file a list of creditors, in most cases a schedule of assets and liabilities (and of open contracts and unexpired leases), as well as various other items of information as set out in Rule 1007 of the Federal Rules of Bankruptcy Procedure. Upon entry into Chapter 11 proceedings the debtor is permitted to continue with its business operations (usually without a trustee being appointed), although the bankruptcy court is required to approve most major business decisions such as the sale of assets, entering into secured financing arrangements, and other matters of this kind. Ordinarily, the debtor will have the exclusive right for four months after it has made its Chapter 11 filing to propose a reorganisation plan, but when this exclusivity period (which may be extended) expires, the creditors' committee or other parties can propose competing reorganisation plans. It appears that competing plans are rare under Chapter 11, since in the normal course dissatisfied creditors will move to dismiss or convert the case to a Chapter 7 proceeding.

Chapter 11 filings fall into one of two categories: (a) the pre-negotiated cases (where a reorganisation plan has been substantially agreed prior to the filing); and (b) the free-fall cases (where the filing is made without an exit strategy having been formulated in advance).

Accordingly, one of the principal distinctions between the scheme jurisdiction and the Chapter 11 process is that, whereas a Chapter 11 filing may be made without a reorganisation plan necessarily having been fleshed out by the company in advance (the filing having been made perhaps primarily so that the company might obtain the protections that come with being in Chapter 11 proceedings), by contrast in the English context the details of the proposed scheme need to a great extent to have been worked out in advance of the convening hearing.

Indeed, as noted above, whereas the scheme of arrangement jurisdiction is limited to the restructuring process itself, without any of the incidents of a formal insolvency proceeding (such as the automatic statutory moratorium[4] or the appointment of an officeholder), those features are present in the Chapter 11 proceedings. Similarly, a pre-pack sale, analogous to the pre-pack sales in English administrations, may be effected by way of a Chapter 11 process.

In terms of the relief that may be obtained by a debtor as a result of a Chapter 11 filing, the principal items for present purposes are as follows:

- An automatic stay;
- The presumption that the debtor's management will remain in place rather than be replaced by a trustee;
- The ability to obtain post-petition financing;
- The ability to restructure financial obligations on a non-consensual basis pursuant to the "*cramdown*" provisions of the US Bankruptcy Code; and
- The discharge of a debtor from any debt that arose before the date of confirmation of a plan of reorganisation, regardless of whether a proof was filed (or whether the creditor in question accepted the reorganisation plan).

Some of these forms of relief, as noted above, are more reminiscent of the English administration regime than the scheme of arrangement jurisdiction. An important point of comparison with the English scheme jurisdiction, however, is in the Chapter 11 "*cramdown*" provisions. These provisions (see section 1129 of the Bankruptcy Code) provide that, so long as it satisfies all the other applicable provisions, a reorganisation plan may be confirmed notwithstanding that a class or classes have rejected it, subject to the plan: (a) not being unfairly discriminatory; and (b) being fair and equitable. By way of illustration of proviso (a), whereas a Chapter 11 plan may provide for connected parties to be treated less favourably than trade creditors this differential treatment may not be based solely on the fact that the connected parties are "insiders" (see *In re Woodbrook Assocs.*, 19 F.3d 312,321 (7th Cir. 1994). As to proviso (b), this requirement involves two discrete principles: (i) that a non-accepting class of creditors (or shareholders) cannot be compelled to accept less than payment in full while a more junior class of creditors (or shareholders) receives anything (the "absolute priority rule"); and (ii) that a more senior class of creditors (or shareholders) should not be paid more than the full value of its claim while cramming the plan down on a

4/. But see, for example, the English Court's decision in BlueCrest Mercantile BV v Vinashin [2013] EWHC 1146 (Comm), where a stay of certain creditors' actions was granted to allow creditors to consider the proposed scheme of arrangement.

more junior class of creditors (or shareholders).

In contrast to the flexibility of the Chapter 11 cramdown provisions, the voting majorities required for an English scheme to be approved are quite rigid. In short, a scheme requires approval by at least 75% in value of each class of the members or creditors who vote on the scheme (being also at least a majority in number of each class). If the scheme includes a reduction in the company's share capital then a separate special resolution of the company's members is also required (which is carried by a 75% majority of those voting).

The *quid pro quo* of the English scheme, however, is that although every class must vote in favour, the courts have in general been prepared to adopt a broad definition of 'class' and have (as noted above) a scheme to be entered into with some only of the company's creditors (so that the inability to obtain the agreement of a particular class of creditors – particularly a group with no economic interest in the company's assets in view of where the value breaks within the debt structure – is not fatal to the success of the scheme). So far as the former point is concerned, differences in the creditors' *interests* (as opposed to *rights* against the company) are insufficient to require them to be placed into separate classes. Moreover, even creditors with different rights (either going into, or coming out of, the scheme) may be combined in the same class, provided that those rights are not so dissimilar as to make them unable to consult together on the scheme in their common interest.

So far as voting within classes is concerned, the other major difference between the two jurisdictions is that the requisite majority by value under Chapter 11 is two-thirds, whereas it is 75% in an English scheme.

ALEXANDER RIDDIFORD

Conclusion

The jurisdictional threshold for a Chapter 11 filing has been low for a long time, extending to companies with a *de minimis* amount of assets held within the jurisdiction. In contrast, it is only in the last few years that English law has developed so as to expand the range of circumstances where an overseas company's connection with England will be considered "*sufficient*" for the English Court to accept jurisdiction in the context of a proposed scheme of arrangement. This expansion has, however, taken place in the context of schemes designed solely to amend the terms of the debt with a company's financing creditors and has, accordingly, focussed on the governing law of that debt.

This factor, together with the choice afforded to the company as to which creditors to encompass within a scheme, and the flexible approach which the English courts have traditionally taken to the definition of classes, means that the scheme of arrangement remains an extremely important and valuable tool in the restructuring world and one which, in combination with the use of the administration procedures under the Insolvency Act, imports much of the advantages available under the Chapter 11 jurisdiction.

European banking resolution...

TOM SMITH QC examines litigation arising out of collapsed banks under the new regime

One of the key lessons which was very quickly learned following the tumultuous events of 2008 was the need for a proper legal framework to be put into place in order to deal with banks which had run into distress [in an efficient and orderly way.] In the UK that first led to the Banking (Special Provisions) Act of 2008 which was in turn replaced in early 2009 by the Banking Act 2009. The 2009 Act introduced a new resolution regime to deal with distressed and insolvent banks, the primary objective of which was to promote and protect the stability of the UK financial system.

The EBRRD

Similar developments have been taking place at the European level, albeit proceeding at a slower pace, with the aim of providing for a unified regime for the resolution of distressed banks across Europe. These developments resulted in the European Banking Recovery and Resolution Directive entering into force on 1 January 2015 (EBRRD). This introduces a new framework for the resolution of failing credit institutions and investment firms, and supersedes and replaces the various national banking resolution regimes.

The EBRRD is a comprehensive piece of legislation but, at its heart, requires Member States to ensure that the resolution authority of the home Member State of a credit institution or investment firm has a number of core powers (so called "*resolution tools*") to enable to it to deal with a distressed credit institution or investment firm. These are:

- a sale of business tool: this enables authorities to sell part of the business of the bank without shareholder consent;
- a bridge institution tool: this allows authorities to transfer all or part of the business to an entity owed by the authorities, a so-called "*bridge institution*" which can then continue to provide essential financial services pending a sale to a third party;
- an asset separation tool: this enables the transfer of assets to a separate vehicle; and
- a bail-in tool: this enables debt to be written down to ensure that the creditors of an institution bear appropriate losses and that the need for a taxpayer "bail-out" is avoided.

The central feature of these tools is a power conferred on the resolution authority (which will usually be the Central Bank of the relevant Member State) to (a) transfer the shares (or other ownership rights) in the institution under resolution and/or (b) to transfer assets, rights or liabilities of the institution[1]. This power is key to the sale of business, bridge institution and asset separation tools. The EBRRD then imposes an obligation on other Member States to ensure that any such transfer has effect and is recognised. For these purposes, transfers of liabilities are potentially wide ranging and include (a) re-transfers (e.g. back from bridge institution to resolution institution), (b) further transfers (e.g. from bridge institution to a third party), and (c) partial transfers.

In relation to recognition, in broad terms, the scheme of the EBRRD provides that decisions by the

1/. Article 63 of the EBRRD

THE NATURE OF CREDITORS' RIGHTS IN RELATION TO A DISTRESSED EUROPEAN BANK, SUBJECT TO RESOLUTION WAS AT ISSUE IN *GOLDMAN SACHS INTERNATIONAL V NOVO BANCO SA*

resolution authority of the home Member State will have automatic effect across the EU. Prior to the crisis events of 2008, EU legislation in the form of the Credit Institutions Winding Up Directive, Directive 2001/24/EC (CIWUD) already provided for "*reorganisation measures*" and "*winding up proceedings*" in the home Member State of a credit institution to be automatically recognised and have effect in other Member States. The EBRRD has built on and used the regime established under CIWUD by providing for the concept of a "*reorganisation measure*" to be enlarged so that these measures now also include "*the application of the resolution tools and the exercise of resolution powers provided for in [the EBRRD]*".

The effect of what is on its face a relatively modest change in drafting terms is far reaching. It means that the rights of creditors against a European bank are now subject to the exercise of extensive powers by the resolution authority of the home Member State, including a power to transfer such liabilities away or to leave them behind in a "*bad bank*". Moreover, the consequences of such powers fail to be recognised in England, even where the relevant liabilities are subject to English law and to English jurisdiction (including exclusive jurisdiction). So far as English law is concerned, this represents a significant statutory inroad on the *Gibbs* principle i.e. that English law will not recognise the variation or discharge of a contractual liability other than in accordance with its governing law. Pursuant to the EBRRD, English law liabilities may be transferred or varied by the acts of

The rights of creditors against a European bank are now subject to the exercise of extensive powers by the resolution authority of the home Member State

TOM SMITH QC

the resolution authority of a bank's home Member State.

Similarly, the recognition of transfers, write-down or conversion applies irrespective of any prohibitions on assignment/transfer in the contract/instrument itself, and there is no ability for a creditor to challenge the transfer, write-down or conversion except by way of way of right of appeal in the Member State of the resolution authority itself[2]. There is also no express public policy carve out on recognition.

The UK Position

The UK has discharged its obligation to give effect to the exercise of resolution tools under the EBRRD by amending the definition of "*directive reorganisation measure*" in the 2004 Credit Institutions (Reorganisation and Winding Up Regulations) (**CI Regulations**). This now includes as a reorganisation measure "*any other measure to be given effect in or under the law of the UK pursuant to Article 66 of [the EBRRD]*"[3]. In addition, as noted above, the definition of "*reorganisation measure*" in CIWUD has itself been enlarged. The net effect is that the exercise of any resolution tool or resolution power under the EBRRD now has effect in the UK in relation to (a) any branch of the institution, (b) property or other assets or (c) debt or liability of that institution as if part of the general law of insolvency of the UK[4]. Amongst other things, it follows that any transfers, write-downs or conversions of liabilities by a resolution authority pursuant to the EBRRD now have automatic effect in the UK, even in relation to English law governed rights and obligations.

Novo Banco

So far as creditors of a distressed European bank are concerned, one of the principal questions which now arises is to what extent their rights – which may well be subject to express choice of law and jurisdiction provisions – can now be overridden by the operation of resolution tools under the EBRRD which have automatic effect across the EU. A creditor of a European bank may well have rights which are governed by English law and jurisdiction: where the bank becomes subject to resolution, is such a creditor effectively required to pursue his rights and remedies in the home Member State of the credit institution which is under resolution, or does he have any continuing ability to avail himself of his rights before the English courts? This was in effect the issue at the heart of the recent Commercial Court decision in *Goldman Sachs International v Novo Banco SA*[5].

That case arose out of the well-publicised collapse of the Portuguese bank, Banco Espirito Santo SA ("**BES**"). BES was subject to resolution by Banco de Portugal on 3 August 2014 by use of a bridge institution tool to transfer its assets and liabilities to a newly established bridge institution, Novo Banco. The purpose of a bridge institution is to facilitate sale of bridge institution or its assets, rights of liabilities to a private sector purchaser[6], and the original intention of the Portuguese authorities was for Novo Banco to be sold to a third party acquirer.

One of the liabilities of BES was a loan which had

2/. Article 85 of the EBRRD.
3/. By virtue of an amendment to the 2004 Credit Institution Regulations effected by the Bank Recovery and Resolutions (No 2) Order 2014.
4/. Regulation 5.
5/. [2015] EWHC 2371 (Comm).
6/. Article 41.2 of the EBRRD.

The recognition obligation under the EBRRD only extends to acts which are genuinely the exercise of resolution tools or powers

been advanced to it by Oak Finance, a Luxembourg securitisation vehicle, which issued notes subscribed for by international investors. Both the loan and notes were governed by English law and subject to English jurisdiction. The loan had had been prima facie transferred to Novo Banco by the 3 August 2014 resolution measure, and had been treated as such by Novo Banco. But in December 2014 the Banco de Portugal subsequently sought to "*interpret*" its earlier decision arguing that the loan was not in fact to be transferred and remained with BES, which was in essence left as a "*bad bank*".

The noteholders, who had become the lenders under the loan sued Novo Banco in London for repayment of the loan. The issue for the English court was whether it had jurisdiction to hear the dispute or whether the remedies of noteholders were in effect limited to a challenge in Portugal to the December decision of the Banco de Portugal. The English court decided that it did have jurisdiction. A number of important points as to the operation of the EBRRD regime on the rights of individual creditors follow from this.

First, and foremost, it is clear that the recognition obligation under the CI Regulations, and under the EBRRD, only extends to acts which are genuinely the exercise of resolution tools or powers within the meaning of the EBRRD. The relevant "*resolution powers*" are, for example, set out in Article 63 of the EBRRD, and there is no warrant or basis for recognising acts which do not involve the exercise of such a power. On the facts of the Novo Banco case, this meant that, whilst the English Court would recognise the original transfer of the Oak loan from BES to Novo Banco, it would not recognise the subsequent acts and decisions of the Banco de Portugal purporting to interpret or change that initial decision.

Similarly, the recognition obligation under the scheme of EBRRD does not extend to subsequent decisions or adjudications of the resolution authority or of the courts of the resolution authority; rather the obligation is to recognise the exercise of resolution tools and powers by the resolution authority, and the questions of whether an act is in fact the exercise of a resolution tool or power and, if so, the consequences of that act fall to be decided by the courts of the Member State in which recognition of the act is sought. Unlike the Insolvency Regulation[7], there is no principle or requirement under the EBRRD which requires decisions or adjudications of the courts of another Member State or of a resolution authority itself to be recognised.

The final point relates to the terms of the resolution measure adopted by Banco de Portugal in the Novo Banco case. This has been structured and drafted on the basis that all the liabilities of BES were to be transferred to Novo Banco except for certain "*Excluded Liabilities*" which were defined by reference to certain express criteria e.g. excluding loans made by shareholders with a certain level of shareholding in BES. In these circumstances, in order to establish the jurisdiction of the English court it was sufficient for the claimant lenders to show that they had the better argument that the Oak loan was not an "*Excluded Liability*".

Once this had been shown, it could then be said that the lenders had the better of the argument that the loan had been transferred to Novo Banco and that Novo Banco had thereby become a party to the jurisdiction agreement contained in the loan. Once this basis had been established then, in accordance with established principles, the English Court had jurisdiction and it was for the English Court to determine the action, including any question of whether the loan was in fact an "*Excluded Liability*". What this ultimately demonstrates is that, whilst the exercise of resolution powers and tools is undoubtedly a matter for the resolution authority of the home Member State of a credit institution, the working out of the effect of such measures on particularly rights, liabilities and obligations is likely to be a matter for the courts in which the recognition of the measure is sought.

Tom Smith QC appeared for the successful respondent lenders/noteholders in Goldman Sachs v Novo Banco.

7/. Article 25.

Case Digests

Does anyone know whether section 236 of the Insolvency Act 1986 has extraterritorial effect? In July, in MF Global UK Limited (in special administration), the Court decided that section 236, which gives officeholders powers to inquire into the company's dealings, does not have extraterritorial effect (summarised at page 25). The Judge, Mr Justice David Richards (as he then was) held that he was bound to follow the decision of the Court of Appeal in Re Tucker; a decision under section 25 of the Bankruptcy Act 1914 which was in substantially the same terms as section 236. This case is not going to appeal. In September, Mr Justice Hodge gave an extemporary judgment in the matter of Omni Trustees Ltd in which he decided that the Court did have jurisdiction to make an order pursuant to section 236 to require a person resident outside this jurisdiction to provide documents to the liquidator (summarised on page 26). Neither of these judgments refers to the decision in Re Casterbridge Properties Limited (in liquidation) [2002] BCC 453 in which it was decided that section 236 was "partially extraterritorial" in that an order could be made for the private examination to take place in the place of residence of the respondent, even if there was no jurisdiction under section 236 to require a person to come to this jurisdiction to be examined.

In Nortel Mr Justice Snowden gave permission for the administrators to make distributions to creditors permitting, among other things, distribution to creditors by means of creditors' voluntary arrangements the terms of which were intended to ensure that assets were distributed in accordance with the local law of the member states where permission had been given, previously, to operate "synthetic secondary proceedings" whereby assets would be distributed as if secondary proceedings had in fact been opened (see page 24)

HILARY STONEFROST

The judiciary appear to be retaining a hard line on relief from sanctions pursuant to CPR rule 3.9. In Akcine Bendore Bankas Snoras v (1) Antonov and (2) Yampolskaya a litigant in person, albeit a sophisticated litigant in person married to Vladimir Antonov with means to pay a lawyer for advice, failed to file her appeal bundle in time and failed to comply with an unless order requiring her to file the bundle. The point was made that the appeal bundle would only be read by the court weeks or more likely months later. The Judge refused, however, to grant relief from sanction. The

BANKING AND FINANCIAL SERVICES

Digested by TOBY BROWN


TOBY BROWN

Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq [2015] EWCA Civ 835 (Moore-Bick LJ, Sullivan LJ and Briggs LJ, 28 July 2015)

Letters of credit – third party debt and receivership orders – state immunity

The appellant ("Tarus"), wished to enforce an $8.7m arbitration award against the respondent ("SOMO") by means of third party debt and receivership orders. The underlying claim arose from contracts between the parties for sale of crude oil and LPG. Tarus obtained from the High Court an interim third party debt order and receivership order with respect to funds receivable by SOMO for an unrelated sale of oil under letters of credit issued by a London branch of Crédit Agricole S.A. The letters provided for payment to be made to a New York bank account and contained a separate promise to pay the Central Bank of Iraq ("CBI") in that way. On SOMO's application, Field J set aside the orders holding that the letters contained a single joint promise to both SOMO and CBI and therefore no third party debt order could be made, and in any event the debts were immune from execution under the State Immunity Act 1978. Tarus appealed.

Following the Court of Appeal's decision in *Power Curber International Ltd v National Bank of Kuwait S.A.K.* [1981] 1 W.L.R. 1233, Moore-Bick LJ and Briggs LJ held they were bound to decide that the debts were situated in New York rather than in London. As a result, the English Courts had no jurisdiction to make a third party debt order in relation to the letter, which must be discharged.

Since receivership orders operate *in personam* the same obstacle did not apply. However, the Lord Justices agreed that the Court should not have made the receivership order because it exceeded the proper limits of its jurisdiction. Moore-Bick LJ stated that since the order involved an exercise of the Court's powers in relation to property situated outside its own territory, "it calls for a degree of caution".

Although these matters were sufficient to dismiss the appeal, their Lordships disagreed on the additional question of the construction of the letters of credit. Briggs LJ (Sullivan LJ concurring, Moore-Bick LJ disagreeing) considered that the letters' unusual terms contained in its special conditions made CBI (not SOMO) the sole creditor of the money promised to be paid and therefore only it was entitled to the debt thereby created. As a result, the debt was immune from execution under the 1978 Act.


JEREMY GOLDRING QC


ROBIN DICKER QC

Deutsche Trustee Co Ltd v Cheyne Capital (Management) UK (LLP) [2015] EWHC 2282 (Ch) (Arnold J, 31 July 2015)

Commercial mortgage-backed securitisation transaction – servicing agreement – interpretation

The case concerned the interpretation of a clause in a servicing agreement which was part of the documentation for a commercial mortgage-backed securitisation transaction. The Claimant was the note trustee and issuer security trustee ("the Trustee") in relation to certain notes issued in 2007 as part of the transaction. Each class of notes was rated by one or more of the three rating agencies, Moody's, S&P and Fitch. Under the servicing agreement, the management of the loans was outsourced to a third party service provider (the "Servicer").

The relevant clause in the agreement required that any termination of the Servicer would not take effect unless "*the Rating Agencies have confirmed to the Issuer Security Trustee and the Note Trustee that the appointment of the successor [Servicer] will not result in an Adverse Rating Event, unless each class of Noteholders have approved the successor [Servicer], as applicable, by Extraordinary Resolution*".

The First Defendant ("Cheyne") acted as operating adviser to a class of noteholders and requested that the Trustee and Issuer terminate the appointment of the Servicer and appoint a specified replacement. The three rating agencies were notified of the request. S&P provided confirmation and Moody's indicated it would do so contemporaneously with the replacement. However, no confirmation was received from Fitch, which in 2012 publicly announced it would not provide such confirmations, having generally stopped doing so around 2007.

The issue was whether the clause permitted the replacement of the Servicer in circumstances where the

rating agency declines to say whether or not this would lead to an Adverse Rating Event. Cheyne contended that it should be interpreted as requiring confirmation from such rating agencies as were willing in principle to give such confirmations, and therefore the absence of Fitch's confirmation did not prevent the replacement of the Servicer. The Trustee argued that the meaning of the clause was clear and confirmation was required from all three agencies. In addressing the parties' arguments, Arnold J considered the various provisions of the agreement, conducting the "iterative process" of interpretation described by Lord Clarke in *Rainy Sky*. The Judge decided that the Trustee's interpretation accorded with the natural meaning of the words. Secondly, he held that the second limb of the clause provided a partial answer to the problem that had arisen, since an extraordinary resolution could be passed to replace the Servicer.
Thirdly, Cheyne's interpretation amounted to re-writing the clause, since the clause could easily have provided for the situation where the rating agency fails to respond to a request for confirmation and in fact the agreement had expressly done so with respect to Moody's. Finally, although both parties had argued the other's interpretation produced a commercially absurd result, the Judge decided the arguments on absurdity went in both directions. Accordingly, the Judge made a declaration in favour of the Trustee's interpretation.
[Gabriel Moss QC; Robin Dicker QC; Jeremy Goldring QC]

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Yampolskaya v AB Bankas Snoras (In Bankruptcy) [2015] EWHC 2136 (QB) (Green J, 2 July 2015)

Relief from sanctions – Case management

The Applicant applied for relief from sanctions arising from her failure to file an appeal bundle on time.
In 2014 the Lithuanian Court had given two judgments against the Applicant and her hushand for several million euros. Both of these judgments were subject of a registration order in England. The Applicant filed an appeal against the registration of the first judgment. As she was a litigant in person, she had been informed by the Respondent bank that her appeal might be misconceived but advised her to speak to the Citizens Advice Bureau. Despite this, the Applicant failed to file an appeal bundle on time. On the application she submitted that the failure to submit the appeal bundle was not significant, on the basis that it was a purely administrative default given that the bundle would only be read some weeks later by the Judge. She also submitted that she had not understood the Court's instructions and the fact that she was not a native English speaker should be taken into account.
The Judge refused the application. Applying the *Denton* test, the Court had to identify the seriousness or significance of the failure to comply with CPR rule 3.9(1). The test was not whether the breach was trivial, but whether it was serious or significant. Secondly, it had to consider why the failure occurred. Thirdly, it had to consider all the circumstance of the case so as to enable it to deal justly with the application and the need to enforce compliance with rules, practice directions and orders. Here, the failure was serious, since failing to file a bundle could affect how a trial proceeded and that was why the Court in *Denton* had urged a more robust approach to case management. An appeal against the registration of the Lithuanian judgment should have been seamless, but instead it had been delayed. Secondly, the failure had occurred because the Applicant had failed to read Court documents. Thirdly, the Applicant was a sophisticated person with access to resources and she was not comparable to many litigants in person. In the circumstances, the Court concluded that the Applicant had no right to delay registration further.
[Robert Amey]

Edgeworth Capital (Luxembourg) S.A.R.L. v Glenn Maud [2015] EWHC 2364 (Comm) (Leggatt J, 3 July 2015)


MARK PHILLIPS QC


WILLIAM WILLSON

Summary judgment – foreign law

The claimant ("C") applied for summary judgment of its claim under a personal guarantee given by the defendant ("D").

D was a shareholder in a Spanish company ("R") which had purchased a property in Spain, financed by a bank loan, security for which had included D's English law personal guarantee. A default under the loan agreement was triggered after late payment of interest, which meant that the entire loan became repayable. Insolvency proceedings began against R in Spain, and the C applied for summary judgment on the amount of the guarantee. R's insolvency administrators listed C as a subordinate creditor and C challenged their classification.

D submitted that, for the purpose of resisting summary judgment, under Article 97.2 of the Spanish Insolvency Act, if C's challenge to the classification of subordinate creditors was unsuccessful, then the court was required to declare guarantees in C's favour as extinguished. His argument was supported by a witness statement made by a Spanish lawyer. C submitted that that argument had no real prospect of success. The literal interpretation of the provision resulted in absurdity, and Article 97.2 applied only to guarantees in rem. C further submitted that it did not matter in any event because the applicable law was English law.

Held, applying the principles in *Tesco v Mastercard* [2015] EWHC 1145 (Ch) that, while It was hard to see any sense in D's interpretation, it was important to be cautious when dealing with questions of foreign law.

No opinion on the meaning of the provision had been given by an independent expert and the evidence provided was not subject to CPR provisions governing expert reports, including the duty to draw attention to a range of opinions. Those difficulties did not automatically preclude the court from granting summary judgment, but the issue was not straightforward. D's had the significant advantage of reflecting, on its face, the express wording of the provision. That interpretation might be wrong, but it was C who had to show that provision could not be given its clear meaning. Spanish was a civil law system and did not operate the same doctrine of precedent that the English court did. There was considerable force in the claimant's argument with regard to jurisdiction, but the court and the parties had not had adequate time to engage with the arguments in the short time available.

[Mark Phillips QC; William Willson]

Otkritie Capital International Ltd v Threadneedle Asset Management Ltd [2015] EWHC 2329 (Comm) (Knowles J, 7 August 2015)

Abuse of process – striking out

D applied to strike out a claim as an abuse of process on the basis that it should have been brought in earlier proceedings. C had brought proceedings in 2011 against its own employees for making false representations regarding investments. A member of an asset management company was joined as a tenth defendant in those proceedings. C won the 2011 litigation. In 2014 C sued D for vicarious liability on the basis that it had been the employer of the tenth defendant in the 2011 litigation, who had been found liable (along with the other defendants). The asset management company asserted that this claim should have been brought in the earlier proceedings and applied to have it struck out as an abuse of process on this basis. In *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260 it was held to be in the public interest and in the efficient use of court resources that a similar issue arising in complex commercial litigation should at least be made the subject of an application for case management direction in the first action (the *Aldi* principle).

The Judge refused D's application to strike out the claim. The Court applied the principles applicable to strike out applications brought on the basis that a claim was an abuse of process since it should have been brought in earlier proceedings, as set out in *Johnson v Gore Wood & Co (No.1)* [2002] 2 AC 1 and considered in *Aldi*. The Court noted that breach of the *Aldi* principle concerned case management, whereas whether there was an abuse of process concerned the general procedural rule and policy against abuse of process (*Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2014] AC 160 followed). However, a breach of the *Aldi* principle, coupled with a possibility that the Court might have

taken a different course but for the breach, created a low threshold for a finding of an abuse of process. The failure to bring the claim in the 2011 lititgation had deprived the Court of an opportunity to weigh the underlying public interest in the finality of iitigation (*Johnson v Gore Wood* followed). However, it was likely that the Court in the 2011 litigation would have allowed two separate sets of proceedings to be conducted. Accordingly, and notwithstanding that C had behaved irresponsibly in not complying with the *Aldi* requirement, this conduct was not an abuse of process and so the strike-out application was dismissed.

Emmott v Michael Wilson and Partners Ltd [2015] EWCA Civ 1028 (Black LJ, Lewison LJ, Gloster LJ, 14 October 2015)

Freezing injunctions – non-compliance – civil contempt

A freezing order was made following an arbitration award in favour of the Respondent. The Applicant company appealed against a decision that payments it had made were in breach of that freezing order. The freezing order had prohibited the Appellant from dealing with or disposing of any of its assets other than those that were in the ordinary and proper course of business. The Appellant had made two substantial payments to a company (K1) and its subsidiary (K2). The Appellant contended that these payments were in respect of a loan provided by K1 to finance its business and overdue rent relating to a premises let to it by K2.

At first instance the Judge proceeded on the basis that there had been a genuine loan and that the rent was not inflated. However, considering that there was at lest some connection between K1 and K2 and that the previous largest payments to K1 and K2 were substantially lower than the larger payments made after the order came into force, the Judge concluded that the payments were not made within the ordinary course of business.

The Court of Appeal held that the Judge had taken too narrow a view and held that there had been no breach of the freezing order. The Judge had overlooked various factors, such as that the K1 payment was less than one tenth of the balance outstanding on the loan, and that the rental liability had pre-dated the arbitration award and that the Appellant had made regular payments on account. In particular, it was not sufficient for the purposes of determining whether there had been a breach of the order to focus on the quantum of each payment.

Accordingly the Judge's finding that the payments had been made in breach of the freezing order were set aside.

COMMERCIAL CASES

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

AIG Europe Ltd v OC320301 LLP [2015] EWHC 2398 (Comm) (Teare J, 14 August 2015)

Insurance – solicitors – aggregation

A developer of two holiday home developments in Turkey and Morocco was advised by the Defendant firm, which had devised a scheme whereby investors paid money into an escrow account and were then to become beneficiaries of a trust, with the trust having security over the land purchased for the developments. Money was not to be paid out of the escrow account until adequate checks were made to ensure the security had been put in place. Monies were released even though the mortgage in respect of the land in Turkey was defective and the security over the shares in the company which owned the land in Morocco was of limited value because the developer only had a small shareholding. When the development was not completed and the developer was wound up, investors claimed against the firm, its partners and an employee.

The firm's insurer's case was that the investors' claims arose from similar acts or omissions in a series of related matters or transactions for the purpose of clause 2.5 of the Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors in England and Wales and should therefore be regarded as one claim, such that liability was limited to £3 million under the policy.

It was held that for the claims to have arisen from "similar acts or omissions" there had to be a real or substantial degree of similarity. In all the claims the developer could not pay the vendor for the land and the firm had failed to provide effective security, such that investors were exposed to loss, there was a real and substantial degree of similarity. However, "a series of related matters or transactions" pointed to transactions which were, by reason of their terms, dependent

on each other rather than independent and therefore the underlying claims, although they arose out of similar acts or omissions, were not aggregated as one claim.

Eurobank Ergasias SA v Kalliroi Navigation Co Ltd [2015] EWHC 2377 (Comm) (Judge Waksman QC, 10 August 2015)

Loan agreement – illegality

The Claimant bank was the successor-in-title to another bank which had, under the first loan agreement, lent $10 million to a shipping company and, under the second agreement, $50 million to two other shipping companies. The first loan was to finance the purchase of a vessel. The second loan was in two tranches: the purpose of the second tranche was to finance the purchase of two vessels, but the purpose of the first tranche was in dispute. The Claimant sought summary judgment in respect of its claim, as well as the Defendants' counterclaim that the second agreement had been entered into as a result of fraudulent misrepresentation by the lending bank and had been breached. The Defendants' position was that summary judgment should not be granted as there was a real prospect of showing that the second agreement was unenforceable as the sums due under the first tranche were payable in consideration for the loan under the second tranche, which constitutes an illegal commission under Greek law. It was also argued that an implied term of the first agreement meant that there could be no claim under that agreement as otherwise the bank would be allowed to take advantage of the aforementioned wrongdoing in relation to the second agreement. It was held that there was a real prospect of defending the claim in respect of the first tranche under the second agreement on the basis of illegality. However, summary judgment was granted in part as there was no real prospect of a successful defence to the claim under the second tranche. Further, in order to attract the principle that a party to a contract could not be permitted to take advantage of its own breach of duty, that duty had to be owed to the other party to the contract. In the instant case, any breach of duty committed by the lending bank was not as against the parties to the first agreement but rather the parties to the second agreement. In any event, the Claimant was not relying on, or taking advantage of the lending bank's alleged breaches. Rather, it relied on the fact of non-payment under the first agreement. Summary judgment was not granted in respect of the counterclaim, save insofar as it was alleged that as a result of the wrongdoing the Defendants had lost the opportunity to obtain $300m to refinance, which was fanciful.

Involnert Management Inc v Aprilgrange Ltd [2015] EWHC 2225 (Comm) (Leggatt J, 29 September 2015)

Insurance – negligence – non-disclosure

The Claimant purchased a yacht. Four years later, its broker (engaging a sub-broker) obtained the insurance in issue, stating on the proposal form that the yacht's value was €13 million. The Claimant claimed €13 million from its insurers in respect of damage to its yacht. If it failed to recover that amount from the insurers, the owner sought damages for negligence by the broker and/or sub-broker who had arranged the insurance. The issues were: (i) whether the insurers could avoid the policy on the basis of the non-disclosure of a €7 million valuation of the yacht and the fact that the yacht was on sale at the time of contract for €8 million; (ii) whether the policy could be avoided for misrepresentation; (iii) whether the yacht owner's claim was in any event barred due to non-compliance with contractual terms; and (iv) whether the broker and/or sub-broker were negligent. It was held that the insurers had been entitled to avoid the policy. The sub-broker had not owed a duty of care directly to the owner, but the broker, entering the €13 million figure on the form without the owner's agreement or knowledge had been negligent. As to loss, the owner would in any event have been unable to claim in respect of hull and machinery cover because it failed to file a proof of loss or notice of abandonment, but it would have been able to claim under the increased value cover for the sum of €2 million.

Goldman Sachs International v Novo Banco SA; Guardians of New Zealand Superannuation v Novo Banco SA [2015] EWHC 2371 (comm) (Hamblen J, 7 August 2015)

Loan agreement – conflict of laws

A company had loaned $835 million to a Portuguese bank. The loan agreement contained an English jurisdiction and choice of law clause. When the bank encountered financial difficulties some of its assets and liabilities were transferred by to the newly created Defendant bank, pursuant to the scheme for the rescue of banks contained in Directive 2014/59. The company later assigned its rights under the agreement to the Claimants, who brought proceedings seeking repayment of the loan by the Defendant. The Bank of Portugal declared that the liability had not been of the kind that could be transferred to the Defendant. The Defendant maintained that, as a consequence of the declaration, under Portuguese law there had been no transfer of the liability to it and that the English court was bound to recognise that. It sought to have the proceedings set aside or stayed. The Claimants position was, however, that the declaration was irrelevant to jurisdiction and, in any event, had no effect as a matter of English law. The applications were refused. The Court considered that the proceedings were civil and commercial matters and that the defendant, albeit not an original party to the agreement, could be taken to have agreed the jurisdiction clause as it had succeeded to the rights and obligations of the original bank. Further, the English Court was not seeking to adjudicate on the status or validity of the Bank of Portugal's declaration as the claim did not rely on its declaration and, insofar as the declaration was relied on by way of defence, the Court would not be pronouncing on its validity. Rather, it would be determining whether it had effect as a matter of English law.

[Tom Smith QC]

COMPANY LAW

Digested by MARCUS HAYWOOD

MARCUS HAYWOOD

Christopher Charles Dixon EFI (Loughton) v Blindley Heath Investments Ltd [2015] EWCA Civ 1023 (Longmore LJ, Jackson LJ, Hildyard J, 9 October 2015)

Estoppel – convention – pre-emption rights

The appellant company appealed against a decision upholding a transfer of its shares to the respondent company. The judge had held that although there were valid pre-emption rights in place, the appellant was estopped by convention from relying on them to prevent the transaction. The judge held there to be clear evidence of a common assumption between the parties that there were no valid rights of pre-emption in relation to the shares. The Court of Appeal held as follows: (1) Estoppel by convention was not confined to cases of mistake. Furthermore, a mistaken recollection was not a legally different state to forgetfulness. The essence of the principle was that the parties had conducted themselves on a basis which was different from the true basis and had mutually adopted a common assumption. Ignorance of the law could operate as a valid assumption, and if ignorance was enough, then forgetfulness had to be enough also, as long as the requirements as to conduct and unconscionability were also met. The real difficulty for a person seeking to establish an estoppel based on an assumption contrary to the true state of things was an evidential problem, not a legal one. It was the problem of showing that something other than forgetfulness had played a part in the adoption of the assumption, and that the person sought to be estopped assumed some responsibility for it. The assumption had to be shared, and while there did not necessarily have to be an expression of accord, there had to be more than a mere coincidence of view. On the fact, the judge had been convinced that both parties had manifested assent, and there was no reason to depart from that conclusion.

Optaglio Ltd v Tethal [2015] EWCA Civ 1002 (Black LJ, Lewison LJ, Floyd LJ, 6 October 2015)

Directors' Powers and Duties

An order for summary judgment in favour of directors in an action for breach of their duties in withdrawing a patent application was set aside as the judge had neither been justified in concluding the patent application had been weak, nor in holding that commercial pressures had meant that the directors had had no choice but to withdraw the application.

Optaglio Ltd ("Optaglio") appealed against a grant of summary judgment in favour of the respondent directors, Mr Tethal and Mr Hundson, in which Optaglio had alleged that the respondents had breached their directors' duties in withdrawing a patent application. Optaglio specialised in the manufacture of optical technology. In 2006, 90 per cent of the appellant's shareholding was acquired by a foreign investor.

In mid-2006 Mr Tethal attended a lecture given by Professor Song of the University of Manchester ("the University") concerning planar diodes and transistors. Optaglio had developed microstructure embossing techniques, and Mr Tethal realised that there was potential for combining the ideas being discussed by Professor Song and Optaglio's manufacturing techniques.

In September 2006 the University, a company called The University of Manchester Intellectual Property Limited and Optaglio entered into a Mutual Confidential Disclosure to enable the exchange of confidential information for preliminary evaluation purposes. At the end of 2006 and the beginning of 2007 Optaglio started tests with the University under the terms of the first MCDA.

In the spring of 2007 Optaglio became aware that Professor Song intended to speak at a conference in Cambridge. A decision was taken to file a patent application as a defensive measure to guard against anything said by Professor Song becoming part of the state of the art and thus destructive of any later attempt to patent the ideas which were then under discussion. The application was filed on 18 April 2007 in Mr Tethal's name.

In December 2007, by which time Mr Hundson had ceased to be a director, the application was withdrawn and a collaboration agreement was reached with the University.

Optaglio's case was that the withdrawal of the application was negligent and that the defendants fell below the level of skill, care and competence required of directors, either under their service contracts or pursuant to section 174 of the Companies Act 2006. The respondents contended that the patent application was withdrawn in the proper and skilled exercise of their duties as directors.

At first instance, the judge concluded that it was not seriously arguable that the decision to withdraw had been in breach of any directors' duties, as the appellant had perceived its patent application to be weak and that if it had wanted to benefit from long-term collaboration with the University it would have to withdraw the application, and that on the evidence all of the directors had acquiesced in that decision.

Allowing the appeal, the Court of Appeal held that it was not unarguably the case, as the judge had held, that it had been open to a director to agree to the withdrawal of the application without any breach of duty: the judge had neither been justified in saying that it had been established to the high standard necessary for summary judgment that the appellant considered its patent application to be weak or precarious, nor had he been justified in holding that the appellant had been under commercial pressures such that it had no choice but to withdraw the application

Although there was no dispute that when the application was withdrawn Mr Hudson had ceased to be a director and that it had been agreed that Mr Tethal would be the main contact in the relationship between Optaglio and the University and U, Mr Hudson had been aware of the progress of negotiations and had been the Optaglio's representative who signed the agreement which had expressly contemplated that the application be withdrawn. It had thus not been established to the summary judgment standard that Mr Hudson had not been a party to the decision to withdraw and that he had not been a director when the decision to withdraw had been taken.

As to loss, the Court of Appeal that tt was necessary to distinguish between absence of loss and difficulty in establishing it: there was no doubt that the appellant would have difficulty in showing loss, but the judge's reasons for saying that they had lost nothing could not be accepted.

CORPORATE INSOLVENCY

Digested by RYAN PERKINS


WILLIAM TROWER QC


DANIEL BAYFIELD


ADAM AL-ATTAR

Re Nortel Networks UK Ltd [2015] EWHC 2506, (Snowden J, 15 July 2015)

Rules of distribution

This application related to a number of companies incorporated in Europe, the Middle East and Africa (the "EMEA Companies") within the Nortel Group. The EMEA Companies were placed into administration in England on 14 January 2009, on the basis that each EMEA Company had its centre of main interests in the UK. Other companies in the Nortel Group filed for insolvency protection in Canada and the United States.

The office-holders of the Nortel Group companies worked together in an effort to co-ordinate a global reorganisation. When that proved impossible, it was decided to effect a global sale of the business and assets of the Group. The net sale proceeds of approximately US$7.3bn were paid into escrow bank accounts in New York, collectively known as the "Lockbox", pursuant to an Interim Funding and Settlement Agreement. The parties agreed to allocate the Lockbox monies in accordance with the directions of courts in the United States and Canada. An allocation protocol was approved by both courts, requiring a joint trial in Ontario and Delaware. On 12 March 2015, judgments were handed down by Judge Gross (in Delaware) and Mr Justice Newbould (in Ontario). In his judgment, Mr Justice Newbould requested that a claims determination procedure be initiated in England for the creditors of the EMEA Companies, so that the Lockbox funds could distributed on a timely basis.

Accordingly, the English administrators applied to the English court, before Mr Justice Snowden, for permission to commence a claims determination procedure.

The administrators proposed a different claims determination procedure for different EMEA Companies. In the case of one such company (NNUK), the administrators proposed to serve a "notice of intention to distribute" under rule 2.95 of the Insolvency Rules 1986, such that a standard proof of debt process would be initiated in accordance with the mandatory rules of English insolvency law. The administrators also applied for permission to make a distribution to the unsecured non-preferential creditors of NNUK, pursuant to paragraph 65(3) of Schedule B1 to the Insolvency Act 1986. After reviewing the authorities, Mr Justice Snowden granted permission.

The position was rather more complex in relation to the other EMEA Companies apart from NNUK (the Relevant EMEA Companies). Apart from NNUK, all of the Relevant EMEA Companies had "establishments" elsewhere in the EU, as defined by Article 2(f) of the EC Regulation on Insolvency Proceedings (1346/2000). Article 3(2) of the EC Regulation enables "secondary insolvency proceedings" to be opened in a Member State where the debtor has an establishment. Where secondary proceedings are opened, assets of the debtor situated in the relevant Member State are distributed according to local laws, including local priority and distribution rules. Such rules vary widely within the EU.

At the time of their appointment, the administrators considered it possible that creditors of the Relevant EMEA Companies in other EU Member States might seek to open secondary proceedings, so as to take advantage of local priority and distribution rules as regards local assets. The administrators considered that it would be in the interests of the Relevant EMEA Companies' creditors as a whole to avoid such secondary proceedings, which would be disruptive and expensive. Accordingly, the administrators obtained permission at an early stage from Mr Justice Blackburne to operate "synthetic secondary proceedings", whereby the Relevant EMEA Companies' assets would be paid to employees and preferential creditors as if secondary proceedings had been commenced. This was designed to remove any incentive for local creditors to apply for the opening of secondary proceedings.

The "synthetic secondaries" plan was largely effective to prevent the opening of actual secondary proceedings (except in relation to a French company, NNSA, for which secondary proceedings were opened in France). However, if the administrators converted the administrations of the Relevant EMEA Companies into distributing administrations (as in the case of NNUK), the mandatory rules of English insolvency priorities and distribution would come into effect. This would destroy the synthetic secondaries devised by the administrators, because creditors in other Member States could no longer be assured that local assets would distributed in accordance with local law. In order to avoid this situation, the administrators sought permission from Mr Justice Snowden to propose a series of CVAs, which will be structured to ensure that the Lockbox

monies belonging to the Relevant EMEA Companies will be paid to employees and preferential creditors as if secondary proceedings had been commenced. The administrators devised a bespoke CVA to deal with NNSA (for which actual secondary proceedings had already been opened), the details of which are explained in the judgment. Mr Justice Snowden held this was an entirely appropriate course of action, and granted permission for the administrators to promulgate the CVAs. **[William Trower QC; Daniel Bayfield; Adam Al-Attar]**

Re Angel Group [2015] EWHC 2372 (Ch), (Mr Robin Hollington QC, 29 July 2013)

Application for removal of administrators – specific disclosure – full and frank disclosure

These proceedings relate to a long-running dispute between the administrators of companies in the Angel Group, and the beneficial thereof (JD). JD had applied to remove the administrators, but the administrators contended that JD's application was merely an attempt to delay their investigations into a possible misfeasance claim against JD. The possible misfeasance claim related a substantial dividend which was paid prior to the collapse of the Angel Group. The administrators made an application against JD for specific disclosure of advice given by an accountant in respect of the dividend. JD resisted the application for specific disclosure on the basis, *inter alia*, that the misfeasance claim was totally unmeritorious. The Deputy Judge dismissed the application for specific disclosure. He left it to the Judge at the substantive hearing of the removal application to determine, in his discretion, whether any adverse inferences should be drawn from JD's failure to give full and frank disclosure.

Re MF Global UK Ltd [2015] EWHC 2319 (Ch) (David Richards J, 31 July 2015)


GABRIEL MOSS QC


FELICITY TOUBE QC

Extraterritorial effect

The special administrators of the company (MFG) made an application against two entities in the London Clearing House Group under section 236 of the Insolvency Act 1986. The first respondent (R1) was incorporated in England. The second respondent (R2) was incorporated in France, and had no presence in England. Prior to its collapse in 2011, MFG held a number of open positions in respect of European sovereign debt. Following MFG's default, the respondents exercised their contractual rights to close out MFG's open positions. The close-outs resulted in losses for MFG. The administrators sought an order for the production of documents relating to the close-outs, for the purpose of determining whether proceedings should be issued against the respondents. The application was dismissed. In relation to R2 (the French company), the Judge held that section 236 does not have extra-territorial effect, following the decision of the Court of Appeal in *Re Tucker* [1990] Ch 418. The Judge recognised that many other sections of the Insolvency Act enjoy extra-territorial effect, including sections 133, 213 and 238. However, the Judge held that he was bound to follow *Re Tucker*. Since R2 had no presence in England, the court had no jurisdiction to make an order under section 236. The administrators advanced an alternative application under section 237(3), which empowers the court to order that "*any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 … shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom.*" Pursuant to the latter provision, the administrators applied for the English court to issue a letter of request to the French court for an order compelling the production of the relevant documents. The administrators relied on Council Regulation (EC) 1206/2001 of 28 May 2001 (the Evidence Regulation), which empowers the English court to issue a letter of request to a court elsewhere in the EU to obtain evidence in "*civil or commercial matters*".

The administrators' alternative application was also dismissed. It is a pre-requisite of a request under the Evidence Regulation that the evidence sought is intended for use in judicial proceedings, commenced or contemplated, which will result in a decision. The Judge held that the administration of MFG did not constitute judicial proceedings in the relevant sense. Accordingly, a letter of request could not be issued under the Evidence Regulation. There was no other juridical basis for issuing a letter of request, so the alternative application under section 237(3) failed. In relation to R1 (the English company), the Judge also dismissed the administrators' application. The Judge held that there was insufficient evidence that an investigation into R1 was warranted.

[Gabriel Moss QC; Felicity Toube QC]

In re Omni Trustees Ltd (in liquidation) [2015] EWHC 2697 (Ch) (His Honour Judge Hodge, 14 September 2015)

Section 236 - Production of documents

This was an application by the Official Receiver as liquidator of Omni Trustees for an order pursuant to section 236 of the Insolvency Act 1986 for production of documents and an examination of an individual who resides in Hong Kong, Mr Norriss. The application originally came before His Honour Judge Pelling and His Honour Judge Pelling stated that he did not have power to summon a person from abroad to appear before the Court in this jurisdiction; he adjourned the hearing and gave permission to serve by email on Mr Norriss. The matter came back before the same Judge who gave directions for filing and serving evidence. Mr Norriss did not serve any evidence. At the hearing before His Honour Judge Hodge the Official Receiver did not seek examination of Mr Norriss either in Hong Kong or in this jurisdiction, he was asking for a witness statement and supporting documents. His Honour Judge Pelling considered the decision of Mr Justice David Richards (as he then was) in MF Global and noted that what was sought in that case was production of documents and a description by way of witness statement of certain dealings with the company. His Honour Judge Pelling declined to follow the decision of Mr Justice David Richards in MF Global (summarised above) Pelling HHJ decided that section 25 of the Bankruptcy Act 1914, which was considered in Re Tucker, was framed in such a way that the Court's power to order the production of documents was ancillary too and dependent upon the power summon a person before the court. Re Tucker, he stated, had been decided on the basis that the Court will not compel someone to come to this jurisdiction to be examined on oath and produce documents. By contrast, he held that section 236 of the 1986 Act was structured differently from section 25 of the 1914 Act and that the court had a freestanding power to order production of books, papers and records. HHJ Pelling found some support for this approach the judgments in Re Mid-East Trading Ltd [1998] 1 BCLC 240 where the Court of Appeal decided that it did have jurisdiction to make an order under section 236 requiring the production of documents that were situated in a foreign jurisdiction where the respondent was not outside the jurisdiction of the English court.

Re Finch (UK) plc [2015] EWHC 2430 (Ch), (HHJ Hodge QC, 13 August 2015)

Preferences – misfeasance – unlawful dividends – redeemable shares

The liquidators brought proceedings against the respondents (a husband and wife), who were the company's sole directors and shareholders, under sections 212 and 239 of the Insolvency Act 1986. The husband borrowed £875,000 from the company to purchase 875,000 of the company's own redeemable shares. Shortly thereafter, the company redeemed the shares. The company set off its liability to pay the redemption amount (£875,000) against the husband's loan, which was written-off in full. The company went into creditors' voluntary liquidation within 6 months of the write-off. The liquidators claimed that the allotment of the redeemable shares constituted misfeasance, and that the write-off constituted a preference under section 239 of the Insolvency Act 1986. The Deputy Judge rejected the claim for misfeasance. Both respondents, as the sole directors and shareholders of the company, had approved the allotment of the shares. Accordingly, the principle in *Re Duomatic Ltd* [1969] 2 Ch 365 blocked the liquidators' claim for misfeasance, notwithstanding any non-compliance with the technical requirements of the Companies Acts in relation to the allotment of shares for non-cash consideration. However, the liquidators' claim under section 239 succeeded. From the moment that the husband served notice on the company demanding the redemption of his shares, he became a creditor in the sum of £875,000. The write-off caused the husband to receive 100p in the £, which he would not have received in a liquidation. Further, the company did not have sufficient distributable reserves at the time when the shares were redeemed, contrary to the requirements of the Companies Acts. The redemption of the shares therefore constituted misfeasance. Such misfeasance could not be cured by the *Duomatic* principle, which had no application once a company was insolvent or in financial difficulties.

RE SSRL Realisations Ltd [2015] EWHC 2590 (Ch) (Richard Spearman QC, 14 September 2015)

Administration – permission for forfeiture – paragraph 43 of Schedule B1

A landlord applied for permission to forfeit a lease belonging to the company (which was in administration), pursuant to paragraph 43 of Schedule B1 to the Insolvency Act 1986. The Deputy Judge granted the landlord's application. Applying the test in *Re Atlantic Computer Systems plc* [1992] Ch 505, the basic issue was whether the forfeiture would impede the purposes of the administration. In the present case, the purposes of the administration would not be impeded, because *inter alia* (i) the administrators would be unlikely to achieve a significant premium by assigning the lease, and (ii) the administrators had already been appointed for nine months.

Re Sahaviriya Steel Industries UK Ltd [2015] EWHC 2726 (Ch), HHJ Pelling QC, 30 September 2015

Validation order – prejudice to creditors – hearings in private – CPR 39.2(1)

The company applied under section 127 of the Insolvency Act 1986 for a validation order in respect of various payments, which would enable the company to restructure its debt or to negotiate a disposal of its business. The application was granted. HHJ Pelling QC held that: (i) the purpose of the rule in section 127 of the Insolvency Act 1986 is to preserve the assets of an insolvent company so that they can be distributed *pari passu*; (ii) however, there are circumstances in which it is beneficial for the company and its unsecured creditors that the company is permitted to dispose of its assets after the presentation of a winding-up petition; and (iii) the overriding concern of the court is to ensure that the interests of the unsecured creditors will not be prejudiced (*Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 applied). In the present case, the proposed payments would not increase the company's liabilities, and would further the interests of the unsecured creditors by enhancing the prospect of a successful restructuring or disposal. Unusually, the proceedings were heard in private. The general rule under CPR 39.2(1) is that public hearings are the default position. However, the court can direct for a hearing to be conducted in private where the justice of the case so requires. In the present case, the application involved a large quantity of commercially sensitive information. If such information were disclosed to the public, the company's restructuring plans might have been compromised, contrary to the interests of the unsecured creditors.

Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030, (McCombe LJ, Gloster LJ and Rimer LJ, 13 October 2015)

Injunction restraining winding-up petition – interim payments – construction insolvency

The appellant (W), a property developer, sought an injunction restraining a building contractor (H) from presenting a winding-up petition against W. The contract between W and H provided for certain "interim payments" to be made by W to H during the duration of the project, pursuant to sections 110 and 111 of the Housing Grants, Construction and Regeneration Act 1996. H presented a winding-up petition against W for its failure to make certain of the interim payments. H itself was insolvent. W argued that, under the terms of the contract, it had no obligation to make the interim payments (by virtue of H's insolvency). At first instance, the Judge rejected W's application for an injunction restraining the presentation of the petition. The Court of Appeal allowed W's appeal, and granted a permanent injunction. On the true construction of the contract, W had no obligation to make any interim payments from the date when H became insolvent. The court also held that, in appropriate cases (including where the relevant contractor is insolvent), the provisional nature of an employer's obligation to make interim payments will lead to the court refusing summary judgment on an application on an adjudication in favour of the contractor. However, there is no absolute rule that summary judgment on an adjudication will be refused simply because the employer is able to prove that the contractor is insolvent. The court is obliged to take all relevant circumstances into account.

Official Receiver v Sahaviriya Steel Industries Public Co Ltd [2015] EWHC 2877 (Ch) (HHJ Pelling QC, 13 October 2015)

Service out of the jurisdiction – sections 233 and 236 – extraterritorial effect

The OR, acting as the liquidator of the company (S), sought permission to serve an application out of the jurisdiction against the respondent, which was the holding company of S. The respondent was registered in Thailand. The application sought relief under section 233 of the Insolvency Act 1986, in order to restore S's access to an essential IT system. The application also sought relief under section 236 of the Act. HHJ Pelling QC heard the proceedings in private, on the basis that the OR might otherwise have felt inhibited from discussing the issues frankly.

HHJ Pelling QC granted permission for the application to be served out of the jurisdiction, pursuant to rule 12A.20 of the Insolvency Rules 1986 and CPR Part 6. There was a strong *prima facie* case that the OR was entitled to the relief sought under section 233. The most important issue, for present purposes, was whether section 233 had extraterritorial effect. That issue has yet to be determined conclusively by an English court. Nevertheless, HHJ Pelling QC considered it strongly arguable that section 233 does have extraterritorial effect. There was a "serious question to be tried", such that service out of the jurisdiction would be permitted. Further, there was no evidence that the OR could bring proceedings in Thailand to achieve the same relief. HHJ Pelling recognised that it is much less straightforward whether section 236 has extraterritorial effect (see the *MF Global* case cited above). Although the OR's case was sufficiently strong to justify service out of the jurisdiction, a substantive order would not be made against the respondent *ex parte*.

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


MATTHEW ABRAHAM

Re Riemann (Registrar Briggs, 31 July 2015)

Annulment of Bankruptcy Order

This was an application by a tax office in the state of Lower Saxony, Germany, to annul a bankruptcy order made against Dr Ernst Riemann (the Debtor) pursuant to s. 282(1)(a) of the Insolvency Act 1986. The order was made on 30 September 2008.

The application for annulment was based on two grounds (1) the Debtor's centre of main interest (COMI) was not in England and Wales when the order was made; and (2) the order ought to be annulled on the basis of material non-disclosure. In the alternative, the application sought the rescission of the order that was made. In support of its application the tax office argued that the Debtor's COMI was in Germany on 30 September 2008 and not in England and Wales as was claimed. In particular, the tax office relied on the following: (1) the Debtor maintained interest in Germany at the date of the bankruptcy order and (ii) the Debtor's quick return to Germany soon after the order was made.

In dealing with the issues of COMI and the EC Regulation the Court relied on the principles set out by Newey J in O'Donnell v The Governor and Company of the Bank of Ireland [2013] BPIR 509. Following a detailed review of the factual circumstances in the present case the Court found that the administration of the Debtor's main interests was in England on a regular basis as at 30 September 2008. Further, the Court held that the Debtor's main interest was ascertainable by third parties including the German creditors, the tax office and potential creditors. As a result the Court held that the tax office had failed to discharge the burden of proof to demonstrate otherwise. It was argued by the tax office that the order should not have been made at the time as there was a failure to disclose the Debtor's pension policy in the statement of affairs and such material non-disclosure was ground for an annulment. This was based on the dicta of Registrar Baister in Official Receiver v Mitterfellner [2009] BPIR 1075 and Proudman J in Die Sparkasse Bremen AG v Armutcu [2013] BPIR 210. Following a review of the facts in the case the Court found that the non-disclosure raised was not material and that the bankruptcy order would have been made as the Debtor was insolvent. In particular, the Court found that the order should not be disturbed as a result of an innocent mistake which had no effect on the estate.

Given the findings of fact set out above the Court also found that it was not appropriate for the Court to exercise its discretion in favour of the rescission of the bankruptcy order.

[Daniel Bayfield]

Re Franke (Deputy Registrar Schaffer, 27 May 2015)

Opposition debtor's Bankruptcy Petition

This was the hearing of a bankruptcy petition by a German national (the Debtor) that was opposed by one of the Debtor's German creditors. The bankruptcy petition was presented on 30 May 2014. It was opposed on two grounds: (1) the Debtor's Centre of centre of main interest (COMI) was in Germany at the time the petition was presented and not in England and Wales; and (2) there was material non-disclosure in the Debtor's statement of affairs such that the Court ought to dismiss the petition.

In relation to the issue of COMI, the Court relied on the factors set out by Chief Registrar Baister in Schrade v Sparkasse Lundenscheid [2013] BPIR 911 which was gleaned from the decision in Sparkasse Hilden Ratingen Velbert v Ben & Another [2012] EWHC 2432 (Ch). The Court noted that, unlike most bankruptcy cases involving COMI which arise in relation to an annulment application, in the present case the burden was on the Debtor to show his COMI was in England and Wales at the time the petition was presented. The Court referred to the decision in Schrade v Sparkasse in support of this. The Court also highlighted the decision in Re Eichler (No. 2) [2011] BPIR 1293 where the Court made the distinction between conducting affairs *in* England as opposed to *from* England.

Following the examination of witnesses, in particular the cross-examination of the Debtor whose evidence the Court found unconvincing, the Court was firmly of the view that the Debtor had failed to discharge the burden on him to show that his COMI was in the jurisdiction at the time the petition was presented. In particular, the Court found that (1) the Debtor had moved to England to avoid German judgments obtained against him; (2) there was no evidence of any business being undertaken by the Debtor in England; and (3) any evidence of a permanent move was not genuine and merely transitory. As a result, the Court held that the petition should be dismissed due to the Debtor's failure to establish his COMI in England and Wales.

The Court further found that there was nothing in the evidence which would lead the Court to conclude that anything had changed between the time the petition was presented and when the matter came before the Court. As a result the Court held that to present at this stage a further bankruptcy petition is likely to be an abuse of process.

In addition to the above, the Court held that, if it was wrong on the question of jurisdiction, the omissions and inaccuracies, drawn out from cross-examination, in the Debtor's statement of affairs was sufficient and an entirely independent ground to dismiss the petition. In this regard the Court relied on the decision of Proudman J in Die Sparkasse Bremen AG v Armutcu [2013] BPIR 210.

[Matthew Abraham]

PROPERTY & TRUSTS

Digested by ANDREW SHAW

Federal Republic of Brazil v Durant International Corpn [2015] 3 WLR 599 (Lord Neuberger, Lord Mance, Lord Carnwath, Lord Toulson, Lord Hodge JJSC, 3 August 2015)


ANDREW SHAW

Constructive trusts – tracing

This case concerned a substantial fraud that took place in Sao Paulo in the mid to late 1990s in connection with a major public works contract, resulting in payments to either or both of Paulo Maluf and his son, Flavio Maluf (together, "the Malufs").

At the trial the Respondents set out to show that certain of those monies could be traced into specific credits made to a bank account held in the name "Chanani" at Safra International Bank in New York, an account said to be beneficially owned and controlled by the Malufs ("the Chanani account"). It was alleged that those monies were subsequently transferred to an account held in the name of Durant International Corpn ("Durant") at Deutsche Bank, Jersey ("the Durant account"). Both Durant and Kildare Finance Ltd ("Kildare"), the other Appellant, were at all material times beneficially owned and controlled by the Malufs. At first instance, the Royal Court of Jersey upheld the Respondents' claim, finding that Paulo Maluf had practised a fraud on the Second Respondent and received 15 secret payments. Flavio Maluf was aware of the nature of these payments and arranged for the transfer of at least 13 of them, amounting to some US$10,500,055.35, into the Chanani account. These payments were subsequently transferred to the Durant account and then to a bank account held by Kildare. Since the knowledge of the Malufs was attributable to each of Durant and Kildare, these entities were liable as constructive trustees to the Respondents in the sum of

US$10,500,055.35. The Court of Appeal in Jersey upheld the first instance judgment and refused permission to appeal to the Privy Council. Permission to appeal was granted by the Privy Council, before which the Appellants argued that their liability was limited to some US$7.7million because (i) three impugned payments into the Chanani account were made after the final payment from the Chanani account to the Durant account and so could not be traced because "backwards tracing" is not permitted; and (ii) the Chanani account was a mixed account and two payments made from it to the Durant account exceeded the lowest balance which could be said to represent the Respondents' funds, so breaching the "lowest intermediate balance" rule.

While the Board rejected the Respondents' contention that money used to pay a debt can, in principle, be traced into whatever asset was acquired in return for the debt, it was prepared to accept that where a close causal and transactional link existed between the incurring of a debt and the use of trust funds to discharge it, then it might be possible to trace the value of the misappropriated trust funds into the asset acquired with the debt. Thus, where a court is satisfied that the various steps comprising the movement of monies are, "*part of a coordinated scheme*", then it, "*should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect*." So, if an account is used as a conduit for the transfer of misappropriated monies, tracing through that account could still be possible even if it is overdrawn at the time. The Board rejected the Appellants' argument that "backwards tracing" could never occur and that the value of an asset could never be traced through an overdrawn bank account but held that in such circumstances it would be for the claimant to establish the necessary connection between the misappropriated trust monies and the asset that was the subject of the tracing claim. Such a connection existed in the instant case, and so the appeal was dismissed. The Board explicitly stated that it did not doubt the correctness of the decisions in *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 and *Re Goldcorp Exchange* [1995] 1 AC 74, both of which had applied the "lowest intermediate balance" rule; however, in neither of those cases was there evidence of, "*an overall transaction embracing the coordinated outward and inward movement of assets*."

Ghazaani v Rowshan [2015] EWHC 1922 (Ch) (HHJ Behrens, sitting as a Judge of the High Court in Leeds, 13 July 2015)

Oral Contracts for Transfer of Land – proprietary estoppel

Two members of the Iranian community in Leeds were involved in a dispute over the transfer of two properties, one in Leeds and one in Tehran. Dr Ghazaani's case was that, pursuant to an agreement between the parties, he had transferred an apartment in Tehran and made an additional payment to the defendant, Mr Rowshan, but that Mr Rowshan had failed to transfer the Leeds property to Dr Ghazaani. While Mr Rowshan accepted that the parties had agreed in principle to transfer the properties, he denied that he had received any payment or that the property in Tehran had been transferred to him. The judge found as a matter of fact that there was an oral agreement between the parties for the exchange of the Leeds property and the Tehran property, together with the payment of an "equality payment" by Dr Ghazaani. He further held that Dr Ghazaani had transferred the Tehran property to Mr Rowshan and had given him two cheques totalling IRR 500 million as the "equality payment". While Mr Rowshan had instructed his tenant in the Leeds property to pay the rent to Dr Ghazaani and allowed Dr Ghazaani into possession of that property, he did not transfer title to him. Since the contract for the transfer of the Leeds property was oral, it did not comply with the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. While this provision allows an exception in the case of resulting, implied or constructive trusts, there is no such exception in the case of proprietary estoppel. After considering the authorities, the judge concluded that a proprietary estoppel could nonetheless arise in instances where there was no written contract but that such cases would be exceptional. The judge also held that this was a case where there was considerable overlap between the areas of constructive trust and proprietary estoppel.

The judge considered that in circumstances where the parties had agreed all the terms orally and never intended to reduce them to writing and where Dr Ghazaani had fulfilled his obligations it would be unconscionable of Mr Rowshan to refuse to complete the transfer of the Leeds property to him. Accordingly, Dr Ghazaani had succeeded in establishing that the conditions existed for the establishment of a constructive trust and/or a proprietary estoppel. The judge made an order that the Leeds property should be transferred to Dr Ghazaani and also made ancillary orders so that the parties were put in the same position as if the oral agreement had been properly and punctually performed.

SPORT

Digested by ROBERT AMEY


ROBERT AMEY

Bruce Baker v The British Boxing Board of Control [2015] EWHC 2469 (Ch)

Appeal Stewards of the British Boxing Board of Control – whether constituting an arbitral tribunal under the Arbitration Act 1996

Mr Baker was a professional boxing promoter. In 2013, he was involved in a boxing promotion that had not been authorised by the British Boxing Board of Control (the Board). As a consequence, he was charged with misconduct pursuant to the Board's regulations, and summoned to a disciplinary hearing. Following the hearing, the Board withdrew Mr Baker's licence.

Mr Baker then appealed to the Board's 'Stewards of Appeal'. Nine Stewards, all qualified lawyers (including five QCs, two junior barristers and two solicitors) heard his appeal, and upheld the Board's decision. Mr Baker, still dissatisfied with the removal of his licence, commenced proceedings in the High Court challenging the lawfulness of the decision. The Board applied to strike out the proceedings on the basis that the hearing before the Stewards of Appeal had been an arbitration, and so was only challengeable on the limited grounds set out in the Arbitration Act 1996.

The court noted that section 58 of the Arbitration Act 1996 provided that an arbitral award was final and binding, and could only be challenged under another available arbitral process or in accordance with the provisions of sections 67-69 of the Act. Mr Baker had exhausted all available arbitral processes, and was out of time to challenge the Stewards' decision under the Act. Accordingly, if the Board could show that the Stewards were an arbitral tribunal, Mr Baker's challenge would necessarily fail.

The Board relied upon a line of authorities on sporting appeal tribunals, including *The England and Wales Cricket Board Ltd v Kaneria* [2013] EWHC 1074 (Comm) (whether an appeal tribunal considering allegations of match-fixing was an arbitral panel within section 43 of the Arbitration Act 1996, so enabling the High Court to issue a witness summons in aid of its processes), *Walkinshaw* v *Diniz* [2000] 2 All ER (Comm) 237 (a case about Formula One motor racing) and *O'Callaghan* v *Coral Racing Ltd*, The Times, 26 November 1988 (a case about the effect of referring disputes in a gaming agreement to a newspaper editor). In the present case, the court recalled the ten indicia of arbitration set out in *Kaneria*: (i) it is a characteristic of arbitration that the parties should have a proper opportunity of presenting their case; (ii) it is a fundamental requirement of an arbitration that the arbitrators do not receive unilateral communications from the parties and disclose all communications with one party to the other party; (iii) the hallmarks of an arbitral process are the provision of proper and proportionate procedures for the provision and for the receipt of evidence; (iv) the agreement pursuant to which the process is, or is to be, carried on ('the procedural agreement') must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement; (v) the procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal; (vi) the jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration; (vii) the tribunal must be chosen, either by the parties, or by a method to which they have consented; (viii) the procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides; (ix) the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law; and (x) the procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which has already been formulated at the time when the tribunal is appointed.

Noting that it is not necessary to refer expressly to the process being an "arbitration" for it to be an arbitration, the court held that the procedure of the Stewards satisfied all ten requirements, and fell within the Arbitration Act 1996. Accordingly, it did not matter that Mr Baker complained that the Stewards had made serious errors of law and fact. The policy of the Act was to limit challenges to the result of arbitrations, however fundamental, to the grounds and the time limits laid down by the Act. Such a policy provides certainty to the many, at the cost of possible injustice to the few. The court therefore struck out Mr Baker's claim.

Nominee directors

Hilary Stonefrost considers disclosure of a company's confidential information to a nominee director's appointor

The expression "*nominee director*" in this article is used to describe the situation where a director is appointed to the board of a company by a person for the purpose of representing that person's interests. Usually the appointor is a shareholder or a major creditor of a company.

Such a nominee director is a director who falls within the category of *de jure* directors falling within the definition of director in section 250 of the Companies Act 2006 (the **2006 Act**). A nominee director has the same duties to the company as any other *de jure* director.[1]

The fact that a person has been nominated as a director by a third party does not impose a duty on the nominee director to that person.[2] Even where there is a separate duty owed by the nominee director to his appointor because, for example, the nominee director is an employee or officer of the person who nominated him, these obligations do not alter or detract from the duties that the nominee director owes to the company.[3]

The inherent difficulty faced by all nominee directors is obvious: a nominee director owes the same duties to the company as every other director but, at the same time, the commercial reality is that he has been appointed to his position as a director in order to protect the interests of his appointor.

The absolutist approach, which did not allow the interests of the appointor to play any role in the decision of a director, has now been attenuated.

In *Re Southern Counties Fresh Food* [2008] EWHC 2810, Warren J held that directors' duties, including the duty to act in the best interests of the company, can be attenuated with the unanimous agreement of the shareholders. Subsequently, in the *Neath Rugby Club* case[4] it was held that nominee director is able to take into account the interests of their appointors if (a) this interest does not conflict with the interests of the company; and, (b) acting in the interests of the appointor is also likely to promote the success of the company. In that case Mr Cuddy and Mr Hawkes were equal shareholders in Neath Rugby Club Ltd (**Neath**). Mr Cuddy was Neath's nominee director on the board of Neath-Swansea Ospreys Ltd (**Ospreys**). Neath and Swansea were equal shareholders in the Ospreys. Mr Hawkes brought an unfair prejudice petition against Mr Cuddy alleging, among other things, that Mr Cuddy had preferred the interests of the Ospreys to the interests of Neath and, therefore, the conduct of the affairs of Neath had unfairly prejudicial to Mr Hawkes as a shareholder in Neath. The Court of Appeal held that a nominee director who had put the interests of the company ahead of those of his appointor had not breached his duties and, in the course of his judgment, Stanley Burnton LJ stated that a nominee director could act in the interests of his appointor if he genuinely considered that this was in the best interest of the company.

It is clear that a nominee director would be in breach of his duty to the company if he were:

(1) to act on the basis that his primary duty was to the person who nominated and not to the company;

(2) to take instructions from the person who nominated him as a

1/. Boulting v Association of Cinematograph Technicians [1963] 2 QB 602 at 626.
2/. Re Neath Rugby Ltd (No. 2); Hawkes v Cuddy [2009] 2 BCLC 427, CA; para. 32.
3/. See previous footnote.
4/. In Neath Rugby Club; Hawkes v Cuddy [2009[EWCA Civ 219.

director that were in conflict with his duties to the Company;[5] and/or,

(3) to undertake to his appointor that he will not use his powers unless the interests of the company and his appointor are the same.[6]

One particularly difficult issue is the extent to which a nominee director can disclose confidential company information to his appointor without being in breach of his duties to the company.

Directors' duties are set out in the 2006 Act which is intended to be a codification of the common law rules and equitable principles that governed directors' duties before that statute came into force.[7] The duties that are included in the statute are not a complete code of the conduct expected of directors; there are further duties that are not included in the 2006 Act: for example, the duty not to misapply company property[8] and the duty to act in the interests of creditors when a company is insolvent or near-insolvent.

There is no express duty of confidentiality in the 2006 Act.

There is a helpful summary, albeit in an article on the law in the United States (where nominee directors are usually referred to as designated directors), which describes the position on confidentiality as follows:

"What happens when the designating investor expects the designated director to report to the investor on non-public financial results, board discussions, potential corporate actions, and board decisions? On the one hand, the investor specifically sought board representation so that it could keep a watchful eye over its investment and receive exactly this type of report. On the other hand, the designated director has independent fiduciary duties to the corporation and all of its shareholders, which duties are usually understood to include a duty to maintain the confidences of the corporation. There is little law or commentary addressing this situation, but it appears that reporting to the investor should be permissible, as long as it does not harm the corporation or the other shareholders, it not prohibited by a specific corporate policy, and does not result in trading in inside information.

Some of the uncertainty arises from the fact that there is no explicit source for a director's duty of confidentiality. It is usually inferred from the duty of care, the duty of loyalty or both. Some corporations adopt a policy of confidentiality or a policy limiting those people who are allowed to speak to outsiders…"[9]

As in the United States, there appears to be no case law in this jurisdiction expressly dealing with a director's duty to maintain the confidentiality of corporate information. In this jurisdiction the use or misuse of confidential information would be likely to fall within one or more of the following duties: the duty of care; the duty to avoid conflicts of interest; the duty to exercise independent judgment; and/or, the duty to promote the success of the company.

Not all non-public information is confidential because not all of that information is concerned with the company's private affairs and/or is material to the governance of the company. It is unlikely that a director

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who discussed the corporate history of the company or general business issues would be acting in breach of any duty to the company even where that information is not available to the public.

The disclosure of confidential information about the private affairs of the company would be likely to be a breach of one of more duties that a director owes to the company if the disclosure of that information causes harm to the company. Disclosure of confidential information that harms the company includes information about commercial interests and information that damages the reputation of the company or causes problems such that the corporate governance of the company is disrupted in a material way.

5/. In Selangor United Rubber Estates v Cradock [1968] 1 WLR 1555 two directors nominated by shareholders acted on the express instructions of the shareholders because they assumed that their primary duty was to their appointors. The Court held that the directors had breached their duty to exercise their independent judgment; they had not made their own judgments.
6/. Ashburton Oil NL v Alpha Minerals NL [1971] 123 CLR 614.
7/. Sections 171 to 177.
8/. In Re Paycheck Services 3 Ltd, HMRC v Holland [2010] 1 WLR 2793, SC.
9/. David Morris, Lois Herzeca & Julie E. Kamps, Designated Directors and Designated Investors: Early Planning is the Key, 16 Corp. Governance Advisor 5, 5 (May/June 2008).

Unitranche finance: the impact of Apcoa

Following the decision in *Re Apcoa* **William Trower QC** and **Ryan Perkins** consider the interaction between unitranche facilities and schemes of arrangement under Part 26 of the Companies Act 2006

Abstract

Unitranche facilities are increasingly popular among mid-market borrowers in the European credit markets. The lenders execute a document known as an "agreement among lenders" (AAL), which is similar to a traditional intercreditor agreement, but with a number of important differences. In particular, the borrower is not a party to the AAL, and is therefore not privy to the subordination arrangements between the unitranche lenders. This article considers the interaction between unitranche facilities and schemes of arrangement under Part 26 of the Companies Act 2006 and the extent to which the recent decision of Hildyard J in *Re Apcoa Parking Holdings GmbH & Ors* [2014] EWHC 3849 (Ch) illuminates class composition in a unitranche scheme.

1. An introduction to unitranche finance

Prior to considering the essential features of unitranche finance, it is necessary briefly to consider the traditional forms of finance available to mid-market borrowers in Europe. (For present purposes, borrowers seeking between €30m and €250m are treated as "mid-market".)

Traditionally, mid-market borrowers have used a combination of senior debt and mezzanine debt to finance mergers, acquisitions and other corporate activities. The senior debt and the mezzanine debt are often documented in two separate credit agreements, with a number of different terms. For example, the interest rate on the mezzanine debt will usually be 200 to 400 basis points in excess of the interest rate on the senior debt. The financial covenants in the mezzanine debt agreement will often be less demanding than the financial covenants in the senior debt agreement, with the former permitting up to 10 percent more headroom than the latter. There may be different facility agents for the senior and mezzanine debt. Participations in both tranches of debt will be syndicated among a range of financial institutions, and will be freely transferable in the secondary markets. As a result, there will be little room for bespoke negotiation between the borrower and the lenders: secondary markets expect standardised terms. All of the documents will usually be based on standard forms promulgated by the Loan Markets Association (LMA).

The relationship between the senior lenders and the mezzanine lenders will be governed by an intercreditor agreement, designed to ensure that the mezzanine debt is fully subordinated to the senior debt. The intercreditor agreement will provide for the rights of the mezzanine lenders to be severely curtailed in a default scenario, so that the senior debt is repaid first. The borrower will

also be a party to the intercreditor agreement, and will agree not to make any payments on the mezzanine debt following (*inter alia*) a payment default on the senior debt. The senior lenders will usually be banks (at least initially), whereas the mezzanine lenders will usually be a combination of banks and alternative credit providers.

At the beginning of the 21st century, the American credit markets developed a new structure known as "unitranche debt". This was designed as a simpler alternative to the traditional senior/mezzanine structure described above. Unitranche finance was imported into European credit markets shortly thereafter, and has continued to increase in popularity. Recent headlines in the financial press include: "Bonds jostle with unitranche financing in cash-strapped European markets" (*Financial Times*, 8 October 2013); "Unitranche loans increase presence in Europe's leveraged markets" (*Reuters*, 22 December 2014); and "Chunky unitranches provide alternative route for slow syndications and unique deals" (*Debtwire*, 5 January 2015).

Unitranche finance consists of a single term loan facility, documented in a single credit agreement with a single set of covenants. The borrower pays a single "blended" rate of interest on the unitranche facility to a single facility agent. This rate falls between the market rate for senior debt and the market rate for mezzanine debt, and is calculated in the manner described below. The borrower executes a single set of security documents. From the borrower's perspective, unitranche debt is perhaps the simplest form of finance available in the modern credit markets.

The simplicity of unitranche finance has a number of potential advantages. Execution times for unitranche deals are usually shorter than execution times for traditional senior/mezzanine structures. Likewise, unitranche structures are usually less expensive to negotiate and arrange than

EUROPEAN PARKING GIANT APCOA, OBTAINED THE SANCTION OF THE HIGH COURT IN ENGLAND TO A SET OF SCHEMES OF ARRANGEMENT UNDER PART 26 OF THE COMPANIES ACT

senior/mezzanine structures. The costs savings are passed on to the borrower, at least in principle: see Erens & Hall, "Unitranche financing facilities: simpler or more confused?", 9 Pratt J Bankr L 487 at 488.

From the lenders' perspective, unitranche finance is rather more complex. Unitranche debt is often (though not invariably) provided by a small club of lenders, so that the risk of default is not borne by a single institution. However, unlike senior debt or mezzanine debt, unitranche participations are often subject to significant restrictions on transferability. For example, unitranche documentation usually confers rights of pre-emption on the existing lenders: see Erens & Hall (*op cit* at 492). As a result, the market for unitranche debt is relatively illiquid, and lenders often hold their participations until maturity. Due to the illiquid nature of unitranche debt, the relevant lenders tend to be specialist debt funds rather than banks.

The rights of unitranche lenders *inter se* are governed by a document known as an "agreement among lenders" (AAL). The function of the AAL is similar to the function of a traditional intercreditor deed, but with a number of significant differences. The most important function of the AAL is to divide (or "retranche") the unitranche facility into two or more sub-tranches. In a simple structure, the AAL will create two sub-tranches: the "first-out" tranche and the "last-out" tranche. As its name suggests, the first-out tranche is repaid in priority to the last-out tranche. Thus, the first-out tranche is broadly equivalent to senior debt, and the last-out tranche is broadly equivalent to mezzanine debt. The AAL may be executed at the same time as the unitranche agreement, or at a subsequent time—for example, where a sole original lender wishes to sell part of its participation to new lenders.

It may seem strange to describe a structure as "unitranche" when it contains two tranches of debt. The explanation of this apparent oddity lies in the fact that the borrower is not a party to the AAL. The division of the facility into first-out and last-out tranches, and the subordination of the latter to the former, is therefore based entirely on a private agreement between the lenders. From the borrower's perspective, the facility contains only one tranche (hence "unitranche"), even though it contains multiple tranches from the lenders' perspective. Speechly aptly describes the AAL as a "behind the scenes agreement" (*Acquisition Finance* (2nd edn 2015) at §3.13). He explains:

"… retranching is usually done in a way that has no effect on the borrower, so that it does not change the terms of the unitranche debt as between borrower and unitranche lender(s) – it is still a single loan with a single interest rate."

The AAL will provide for the interest received from the borrower to be divided into specified proportions among the lenders. Absent a default, the last-out lenders will receive a greater proportion of the interest paid by the borrower than the first-out lenders, to compensate them for the risks inherent in subordinated debt. For example, consider a unitranche facility of £100m (drawn down in full), with a first-out tranche of £50m and a last-out tranche of £50m. Assume that the market interest rate for senior debt is 5%, and that the market interest rate for mezzanine debt is 8%. The last-out lenders will expect to receive the market rate for mezzanine debt, and the first-out lenders will expect to receive the market rate for senior debt. In this scenario, the unitranche agreement will provide for a single blended interest rate of 6.5%. Assuming that the borrower does not default, the facility agent will allocate £2.5m of annual interest to the first-out lenders (being 5% of £50m), and £4m of annual interest to the last-out lenders (being 8% of £50m).

Many of the provisions in the AAL are

It may seem strange to describe a structure as 'unitranche' when it contains two tranches of debt. However, the borrower is not a party to the AAL

copied from traditional intercreditor agreements between senior and mezzanine lenders. For example, the AAL will contain a payment waterfall governing the allocation of recoveries by the facility agent (or other intermediaries) in the event of default, with first-out lenders ranking in priority to last-out lenders. Following an event of default, a specified proportion of first-out lenders will be entitled to direct the agent(s) as to acceleration, enforcement, amendment and waivers. The AAL may create a "turnover trust", whereby post-default recoveries by the last-out lenders are held on trust for the first-out lenders until the latter are repaid in full. Such provisions are enforceable both in England and the United States: see Gullifer & Payne, *Corporate Finance Law* (2nd edition 2015) at §5.3.4 and section 510(a) of the US Bankruptcy Code.

However, unlike a traditional intercreditor agreement, the AAL cannot prohibit the borrower from making payments to the last-out lenders following a payment default on the first-out debt. (Such provisions are known as "payment blocks": see Clause 5 of the standard LMA senior/mezzanine intercreditor agreement.) This is for the simple reason that the borrower is not a party to the AAL, and does not need to know the detail of the first-out/last-out division. The absence of payment blocks may be a point of some significance, for reasons explained below.

Needless to say, the foregoing explanation of unitranche finance has proceeded at a high level of generality. A note of caution sounded by Erens & Hall (*op cit* at 488) is worth repeating:

"While trends in the unitranche space are beginning to emerge, it is important to remember that these deal structures are still somewhat nascent … terms may vary widely between deals and will turn on the relative negotiating positions of the parties."

2. Schemes of arrangement for unitranche debt

As the unitranche market continues to grow, it is inevitable that certain unitranche facilities will need to be restructured. To the best of the authors' knowledge, unitranche documentation (such as the AAL) has not been subjected to substantive consideration by an English court in the context of insolvency or restructuring. The same appears to be true in the United States: see Erens & Hall (*op cit* at 494). Among the most powerful restructuring techniques available in English law is a scheme of arrangement under Part 26 of the Companies Act 2006 (the Act). The remainder of this article considers the interaction of unitranche debt and schemes of arrangement.

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A scheme of arrangement is a statutory mechanism for varying creditor rights, including the ability to "cram down" minority creditors who do not consent to a restructuring proposal. The Act provides for the rights of a minority to be varied without their consent, so long as it is appropriate to put the members of both the majority and the minority into the same class for the purposes

UNITRANCHE FINANCE WAS PIONEERED IN THE US AT THE BEGINNING OF THE 21ST CENTURY BEFORE ARRIVING IN EUROPE

of voting on whether or not to approve the scheme. The US equivalent of the scheme of arrangement is a plan of reorganisation under Chapter 11 of the US Bankruptcy Code.

The process of implementing a creditors' scheme can be divided into a number of stages. First, a compromise or arrangement of the company's liabilities must be proposed, in accordance with section 895 of the Act. Second, an application must be made to the court under section 896 of the Act for an order that meetings of the affected creditors be convened. At the hearing of such an application (the convening hearing), the court's principal function is to approve the division of affected creditors into one or more classes for the purposes of voting. The basic principle is that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest": see *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 at 583 (Bowen LJ). The correct composition of classes is a matter which goes to jurisdiction and the court will have no discretion to sanction the scheme if the classes are not properly constituted.

Third, creditors' meetings must be held in accordance with the court's directions. Each class of creditors must vote in favour of the scheme by a majority in number representing 75% in value of the creditors from that class who are present and voting, either in person or by proxy: see section 899 of the Act. Fourth, a further application to the court must be made for the sanction of the scheme. At the hearing of such an application (the sanction hearing), the court's principal function is to ensure that the scheme does not involve unfair or unreasonable conduct by the majority creditors: see *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 238-239 (Lindley LJ).

There is no doubt that unitranche facilities are capable of being restructured by a scheme of arrangement. However, where an AAL divides the unitranche facility into first-out and last-out tranches, an important

question of class composition arises: should the first-out lenders be grouped together with the last-out lenders, or should the first-out lenders be placed in a separate class from the last-out lenders?

To illustrate the importance of this issue, consider a unitranche facility of £100m, with a first-out tranche of £90m and a last-out tranche of £10m. If the last-out lenders form a distinct class from the first-out lenders, then last-out lenders representing only £2.51m of the unitranche facility can block the scheme. Conversely, if the last-out lenders are grouped together with the first-out lenders, then the scheme can be approved notwithstanding the dissent of every last-out lender.

(a) Lessons from Apcoa

A recent judicial analysis of class composition is to be found in the decision of Hildyard J in *Re Apcoa Parking Holdings GmbH & Ors* [2014] EWHC 3899 (Ch). For reasons explained below, the principles discussed in *Apcoa* may have significant ramifications on class composition in a unitranche scheme.

In *Apcoa*, the scheme companies had three principal layers of debt: what was called super-senior debt, senior debt and second lien debt. Unusually, the senior debt was secured but the super-senior debt was not. This came about because the super-senior debt was incurred at an early stage in the restructuring process, when new working capital was advanced without the consent of all of the secured seniors. The consenting seniors then entered into a turnover agreement with the super-seniors, pursuant to which they undertook an obligation to remit any recoveries received in respect of the senior debt to the super-seniors, until the super-senior debt was discharged in full. Two minority senior lenders (FMS and Litespeed) declined to enter into the turnover agreement. As a result, FMS and Litespeed would have enjoyed priority over the super-senior lenders in a liquidation.

The borrowers and other obligors proposed several interlocking schemes of arrangement. The schemes were supported by the super-senior lenders and the senior lenders, with the notable exceptions of FMS and Litespeed. In an attempt to block the schemes, FMS argued that it should not be placed into a class containing the consenting senior lenders. FMS relied on the fact that, unlike the consenting senior lenders, it had not acceded to the turnover agreement, and was not subordinated to the super-senior lenders.

WILLIAM OF OCKHAM. HILDYARD J'S ANALYSIS IS FOUNDED ON A PRINCIPLE SIMILAR TO OCKHAM'S RAZOR

Hildyard J explained that the difference between rights against the company and interests was critical, but has sometimes given rise to confusion and difficulty. He said (at [52]) that:

"The modern approach … is to break the question [of class composition] into two parts, and ask first whether there is any difference between the creditors in point of strict legal right … and if there is, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interest or subjective motivation operating in the case of

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any particular creditor(s)."

This approach draws a sharp distinction between economic interests and legal rights. If the "strict legal rights" of two creditors against the company are identical, then there is no scope for a class division – even if their economic interests are opposed.

Hildyard J's analysis is founded on a principle similar to Ockham's razor, *viz.* that classes should not be proliferated beyond necessity, "lest by ordering separate meetings the court gives a veto to a minority group" (per Chadwick LJ in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at para 33). The fragmentation of classes limits the court's jurisdiction, because the court is powerless to sanction a scheme unless the required majority is attained in each class: see *Re Telewest Communications plc (No 1)* [2004] BCC 342 at [14] (David Richards J). As a result, there is often a judicial inclination to analyse the problem in such a way that creditors' objections can be dealt with as a matter of discretion at the sanction stage, rather than using the blunt jurisdictional tool of class composition. This point was described by Hildyard J (in *Re Apcoa* at [54]) as being:

"… the inclination of judges to prefer the more flexible tool of discretion and an overall appreciation of fairness tested by reference to the real alternatives rather than the straitjacket of jurisdiction, especially where rigidity may result in fragmentation of classes to avoid jurisdictional issues, but at the cost of enabling a small group to hold out unfairly against a majority."

Applying this approach, Hildyard J rejected the argument advanced by FMS. Although the turnover agreement modified the rights of the consenting senior lenders and the super-senior lenders *inter se*, it had no (or no material) effect on the rights of anyone against the scheme companies. In metaphorical terms, the turnover agreement operated "behind the curtain" [92]. As a result, the turnover agreement could not affect class composition: class composition is determined by reference to creditors' rights against the company itself, rather than their rights *inter se*. (Two of the scheme companies were parties to the turnover agreement, but Hildyard J held that their joinder was merely "nominal": *ibid.*) As a result, FMS and Litespeed were grouped together with the rest of the senior lenders, and their dissenting votes were insufficient to block the scheme.

The significance of this analysis for unitranche facilities is clear. Much like the turnover agreement in *Apcoa*, the AAL in a unitranche structure operates "behind the curtain". The borrower is not a party – nor even a nominal party – and the subordination arrangements are a matter of private agreement between the lenders. In short, the AAL affects the rights of the lenders *inter se*, but does not affect the rights of the lenders against the borrower. From the borrower's perspective, there is a single facility in a single credit agreement with a single interest rate. It would appear to follow that the AAL is irrelevant to class composition. If that is correct, then first-out lenders and last-out lenders will ordinarily be grouped in the same class.

In this respect, there is an important contrast between traditional senior/mezzanine structures and unitranche

Hildyard J's analysis is founded on a principle similar to Okham's razor, viz. that classes should not be proliferated beyond necessity

facilities. In a traditional structure, senior lenders and mezzanine lenders will generally be grouped in different classes: see Payne, *Schemes of Arrangement* (1st edition 2015) at §5.5.2.1.1. This is because the mezzanine lenders' legal rights against the borrower are very different from the senior lenders' legal rights against the borrower. For example, the intercreditor agreement, to which (unlike the AAL) the borrower will be a party, will contain "payment blocks", whereby the borrower agrees not to make any payments on the mezzanine debt following a payment default on the senior debt. As a result, the different economic interests of the senior and mezzanine lenders are accompanied by distinct legal rights against the borrower. By contrast, a unitranche structure creates different economic interests between the first-out and last-out lenders without modifying their legal rights against the borrower.

From the perspective of last-out lenders, the focus on strict legal rights exemplified by *Apcoa* materially reduces their clout in a restructuring (by comparison to their position in a traditional senior/mezzanine structure). From the perspective of first-out lenders, *Apcoa* is a boon: it reduces the prospects that subordinated creditors will be able to hold-out and block a restructuring. From the perspective of unitranche borrowers, *Apcoa* may also be regarded as a welcome restatement of principle.

(b) A different approach?

As noted above, however, unitranche facilities have yet to be considered by an English court. In this unmapped territory, it remains possible that the court will seek to distinguish the turnover agreement in *Apcoa* from a unitranche AAL. In this regard, Lord Millett's judgment in the Hong Kong case of *Re UDL Holdings Ltd & Ors* [2002] 1 HKC 17, which was considered by Hildyard J in *Re Apcoa* (at [55]), may provide the jurisprudential basis for a different analysis.

Although Lord Millett focused on the traditional distinction between rights and interests he seems to have divided creditors' interests into two categories: "interests proceeding from rights", which he appeared to equate to rights, and "extraneous interests", which he did not (181-182). The nature and scope of each category is open to debate. However, Lord Millett appears to equate "extraneous interests" with private views or preferences that are unrelated to the creditor's rights against the company (184), but appears to countenance the possibility that creditors with different "interests proceeding from rights" may have to be placed into different classes, even if their strict legal rights against the company are the same.

Arguably, the divergent economic interests of first-out lenders and last-out lenders under a unitranche facility should be treated as "interests proceeding from rights" (rather than mere "extraneous interests"). The subordination arrangements are inherent in the legal structure of a unitranche facility and cannot be described as an extraneous matter, even though the borrower is not a party: rather, they are closely related to the economic value of the lenders' rights against the borrower. On this view, it may be necessary to place first-out lenders and last-out lenders into different classes.

Of course, the foregoing analysis does not sit easily with Hildyard J's decision in *Apcoa*, and is inconsistent with the preference for flexibility expressed by David Richards J in *Re Telewest*. However, legal certainty will remain elusive until an appellate court provides an authoritative explanation of exactly what Lord Millett meant by "interests proceeding from rights". With the increasing prominence of unitranche facilities, it may be the case that this issue will arise in the near future.

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Chambers & Partners 2015 and the Legal 500 2016

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Financial Services

South Square offers extensive expertise in the financial services arena, bringing an insolvency-focused perspective to the work due to its "immense strength in administration and restructuring proceedings" (*Chambers & Partners*). Our members frequently advise financial institutions on the potential risk and impact of issues relating to client assets and Financial Conduct Authority regulation. **Antony Zacaroli QC**, **Glen Davis QC**, **David Allison QC** and **Adam Al-Attar** are noted as leading practitioners.

Insolvency

"South Square" is still unquestionably the leading restructuring and insolvency set in the market." It has the best range of expertise in the field and "the most technically able, practical and sensible" barristers within its ranks." *Chambers & Partners.* "South Square is 'without doubt the strongest chambers for restructuring and insolvency work. The depths of its offering and its combined experience is unparalleled, and the barristers are right for any given situation'" *Legal 500*. Members are regularly called upon to handle some of the most high-profile and complex matters at both a domestic and international level. A large number of them have been involved in the high-profile Waterfall I Application and Waterfall II Application, which both stem from the administration of Lehman Brothers. Chambers is lauded for its strength and depth in both the senior and junior ranks, as well excellent client service. The following Members are individually ranked as leading practitioners:

Michael Crystal QC
Gabriel Moss QC
Simon Mortimore QC
Richard Adkins QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe 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
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Daniel Bayfield
Richard Fisher
Stephen Robins
Marcus Haywood
Hannah Thornley
William Willson
Georgina Peters
Adam Al-Attar

Sport

Recommended once again as a leading silk is **Mark Phillips QC**, who handles high-profile Formula 1 cases (advising and representing Formula 1 teams and drivers in connection with competition law issues), and heavyweight football disputes. He has also advised on matters concerning cricket, Formula 3, Formula Ford and World Powerboat racing. He regularly leads recommended junior **Daniel Bayfield**, who acts for both the FA Premier League and the Football League, and has advised and represented a number of high-profile players and managers.


HANNAH THORNLEY


DANIEL BAYFIELD


ROBIN DICKER QC


FELICITY TOUBE QC

Should the Insolvency Exemption remain?

A report of a recent lecture by Lord Justice Jackson

The Civil Justice Reforms devised by Lord Justice Jackson came into effect in April 2013. However, by that time it had been announced that insolvency litigation would be exempt from those reforms until April 2015 to allow time for practitioners to adjust to the changes and make different arrangements for litigation funding.

LORD JUSTICE JACKSON

From about the time when the temporary insolvency exemption was brought into force, R3 and others campaigned for the temporary exemption to become permanent. Whilst that has not happened, on 26 February 2015 it was announced that the government accepted that insolvency practitioners and other interested parties needed further time to prepare for the changes. Accordingly the insolvency litigation exemption has been extended.

On 16 October 2015, the architect of the civil justice reforms, Lord Justice Jackson delivered the Mustill Lecture, a biennial event held in Leeds and which had been established in honour of Lord Mustill. The lecture was entitled "The Civil Justice Reforms and whether insolvency litigation should be exempt". In the Lecture Lord Justice Jackson, whilst accepting that whether the exemption should continue was a matter of policy for government, argued strongly that the exemption should not continue. He gave four reasons for his views.

Firstly, Lord Justice Jackson said that the recoverability regime was principally designed to assist individual claimants of modest means, in particular those who ceased to qualify for legal aid in April 2000. The advantages gained for insolvency litigation were a windfall. Claimants in insolvency proceedings, who whilst some might have used a CFA, were not a group who had previously been operating on legal aid and were then losing it. Nor, so Lord Justice Jackson said, were claimants in insolvency proceedings one of the groups at whom the

LORD MUSTILL

recoverability regime was aimed, there being no suggestion that this was intended in the 1998 consultation paper.

Secondly he said that recoverability is an instrument of oppression, which is liable to crush defendants who have a good defence. The recoverability regime has a blackmail or chilling effect. Unless or until insolvency litigation is concluded by a trial or a fair settlement, it is not known whether the defendant has been guilty of misconduct. Some have been. Some have not. But it is wrong in principle to force all defendants in insolvency cases backed by CFA/ATE to litigate at a massive disadvantage. Ex-directors who have not been guilty of misconduct should not be crushed into paying up.

Thirdly Lord Justice Jackson said that recoverability drives up the overall costs of litigation. This is for two reasons. First, the success fee and the ATE premium add a new layer of costs. Secondly, the recoverability regime distorts incentives. The party with a CFA and ATE has insufficient incentive to control costs, since win or lose that party will not be paying them.

Fourthly, and finally, he said that it is perfectly possible to bring insolvency litigation without the benefit of recoverability. He points out that insolvency practitioners operated perfectly satisfactorily throughout the whole of the twentieth century without the benefit of the recoverability regime. And from 1995 they had the benefit of CFAs on the basis that the claimant paid its own success fees. In addition, Lord Justice Jackson says that what is the problem with creditors putting up the money, or HMRC. But even if that were not to happen, insolvency practitioners still have funding options which were not available in the past. Insolvency practitioners will still be able to use CFAs and ATE but without the benefit of recoverability. In larger cases, third party funding may be available. Insolvency practitioners will also be able to use Damages Based Agreements. And finally, from 1 October 2015, liquidators and administrators have been able to assign rights of action in relation to various causes of action including fraudulent and wrongful trading.

In addition to his four reasons as to why the insolvency litigation exemption should be brought to an end, Lord Justice Jackson also raises the question of whether the continuation of the exemption is lawful. However, as a serving judge, he naturally declined to answer the question.

By way of conclusion, Lord Justice Jackson says that there was much wisdom in the original decision to end the exemption in 2015 and asks whether the Government should do what it said it would do.

Unintended consequences

Jeremy Goldring QC looks at *Erste Group Bank* and the dangers of submission to a foreign insolvency

One important consequence of the decision of the Supreme Court in *Rubin v. Eurofinance SA* [2012] UKSC 46 [2013] 1 AC 236 ("*Rubin*") has been to draw attention to long established but perhaps overlooked principles about the effect of submission by a creditor to an insolvency process.[1] In *Rubin* itself, the effect of submission to a foreign insolvency was to make a creditor liable to enforcement of claw-back orders made by that foreign court. In *Stichtung Shell Pensioenfunds v. Krys* [2014] UKPC 41 ("*Shell*"), the Privy Council held that the lodging of a proof of debt in a domestic insolvency, even if rejected, amounted to a submission to the jurisdiction which could form the basis for an injunction by the domestic court restraining the creditor from seeking, through enforcement, a more than *pari passu* distribution of the debtor's assets abroad. Lords Sumption and Toulson identified the core principle (at [31]):

"*A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the Defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted. The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim*

1/. See Sheldon, *Cross-Border Insolvency* (4th ed), para 13.13 to 13.23 and *Rubin*, especially at [165] to [167]. The rationale for the principle is set out in *Ex p Robertson*; *In re Morton* (1875) LR 20 Eq 733, at 737-738, quoted in *Rubin* at [165]: "*… what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it - that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate. … [C]an there be any doubt that the Appellant in this case has agreed that, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit .. [The Appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.*"

A, he has submitted to a statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants."

The Court of Appeal's decision in Erste Group Bank

The principle has broader implications for a creditor. In *Erste Group Bank AG v. JSC "VMZ Red October"* [2015] EWCA 379, the Court of Appeal[2] has considered the effect of the claimant's submission to a foreign insolvency process on the English Court's jurisdiction to determine claims brought against foreign defendants under the "gateways" for permission to serve out in Practice Direction 6B of the CPR. The facts of the case are complex, but the message is reasonably straightforward: submitting to a foreign insolvency by (for example) lodging a proof of debt, can have wide-ranging and (presumably) unintended consequences on a creditor's rights in other contexts, and not only against the insolvent entity. It is a step that often requires careful thought, so that its impact on the creditor's rights can be properly assessed.

The facts

Erste Group Bank, an Austrian bank, lent some $20 million to a Russian company (D1) under an English law syndicated loan agreement. The loan was guaranteed by D1's immediate parent (D2), which was also Russian. Both agreements were governed by English law and contained a London arbitration clause and an exclusive English jurisdiction clause. The borrower and guarantor defaulted in 2009 and both were placed in Russian liquidations. The bank proved in both[3], its claim being admitted against the borrower, but rejected against the guarantor because the guarantee was a related party transaction invalid under Russian insolvency law.

In 2012, the bank commenced proceedings in the Commercial Court seeking payment of the loan and guarantee from D1 and D2. In addition to these anchor defendants, the Bank also claimed against various other Russian entities said to own or control them (including D3 and D5), or to have received their assets, alleging various economic torts, including conspiracy, and a claim under section 423 of the Insolvency Act 1986. The thrust of the bank's claim was that the failure of borrower and guarantor to comply with their obligations was caused by the defendants' tortious conduct.

THE AUSTRIAN BANK LENT $20M TO A RUSSIAN COMPANY

The bank obtained permission to serve D3 and D5 (the "applicants") in Russia, including on the basis that there was "a real issue" between the Bank and D1/D2 "which it is reasonable for the court to try" and each of D3/D4 was a "necessary or proper party to the claim".[4] D3 and D5 (the "applicants") then challenged the English Court's jurisdiction. The judge (Flaux J) rejected the

2/. Gloster and Briggs LJJ made the major contributions to the judgment of the Court: see [1].
3/. The Bank also participated in the liquidations in other ways; for example, it attended creditors' meetings, was a member of D1's creditors committee, sought removal of D2's liquidator and participated extensively in Court proceedings in Russia: see [12] and [69].
4/. CPR Practice Direction 6B, para 3.1(3), set out in [37].

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application, but Court of Appeal allowed the applicants' appeal.

Effect of the bank's participation in the Russian liquidations

For current purposes, the most interesting part of the judgment concerns the effect of the Bank's participation in the Russian liquidations of borrower (D1) and guarantor (D2), which is labelled "Issue 1" and dealt with in a lengthy passage at [47] to [82]. Reversing the judge at first instance, the Court of Appeal concluded that an effect of that participation was that, as between the Bank and D1/D2 as anchor defendants there was no *"real issue which it is reasonable for the [English] court to try"*,[5] so that the English Court did not have jurisdiction in respect of D3 and D5. This was for two main reasons.

First, applying *Rubin* and *Shell*, the Court concluded that, as a matter of English law (which was determinative) the bank had submitted its claims against D1 and D2 to the jurisdiction of the Russian courts and the Russian insolvency process. *Shell*, in particular, demonstrated that lack of receipt by the Bank of any dividend did not prevent submission (see [58]). Nor did it matter that the Bank's claims against D1/D2 had different labels in Russia and England: *"both arise under the general law and relate, and are limited, to the same amount. In other words, the claim for damages in the conspiracy claims duplicates the amount claimed under the debt and contractual claims against D1 and D2 in respect of the amounts advanced by, or owing to, the Bank under the Loan Agreement in respect of principal, interest and costs. Both claims are capable of being proved in the liquidations of D1 and D2, or, in the case of D2, would have been so capable, if the Guarantee had not been set aside by the Russian courts."* (at [59]). Finally, on the facts, the Court concluded:

"In our judgment, on the evidence before him, the judge should properly have concluded that the Bank's participation in the Russian insolvencies of both D1 and D2 resulted in its submission to, and acceptance of, the jurisdiction of the Russian Courts in relation to all issues arising in the insolvencies …. In addition to lodging proofs, the Bank thereafter participated in the insolvencies through the assertion of its status as a creditor, its participation in appeals seeking positive relief and its objection to applications by other parties. In addition, the evidence demonstrated that the Bank's representative participated on the creditors' committee of D1 and also in lobbying D2's manager to start litigation to set aside transactions underlying the claims of other creditors. We agree … that those steps taken by the Bank in the insolvencies of D1 and D2 in Russia, and before the Russian courts, indicate, as a matter of fact, not only that the Bank had sought to take advantage of its

5/. As required by CPR Practice Direction 6B, para 3.1(3)(a). The burden was on the Bank to show that there was a good arguable case that its claims fell within the gateway.

Participation in a borrower's insolvency process can have serious repercussions, and limit possibilities for the future

claimed status as a creditor in the insolvencies of D1 and D2 but also that, by seeking positive determinations in its favour, the Bank had accepted the Russian courts' jurisdiction to determine all issues in the insolvencies of D1 and D2."[6]

In that context, it was irrelevant that, applying the principle in *Gibbs v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, the Russian proceedings might not discharge an English law debt as a matter of contract law (at [76]):

"As this court pointed out during the course of submissions, the fact that the court of the debtor's COMI, and/or country of incorporation, makes an order avoiding, or setting aside, a transaction in the interests of creditors under its relevant insolvency laws, is a very different thing from contractual discharge – i.e. performance. In our judgment, [Rubin] demonstrates that, if there has indeed been a submission by the foreign creditor to the court of the debtor's insolvency for whatever purpose, (and, in particular, where the creditor has sought to obtain a benefit by such participation), then the creditor cannot in subsequent proceedings challenge the avoidance order made against it by the foreign insolvency court simply on the grounds that its contract was subject to English law and an English exclusive jurisdiction clause."

The result of the Bank's submission was that it could not be the case that there was any real issue as between the Bank and D1 or D2 that it was reasonable for the English Court to try.

Secondly, even if the Bank had not technically submitted, there remained a "*more finely nuanced, soft edged question*", whether, in all the circumstances, it was reasonable for the English Court to try the issue (see [48] and [77]). For a series of reasons, the Bank could not satisfy that requirement (see [78]). For example, as regards D1, there was had been no issue at all when leave to serve out had been granted, the Bank's claims having been admitted in D1's liquidation in 2010. As regards D2, the only potential benefit of an English judgment was to provide the basis for a proof in Russia, but it had already been determined in the Russian liquidation that the guarantee was invalid. Furthermore, the "*fact that D1 and D2 were bound by the exclusive jurisdiction agreements contained in the Loan Agreement and the Guarantee in favour of England in relation to all the relevant claims did not predicate that it would be "reasonable" for the purposes of the paragraph 3.1(3)(a) test for the English court to "try" such claims. The English court clearly had jurisdiction to try such claims against D1 and D2, which, in the absence of any submission by the Bank to the Russian courts, it would most probably accept. But the question is not whether the English court should, or was obliged to, accept jurisdiction; rather, in the context of an application for permission to serve proceedings out of the jurisdiction against third parties, the question is whether in all the circumstances it is reasonable for the English court to try such claims against the anchor defendants, D1 and D2."*

Conclusion

Following a borrower's default, a bank will often have a range of options. For example, it might seek to enforce its security outside an insolvency process; it might bring proceedings relying on its contractual choice of jurisdiction provisions and then seek to enforce the judgement; it might identify possible proceedings against solvent third parties; and it might participate in a borrower's insolvency process. The *Erste Bank* case shows that taking the last route can have serious repercussions, and limit possibilities for the future. Before taking such a step a creditor will wish to consider whether the benefits of participation, often a small dividend at best, is really worth it.

6/. The Court of Appeal found that the Bank had participated without any reservation of jurisdiction: see [70] to [73].

INSOL International Annual Regional Conference

INSOL International's Annual Regional Conference is taking place from **Sunday 24 January to Tuesday 26 January 2016** at the Madinat Jumeirah Resort in Dubai. The event marks the second INSOL conference to be held in The United Arab Emirates.

More than 600 delegates from around the globe are due to attend the Conference, which is certain to provide a perfect setting for networking with experts from across the insolvency and restructuring sector.

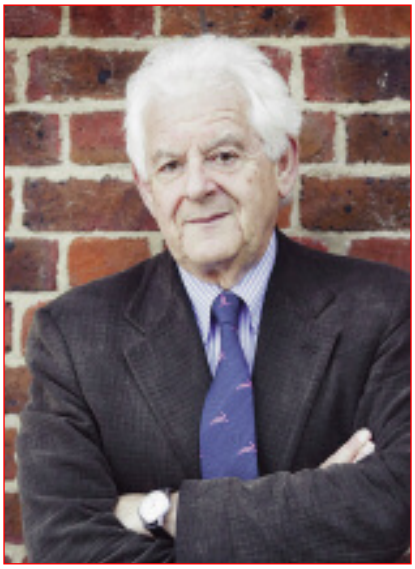
South Square is delighted to be supporting INSOL and sponsoring Tuesday's lunch, at which members of Chambers look forward to catching up with fellow delegates.

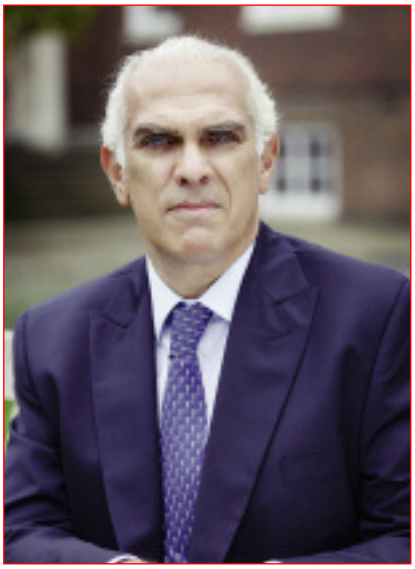
At present, the following South Square barristers are due to attend: Michael Crystal QC, David Alexander QC, Glen Davis QC and Tom Smith QC, whilst others remain keen to join should other commitments permit.

The Conference will start with a welcome reception and dinner, sponsored by BDO, on Sunday 24 January. Two days of technical sessions will follow, culminating with a Gala dinner on Tuesday 26 January.

In light of recent developments in Greece, Cyprus and the Ukraine, topics to be covered will include sovereign debt restructuring. An expert panel will consider how this differs from corporate debt restructuring, and will discuss the role of multilateral agencies such as the IMF and central banks.

In another breakout session, panellists will draw upon their global expertise to explore practitioner exposure to liabilities across jurisdictions, while a further panel will





FROM LEFT TO RIGHT: MICHAEL CRYSTAL QC, TOM SMITH QC AND GLEN DAVIS QC

consider the future role of Islamic finance and Middle Eastern restructuring.

The second day of the Conference will open with a session entitled "The art of judging in cross-border and multinational cases", during which a host of frequently-asked questions will be put to eminent bankruptcy judges.

Further sessions will include "Europe's grand plan: will the new European Insolvency Regulation lead to harmony or more complexity?" and "Times are changing – evaluating new restructuring options and their impact on global practice".

South Square's Glen Davis QC has been invited to speak on "Hot Topics for 2016". In this interactive session, panellists will provide an up-to-the-minute review of the latest developments in the insolvency world, before asking the audience to select four hot topics which they would like to debate in further detail.

We very much look forward to catching up with old friends and meeting new faces at what promises to be an enjoyable and insightful event.

DUBAI'S MARINA FROM THE PALM JUMEIRA

Re-arranging the furniture: the decision of the Supreme Court in *Gabriel v. BPE Solicitors*

Office-holders always want to be sure that they will not be incurring a costs risk in continuing litigation. The Supreme Court raises some troubling issues about proving costs orders in insolvencies. **Felicity Toube QC**

"There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets."

Charles Dickens, Nicholas Nickleby

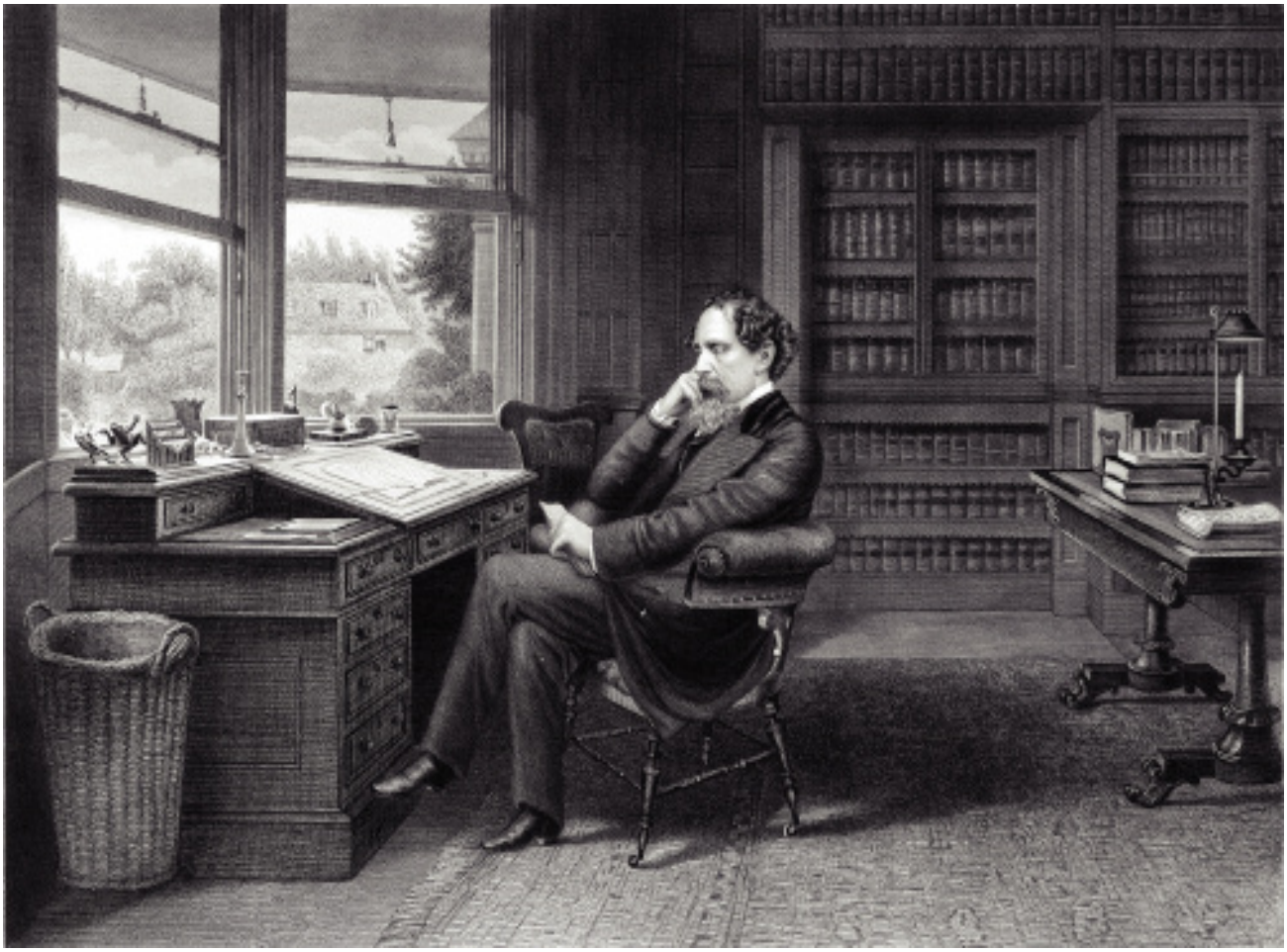
Sometimes when an office-holder takes office, there will be an ongoing piece of litigation. The first questions asked by office-holders are (a) is there merit in continuing to bring (or oppose) this litigation?; and (b) what is my costs risk in so doing?

The case of *Gabriel v. BPE Solicitors and another* [2015] UKSC 39 (Lord Mance, Lord Sumption, Lord Carnwath, Lord Toulson and Lord Hodge JJSC) provides some clarity in this area, but is not as clear as it might be, resting (it appears to the author) on a misapprehension about when costs are provable debts.

The good news is that Lord Sumption, giving the Court's unanimous judgment, makes it clear that a trustee in bankruptcy can adopt an appeal without (at least automatically) risking personal liability for the costs of the previous hearings.

The appeal concerned a claim in negligence by Mr Gabriel against his former solicitors. Mr Gabriel had lent £200,000 to a company called Whiteshore Associates Ltd. His solicitors, BPE Solicitors, were negligent in their handling of the loan transaction. The trial judge ordered the solicitors to pay Mr Gabriel £200,000 in damages, and also ordered the solicitors to pay his costs. The Court of Appeal held that this loss was not within the scope of the solicitors' duty, reduced the damages award to a nominal sum (£2) and set aside the first instance

The case rests on a misapprehension of when costs are provable debts



FOR OFFICE-HOLDERS ADOPTING LITIGATION, IT IS THE BEST OF TIMES AND THE WORST OF TIMES

order. They also held, in the alternative, that even if substantive damages had been awarded, they would have been reduced by 75% on account of Mr Gabriel's contributory negligence. The Court of Appeal also ordered Mr Gabriel to pay the costs of his solicitors at first instance and on appeal.

Interestingly, *Gabriel* was an application to the Supreme Court for directions in a pending appeal. The Trustee in Bankruptcy did not want to act until he knew that he was protected in relation to the previous costs orders. He made the application on the very day of his appointment. The Supreme Court was prepared to consider this question under section 40(5) of the Constitutional Reform Act 2005, which empowers the Court "*to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment*". Although it is "*not usual*" (as Lord Sumption noted) to answer prospective costs' questions before an appeal, it was necessary for the Trustee in Bankruptcy to decide whether to proceed and it was therefore proper for the Supreme Court to answer the question. This was obviously good news for the Trustee in this case.

Even better news for the Trustee in this case came from the result. There is long-standing precedent (in the form of the Court of Appeal's decision in *Borneman v Wilson* [1884] 28 Ch D 53) that a trustee in bankruptcy must adopt litigation either in its entirety or not at all, even where there have been discrete prior proceedings conducted by the bankrupt before his appointment. As Lord Sumption pointed out, two things were different about those types of costs in 1884.

First, there was no possibility of ordering costs against a non-party. This possibility was opened in 1986 in the case of *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.

FELICITY TOUBE QC

Secondly, costs were not provable in a bankruptcy. Following the overruling of *Glenister v Rowe* [2000] Ch 76 in the Nortel/Lehman decision in 2014 (in *re Nortel GmbH (in administration); In re Lehman Brothers International (Europe) (in administration)* [2014] AC 209: see paras 87-93 (Lord Neuberger), and 136 (Lord Sumption)), costs are now provable liabilities, being contingent debts, even before the costs orders are made by the court. They are not prevented from being provable merely by the fact that the court has not yet exercised its discretion to make those orders.

As a result of these two major changes (the second being, in the writer's view, the more important in the insolvency context), the Supreme Court was happy to revisit *Borneman* and, ultimately, to overrule it.

Lord Sumption therefore confirmed that where a trustee adopts an appeal and the bankrupt has been subject to costs orders below, he is not taken by virtue of that fact alone to adopt the proceedings below and cannot be made liable for the associated costs.

There are, however, two troubling facets to the judgment. First, the Court suggested (obiter) that there were circumstances in which it might be appropriate to order a trustee in bankruptcy to pay the other side's costs of legal proceedings including those incurred before the bankruptcy, even thought there was no longer any absolute rule to that effect. It is difficult to see the circumstances in which it would, in fact, be "appropriate" to make such an order. Although a provable debt can be elevated to be treated as if it were an expense under the *Lundy Granite* principle (*Lundy Granite* [1871] LR 6 Ch App 462), that is, in essence a "pay as you play" principle. It is hard to see how an office-holder could have satisfied the relevant "use" principle in the case of litigation costs pre-appointment, save in relation to the costs of the winding-up or bankruptcy petition. The only way in which this principle can be understood would be by treating the costs liability as a single indivisible whole, incapable of being apportioned to the costs pre-appointment and the costs post-appointment. That would be counter to all the modern *Lundy Granite* cases, and in particular the Court of Appeal's decision in *Game Group* [2014] EWCA Civ 180. The author suggests that to exercise discretion in the manner suggested by the Supreme Court in *Gabriel* would be a retrograde step.

Secondly, where a trustee adopts an

The third category of cases is a red herring

appeal and the bankrupt has not been subject to costs orders below, Lord Sumption suggested (obiter) that the pre-appointment costs would still be provable and not laid at the Trustee's door. This is plainly right. However Lord Sumption suggested that there was a complication, in that a reversal of the lower decision would necessitate the making of a non-party order against the bankrupt for the costs below. Again, this is difficult to understand. Surely the costs order would be a contingent debt which was provable in the bankruptcy? Why would it be necessary for there to be a costs order actually made, in order to comply with the *Nortel* test?

As defined by Lord Neuberger in *Nortel*, in order for a company to have incurred a relevant "obligation" under rule 13.12 Insolvency Rules 1986 it must have taken or been subjected to some steps which

(a) had some legal effect (such as putting it under some legal duty or into some legal relationship) and which

(b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred, and

(c) it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under r13.12(1)(b).

It is hard to see why the costs of successful first instance or appeal proceedings taken by a bankrupt would not be a contingent debt, and therefore provable. It is therefore difficult to understand why a third party costs order would be necessary.

Moreover, as Lord Sumption pointed out, a trustee in bankruptcy, unlike the liquidator of a company, is personally a party to legal proceedings which he has adopted and once he becomes a party, the bankrupt no longer has any interest.

"The reason is that the assets of the bankrupt at the time of the commencement of the bankruptcy vest in him personally, and the bankrupt has no further interest in them. The rule, which dates back to the beginning of bankruptcy jurisdiction in England, is currently embodied in section 306 of the Insolvency Act 1986. The trustee's position differs in this respect from that of a liquidator, for although a liquidator is a trustee for the proper administration and distribution of the estate, the assets remain vested in the company and proceedings are brought by or against the company. It follows that with the exception of a limited (and for present purposes irrelevant) class of purely personal actions, a bankrupt claimant has no further interest in the cause of action asserted in the proceedings. Likewise, as Hoffmann LJ observed in Heath v Tang [1993] 1 WLR 1421, 1424, where the bankrupt is the defendant, he has no further interest in the defence, because the only assets out of which the claim can be satisfied will have vested in the trustee."

Why, then, should a non-party costs order be made against the bankrupt? And how would it be treated? If not provable already (which it plainly is) then it would not be provable if only made for the first time after the bankruptcy order (contrary to what is suggested by Lord Sumption in this case). Nor would it be an expense. Would it be, dare I say it, a non-provable debt? This suggested third category of cases is, in the author's view, a red herring. It is just a provable debt like any other contingent liability.

So, having rearranged the deck-chairs and other furniture, the Supreme Court seems to have ended up with a bit of a mess. Some clarification around contingent debts and costs is plainly still needed.

INSOL International Insolvency & Trusts seminar

John Briggs reports on INSOL's International Insolvency & Trusts Seminar last September in St Peter Port, Guernsey

This one-day INSOL seminar held at the Duke of Richmond Hotel in St Peter Port Guernsey was co-chaired by Anthony Dessain of Bedell Cristin and Tim Le Cornu of KRyS Global.

Attended by more than 100 delegates, including Glen Davis QC, David Alexander QC, John Briggs and Hilary Stonefrost of South Square, this was a hugely enjoyable conference whose technical programme was of interest to the offshore and the domestic community alike.

The programme contained a fascinating mix of topics ranging from "Insolvency Trusts – a heresy?" to "Hell hath no fury….Divorces, bankruptcy and trusts" and ending with a debate on the merits or otherwise of Lord Collins' prevailing views on cross-border insolvency enforcement in Rubin entitled "Help! Cross-border mutual assistance and enforcement". Needless to say, the vast majority of delegates preferred "Hoffmann universalism".

SEMINAR VENUE, THE DUKE OF RICHMOND HOTEL

The mid- morning slot was taken up with a talk on "The battle of the trustees: trustees in bankruptcy v trustees – is there a way into the trust assets?" This topic was of particular interest to those of us who practice in the area of personal insolvency. The setting up and use of a discretionary trust – particularly offshore - and the potential for such a trust and payments into the trust to be a transaction defrauding creditors (section 423 of the Insolvency Act 1986) is a constantly recurring theme in bankruptcy. Protection against tax and incidentally against the possibility of future business failure are matters which often go hand in hand in the creation of such a trust.

Sir Alastair Norris, a Judge of the High Court, Chancery Division, in London, took part as a panel speaker in two sessions, and perhaps most notably in the opening session, "Insolvency Trusts – a heresy?"

Apparently, the increasing use of offshore trusts for business purposes and not just their traditional use as a structure for the holding of land and property has led in some recent cases to trust entities becoming insolvent and hence the individuals who assume the position of trustees being threatened with personal bankruptcy.

In order to protect offshore trustees from this danger both Jersey and Guernsey have enacted legislation designed to restrict the personal liability of trustees in those jurisdictions to the assets of the trusts. A lively debate and discussion ensued between panellists and delegates on the propriety of such legislation and its efficacy, particularly as to the precise interpretation of the statutory provisions. Like a lot of offshore legislation, more thought has been given to the need for it than the actual drafting! Sir Alastair not only protested against the principle of the legislation but also expressed the view that the legislation creates more problems than it potentially solves.

The Channel Islands are well known for their friendliness and welcome to visitors and this very brief account of the conference cannot end without mentioning the excellent seminar dinner for delegates (and spouses) at the Auberge restaurant at St Martins overlooking St Peter Port bay and the isles of Herm and Alderney, hosted by EY.

Members of Chambers and many other delegates were also invited by KRyS Global to lunch the next day in St Peter Port to watch the 75th anniversary flying display by vintage planes and the Red Arrows. What a show!

JOHN BRIGGS

The conference was an unqualified success and an event to mark down for next year's calendar. It is understood that we will be invited to Jersey next year.

ST. PETER PORT, GUERNSEY

NEWS in brief

South Square Conferences

November marked a busy month for South Square, with conferences in both London and Grand Cayman. We were pleased to host our third annual Litigation Forum in conjunction with Mourant Ozannes on 4 November. The conference, attended by more than 200 delegates at London's Dexter House, addressed key developments in financial litigation and insolvency & restructuring.

Lord Justice David Richards, recently appointed to the Court of Appeal, delivered a keynote address, touching upon his role as a judge in the administrations of Lehman Borthers, MF Global and T&N.

Three interactive panel sessions followed, drawing upon the offshore insolvency and litigation expertise of South Square, Mourant Ozannes and our guest speakers Euan Clarke (Linklaters), Lynn Dunne (Ashurst), Professor Jeffrey Golden (P.R.I.M.E. Finance Foundation/LSE), Jason Karas (Lipman Karas) and Nick Segal (Freshfields).

The focus areas were 'Capital Markets Litigation in the English Courts and Overseas', 'The Duties of Directors: Protection for Investors and Creditors', and 'International Cooperation in Cross-Border Restructuring and Insolvency – Where Next?'.

South Square panellists included Mark Phillips QC, Felicity Toube QC, Jeremy Goldring QC and Hilary Stonefrost.

Later in the month, South Square's Felicity Toube QC, Mark Arnold QC, Jeremy Golding QC, Marcus Haywood, Robert Amey and Andrew Shaw joined The Restructuring and Insolvency Specialists Association (RISA) to host a half-day conference at the Ritz-Carlton in Grand Cayman.

They joined RISA committee and member speakers Simon Conway (PricewaterhouseCoopers), Matthew Crawford (Maples and Calder), Hugh Dickson (Grant Thornton), Rebecca Hume (Kobre & Kim), Keiran Hutchison (EY) and Neil Lupton (Walkers) to discuss schemes of arrangement, directors' liabilities and insolvency litigation.

The event was followed by a networking drinks reception in the Caribbean sunshine, where we were delighted to have the opportunity to catch up with many of our Cayman clients.

Many thanks to all those who participated and attended to ensure the success of both events.

To claim your CPD points, please quote ERK/SOSQ.

A detailed summary of both conferences will follow in the next edition of the Digest.

Fraud cases on the rise

Cases of fraud reported by businesses and consumers amounted to £798million between last December and May 2015.

BDO's "Fraudtrack" report noted that this marks an increase of almost £800m on the same period the previous year.

The average cost per fraud now reportedly stands at £3.27million, a figure almost double the £1.82million average recorded in the corresponding period a year earlier.

Approximately a quarter of the reported fraud involved consumers, who were conned out of a total of £188million.

Celebrity accountant charged with tax fraud

An accountant to stars, including newsreader Fiona Bruce and actress Sadie Frost, has appeared in court charged with fraudulently altering his clients' tax returns over an eight-year period. Southwark Crown Court heard that Denis 'Christopher' Lunn, 69, employed inexperienced staff who were "easily led" into filling out inflated fees and expenses on tax returns to reduce the taxable profits.

There is no suggestion that any of Lunn's clients were aware of the alleged fraudulent practises. He denies all charges.

ALLEGED FRAUD VICTIM FIONA BRUCE

Barrister accused of perverting the course of justice in Twitter libel case

Leading criminal barrister Andrew Fitch-Holland appeared at Southwark Crown Court in October accused of perverting the course of justice having allegedly attempted to induce a witness to provide a false statement.

The case stems back to 2012, when Fitch-Holland acted as "lead adviser" to former international New Zealand cricketer Chris Cairns in England's first ever Twitter libel trial. Cairns successfully secured damages and costs in excess of £1.4million from Indian Premier League chairman Lalit Modi over a tweet which had accused him of match-fixing.

However, the Goldsmith Chambers barrister, formerly of the now defunct Argent Chambers, stands accused of leaning on a key witness after a prosecution was launched against Cairns for perjury at the original trial.

The witness in question, Lou Vincent, a former teammate of Cairns at Indian Cricket League team the Chandigarh Lions, was banned from the game for life last year having admitted to match-fixing.

In a Skype conversation from 2011 played out in court, Vincent was heard telling Fitch-Holland it was, "A big ask for me to say in a legal document something that isn't true". To which the barrister responded, "If you can literally get a one-paragraph statement that said 'I played in the game, everything seemed OK' end of…it makes it plain that things are a lot more straightforward than they look".

He continued, "We all know some of what is being said is clearly true. A lot of it makes no sense at all. It is bull****."

Fitch-Holland denies the charge of perverting the course of justice. The trial is set to continue until mid-November.

British conman poses as Thai lawyer

A British conman who posed as a barrister in Thailand was jailed in September having duped vulnerable expats and tourists out of their life savings.

Posing as a qualified lawyer, former RBS clerk Brian Goudie represented Britons awaiting trial for various offences.

His victims included a 78-year-old -woman, who handed over £150,000 for her son's bail in a criminal case. Goudie pocketed the money, but failed to intervene.

The court in Pattaya found him guilty of posing as an advocate, sentencing him to three years in prison.

Goudie also faces revenge porn charges brought by a former Thai girlfriend, who claims he posted intimate photographs of her on the internet following their separation.

EU/EEA reading...

- Prof Ian Fletcher of South Square has just published a summary and review of the final version of the 2015 Recast Regulation on insolvency proceedings in 28(7) Insolvency Intelligence 97.

- The same issue of Insolvency Intelligence at p.107 has an article on "establishment" in the light of the Supreme Court decision in Trustees of Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2015] 1 WLR 2399

- A third edition of Moss Fletcher and Isaacs on the EU Regulation on insolvency proceedings has been delivered to the publishers (OUP) and is expected to be published in January 2016. A number of members of South Square have been involved in preparing the third edition. The third edition updates the case-law on the existing regulation, which remains in effect for insolvency proceedings begun prior to 26 June 2017, and also deals with the Recast Regulation, which applies to insolvency proceedings begun on or after 26 June 2017.

- A new commentary on the Regulation edited by Bork and van Zwieten is also due to be published by OUP in January 2006.

American Apparel becomes latest retailer to file for bankruptcy

American Apparel became the latest retail giant to file for bankruptcy in October, following persistently plummeting sales. The Los Angeles-based company, which manufactures all of its clothes in the US, said it had reached a restructuring deal with 95% of its secured lenders to reduce its debts. It will file for Chapter 11 bankruptcy protection.

It is understood lenders will write off $200million (£131m) of bonds in exchange for equity in the company, reducing its debt to no more than $135million and cutting annual interest payments by $20million.

American Apparel arrived on the British high street in 2004 and has 20 UK stores. The fashion empire has previously been hit by scandal following sexual harassment claims against the company's founder, Dov Charney, which resulted in his dismissal as CEO last year.

The exhibitionist Canadian entrepreneur, famed for wearing nothing but a strategically placed sock in meetings, has filed a number of lawsuits against American Apparel in connection with a claim that he was fired illegally and disenfranchised as a company shareholder.

AMERICAN APPAREL: OFF THE RAILS

QC disbarred for tax fraud

The Bar Standards Board has banned disgraced barrister Rohan Pershad QC from practising, two and a half years after he was sent to prison for a £600,000 tax fraud.

Pershad, who specialised in financial disputes, professional negligence and insurance cases, was sentenced in 2013 following an HMRC investigation which found that he had evaded tax payments for 13 years, despite charging clients VAT.

In his defence, the former barrister told the court he was "extremely poor at paperwork".

Sports Direct CEO charged after fashion chain collapse

In an unusual action against the boss of a FTSE 100 company, the Insolvency Service launched criminal proceedings against Sports Direct chief executive Dave Forsey in October in connection with the collapse of fashion chain USC.

USC, which was wholly owned by Sports Direct, dismissed 83 staff at 15 minutes' notice from its Dundonald warehouse in Scotland.

It is alleged that Forsey, who is charged with an offence contrary to section 194 of the Trade Union and Labour Relations Act 1992, did not give proper notification that staff would be made redundant.

Sports Direct shares immediately fell by almost 7 per cent when the charges against Forsey became public. It subsequently emerged that he had resigned from Mash Holdings, the £2.7billion holding company for Sports Direct tycoon Mike Ashley's stakes in Newcastle United and the sportswear chain.

SPORTS DIRECT: OWNED USC

Law student wins landmark privacy case against Facebook

An Austrian law student's two-year David v Goliath battle against Facebook culminated in a landmark ruling in October which sent ripples across the business world.

Max Schrems, a Ph.D student at Vienna University and founder of Europe vs Facebook, was concerned by the level of information held by the company on EU citizens.

Following a term studying at Santa Clara University in the heart of Silicon Valley, where he attended a talk by a Facebook privacy lawyer which allegedly downplayed the importance of Europe's privacy laws, he requested to see the data which the company held on him.

Alarmed by the results, he challenged the US social network, whose European base is in Dublin, via Ireland's data protection commissioner.

Having lost at first instance, with his grievance dismissed as "frivolous and vexatious", he won at appeal in the Irish High Court before the case reached the European Court of Justice in Luxembourg.

Lawyers were quick to label October's result in the ECJ a "bombshell" ruling, as it has invalidated the so-called "Safe Harbour" agreement, a 15-year-old data-transfer pact which offered transatlantic tech companies a privileged route to self-satisfy that they met "adequate" data protection standards under European law.

Edward Snowden sent Schrems a congratulatory tweet, writing "You've changed the world for the better".

Ryan Perkins

South Square is pleased to welcome Ryan Perkins as a new tenant from October 2015

Prior to joining the Bar, Ryan read philosophy at Warwick and Oxford. As an undergraduate he achieved the highest overall mark ever awarded in Warwick's philosophy BA. Ryan then achieved a distinction in his BPhil at Oxford before completing the Graduate Diploma in Law at City University, again with distinction and the BACFI Commercial Law Prize, and was called to the Bar by Gray's Inn in 2014 as a Bedingfield Scholar.

Ryan joined South Square as a tenant in October of this year, following successful completion of his pupillage. As a pupil Ryan gained extensive experience in all of Chambers' core practice areas, including domestic and cross-border insolvency, banking and finance, commercial litigation, company law and offshore work. He has assisted in a number of significant cases, in all tribunals up to the Supreme Court - including the Lehman Brothers Waterfall II application, the Madoff fraud (Primeo Fund v HSBC), derivatives litigation arising from the insolvency of Landsbanki and other Icelandic credit institutions, the Saad litigation in the Cayman Islands, and transactional work on a securitisation programme originated by Northern Rock.

Ryan was recently selected as a contributor to the forthcoming editions and supplements of Dicey, Morris & Collins on the Conflict of Laws, and has written for several other practitioners' textbooks and journals on cross-border insolvency and structured finance. Ryan enjoys technical work, and has a close familiarity with most forms of derivatives (OTC and exchange-traded), syndicated lending structures, securitisation programmes, dematerialised securities and collective investment schemes.

In his spare time Ryan enjoys music (having attended the Purcell School of Music), logic, Bitcoin and other cryptocurrencies.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the November 2015 edition of the Digest. This time all you have to do is work out what the eight pairs of pictures represent. Then you have to identify what connects them. When you have done that please send your answers to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. To the winner, if necessary drawn out of the wig tin, goes the usual magnum of champagne and a South Square umbrella. Answers by Friday 15th January, 2016 please. Good luck! *David Alexander QC*

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And the connection is?

AUGUST CHALLENGE

The answers were: 1/. Greece 2/. France 3/. Germany. 4/. Argentina. 5/. Yugoslavia. 6/. Russia 7/. Denmark. 8/. Netherlands.
The connection is Sovereign Default and the first name out of the wig tin was Anna Nolan of Ropes & Gray International LLP to whom go our congratulations, a magnum of champagne and a South Square umbrella.

Diary Dates

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

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

INSOL International Mexico City One Day Seminar
3 March 2016 – Hyatt Regency Hotel, Mexico

R3 26th Annual Conference 2016
18-20 May 2016 – InterContinental Hotel, Budapest

International Insolvency Insitute (III) 16th Annual Conference
6-7 June 2016 – Grand Prince Hotel New Takanawa, Tokyo

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

South Square also runs a programme of in-house seminars and talks - both in Chambers and onsite at our clients' 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.

SOUTH SQUARE

'STILL UNQUESTIONABLY THE LEADING RESTRUCTURING AND INSOLVENCY SET IN THE MARKET'

Chambers & Partners 2016

SOUTH SQUARE

'AN EXCELLENT SET AT THE FOREFRONT OF THE LONDON BAR'

Chambers UK Bar Guide 2016

Michael Crystal QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Richard Adkins 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
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Daniel Bayfield
Richard Fisher
Stephen Robins

Joanna Perkins
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

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