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FROM THE EDITOR

MARK ARNOLD QC

'The golden met-wand and measure to try the causes of the subjects'

As many of you will know, we have recently lost our friend and colleague, Richard Adkins QC. Immediately after this editorial, David Alexander QC pays tribute to this extraordinarily brave, gifted and generous man, who was an example to us all. Richard will be sorely missed.

On Monday 27 January 1606, when Brexit was still some way off, the Attorney General, Sir Edward Coke, led the prosecution of one Guido Fawkes and others, apprehended in their attempt to blow up the King in Parliament the previous November. James I ("the greatest King that ever was of England", according to the Attorney General) survived; the plotters did not. James I attempted to rule by proclamation (as well as divine right). This led first to the *Case of Prohibitions* (1607). James I asserted that "the Judges are but the delegates of the King," who may hear such cases as he pleased and decide them himself. The Chief Justice of the Common Pleas, Sir Edward Coke, disagreed. He said that the law was "the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace". The King was greatly offended, apparently, for this would mean that he was under the law. Quite so, said Coke. The *Case of Proclamations* followed in 1610. Coke opined that the King could not by his proclamation change any part of the law of the realm, and that he had no Prerogative save that which the law of the land allowed him.

James' successor, who was nine at the time, was not paying attention. Charles I quickly tired of Parliament. He wanted money and was not above forcing his subjects to advance loans to him. Coke's next lecture became the Petition of Right, which sought to enshrine the subject's rights against the Prerogative, including against being forced to lend the King a fiver without the consent of Parliament. Charles I signed it, then ignored it, and attempted instead to rule without Parliament for a decade or so, making plentiful use of his Prerogative in the process. Parliament remonstrated, grandly. Civil War ensued; the King lost his head. After the intermission, the monarchy was restored. On the whole, Charles II ruled wisely; his brother, James II, less so. He abdicated and was replaced by William III, "the glorious instrument of Delivering this Kingdome from **...** Arbitrary Power", who ruled with his wife, Mary II.

In 1689, they signed the Bill of Rights. It recorded that James II "did endeavour to subvert and extirpate **...** the Lawes and Liberties of this Kingdome" by "Assumeing and Exercising a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament", amongst other unpleasant things. The

exercise of such "pretended powers" was declared illegal. Thereafter the King ruled with Parliament, and the Crown in Parliament became – and remains – sovereign. By the Act of Settlement 1701, Parliament also safeguarded the independence of the judiciary, who could be removed only by Act of Parliament.

What of the Royal Prerogative? It survives as a necessary part of the machinery by which executive power is exercised. In particular, the conduct of international relations and the making and unmaking of treaties on behalf of the UK are regarded as matters for the Crown in the exercise of its prerogative powers. But there are limits. It is a fundamental principle of Parliamentary sovereignty that primary legislation is not subject to displacement by the Crown (ie the executive government) through the exercise of its prerogative powers: legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The Crown only has and may exercise prerogative powers within limits recognised by the law, as Coke had said. Thus executive government is made subject to the rule of law in the UK.

The Divisional Court has recently ruled that HM Government cannot, by exercising the Royal Prerogative, trigger Article 50 without first consulting Parliament. Why not? By the European Communities Act 1972, EU law confers certain rights on the people of this country. Those rights cannot be removed by the exercise of prerogative powers unless Parliament has said so. According to the Divisional Court, Parliament has not said so.

Whether or not that is correct will be a matter for the Supreme Court hearing the appeal shortly. For now, it is instructive to consider the response. The judges have been branded "Enemies of the People". Really? Judges have applied what they judge to be the law of this land so as to require the Government to consult Parliament, elected by the British people to represent their interests, before modifying or removing rights vested by Parliament in those same people. They have reaffirmed the sovereignty of Parliament and the rule of law. For those concerned about the erosion of British sovereignty, what's not to like? It is the Lord Chancellor's constitutional responsibility to uphold the independence of the judiciary and the rule of law. A little more than forty-eight hours after judgment was delivered, she rallied to their defence (sort of), saying: "The independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality." But not in England, it seems.

THE MOTHER OF PARLIAMENTS

The Prime Minister has assured her European counterparts that she still intends to trigger Art 50 by March 2017. Once triggered, will it be irrevocable? Yes, says the Government. No, says Lord Kerr, author of Article 50. "Brexit means Brexit", we are told. Of course it does. But will that be hard or soft? Sunny side up, over easy, or scrambled? The Foreign Secretary remains optimistic: "Brexit means Brexit and we are going to make a Titanic success of it **...**"

The Government has also announced the Great Repeal Bill, the object of which will be

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TRUMP: BREXIT, BREXIT PLUS

to repeal the ECA 1972 in due course while also converting existing EU law into purely domestic law. Parliament will then decide what should be kept, changed or dispensed with. That may work in the domestic context. In the restructuring and insolvency world, as in many others, however, that would not address one of our principal concerns: namely, the question whether what is done here will be recognised and enforced elsewhere in the EU. That must be a matter for negotiation and agreement, when Article 50 is triggered.

Lest it be thought that the United Kingdom is alone in its constitutional travails in this season of mists and mellow fruitfulness, as we go to print the people of the United States have voted Donald Trump into office as their 45th President. In Mr Trump's words, this is "Brexit Plus Plus Plus". After an election notable for its animosity, claims that it would be rigged (as Republican hopes appeared to wane) or perhaps not (as they waxed), and the late interventions of the Director of the FBI, and much more, President Trump has much to do to calm troubled waters, both domestically and internationally.

This issue of the Digest is truly international. Joey Garcia and Jonathan Garcia of ISOLAS look at the effect of Brexit on Gibraltar Funds and a recent appellate decision concerning directors' duties. Tom Smith QC discusses with Rocco Cecere and Christopher Levers of Mourant Ozannes appellate clarification in *In Re Hedge Fund SPC* of the priority accorded to redemption claims in Cayman liquidations. Matthew Abraham outlines the new insolvency and bankruptcy code in India, and reports on both the opening of the Mumbai Centre for International Arbitration and also the 3rd Regional Conference held in Singapore, which he attended with Antony Zacaroli QC in September.

Closer to home, we re-introduce you to Riz Mokal, who rejoins us as a tenant following a distinguished academic career, and to Madeleine Jones and Edoardo Lupi, who became tenants on 1 October 2016 on successful completion of their pupillages. Glen Davis QC reviews the latest edition of Jersey Insolvency and Asset Tracing, by Anthony Dessain and Michael Wilkins. David Allison QC and Adam Al-Attar discuss the latest judgment handed down in the Lehman Waterfall litigation, Waterfall IIC, concerning the rate of interest payable to creditors under the ISDA Master Agreement. Richard Fisher considers the implications of *BTI 2014 LLC v Sequana*, an important recent decision concerning the directors' duty to take into account the interests of creditors. Alexander Riddiford looks at the *Nortel Group* settlement just sanctioned by Snowden J. And, for something completely different but no less engaging, Joanna Perkins takes a look at weather derivatives.

In addition to all this, Pierre Ali-Noor of Mourant Ozannes and our own Madeleine Jones report on the Litigation Forum 2016, which South Square hosted jointly with Mourant Ozannes. And, of course, we have the usual case digests, edited by Lloyd Tamlyn, as well as news in brief, diary dates and the South Square Challenge.

All at South Square hope that you enjoy this edition of the Digest. If you would like to be added to the circulation list (or your contact details have changed) please contact kirstendent@southsquare.com.

Richard Adkins QC

RICHARD ADKINS QC

With the death of Richard Adkins QC on 4 August 2016, Chambers lost a fine lawyer and a good and loyal colleague and friend.

Having been to Oxford University, Richard initially went down the route of becoming a solicitor with Lovell White & King. However, he swiftly determined that this side of the legal profession was not for him and, despite the risks that becoming a barrister entailed, decided that he would give up the safety and security of working in a big firm for the vagaries of practice at the independent bar where life is either all roses and no bed or all bed and no roses. So Richard was called to the Bar in 1982 and subsequently became a member of chambers at 3 Paper Buildings in the Inner Temple which is where Chambers was housed before we moved up to South Square in the early 1990s.

Richard then went on to develop a highly successful career at the Bar taking silk in 1995. Like many in Chambers he specialised in business and financial law both domestically and internationally, but was one of the first to recognise the importance of restructuring, an area of work at which he excelled. He was also regularly instructed in takeover litigation and professional negligence cases and developed a thriving banking practice, with a particular specialism in securities, debt discounting and factoring, chattel leasing and securitisations. Richard was a very clever man; he was a genuinely fine lawyer who had an amazing brain for unscrambling the most complex of problems. He was also generous with his time in explaining the finer details of impenetrable financing transactions to people who were less intellectually agile than he was. He was highly regarded for his investigative approach and ability to solve problems which defied the efforts of others. He approached his cases with great enthusiasm and was very good at identifying the points that mattered – and doing so very quickly.

Richard also had another side. He cared enormously for others and gave up much of his time to help them. He served for many years as part of the Chambers Executive Committee on which he was a core member. He was always available to provide his wise counsel to all whether you were a pupil, a junior tenant or even a senior member of Chambers. He tried to look after everyone in a very fair and measured way. He was also totally loyal to Chambers.

Family was immensely important to Richard. The support which he received from his wife Jane and his children, Edward, Rachel and Thomas, was crucial to the success which he achieved at the Bar.

Richard David Adkins QC had what all really good barristers should have. He was supremely clever. He had total and utter integrity. And he loved his fellow man. He truly was one of the good guys. All in Chambers owe a debt of gratitude to Richard for enriching our lives. All in Chambers will miss him and his wise counsel very greatly.

Declaring dividends in the face of contingent liabilities

Following the recent High Court decision in *BTI 2014 LLC v Sequana* **Richard Fisher** considers what guidance it offers to directors wishing to pay shareholder dividends.

The existence of long-tail contingent liabilities is an unfortunately common feature of modern corporate groups. Actual and contingent asbestos liabilities drove the T&N group into insolvency. Other entities face liabilities for historical acts that they committed themselves, or as a consequence of successor liability which, despite the purchase of insurance, continue to grow beyond existing cover, and require ever more demanding provisions in their accounts.

If the current business is being conducted profitably, and the accounts demonstrate sufficient distributable profits, is it open to directors of a company to pay dividends to shareholders if they have made a reasonable estimate of the potential liabilities faced by the relevant entity? Or is something more required? Should prudence prevail, and the monies be retained in order to cater for the possibility that the contingencies will vest and liabilities exceed those estimates?

Issues of this type arose for consideration by the High Court in the recent case of *BTI 2014 LLC v Sequana SA* [2016] EWHC 1686 (Ch).

Consider a scenario in which Company A faces potentially huge liabilities to indemnify a third party, B, for liabilities arising under the United States Comprehensive Environmental Response, Compensation and Liability Act 1980 ("CERCLA"). Based on matters of judgment by its directors, A's accounts make a provision for these contingent liabilities in the amount of circa £50 million. But the extent, if any, of those liabilities is very uncertain.

The provision is at a level that enables A's directors to form the view that A is solvent, such that it is able to effect a reduction of capital and has sufficient distributable reserves in its accounts so as to enable it to declare dividends in two successive years to its parent company, C. C, shortly after receipt of the second dividend, sells A on terms which seek to ensure that it can have no possible liability for any CERCLA indemnity. However, in due course, the creditors of A allege that the provision in A's accounts for the indemnity liability was manifestly inadequate.

What remedies, if any, are open to the creditors of Company A to challenge the payment of the dividends to C?

In BTI, Mrs Justice Rose considered an attack on the payment of dividends in circumstances broadly similar to the above on the three-fold basis that (i) their payment contravened the requirements of Part 23 of the Companies Act 2006 (the "2006 Act") (because the accounts on which the directors relied were incorrect and did not give a true and fair picture of the state of the company's finances); (ii) the decision to pay both dividends was in any event a breach by the directors of their fiduciary duties; and (iii) the

declaration and payment of dividends constituted transactions defrauding creditors for the purpose of Section 423 of the Insolvency Act 1986 (the "1986 Act"). Ultimately, the claims failed other than in respect of the final dividend declared, which Mrs Justice Rose held (on the very specific facts of the case) contravened Section 423 of the 1986 Act. But the decision contains a number of useful findings as to the current state of the law that should provide guidance going forwards.

At the heart of the attack on the dividends was the manner in which directors should approach the question of assessing the solvency of a company where it faces contingent liabilities. A company can only make a distribution out of profits available for that purpose, and by reference to properly prepared annual or interim accounts that enable a reasonable judgment to be made as to the amounts of the items on which the justification of the dividends depends (Ss 830, 836 and 837 of the 2006 Act). In this instance, although the accounts purported to support the payment of dividends, they were predicated on the reduction of capital having been effective and the provision for the contingent liabilities having been appropriate.

Where a reduction of capital takes place out of court in accordance with Chapter 10 of the 2006 Act, the reduction must be supported by a solvency statement (Ss 641 and 642). This requires (see judgment at [312]) a statement that each of the directors of the company has formed the opinion that (i) "there is no ground on which the company could then be found to be unable to pay (or otherwise discharge) its debts"; and (ii) that the company will be able to pay (or otherwise discharge) its debts as they fall due during the year following the date of the statement.

This language (which is in substance

BTI V PAPER GIANT SEQUANA

Mrs Justice Rose found that the 'no ground' requirement did not mean 'on the worst case scenario'

mirrored in the context of solvency declarations given by the directors for the purpose of a members' voluntary liquidation under the 1986 Act), and how stringently it will be interpreted, had not been the subject of any decision since the Supreme Court opined on the meaning of insolvency in Section 123 of the 1986 Act in *Re Eurosail* [2013] UKSC 28. In BTI, the issue concerned the first limb of the above test i.e. what was required for the directors' statement of opinion that there was no ground on which the company could then be found to be unable to pay (or otherwise discharge) its debts?

The conclusion reached is likely to give comfort to directors both in this context and when considering solvency statements in the context of voluntary liquidations. Upholding the validity of the reduction of capital notwithstanding the existence of the large contingent liabilities (which could ultimately greatly exceed the provisions made), the Court held that:

- The directors must in fact have formed the opinions required by Section 642 of the 2006 Act and applied the correct test in coming to those opinions (i.e. it is not enough that the directors acted honestly) [322]
- However, the requirement that there be "no ground" on which the company could be found at the date of the statement to be unable to pay its debts did not mean "on the worse case scenario". As Mrs Justice Rose put it at [327]:

"*I hold that the opinion that the directors must form is not whether, if calamity were to strike on some or all fronts, the company might be unable to pay its debts nor is it whether the court would have jurisdiction to wind up the company under Section 123 of the Insolvency Act 1986 on a petition issued on the day the solvency statement was signed. The test is not a technical one but a straightforward one applying the words of the section. The directors must look at the situation of the company at the date of the statement and, taking into account contingent or prospective liabilities, form an opinion as to whether the company is able to pay its debts.*"

- The phrase "*taking into account contingent and prospective liabilities*" carries the same meaning as used in Section 123(2) of the 1986 Act, and is to be construed in the same way as described in *Re Eurosail* (see [337]-[339]) i.e. not in a technical sense, but whether considering the nature of the contingent and prospective liabilities, assets would be available to meet them, and what provision has to be made for that purpose ([329] and [330]).
- It is not necessary for the directors to have reasonable grounds for the opinion that they form (albeit it will be a criminal offence under Section 643(c) of the 2006 Act if they do not have reasonable grounds for the opinion that they hold). The effect of this will be that even if an offence occurs, the reduction of capital will still be valid ([331]-[333]).

Applying the long standing decision of *De Courcey v Clement* [1970] 1 Ch 693, the Court further held that errors in the solvency statement (or statement of assets and liabilities on which the statement was based) would not invalidate the reduction of capital provided that the statement can be reasonably and fairly described as a statement of the company's assets and liabilities ([318] and [343]).

The reduction of capital was not, however, the only basis on which the dividends were attacked. The Claimants further asserted that the declaration of dividends were in any event invalid because the accounts did not give a true and fair view of the state of affairs of the company in light of the contingent liabilities that the company faced. In making a provision in the accounts, the claimants asserted that, even if a best estimate (in admittedly very complicated circumstances: [109]), the directors should have taken more account of the possibility that that estimate

The Court held that errors in the solvency statement would not invalidate the reduction of capital...

could turn out to be wrong "by a long way" ([6]). The estimated liabilities had covered a large range with (at certain times) a potential difference of more than $250 million between the low and high estimates in a worst case scenario (see, for example, [122] and [131]).

This argument was also rejected. The Court noted (with implicit approval) the conclusion reached by various eminent Chancery silks over the last 3 decades that:

"*The requirement to prepare accounts which show a true and fair view is a legal requirement, the satisfaction of which is a question of law for the courts to determine. In determining that question, the Courts will rely very heavily upon the ordinary practices of professional accountants in determining whether accounts show a true and fair view. That is because those practices reflect the accumulation of experience and good practice and mould the expectations of the users of accounts as to the sufficiency and utility of the information in terms of quantity and quality*" (see [372]).

The Court also noted the definition in FRS 12 that a provision for a contingent liability should only be recognised when an entity has a present obligation (legal or constructive) as a result of a past event, it is probable that a transfer of economic benefit will be required to settle the obligation, and a reliable estimate can be made of the amount of the obligation. Unless those conditions are met, no provision should be recognized ([374] –[378]).

Mrs Justice Rose therefore concluded that, provided a provision was reasonably included as reflecting the best estimate of those involved, the accounts would be regarded as giving a true and fair view of the company's financial position even if it was possible that a much higher provision could (or, with hindsight, would) be justified (at, for example, [400] and [431]).

Is it possible to argue that, even if the payment of dividends was valid for the purpose of Part 23 of the 2006 Act, the declarations amounted to a breach of fiduciary duties in circumstances where the directors were aware that the estimates used for provisions were surrounded by great uncertainty and there was a risk that the liability would be much greater than the estimate?

RICHARD FISHER

The answer to this question appears to be a tenuous yes, albeit the circumstances in which such a claim could arise seem likely to be rather extreme. Of potentially wider interest was the consideration given by the Court to the question of when a duty to take into account the interests of creditors may arise.

Reliance was placed on the duty reflected in Section 172 of the 2006 Act to act in the way that a director, in good faith, considers would most likely promote the success of the company, and to take account of the interests of creditors (see in particular Section 172(3)). A number of aspects of the law in this regard were common ground and accepted by the Court as correct (see [460]-[463]) including that (i) the content of the duty does not vary

MRS JUSTICE ROSE

according to the degree of risk of insolvency that has arisen, and (ii) that, if the court decides that the duty to take into account creditors' interests has arisen but the directors did not in fact take the interests of creditors into account, that is not of itself a breach of fiduciary duty invalidating everything done automatically (applying *Colin Gwyer v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch)).

In determining when the duty to creditors may arise, the Claimants argued that it sufficed if there was a real as opposed to remote risk of insolvency. The Defendants argued that the company had to be "*very close to insolvency*".

Rose J conducted an extensive review of the authorities in this area (see [466]-[476]) and, agreeing with the judgment of John Randall QC in *Re HLC Environmental Projects Ltd (in liq)* [2013] EWHC 2876 (Ch), held that the language of a real risk of insolvency was, on analysis, in all cases treated as being analogous with notions of being "*on the verge of insolvency*" or "*of doubtful or marginal solvency*". She stated at [478]:

"*The essence of the test is that the directors ought in their conduct of the company's business to be anticipating the insolvency of the company because when that occurs the creditors have a greater claim to the assets of the company than the shareholders.*"

Having expressed the applicable test broadly, she therefore concluded that, in circumstances where there was a real possibility that the company would never become insolvent or even close to insolvent, the company could not be described as being on the verge of insolvency or of doubtful insolvency or in a precarious or parlous financial state. Therefore, the directors could not be said to be required to run the company in the interests of the creditors rather than the shareholders of the company (see [483]).

Whilst not impossible, it seems unlikely that a Part 23 compliant declaration of a dividend will in many cases be capable of being challenged as being in breach of the director's fiduciary duties to take into account the interests of creditors.

It is therefore a little surprising that, having reached this conclusion, the challenge to one (but not both) of the dividends declared succeeded as being a transaction defrauding

It seems unlikely that a Part 23 compliant declaration of a dividend will be capable of being challenged as being in breach of the director's fiduciary duties to take into account the interests of creditors

The fact that the declaration of the dividend was a pre-cursor to the sale ought not to mean that it is a transaction susceptible to challenge under Section 423

creditors within the meaning of section 423 of the 1986 Act.

Section 423 requires *inter alia* that the directors had the subjective purpose of putting assets beyond the reach of creditors, and that this was a real or substantial purpose of entering into the transaction (*IRC v Hashmi* [2002] EWCA Civ 981 and *Hill Spread Trustee* [2006] EWCA Civ 542). The Court rejected the argument that a payment of a dividend could not fall within the scope of Section 423 (on the basis that it was a discretionary decision to pay assets to members which moved them from the debtor to a third party, irrespective of the source of their entitlement i.e. the original articles): [500]. However, it went on to hold that, although there was no evidence of the relevant purpose at the time that the first dividend was declared, the second was declared at a time when sale of A by C was in contemplation. The fact that it was declared in order to facilitate that sale (which sale would remove a potential responsibility for environmental liabilities from the group balance sheets), did satisfy the purpose requirement of Section 423.

This appears to be a somewhat surprising conclusion and, with respect, the submission made by the Defendants in response to this argument appears to have force (see [512]): that the purpose of the sale may have been to remove the liability from C's group, but the transaction which was being challenged was the declaration of the dividend. The Judge rejected this argument on the basis that linked transactions may be attacked under Section 423, and that it was not possible to distinguish the purpose of paying the dividend and the purpose of selling the company. However, the transaction that deprives the company of value in this instance was the payment of the dividend. It was not a necessary part of the declaration of the dividend that there was also a sale of A by C's corporate group: there were two self-standing transactions. The purpose of the company in paying the dividend does not appear to have been to deprive the creditors of recourse to that asset: on the contrary, on the evidence it appears to have been clear that leaving assets in A that could otherwise be used for dividends might increase the likelihood of claims being made. The purpose of the sale may have been to ensure that C's corporate group no longer had a member within it that was potentially subject to the risk of claims arising under or as a consequence of CERCLA, but that is a purpose relating solely to the sale. The transaction that the claimant really wanted to challenge was the sale (as the passage at [516] of the judgment suggests):

"*Here there is no doubt that the substantive intention of the directors at the time of the May Dividend and the sale was to prevent AWA having any legal or moral call upon its parent company to meet its creditors' claims*"

The transaction that eliminated any legal or moral ability of A to call upon C was the sale, not the declaration of dividend. But the sale was not a transaction entered into by A causing prejudice to its creditors by putting assets beyond their reach. The fact that the declaration of the dividend was a pre-cursor to the sale ought not to mean that it is a transaction susceptible to challenge under Section 423, or that the purpose of the sale was also a substantial purpose of the declaration of dividend.

This issue will be revisited on appeal and may also be relevant to the point that the Court did not determine at the first trial, namely the remedy (if any) that would be ordered (see [525]).

Assuming the decision to be upheld on appeal in all other respects, it provides helpful guidance for directors whose shareholders want dividends to be paid notwithstanding the existence of material contingent liabilities.

Lehman 'Waterfall IIC' judgment handed down - meaning of default rate in ISDA Master Agreements

David Allison QC and **Adam Al-Attar** review the latest judgment to be handed down in the Lehman 'Waterfall' litigation, which adjudicates the rate of interest payable to creditors under the ISDA Master Agreement.

Introduction

On 5 October 2016, Mr Justice Hildyard handed down judgment in the latest instalment of the Lehman "Waterfall" litigation arising out of the collapse of Lehman Brothers International (Europe) (LBIE). The judgment addresses the interpretation of key provisions in the 1992 and 2002 ISDA Master Agreements concerning interest on sums due following the close-out of transactions upon early termination. It also addresses similar issues arising under a German law governed form of master agreement.

The need for the court to adjudicate on the matter arose in the context of the substantial surplus that remains in LBIE's administration after paying or providing for the provable debts owed by LBIE in full. The situation is unusual, with the surplus estimated to be in the region of £7 billion.

Given the widespread use of the ISDA Master Agreement throughout the world (at the end of December 2014 the total notional amount of over the counter derivatives in existence was US$630 trillion), the issues are of considerable importance to the whole derivatives market. However, the rare fact of the surplus in LBIE's administration means that the issues in the case are unlikely to arise again. For the parties involved in the case, some £4.4 billion of LBIE's admitted claims arise under ISDA Master Agreements, and the debts have been outstanding for more than five years. Even a small change in the percentage of interest owed would therefore be magnified dramatically.

Given the large surplus and the fact that such a small difference in interest could have such a large impact, it is unsurprising that creditors took such a keen interest in the case. For creditors lower down the insolvency payments waterfall, such as subordinated creditors and shareholders, there was an incentive to argue that the interest payable under the ISDA Master Agreement does not exceed the eight percent simple interest granted by the Judgments Act. For those creditors with payments due to them under the ISDA Master Agreement and without an interest in the subordinated debt, it was in their economic interest to argue that their 'cost of funding' – which was the key issue in the case – could have included equity funding that surpassed that eight percent threshold, so as to claim a rate of interest higher than the Judgments Act rate.

The Issues

Rule 2.88(9) provides for statutory interest under Rule 2.88(7) to be payable at the greater of: (a) the rate specified in section 17 of the Judgments Act 1838 on the date when the company entered administration ("the Judgments Act Rate") (namely eight percent simple per annum); and (b) the "*rate applicable to the debt apart from the administration*".

In both the 1992 and 2002 ISDA Master Agreements interest on sums payable by the defaulting party (in this case LBIE) is due at the Default Rate for much of the period since LBIE's collapse in September 2008. The Default Rate is defined in both agreements as "*a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1 percent per annum*".

The principal question was whether LBIE's counterparty creditors would be entitled to claim interest at the Default Rate, as the "*rate applicable to the debt apart from the administration*" within the meaning of Rule 2.88(9), which exceeds the Judgments Act Rate of eight percent simple per annum.

The Judgment deals with two key issues (and a number of sub-issues) arising from the definition of Default Rate in the ISDA Master Agreement. First, whether the "relevant payee" (whose cost of funding is to be certified) is confined to LBIE's contracting counterparty, or includes those who acquired by assignment the right to payment of the close-out


DAVID ALLISON QC

amount subsequent to LBIE's collapse. Second, whether the phrase "*cost ... if it were to fund or of funding the relevant amount*" is confined to the cost of borrowing the relevant amount or whether it includes costs of and associated with raising money by any means. As Hildyard J commented at paragraph 53, the sharpest division between the parties was whether the phrase was confined to cost of borrowing or extended to the cost of issuing equity.

The first issue was of particular importance in the LBIE administration, because a large proportion of LBIE debt had been purchased in the secondary market by hedge funds and other entities whose cost of funding, generally speaking, was likely to be of a different order to the cost of funding of the original counterparties.

The second issue was of considerable importance taking into account the assumption that if counterparties could certify a cost of funding that included their cost of raising equity then it was likely that the rate so certified would be significantly higher than if they were confined to certifying their cost of borrowing the relevant amount. The interest related to funding by way of a loan, especially for large commercial entities, will often be lower than the costs associated with raising the same amount through equity. This was dramatically illustrated in the case of Goldman Sachs International (a party whose joinder was expressly limited to the submission of evidence and the making of arguments not raised by the Senior Creditor Group) who "*was in fact able to borrow at the relevant time many billions of dollars at rates of interest ranging from 0.01 percent to 1.10 percent*", yet sought to contend that it was entitled to rely upon its equity funding costs to certify a rate in excess of the eight percent statutory rate. The potential commercial significance of this issue in connection with the LBIE administration can be seen at paragraph 11 of the Judgment, where Hildyard J noted that statutory interest on all ISDA claims at the Judgments Act Rate would result in an aggregate amount of statutory interest payable of £1.7 billion, but if interest was payable on ISDA claims at a compound rate of eight percent, 12 percent or 18 percent, then the aggregate amount of statutory interest payable would be £2.1 billion, £3.7 billion or £6.8 billion respectively.

Contractual interpretation

As with many terms used in a commercial context that are not considered terms of art, the terms involved were to be construed in accordance with the commercial purpose of the ISDA Master Agreements and the need for commercial certainty, but also the need for flexibility in how different parties choose to contract under the Master Agreement.

The relevant payee

The ISDA Master Agreement allows a party to transfer all or any part of its interests in any Early Termination Amount payable to it by a Defaulting Party (under section 7 of the 2002 Agreement).

Hildyard J concluded that 'relevant payee' meant the original contracting counterparty, and thus did not include the persons who had acquired the right to payment under Section 6 of the Master Agreement via an assignment under Section 7. Putting it figuratively, "*the transferee is entitled to the tree planted by the transferor and such fruit as had grown and would grow on it when transferred, and not to fruit of a different variety or quantity which might have grown had the transferee planted the tree*." Hildyard J also found support from the general principle that an assignee cannot usually recover more against the debtor than the assignor could have recovered. Accordingly, what has to be certified


ADAM AL ATTAR

pursuant to the definition of the Default Rate is the cost to the original counterparty of funding the relevant amount irrespective of whether that original counterparty has sold its debt in the secondary market.

Cost of funding

Hildyard J concluded that the phrase in the Default rate clause (above) "*Cost ... if it were to fund or of funding the relevant amount*" is confined to the cost to the relevant payee of borrowing the relevant amount under a loan transaction. It does not include, therefore, the cost of raising equity. Nor does it include costs to the relevant payee of raising money beyond that required to fund the relevant amount.

Hildyard J summarised the test, at paragraph 174, as "'*cost' is the price which the relevant payee paid, or would have to pay, to a counterparty to a transaction to borrow an equivalent sum, taking into account all relevant considerations. That leaves a broad margin, confined by certification, but which is tied to a borrowing transaction (actual or hypothetical) rather than the activities of the relevant payee as a whole*". In rejecting the possibility that equity funding could form part of the certification, he said, at paragraph 136, "*Interest is payment by time for the use of money: it is an obligation imposed as the cost of being afforded the use of money over the relevant period of time. The obligation is in the nature of a debt established by the transaction under which the use of the money is provided. That obligation is plainly a cost, equal to the rate of interest charged*" and, at paragraph 137, "*A share has very different characteristics ... A share confers an interest, measured by the participation and any voting rights, in the issuer; any return is in right of that interest*."

Hildyard J also held that the cost of funding may also extend to overnight funding, or funding for any other duration. It may also be calculated either by reference to a particular date or on a fluctuating basis, taking into account relevant market conditions and any other relevant facts or circumstances known to the relevant payee from time to time.

Challenging the certificate

The parties were largely agreed that the relevant payee's certification would be conclusive as to its cost of funding within the meaning of the phrase (now defined by Hildyard J), save in certain circumstances. These circumstances would extend to situations where the certificate is made irrationally or otherwise than in good faith, but the parties divided on whether the test of "manifest error" would go beyond the situations of irrationality and/or lack of good faith. Hildyard J held that that it was "inconceivable" that the drafters of the ISDA intended to preclude challenge to a certificate when it appears founded on "manifest numerical or mathematical error." However, to go beyond this, without restricting the nature of the error to numerical or mathematical error, was held to go beyond implication into refashioning.

New York or England?

According to the Administrators' estimate, some 543 claims arose under English law; and some 310 under New York law. Hildyard J held that although there are differences between the two jurisdictions in their respective approaches to issues of contractual construction, none of the parties contended for any different result according to the choice of English or New York law, nor did Hildyard J see any reason to depart from that agreed position. Indeed, it seems likely that the draftsmen of the ISDA Master Agreements anticipated that they would produce the same result whichever of the two laws was adopted. Furthermore, the principles of New York law as to the construction of contracts were largely matters of common ground between the experts.

German Master Agreement

Hildyard J also considered similar questions arising in relation to a standardised master agreement governed by German law (the GMA). The amounts claimed under the GMA were significantly less than under the ISDA Master Agreement. The Administrators received 15 claims with an aggregate value of £311 million. However, a similar issue arose in that if a creditor could establish that a proved debt under the GMA has an applicable interest rate of higher than 8 percent per annum apart from the administration, then they would be entitled to that higher rate of interest under Rule 2.88(9) of the Rules.

However, the issues raised varied from the ISDA Master Agreement in that Wentworth argued that the GMA does not make provision for any contractual entitlement to interest on the close-out amount which falls due from LBIE following its termination. The Senior Creditor Group on the other hand argued that section 288 of the German Civil Code provided an entitlement to interest apart from the administration which reflected the cost to the relevant party of funding the close-out amount under the GMA.

Some 543 claims arose under English law, some 310 under New York law, and a further 15 claims under German law

Hildyard J held that s.288(4) of the German Civil Code, which provides for a claim for "further damage" for a default in payment, was not available as a basis for a claim for Statutory Interest in excess of 8 percent pursuant to Rule 2.88(9) of the Rules. He held, first, that the required default had not occurred as at the date of LBIE's administration because the termination payment under the GMA did not become due until after it had been calculated and, further, because LBIE had not "seriously and definitively" refused to perform the GMA as at the date of its administration (as would have triggered a default under s.286 of the German Civil Code). Secondly, he held that no default under German law could occur following the commencement of LBIE's administration and, relatedly, that a proof of debt in LBIE's administration did not constitute a "warning notice" under s.286 of the German Civil Code and could not therefore be relied upon to trigger a defaulted payment obligation.

Further, as a matter of English law, Hildyard J held that a claim for "further damage" under s.288(4) was not a rate "applicable to" the proved debt apart from the administration within the meaning of Rule 2.88(9) of the Rules. It was in the nature of a damages claim to be pleaded and proved and assessed by the court. It was not, therefore, "applicable to" the debt proved as at the date of LBIE's administration.

As to the separate issue of whether a "further damage" claim (if it had been a rate applicable under Rule 2.88(9) of the Rules) could be assessed by reference to an assignee's circumstances, rather than those of the assignor, Hildyard J found that the claim was limited to the rights of the assignor.

Supplemental Issue 1(A)

This issue concerned the question raised in Waterfall IIA of whether a rate of interest that arises out of a pre-administration contract but which only begins actually to accrue by reason of action taken by the creditor after the commencement of the administration may be "*the rate applicable to the debt apart from the administration*".

Hildyard J answered this question in the affirmative, and held that the words "the rate applicable to the debt apart from the administration" in Rule 2.88(9) include, in the case of a provable debt that is a close-out sum under a contract, a contractual rate of interest that only begins to accrue only after the close-out sum became due and payable as a result of action taken by the creditor after the commencement date of LBIE's administration.

South Square

The following eleven members of South Square appeared in the case, representing four different parties: Robin Dicker QC, William Trower QC, Antony Zacaroli QC, David Allison QC, Tom Smith QC, Daniel Bayfield QC, Richard Fisher, Stephen Robins, Adam Al-Attar, Henry Phillips and Robert Amey.

The effect of Brexit on Gibraltar Funds

A brief synopsis

Joey Garcia of ISOLAS, Gibraltar, reflects upon recent developments in Gibraltar as a result of Brexit.

Gibraltar Funds: The National Private Placement Regime lives on

It is estimated that over 90 percent of funds registered in Gibraltar operate outside of the scope of the UCITS Directive and the Alternative Investment Fund Managers Directive (AIFMD). In fact, some large Gibraltar-based funds have historically moved out of Gibraltar in order to avoid having to comply with AIFMD since it came into effect in 2013. Open-ended funds that run less than EUR 100M will not be affected by Brexit and will continue to operate and be promoted through the various National Private Placement Regimes (NPPR's) that exist in different European territories, as they have always done. Clearly this needs to be monitored. Originally AIFMD envisaged the phasing out of NPPR's towards the end of 2018, but this was only going to happen on the basis that passporting under AIFMD would be made available for non-EU managers (so there would be no need for NPPR, and distribution could only be on the basis of AIFMD).

This is now unlikely. The European Securities and Markets Authority's (ESMA) statement on 30 July 2014 (its Opinion and Advice on the extension of the AIFMD passport) was lengthy and complex, and most commentary on the publication focused on the positive advice relating to the extension of the AIFMD passport to Alternative Investment Fund Managers (AIFMs) established in Guernsey, Jersey and Switzerland. The reality is that by ESMA opting to follow a country by country assessment of the potential extension, the 2018 timeline has become completely unrealistic. ESMA would be required to adopt a delegated act terminating the NPPR only when it considers that there are no significant obstacles regarding investor protection, market disruption, competition or the monitoring of systematic risk that impedes the application of the passport to the marketing of non-EU funds by EU AIFMs in the Member States and the management or marketing of funds by non-EU AIFMs in the Member States in line with the relevant provisions of AIFMD.

Of the six countries that ESMA initially considered, positive advice was only given in relation to three, with the US, Hong Kong and Singapore being subject to further investigation and review. Guernsey, Jersey and (from January this year) Switzerland were the only countries to 'pass' the ESMA assessment because they are the only three counties who adopted local legislation that was substantially the same as AIFMD. ESMA still need to assess and form a view on Australia; Bahamas; Bermuda; Brazil; British Virgin Islands; Canada; Cayman Islands; Curacao, Isle of Man; Japan; Mexico; Mauritius; South Africa; South Korea; Thailand and US Virgin Islands. They have also declined to assess countries like India and China because there is no MoU between the respective supervisory authorities and ESMA (or because the current level of activity does not justify it).

As such, the significant majority of Gibraltar funds are unlikely to see any change to their operations, both in terms of the way that they are managed, and the way that they can be promoted or distributed. The UK and the US

will remain the key markets for fund distribution in line with other similar but more developed fund jurisdictions. The very recent 'Brexit Information Report' released by the States of Jersey provides an estimate of the net value of funds' assets by the location of the 'ultimate investor.' Only 17 percent of this value relates to the EU while 40 percent relates to the UK and 33% relates to the rest of the world. If funds choose to comply with European NPPRs in order to promote themselves in the EU, then they will need to comply on a country by country basis where the requirements for each Member State are not streamlined or consistent. For example a depositary is required in Germany, Denmark and France where this is not a requirement in Sweden, Finland or the UK. Other jurisdictions such as Spain or Italy do not really have a local registration process and this often deters managers from marketing their funds there. However, this would have been the position pre and post-Brexit so from that perspective, there is actually little change to the Gibraltar fund landscape.

It is also possible for funds to consider other alternative distribution arrangements that can exist outside of the NPPR framework such as the securitisation of a fund's performance through the creation of an Exchange Traded Instrument offered by a few of the member firms of the Gibraltar Stock Exchange, or the more mainstream use of UCITS platforms and management companies that are able to delegate portfolio management to entities in Gibraltar that are authorised or registered for the purpose of asset management and subject to prudential supervision.

AIFMD and Passporting of investment services: life after Brexit

AIFMs that are authorised in Gibraltar will be able to continue to rely on the imperfect AIFMD passporting system for the near future. In the eventuality of an outright exit, unless a special arrangement can be negotiated, then it is likely that passporting rights to the EU would be lost. However, special arrangements to deal with this could (theoretically) be agreed along the lines of an arrangement entered into with a Member State that grants a license in that territory, with operations being maintained largely in Gibraltar, on the basis that Gibraltar offers a similar opportunity to that Member State in order to allow regulated firms there to gain access to the United Kingdom through Gibraltar. This is an option worth exploring. The UK is the key financial centre of the EU and

FRONTIER WITH SPAIN AND THE EU: IN THE EVENT OF AN OUTRIGHT EXIT THE CURRENT AIFMS PASSPORTING RIGHTS ARE LIKELY TO BE LOST

ISOLAS' JOEY GARCIA

although access to the rest of Europe may be important, access to the UK is equally or arguably more important, and there may be opportunities for Gibraltar to position itself here.

Other potential arrangements will depend on the model that is eventually adopted by the UK. The Norway model, (maintaining the UK's membership of the EEA and EFTA) would provide the least disruption to financial services being offered. If this is not the case, Gibraltar firms will need to analyse the patchwork of laws governing access by non-EU 'third countries' to local markets. The recent trend in EU regulation has been to harmonise the position of 'third countries' (in particular under AIFMD and MiFIR/MiFID II), without a requirement for the country in question to accept free movement of people. Given that Gibraltar is (along with the UK) more than simply 'equivalent' on the basis that firms are already required to comply with EU legislation (and not simply equivalent legislation), it is likely that any extension of the third country passport to 'third countries' will include the UK, and by extension Gibraltar.

The industry in Gibraltar is already considering a dual regime along the lines that actually already exists in other jurisdictions where there is an ability to operate on an EU equivalency basis (under regime A) but also as an alternative, under a separate and alternative regime (regime B) that could encourage new, start up, or alternative operations to move into the jurisdiction on the basis of the flexibility, speed to market and pragmatic approach that is available. This has already (to an extent) been done within the 'small AIFM' regime where AIFMD grants the authority to the local regulator, the Gibraltar Financial Services Commission (FSC) to determine the requirements for that regime, and where the FSC has been able to take a view on the requirements that should apply to a small investment manager, adopting a 'MiFID lite' approach. That is not to say that Gibraltar will deviate from the global direction and thinking on prudential requirements that exist within EU directives and regulations but divergences in drafting, interpretation and application are likely to develop over time that ensure that international commitments are met, but without the requirement to strictly conform with EU requirements.

Conclusion

For the majority of Gibraltar funds, 'access' has not changed and is unlikely to change in the near future on the basis that most of these funds rely on NPPR's, and those rules are unlikely to change anytime soon. We expect funds to continue to focus on NPPR's and/or to consider other alternative options available to them.

There are likely to be options for Gibraltar investment firms moving forward that will continue to allow, in some way shape or form, access to single market either directly or on an equivalence basis. For the time being Boards may want to consider contingency options but there is no immediate need for decisions to be made on the basis of a two year transition following Article 50 being invoked (whenever that may be).

The consequences of responsibilities

Jonathan Garcia of ISOLAS, Gibraltar, looks at the Fund Judgment that brought Gibraltar Directors' Duties into focus.

The Court of Appeal has upheld the judgment of Jack J in Minette Compson v The Chief Executive Officer of the Financial Services Commission and Brian Weal v The Chief Executive Officer of the Financial Services Commission, which provided guidance as to what, in practice, is required of persons acting as licensed directors of Experienced Investor Funds, as well as the steps such directors ought to take to ensure they are properly discharging their duties.

SINCE 1740 THE GIBRALTAR SECOND CHARTER OF JUSTICE HAS DECLARED THAT THE LAWS OF ENGLAND 'BE THE MEASURE OF JUSTICE' ON THE PENINSULA. PRIOR TO THAT (INCLUDING BETWEEN 1704 AND 1740) CIVIL MATTERS FOLLOWED SPANISH LAW

ISOLAS' JONATHAN GARCIA

Background

Advalorem Value Asset Fund Limited ("Advalorem") was a collective investment scheme registered under the Financial Services (Collective Investment Schemes) Act 2011 as an Experienced Investor Fund. Advalorem's investment objective was to invest in distressed assets on the terms set out in the offer document issued by Advalorem.

The Gibraltar Financial Services Commission ("FSC") conducted an investigation into Advalorem, between February and October 2013, following which it petitioned the Supreme Court for an order to protect the interest of participants and potential participants. This protection order was granted on January 2014 and the Supreme Court appointed an administrator to safeguard Advalorem's assets.

Subsequent regulatory action by the FSC in respect of Mrs Minette Compson (a director of a company that was itself a director of Advalorem) and Mr Brian Weal (a director of Advalorem), was taken in the public interest to protect investors and, in particular, to address what the FSC considered were serious and significant corporate governance failings on the part of Mrs Compson and Mr Weal. These principally related to investments made by Advalorem following inappropriate property valuations (the valuations made special assumptions that were inapplicable and unrealistic). The FSC's decisions were appealed by Mrs. Compson and Mr Weal, but in a judgment of 29 April 2015, the Supreme Court dismissed both appeals against the FSC's decisions.

The Court's findings at first instance

The Court found that this was a serious case of two directors ignoring their obligations as directors and that their conduct fell well below that which was required of them.

The judgment does not create any new directors' duties but serves as a reminder that investment fund directors and others are required to exercise care, skill and diligence in the performance of their duties. Specifically, the judgment deals with the extent to which ignorance can constitute a defence in a director's breach of duties. The Court confirmed that the often cited principles of Jonathan Parker J in Re Barings Plc as regards directors' duties form part of Gibraltar law.

The Court rejected the argument put forward by the appellants that, since they were not the directors of Advalorem with particular expertise in property matters (they were not the only directors of Advalorem), they lacked the relevant knowledge, either actual or constructive, of the inappropriateness of the valuations obtained by Advalorem. The Court rejected this argument on the basis that the valuation processes were set out in the offer document which was a document that all directors should have been familiar with. Any director should have been able to identify that the offer document was being breached, irrespective of property-related expertise. The regulatory design of the Experienced

Investor Fund regime means that great importance is placed on the declarations/warranties made by the directors in the offer document, including truth and accuracy of the contents of the offer document and it is apparent that the Court followed a similar approach.

The Court did accept that there were some matters, such as the commercial attractiveness of the land, that could perhaps be the subject of reliance on the property expert directors. This however would not absolve Mrs Compson and Mr Weal of responsibility, that is, the duty to supervise cannot be delegated. This shows that although investment fund directors are not expected to be experts in every field, they are required to apply their minds to the appropriate issues and not rely solely on the explanations of others.

Ultimately, whether a director discharged his/her duty to display appropriate levels of knowledge, skill and experience will depend on the facts of each particular case, which assessment will necessarily include a detailed examination of that director's particular role in the management of the company and his/her own individual skills or experience. Likewise, the extent to which an individual director can rely on the expertise of other directors is fact-sensitive. In some cases it will be appropriate; in other cases it will not be.

Other matters of note

Although the following matters did not form part of the case found by the CEO of the FSC, such matters should be considered for information purposes only.

Directors must satisfy themselves that the terms of contracts with the investment fund are in the best interests of the investment fund and the directors cannot simply rely on a person who is not on the record as providing a function in respect of the investment fund to negotiate its terms, not least because such person may have a vested interest in the terms of the contract with the investment fund.

Arguments were also raised as to whether, as a director of a body corporate which itself was a director of Advalorem, Mrs Compson did or did not owe duties to Advalorem. The Court took the view that because the case related to her fitness to be involved in the financial services industry, this was independent of that consideration. The Court was therefore not required to rule on whether it would look at the ultimate directing mind of an investment company in assessing the question of duties, irrespective of whether management and control is being exercised directly or through a body corporate which itself was a corporate director of the investment company.

NOW SELDOM SEEN IN THE UK, GIBRALTAR IS STILL HOME TO THE ICONIC RED PHONE BOX

The decision at first instance was appealed by Mr Weal and, initially, by Mrs Compson.

The Court of Appeal Findings

In a judgment (in which Dudley CJ, the Chief Justice of the Supreme Court of Gibraltar gave the leading judgment, and with whom Dame Janet Smith, JA and Sir Colin Rimer, JA concurred) the Court of Appeal upheld the findings of Jack J and dismissed the appeal of Mr Weal. Mrs Compson had also appealed the decision of Jack J and, although she subsequently withdrew it, joint grounds of

The question of which test should be applied in cases of breach by a director of his common law duty of due skill, care and negligence remains unanswered

appeal had been filed.

The only ground of appeal advanced on behalf of Mr Weal against the judgment of Jack J concerned the standard of care, which should have been applied to measure Mr Weal's performance as a director of Advalorem. Accepting that Jack J had correctly identified the test by which Mr Weal's claimed shortcomings fell to be assessed and rejecting the point put forward, that a general assessment was required as to Mr Weal's competence, character, diligence, honesty, integrity or judgment, or his current ability to perform the duties of an licensed person, the Court of Appeal found that there was no need for Jack J to have considered the wider matters about Mr Weal's competence etc. This was because, once the FSC had found that Mr Weal had breached the fifth statement of principle applying to him under the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006 ("the FSC Regulations"), which provides that "a licensee shall act with due skill, care and diligence in the conduct of its fiduciary services business", that was sufficient to entitle the FSC to take the enforcement action that it took. Given that Jack J's view was that the FSC's findings in this respect were unassailable, there was no need for him to consider beyond this. As in his judgement Jack J had found that there had been a breach of the FSC Regulations, the Court of Appeal was not required to specifically consider Mr Weal's actions in the context of the common law duty of skill and care which he owed to Advalorem and whether the common law test should be subjective or objective in nature. This was because the application of that test needed to be considered in the statutory context, in that Mr Weal was no ordinary director, but rather a licensed Experienced Investor Fund director subject to regulation by the FSC.

Accordingly, the Court of Appeal was only required to consider the statement of principle under the FSC Regulations which required Mr Weal to act with due skill, care and diligence in the conduct of his fiduciary services business, in determining whether the FSC had correctly issued the sanctions that it did. The Court of Appeal took the view, that the plain reading of the FSC Regulations establishes an objective test. Whilst this in itself does still not determine whether unfitness of directors generally (in every context, whether or not involving regulated business) is to be determined by an objective or subjective standard, as not every director of a Gibraltar registered company would be bound by the FSC Regulations on which this decision turned, the fact that the duty of care stated under the statement of principle under the FSC Regulations accurately states the duty of care owed by any director at common law suggests that it could be argued that an objective test similarly applies. Counsel for Mr Weal, sought to rely on section 174(2) of the English Companies Act 2006 to attempt to import a dual objective/ subjective test. The Court of Appeal rejected this, on the basis that there was no need to consider such a test. Accordingly, the question of which test should be applied in cases of breach by a director of his common law duty of due skill, care and negligence (and not breach of the equivalent statement of principle under the FSC Regulations) remains unanswered.

One final point to take from this appeal derives from certain matters of fact. Whilst, the decision of Jack J in the Supreme Court on any question of fact was final and Mr Weal was bound by the findings of fact made by Jack J, there was an attempt it appears, to re-argue the facts. It was advanced on behalf of Mr Weal that acceptance of the valuation reports and the approval of the purchase of land should not have been construed as being in the nature of a final decision of the board but rather as part of a continuum. It was further submitted that Mr Weal had intended to travel to Scotland to undertake further inquiries in respect of the land. Therefore,

whilst Mr Weal may not have undertaken a detailed forensic examination of what was before him at the board meeting, had there not been supervening events he would have undertaken his duties with skill, care and diligence albeit adopting a different approach. Without descending into in any particular detail, the Court of Appeal took the view that Mr Weal's shortcoming was in assenting to a resolution by Advalorem's board to pursue the attempted purchase of the two sites without, apparently, giving any consideration to matters which he should have considered. It is clear from this that directors should insist that when board meetings are held those meetings are fully and accurately documented. Far from merely signing pro forma minutes that are drafted in advance and which simply "note" certain matters (as appeared to be the case in this instance), board minutes should provide a record of the substance of discussions among the directors and other meeting participants, any enquiries that are made and any approvals or resolutions in relation thereto, whether such approvals or resolutions are final or contingent on some other action being taken or indeed, the dissenting opinions or concerns of individual directors.

As pointed out by Samantha Barrass, the CEO of the FSC, "these decisions once again send an important signal that there will be real and meaningful consequences for those who disregard their corporate governance responsibilities and thus put investors at risk." The important findings in the original judgment by Jack J will no doubt stand as a foundation for future fund governance and Gibraltar courts will likely refer to these in any cases that occur in the future. Following Jack J's judgment, the FSC issued a paper, which sets out the FSC's expectations of the directors of Experienced Investor Funds.

SAMANTHA BARRASS, CEO OF THE GIBRALTAR FSC: THIS DECISION SENDS AN IMPORTANT SIGNAL THERE WILL BE CONSEQUENCES FOR THOSE WHO DISREGARD THEIR CORPORATE GOVERNANCE RESPONSIBILITIES

First reference to European Court of Justice from Gibraltar

In a hearing earlier this year in the Supreme Court of Gibraltar, Chief Justice Mr Anthony Dudley decided to make a preliminary reference to the European Court of Justice in Luxembourg. This is the first time that a court in Gibraltar has made a preliminary reference to the European Court.

The case is brought by members of the Gibraltar Target Shooting Association and raises the issue of the application to Gibraltar of EU Directive 91/477 on firearms. Among other things, the Directive establishes a European Firearms Pass which entitles target shooters and hunters to travel to EU Member States with their firearms. In the past, the European Commission had expressed the view that the Directive does not apply to Gibraltar. The case raises complex questions of EU law, and its applicability to Gibraltar, and this has led to the Chief Justice's decision to refer questions on the interpretation and validity of EU law to Luxembourg.

Case Digests

LLOYD TAMLYN

The propriety of dividend payments has been much in the news over the last few months. Two recent cases discussing the remedies which are and are not potentially available are summarised in the Company Law section, below. In *BTI 2014 LLC v Sequana SA*, Mrs Justice Rose considered the propriety of distributions made on the basis of audited and interim accounts which included provisions representing the directors' best estimates of the company's liability for clean-up costs. After concluding that the dividends were lawfully declared in accordance with the Companies Act provisions, so that the directors could have declared the dividends lawfully, the next issue was whether the directors should not have done so, given their duty to have regard to the interests of creditors in circumstances of insolvency and the inevitable uncertainty of any estimate (best or otherwise). The issue for the Judge was - how close to insolvency does a company have to be for this duty to arise? Dicta in the case law variously suggested that the duty arose when the company was on the verge of insolvency, or was of doubtful or marginal solvency, or was near insolvent or where there was a real (as opposed to remote) risk of insolvency. Having commented that there seemed to be a big difference between a house being on the verge of burning down and there being merely a more than remote risk of its burning down, the Judge held that the directors' duty did not arise merely because there was a real risk that the provision might turn out to have been materially understated. (Incidentally, the Court of Appeal in the second of the two digested cases, *Burnden Holdings (UK) Ltd v Fielding*, expressed the duty as arising where following the distribution the company would be insolvent, or of doubtful solvency).

A further issue for the Judge was whether the dividend was a transaction at an undervalue within section 423(1) of the Insolvency Act 1986. She held that it was (rejecting the argument that the declaration and payment of a dividend is merely the satisfaction of a much earlier transaction constituted on the issue of the shares by the company).

Elsewhere, the always uncertain status of the decision of Bingham J. (as he then was) in *Neste Oy* [1983] 2 *Lloyd's Rep 658* has been resolved, very largely, by the Supreme Court in *Angove's Pty Ltd v Bailey* (Property and Trusts, below). *Neste Oy* had decided that monies paid to an agent company at a time when its directors knew that it could provide no consideration by reason of its near insolvency and so could not, in good conscience, be retained by the company were held on constructive trust for the paying principal. *Neste Oy* had been of considerable utility to those asserting a proprietary claim lacking any recognisable legal basis. The Supreme Court disapproved Bingham J.'s reasoning since it begged the question as to what good conscience requires. The Supreme Court left open the possibility that the result in *Neste Oy* might be justified on the basis of the payor's mistake in advancing the monies.

BANKING & FINANCE

Digested by TOBY BROWN


TOBY BROWN

BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc [2016] UKSC 29 (Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson JJSC, 16 June 2016)

Enhanced capital notes – redemption – interpretation

The Supreme Court, by a majority of 3:2, recently gave its decision following an expedited appeal from the Court of Appeal, which had itself allowed an appeal on an expedited basis against the decision of the Chancellor. The case concerned £3.3bn of contingent convertible securities known as Enhanced Capital Notes ("ECN") which were issued by the Lloyds Banking Group ("LBG") in 2009 as part of a recapitalisation necessary for LBG to comply with the minimum ratio of Core Tier 1 capital requirements needed to pass banking stress tests. The ECNs paid a relatively high rate of interest and were not redeemable until maturity dates between 2019 and 2013, but could be redeemed early by LBG upon the occurrence of a "capital disqualification event" ("CDE") within the meaning of the ECN terms contained in a trust deed. Under Clause 19 of those terms, a CDE occurred if as a result of regulatory requirements or changes to the interpretation or application of those requirements, the ECNs ceased to be taken into account for the purposes of any stress test. The Chancellor had concluded that under the terms of the ECNs, no CDE had occurred, but Gloster LJ, giving the judgment of the Court of Appeal, disagreed and held that LBG was therefore entitled to redeem the ECNs. The question of construction was further appealed to the Supreme Court. Lord Neuberger, with whom Lord Mance and Lord Toulson agreed, gave the lead judgment. He stated that when construing a trust deed or contract that governed a negotiable instrument, "very considerable circumspection" was appropriate before the contents of other documents were taken into account. As Lord Collins stated in *In re Sigma Finance Corp* [2009] UKSC 2, where a security document concerns a number of creditors over a long period, it would be "quite wrong" to take into account circumstances not known to all of them. That said, Lord Neuberger concluded that the trust deed could not be understood without some appreciation of the then regulatory policy of the FSA, and therefore the general thrust and effect of the FSA regulatory material from 2008 and 2009 could be taken into account when construing the ECN terms. In that context, on the first issue on appeal, Lord Neuberger agreed with the interpretation of the Chancellor and Gloster LJ that under the terms of the ECNs, the definition of "consolidated core tier 1" should be treated as a reference to "its then regulatory equivalent". In the lower Courts, it had been held that this interpretation involved a strict departure of the literal words, although Lord Neuberger doubted this, commenting that if it did it was on the basis of a "rather pedantic approach to interpretation". The reasons for Lord Neuberger's conclusion included that it was notorious at the time of issue that the regulatory requirements for capital would be strengthened and changed. As to the second issue, the critical question was whether the implementation of CRD IV (a 2013 EU Directive) by the PRA through new capital requirements entitled LBG to say that a CDE had occurred. Lord Neuberger observed that it was a difficult question to resolve, with the Chancellor and the Court of Appeal taking different views and with Lords Sumption and Clarke dissenting in the Supreme Court. Although he saw force in the opposing arguments of the ECN trustee, he preferred LBG's arguments that the regulatory capital requirements changed in 2013 with the consequence that the ECNs could no longer be taken into account in assisting LBG in passing the stress test, because the trigger under the terms of the ECN was at a lower level than the minimum required by the PRA. Furthermore, in any event, the PRA did not in any way rely on the ECNs when conducting its stress tests on LBG in 2014.

As a result, the Supreme Court concluded that a CDE had arisen under the ECN terms, and therefore LBG was entitled to redeem the ECNs. The appeal was accordingly dismissed.

[Robin Dicker QC; Stephen Robins]

Universal Advance Technology Ltd v Lloyds Bank Plc [2016] EWCA Civ 933 (Lord Dyson MR, Gross LJ and Christopher Clarke LJ, 20 July 2016)

BACS system - mistaken payment - unjust enrichment

The Court of Appeal heard an appeal concerning a recalled payment under the BACS system which was mistakenly credited to the recipient. The BACS system operates on a three-day cycle: day 1 is input day when the remitting bank transmits the data relating to the intended transfer; day 2 is processing day for that data; day 3 is the entry day when the remitted funds are credited to the beneficiary. However, payments can be recalled

subject to a cut-off of 3.30pm on the processing day. In the present case, the claimant ("UAT") banked with the defendant ("Lloyds"). UAT offered to supply goods to one of its customers ("Victoria") on the condition that it prepaid for them. On day 1 Victoria's banker, HSBC, effected a BACS transfer to Lloyds for the benefit of UAT's account. The next day, however, HSBC recalled the payment, Victoria having become concerned that it might not receive the goods in time. Notwithstanding the recall, on day 3, Lloyds credited the payment to UAT's account. Later that day, Lloyds debited the sum from UAT's account, and repaid the monies to Victoria. The net result was UAT did not receive the monies but never delivered the goods. UAT issued proceedings against Lloyds seeking payment of the sum briefly credited to its account. It complained that Lloyds had removed the sum from its account without its authority. At both first instance and on appeal in the County Court, the judges regarded the claim as a breach of contract case, and held that whilst there had been a breach of the contract between Lloyds and UAT, there was no evidence that any loss had been suffered by UAT. The Circuit Judge held in the absence of any such evidence, UAT would be unjustly enriched if it were to recover the full price and keep the goods.

In the Court of Appeal, UAT contended that its claim was in debt and therefore no question of damages or their amount arose. Christopher Clarke LJ, with whom Gross LJ and the Master of the Rolls agreed, held that whilst the lower courts had proceeded on the basis that the claim was for breach of contract, it was open to UAT now to put its case as a debt claim. UAT's pleading was apt to support such a claim and it would make little sense on a second appeal to proceed on an assumption which is "simply erroneous", given that UAT did have a claim in debt. However, Christopher Clarke LJ held that Lloyds had a counter-claim for the sum in question, since it was paid under mistake. Applying the key elements of unjust enrichment per *Portman v Hamlin Taylor Neck* [1998] 2 AC 548, the first requirement was that the recipient had been enriched. Christopher Clarke LJ stated that UAT was enriched when it received the sum in error. The second requirement was that the enrichment was unjust: it was because the payment occurred due to the mistake of Lloyds. The third requirement was that the enrichment was at the expense of Lloyds, which was also satisfied because HSBC acting for Victoria had recalled the monies by the cut-off time, such that Lloyds itself was left to the pay the monies to UAT. UAT did not advance and did not have a change of position defence. Lloyds was entitled to have resort to "self-help" in debiting the mistaken payment from UAT's account because Lloyds was entitled to an equitable set-off. The Court of Appeal accordingly dismissed the appeal. Christopher Clarke LJ commented that it was unfortunate that the claim should have been pursued before three courts, when, as the judge put it, the man on the Clapham Omnibus "would find it an alarming proposition" that UAT should be entitled to recover the monies without parting with the goods.

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Interactive Technology Corp Ltd v Ferster [2016] EWCA Civ 614, (Court of Appeal, 28 June 2016)

Freezing injunctions – non-disclosure – search orders – preservation of property orders

R, a company which operated gaming websites, was owned by three brothers. One of the brothers (A1) was alleged by the others to have established 13 other companies (A2-A14) as conduits for funds generated by R and to have paid himself substantial levels of unauthorised remuneration. A1 admitted that a board minute had been fabricated so as (inter alia) to transfer R's assets to A2. R obtained without notice freezing, property preservation and search orders. A1-14 applied to set aside the orders on the grounds of non-disclosure, relying on a subsequent alleged admission by one of the brothers that they did not believe that there was any risk of documents being destroyed (although that brother asserted that the admission had only been made in a specific, narrow context). The Judge refused to set the orders aside and A1-A14 appealed, arguing that there had been material non-disclosure in respect of the following: (a) R's failure to reveal the brother's admission; (b) R's failure to highlight the significance of a statement by its auditor that certain income had been put through R; and (c) a letter admitting that the brothers had no right to see records belonging to A2.

The Court of Appeal dismissed the appeal. As to (a): A1-A14 had not applied to cross-examine the brother about his explanation of his

admission, and the Judge could not have dismissed it as dishonest or inherently implausible. As to (b): What the auditor had said was not material to the alleged fraud. As to (c): The letter was one among many in a series of correspondence and, in any event, the letter had been written on behalf of the brothers and not R.

WH Newson Holding Ltd v IMI Plc [2016] EWCA Civ 773 (Court of Appeal, 27 July 2016)

Contribution claims – part 20 claims – burden of proof

This appeal concerned whether the Court had correctly applied s.1(4) of the Civil Liability (Contribution) Act 1978 (the "1978 Act"). In this case, C brought a claim against IMI, alleging that it had suffered loss and damage as a result of the actions of a cartel between (among others) IMI and Delta (the European Commission having found that IMI and Delta had participated in an unlawful price-fixing cartel). IMI raised a limitation defence. C's response was that the cartel had been concealed and, pursuant to s.32(1)(b) of the Limitation Act 1980 (the "1980 Act"), time ran from the time that the Commission's decision was published. IMI issued Part 20 proceedings against Delta, and other members of the cartel, claiming a contribution or indemnity under s.1 of the 1978 Act. Delta's defence was that C's claim against IMI was time barred pursuant to s.32(1)(b) of the 1980 Act and that IMI was therefore never liable. C and IMI then settled the main claim. IMI pursued the Part 20 claim against Delta on the basis that, following the settlement of the main claim, IMI's contribution claim was governed by s.1(4) of the 1978 Act, arguing that Delta's limitation argument was not a good defence to the contribution claim. The Judge held, on the preliminary issue of the scope of s.1(4) of the 1978 Act, that the burden of succeeding on the limitation point in the main claim would have fallen on C; and that the issue was part of the factual case against IMI in the main claim and could not be challenged in the contribution claim on the basis that it was a "collateral defence".

The Court of Appeal, dismissing the appeal, held that a "collateral defence" was one where the burden of establishing the facts that would determine the issue fell on the Defendant. Under s.1(4) of the 1978 Act: "a person who has agreed to make any payment … in bona fide settlement … of any claim made against him in respect of any damage … shall be entitled to recover contribution … without regard to whether or not he himself is or ever was liable … provided … that he would have been liable assuming that the factual basis of the claim against him could be established". Section 1(4) does not require or permit any inquiry into the question of liability. To succeed in the contribution proceedings, all that IMI had to show was that, on the assumption that the factual basis of the main claim could be made out, this factual basis disclosed a reasonable cause of action in law against it so as to make it liable in respect of the damage that C had suffered. If IMI could demonstrate that, it would have shown that it "would have been liable" to C; and it would not be open to Delta to raise any other argument directed at showing that IMI would not have been held liable in the main proceedings. *Arab Monetary Fund v Hashim (No.10)* Times, June 17, 1993, overruled.

National Infrastructure Development Co. Ltd. V BNP Paribas [2016] EWHC 2508 (Comm) (Mr David Foxton QC (sitting as Judge of the High Court), 26 September 2016)

Foreign judgments – injunctions – stay of execution – summary judgment

This was C's application for summary judgment against D in respect of amounts claimed under two standby letters of credit. Demands had been served under the letters of credit. Payment was not made and C sought summary judgment on the the amount due under the letters of credit. However, on 6th July, an injunction was obtained before the Brazilian court preventing four Brazilian companies, who were the Brazilian subsidiaries of banks which had provided the standby letters of credit, from making payment under the standby letters of credit. The Court proceeded on the basis that, as a matter of Brazilian law, it was arguable that the Brazilian injunction prevented D from paying out under the letters of credit (with D being exposed to a penalty for breach). The issue for the Court was whether that point, which the Court found to be arguable as a matter of Brazilian law, provided any arguable defence for resisting payment as a matter of English law. The Court noted that there are limited circumstances in which the Court will be prepared to refuse to enforce or prohibit payment under a standby letter of credit, in particular where there has been a non-compliant

demand and in the so-called fraud exception cases. D argued: (a) that this was a case where summary judgment should not be granted on the basis that there is some other "compelling reason" for trial; (b) the Court should stay the application for summary judgment until the outcome of the Brazilian proceedings; and (c) alternatively, if summary judgment is granted, it should be subject to a stay of execution. D did not argue that it had a defence to the claim as a matter of English law but relied instead on the fact that it found itself exposed to Brazilian law penalties if it breached the Brazilian injunction. While there is jurisdiction not to grant summary judgment even where there is no defence to the claim, that is very much an exceptional course, particularly in a commercial case, and especially on a claim brought under a standby letter of credit (which has a status equivalent to cash). The Court followed the Court of Appeal's decision in *Power Curber v National Bank of Kuwait* [1981] 2 Lloyd's Rep 394, in which a Kuwaiti Court had made an order preventing a bank from making payment under a letter of credit. Parker J had granted summary judgment and a stay of execution thereon: but the Court of Appeal had upheld entry of summary judgment but overturned the stay of execution. Relying on *Power Curber*, the Judge granted summary judgment against D and refused to grant a stay of execution.

Gerald Metals SA v Timis [2016] EWHC 2327 (Ch) (Leggatt J, 21 September 2016)

Freezing injunctions – arbitrators' powers and duties

C sought a worldwide freezing injunction against D and also applied under s.44 of the Arbitration Act 1996 (the "1996 Act") for a freezing injunction against a trust of which D was a beneficiary. C had provided funds to one of D's companies, which then failed to meet its obligations under the relevant contract to the extent of US$77m. D's companies were ultimately owned by a trust, the trustee of which had given a guarantee (containing an arbitration clause) which guaranteed payment of all sums due to the claimant under the finance contract up to a maximum amount of US$75m. C applied to the LCIA for the appointment of an emergency arbitrator so as to obtain emergency relief including an order to prevent the trustee from disposing of the trust's assets, which the LCIA rejected in light of undertakings given by the trustee. D had at one point also agreed to assign, by way of security, some $75m worth of shares to C. Leggatt J refused C's applications. As regards the application for a worldwide freezing injunction, it was held that whilst the real object of the application was the shares, there was no evidence from which the Court could infer either that D had effective control over those shares or that they were still owned by or could be restored to the trust. As to the application for a freezing injunction under s.44 of the 1996 Act against the trust, it was held that it was not appropriate to grant this relief. Section 44(3) of the 1996 Act, which empowers the Court to make such orders as may be necessary on the application of a party (or proposed party) to arbitral proceedings in cases of urgency, is subject to s.44(5), which provides that the Court should act only if or to the extent that the arbitral tribunal had no power or was unable for the time being to act effectively. It was only in cases where the art.9A and art.9B powers (respectively, for the expedited formation of the arbitral tribunal, and for the emergency appointment of a sole arbitrator pending the formation of the arbitral tribunal), as well as the powers of a tribunal constituted in the ordinary way, were inadequate, or where there was no practical ability to exercise those powers, that the Court could act under s.44 of the 1996 Act.

COMMERCIAL CASES

Digested by CHARLOTTE COOKE & MADELEINE JONES


CHARLOTTE COOKE


MADELEINE JONES

Hayward v Zurich Insurance Company plc [2016] UKSC 48 (Lord Neuberger, Lady Hale, Lord Clarke, Lord Reed, Lord Toulson, 27 July 2016)

Deceit – insurance

The Respondent had been injured at work and had reached a settlement with his employers' insurers, the Applicants. They had suspected he was exaggerating his claims, but had no proof of this, and so entered into an agreement conceding liability and providing for the quantum of the R's entitlement to be decided at trial. After the trial had been held and the money paid over, proof of R's fraud came to light. A commenced

proceedings against R for deceit and R was found to have fraudulently misrepresented his injury. The trial judge in Cambridge County Court set aside the compromise and ordered the issue of quantum in the original action to be retried. It was, and R was awarded a lower amount.

R then appealed the trial judge's decision to set aside the compromise. The Court of Appeal upheld his appeal on the ground that the trial judge had been wrong to say that the test for reliance in a misrepresentation claim was that the representee had been influenced by the representations. In fact, Briggs and Underhill LLJ ruled, the representee must have believed them. The Supreme Court allowed A's appeal. Lord Clarke, with whom the others agreed, took the opportunity to clarify the law on misrepresentation. Inducement and causation, both elements of the claim of misrepresentation, are questions of fact. There is no separate requirement for belief in the truth of the misrepresentation, though this is relevant to the factual inquiry. It is necessary to show that the claimant was "influenced" by the representation. Where the representee settles on the basis that the representation will be believed by the judge, the representation is "centrally relevant to the question of inducement and causation" even if the representee does not think it true. The fact that the representee has carried out enquiries does not mean that he cannot have been induced. There may even be circumstances in which a representee knows for certain that the representation is false but nonetheless is found to have relied on it.

Khouj v Acropolis Capital Partners Ltd [2016] EWHC 2120 (Comm) (Knowles J, 19 August 2016)

Agency – fiduciary duty – duty to account

The administrator of the estate of the deceased former assistant Foreign Minister of the Kingdom of Saudi Arabia brought proceedings against two English companies in relation to their involvement in the deceased's financial affairs. The administrator alleged that the companies had acted on the deceased's behalf in dealing with his investments and sought declarations that they were agents or fiduciaries, such that he was entitled to inspect any documents in their control relating to the investments of the deceased. The English companies' position was that they did not carry out investment management activities and that they did not have any relevant relationship with the deceased.

The Court considered that fiduciary obligations can arise in the context of a range of business relationships where a substantial degree of control over the property and affairs of one person is given to another. It was held that the facts did give rise to the requisite relationship of trust and confidence. The defendants owed a duty to account to the deceased in relation to transactions conducted on his behalf, a duty to keep and maintain proper records of any transaction or other business conducted on his behalf and a duty on request to provide such records.

Atlasnavios v Navigators Insurance (the "B Atlantic") [2016] EWCA Civ 808 (Laws LJ, Christopher Clarke LJ, Sir Timothy Lloyd, 1 August 2016)

Insurance – contractual construction

The ship the "B Atlantic" was to carry a load of coal to Italy. Before she left the Venezuelan lake in which she was loaded, divers discovered a large package of cocaine attached to the outside of her hull. She was detained by the Venezuelan authorities and did not deliver the coal. Her owners, who were not suspected of wrongdoing, made an insurance claim under standard terms based on the Institute War and Strike Clauses 1/10/83. The contract covered loss caused by "any person acting maliciously". It was common ground that the attachment of the drugs to the vessel by smugglers constituted a malicious act. However, the contract also excluded liability for "detainment...by reason of infringement of any customs or trading regulations". The parties disagreed over whether the exclusion applied. At first instance Flaux J held that the exclusion did not apply where, although there might literally be an infringement, lack of malice on the part of the insured meant that the infringement was not in the spirit of the exclusion. The Court of Appeal overturned his decision. Giving guidance on how to approach the contract as a matter of construction ("[t]he perils and exclusions together express the ambit of the cover and they have to be construed together, each of them being looked at in the light of the other; you do not start from the premise that one has primacy over the other") the Court held that it was necessary to identify

the proximate or operative cause. In this case, the malicious act of the smugglers was a cause of the owner's loss. However, the detainment of the vessel was the proximate cause of the loss. The authorities' discovery of the drugs was not the inevitable result of their being planted. The insurers' liability was excluded.

National Private Air Transport Services Co (National Air Services) Ltd v Creditrade LLP [2016] EWHC 2144 (Comm) (Blair J, 24 August 2016)

Aviation – rent

D had sublet an aircraft from C in 2009. The sublease expired in November 2012 and rent had been paid until then. In preparation for redelivery, D arranged to have repair work performed on the craft. In January 2013, C and D agreed that C would invoice D for rent from November to January, but payment would be waived on D's redelivering the aircraft. 31 January was agreed as a target date for redelivery. D sought to redeliver in March but the repairs were not done to C's satisfaction, and the aircraft was in fact not redelivered until 30 April. C claimed rent from November to April. D argued it was not liable for any further rent, because C had waived its entitlement to this, and on various other grounds. Blair J held that because 31 January had been referred to as a "target date", on a true construction of the emails, waiver of rent was not conditional on redelivery by that date. Furthermore, C's conduct after the agreement had made redelivery by 31 January impossible. This meant that C's submission that the waiver was conditional on redelivery by that date could not be correct. Blair J ruled that rent had been waived until 31 January, but not thereafter. Further, C was not in breach of an obligation in the original sublease to make available to D all manufacturers' warranties and therefore D was not entitled to a reduction on rent on this ground, since the defective parts were not covered by the warranty and there was no contractual basis for considering that special warranties would have been negotiated with the manufacturer. D also argued that "full and literal compliance" with the contract terms was outside the bounds of normal trade practice and that there was an implied term that the terms of redelivery were to be in accordance with such practice. Blair J affirmed the authority of the case on which D relied, *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), but also confirmed that it applies only to "relational" contracts, in which a long-term relationship demanding a high degree of commitment on both sides is "legislated for in the express terms of the contract". A sublease is not such a contract and accordingly a term to the effect that strict compliance is not to be insisted on could not be implied.

COMPANY LAW

Digested by HENRY PHILLIPS AND EDOARDO LUPI


HENRY PHILLIPS


EDOARDO LUPI

BTI 2014 LLC v Sequana SA [2016] EWHC 1686 (Ch) (Rose J, 11 July 2016)

Breach of fiduciary duty – dividends – transaction defrauding creditors

The directors of AWA (later renamed Winward, "D2"), resolved to pay two interim dividends in the sum of €443 million and €135 million to its parent company, Sequana, respectively in December 2008 and May 2009 (the "Dividends"). Prior to the payment of the Dividends, AWA effected a reduction of capital by special resolution supported by a solvency statement in order to free up distributable reserves. The Claimant was liable for a series of expenses referable to the clean-up operation of the Lower Fox River in Wisconsin USA. AWA in turn was liable to indemnify the Claimant for the monies it had paid out for these purposes. AWA's accounts made provision for the company's liability to the Claimant during the relevant period.

The Claimant challenged the payment of the two dividends on three bases: (i) the Dividends were declared in contravention of Part 23 of the Companies Act 2006; (ii) the decision to pay the Dividends was a breach by the directors of their fiduciary duties to AWA, in particular the duty to act in the best interest of creditors; (iii) payment of the Dividends contravened s. 423 of the IA 1986 as a transaction defrauding creditors.

As to (i), Rose J held that the proper construction of s. 643 (1) CA 2006 requires directors making a solvency statement to look at the situation at the date of the statement, taking into account contingent or prospective liabilities, to form an opinion as to

whether the company is able to pay its debts: it is not a requirement that the directors should have reasonable grounds for the opinion they form, provided the directors did in fact form the opinion. Rose J found that the provision made by the directors for the company's indemnity liability was not defective as the figure represented the directors' best estimate. Accordingly, the Dividends were not paid in contravention of Part 23.

As to (ii), Rose J noted that it cannot be right that whenever a company has on its balance sheet a provision in respect of a long term liability which might turn out to be larger than the provision made, the duty to have regard to creditors' interests applies for the whole period during which there is a risk that there will be insufficient assets to meet that liability. That would result in directors having to take account of creditors' rather than shareholders' interests when running a business over an extended period. Accordingly Rose J held that, at the time of payment of the Dividends, the duty to take into account creditors' interests had not arisen.

As to (iii), the payment of a dividend falls within the scope of a 'transaction' for the purposes of s. 423 IA 1986. The requisite s. 423 intention was not present in relation to the December Dividend, but AWA did, through its directors, have the purpose of putting the dividend monies beyond the reach of the Claimant, or of otherwise prejudicing its interests at the time of payment of the May Dividend, such that the latter claim succeeded.

Burnden Holdings (UK) Ltd v Fielding [2016] EWCA Civ 557 (David Richards, Tomlinson and Arden LJJ, 17 June 2016

Distribution - breach of fiduciary duty – limitation – summary judgment

The issue on the appeal was whether a claim brought by the Claimant for alleged breach of duty against two directors was time-barred. It was held at first instance that it was, and summary judgment was given against the Claimant.

In 12 October 2007, with a view to selling a shareholding in the Claimant's wholly-owned subsidiary, the Claimant's directors authorised the distribution in specie of the shares in the subsidiary to a Newco which they wholly owned and controlled. By a number of further transactions, the shares were transferred on to a further holding company, and the directors' shareholding was sold to a third party for £6 million.

The Claimant went into liquidation in 2009. Proceedings against the directors were issued on 15 October 2013. It was alleged that the distribution in specie of the shares in the subsidiary was an unlawful distribution, amounting to a breach of fiduciary duty on the directors' part. David Richards LJ accepted that the Claimant's cause of action accrued on the date at which the original distribution was made, namely, 12 October 2007. Section 21 of the Limitation Act 1980 governed actions in respect of trust property and applied here. Prima facie, the limitation period applicable to the directors was six years pursuant to s. 21 (3), subject to the contrary provisions of the Limitation Act. It was agreed that more than six years had elapsed from 12 October 2007 by the time the claim form was issued.

The Claimant relied on s. 21 (1)(b) of the Limitation Act, which provides that no period of limitation applies to an action by a beneficiary under a trust "to recover from the trustee property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use". The directors took the point that they had never in fact received the shares, given that they had been distributed to various shell companies, albeit, as the Claimant pointed out, companies entirely controlled by the directors.

David Richards LJ held that the proper construction of s. 21 (1)(b) includes within its terms a transfer to a company directly or indirectly controlled by the trustee, such that no limitation period applied to the Claimant's claim. The literal reading of the word "received'" proposed by the directors would make it very easy for delinquent directors/trustees to evade the section's effect by transferring trust property to a shell company. Further, his Lordship held that the Claimant was entitled to succeed on the basis of s. 32 of the Limitation Act (deliberate concealment of a cause of action) as an alternative ground, given that it was not possible, in the context of summary judgment, to determine when the Claimant could have discovered the directors' breach with reasonable diligence.

Kevin Taylor v Van Dutch Marine Holding Limited [2016] EWHC 2201 (Ch) (Warren J, 5 September 2016)

Breach of disclosure order – committal for contempt – sentencing contemnor in absence – custodial sentences

The Claimant brought an application for the committal of D3 and D4, who were the directors, sole shareholders and controlling minds of D1 and D2, two Maltese registered companies. D3 and D4 were Dutch nationals resident in Monaco.

Prior to entry of default judgment in respect of the Claimant's underlying claim for repayment under a secured bridging loan facility, the court had made orders which included a proprietary injunction in respect of certain vessels securing the facility, and a disclosure order against all of the Defendants (the "Disclosure Order"). The Disclosure Order required affidavits to be sworn containing information regarding both the accounts and assets of the two defendant companies as well as those of D3 and D4. Subsequently, the first order was augmented by further orders granting, amongst other things, a worldwide freezing injunction. The orders also provided that the provision of information required by the Disclosure Order was a continuing obligation. D3 and D4 failed to provide the information required under theDisclosure Order. In the circumstances, Warren J held that D3 and D4 had wilfully failed to comply with the orders, and were thereby also in contempt of court in relation to the failures to comply of D1 and D2.

Acknowledging that dealing with a contempt application in the absence of the alleged contemnors was an exceptional course, Warren J nevertheless considered that the application should proceed, relying on the checklist of factors set out in *Sanchez v Oboz* [2015] EWHC 235 (Fam).

Warren J considered that it was appropriate to proceed immediately to sentence the contemnors in their absence, having considered that D3 and D4 would have been unlikely to avail themselves of the opportunity afforded by an adjournment to comply with their legal obligations or to make any plea in mitigation. The judge considered that the principles applicable to the punishment for breach of a disclosure order in relation to a freezing order applied to D3 and D4's breaches, despite the fact that the Disclosure Order had not strictly been in support of a conventional freezing order. The appropriate punishment for such contempt is normally a prison sentence. His Lordship went on to impose a six month sentence on D3 and D4, suspended for one month.

Re SABMiller plc [2016] EWHC 2153 (Ch) (Snowden J, 23 August 2016)

Scheme of arrangement – convening hearing – takeovers – class issues

SABMiller plc (the "Company") sought an order under s. 896 of the Companies Act 2006 to summon a single meeting of all of its ordinary shareholders (the "Public Shareholders"), other than two major shareholders, Altria Group Inc. and BEVCO Ltd (together, the "Major Shareholders"), for the purpose of considering a scheme of arrangement. The scheme was the first stage in a complex transaction by which Anheuser-Busch InBev ("AB InBev") would acquire control of the Company. The Company took the view that it was appropriate to propose to the court that the Majority Shareholders be treated as a separate class, and therefore to allow the Company's Public Shareholders to vote separately. To this end, the Company proposed that there should only be one scheme meeting, and that the Majority Shareholders would appear by counsel and undertake to the court at the sanction hearing to be bound by the scheme.

One group of shareholders, "Soroban", took a different view and disputed the Company's proposal. Unusually, Soroban was not a dissentient shareholder. Soroban sought to have the Major Shareholders included in the main scheme meeting, such that there would be a higher chance of dissentient members being outvoted.

The key question before the court was whether the relevant provisions of the Companies Act 2006 permit the court to make an order summoning a meeting of only some of the shareholders to whom a scheme is proposed, on the basis that the others are prepared to give undertakings to the court at sanction to be bound by the scheme.

Snowden J held that he had jurisdiction to order a meeting of the Public Shareholders, which did not include the Major Shareholders. His Lordship accepted the Company's submission that a not uncommon practice in this area is for members or creditors voluntarily to exclude themselves from a class to which they otherwise might be said to belong to avoid giving dissentient creditors the opportunity to attack a favourable vote at the sanction stage, on the basis of unfairness or that the meeting was unrepresentative.

Snowden J considered that there was nothing in the statutory wording of

ss. 895 and 896 to prevent a member or creditor from agreeing voluntarily to waive or forgo the right to participate in the meeting, in the same way as a member or creditor can simply decide not to attend or vote. (The scheme was subsequently sanctioned by the same Judge at a hearing on 4 October 2016.)

Re Garden Products Italy S.p.A. [2016] EWHC 1884 (Ch) (Snowden J, 27 June 2016)


ROBIN DICKER QC

Scheme of arrangement – sanction hearing

Snowden J sanctioned a scheme of arrangement in relation to Global Garden Products Italy S.p.A (the "Company") under Part 26 of the Companies Act 2006. The Company and its parent, Global Garden Products C S.a.r.l (the "Parent") formed part of a group that is one of Europe's leading manufacturers and sellers of lawnmowers and related equipment. The Company was the borrower under a Facility Agreement with Intesa Sanpaolo acting as the existing lender, which was governed by English law and contained an English jurisdiction clause. Under a related Credit Support Agreement, a number of international financial institutions, in effect, provided a commitment to fund a proportion of facilities made available to the Company. The purpose of the scheme was to extend the maturity of the two tranches of the term facilities from August 2016 and August 2017 to the end of 2020. Further, it was envisaged that one tranche would become owed by the Parent and one by the Company, with both being owed directly to the scheme creditors rather than through the existing lender, Intesa Sanpaolo. Snowden J was satisfied that he had jurisdiction to sanction the scheme under Article 8 of the recast Judgment Regulation, on the assumption it did indeed apply, after receiving additional information concerning the identity and domicile of five scheme creditors in the UK. The requirement of a "sufficient connection" was satisfied by the fact that both the Facility Agreement and Credit Support Agreement were governed by English law and contained English jurisdiction clauses. As to the question of the scheme's recognition in Italy, Snowden J was satisfied that there was a realistic prospect of recognition in Italy, where the Company is based, on the basis of a very clear and persuasive expert opinion. Although Snowden J acknowledged that it is not ordinarily appropriate for class issues to receive fresh attention at the sanction stage, his Lordship proceeded to consider a relevant class issue on the basis that it had not previously been raised. The judge considered the effect of Coordination Fee payable to the scheme's Coordinators, which had not been disclosed in the explanatory statement. Upon receiving a more detailed explanation as to its rationale, Snowden J accepted that the fee was not likely to have affected the Coordinators' decision to support the scheme, and waived the deficiency in the explanatory statement.

[Robin Dicker QC]

Re Metinvest [2016] EWHC 1868 (Ch) (Arnold J, 30 June 2016)


STEPHEN ROBINS

Scheme of arrangement - sanction

Following an earlier scheme of arrangement to prevent enforcement of US$1.125 billion of notes issued by Ukrainian mining and steel company (the first moratorium scheme), the scheme company required further time in which to seek to negotiate a substantive restructuring of its debts; and therefore it proposed a further scheme of arrangement (the second moratorium scheme) to extend the first moratorium scheme's prohibition on enforcement for a further period. At the convening and sanction hearings in respect of the first moratorium scheme, the court had concluded that a single class of scheme creditors was appropriate and that the court had jurisdiction to sanction the scheme: see *Re Metinvest BV [2016] EWHC 79 (Ch)* (Proudman J) and *Re Metinvest [2016] EWHC 372 (Ch)* (Asplin J). Furthermore, at the convening hearing for the second moratorium scheme, Newey J had concluded that a single class of scheme creditors was appropriate and that the position in respect of jurisdiction remained unchanged: see *Re Metinvest [2016] EWHC 1531* (Ch). At the meeting of scheme creditors in respect of the second moratorium scheme, the second moratorium scheme had been approved by 100 percent both by number and value of the scheme creditors voting at the meeting either in person or by proxy. Additionally, those voting represented approximately 85 percent by value of those entitled to vote. At the sanction hearing in respect of the second moratorium scheme, Arnold J held that the court had jurisdiction to sanction the second moratorium scheme; that there had been compliance with the statutory requirements and the terms of the convening order; that the class had

been fairly represented and had acted in a bona fide manner; and that the second moratorium scheme was one which it was appropriate for the court to sanction. On this final point, the Judge held that the appropriate comparator was insolvency. The evidence before the court was to the effect that, even on an orderly realisation of the assets of the scheme company in the event of insolvency proceedings, the scheme creditors would be likely to recover no more than 46 cents in the dollar. By contrast, in the event of the successful negotiation of a substantive restructuring, the scheme creditors would be repaid in full over time. The court therefore sanctioned the second moratorium scheme.

[David Allison QC, Stephen Robins]

CORPORATE INSOLVENCY

Digested by RYAN PERKINS AND RIZ MOKAL


RYAN PERKINS


RIZ MOKAL

Re Lehman Brothers International (Europe) [2016] EWHC 2131 (Ch) (Lord Justice David Richards, 24 August 2016)

Post-administration statutory and contracted interest - currency conversion claims insolvency set off

This judgment addresses several supplemental issues arising from the Waterfall IIA and Waterfall IIB judgments given in 2015 by David Richards J (as he then was). Four concern issues of legal principle or statutory construction. First, where an event occurring between the date of the administration and that of the final and full discharge of a creditor's non-provable debt contractually entitles the creditor to interest, the creditor thereafter has an accrued right to that interest. In calculating this interest, no account may be taken of steps that a creditor might have taken but did not in fact take. Second, under Rule 2.88 of the Insolvency Rules 1986, the contractual interest rate applies to contingent and future debts once, but only once, they become payable. Prior to this period, the statutory interest rate applies. Third, when a debt is discharged by insolvency set-off, no currency conversion claim arises, since set-off once triggered is deemed to have occurred as at the date of the commencement of the administration. And fourth, where a part of a foreign currency debt has not been discharged as a result of the depreciation of sterling as between the commencement of administration and the payment of dividends, the creditor is entitled to contractual interest on that part of the debt.

[Robin Dicker QC; William Trower QC; Antony Zacaroli QC; David Allison QC; Tom Smith QC; Daniel Bayfield QC; Richard Fisher; Alexander Riddiford; Adam Al-Attar; Henry Phillips; Robert Amey]

Ronelp Marine Ltd v STX Offshore and Shipbuilding Co [2016] EWHC 2228 (Ch) (Norris J, 7 September 2016)

Recognition of foreign proceedings – lifting of stay to continue individual actions

The five applicants were Liberian companies each of whom had entered into contracts with the Chinese subsidiary of a Korean shipbuilder for the delivery of five vessels. The contracts were governed by English law. The Korean parent had guaranteed the performance of the contracts, and the guarantees were subject to English law and the jurisdiction of English courts. The Chinese subsidiary entered into Chinese insolvency proceedings and the office-holder notified the applicants of the rescission of the contracts. The applicants commenced English Commercial Court proceedings to enforce the guarantees against the Korean parent. The latter was subsequently placed in Korean rehabilitation proceedings, and the Korean office-holder applied under the Cross Border Insolvency Regulations 2006 for recognition of the Korean proceedings as foreign main proceedings. This was granted, with the result that the litigation pursuant to the guarantees was automatically stayed. The applicants applied under the Regulations for permission to continue their guarantee claims. The Court regarded as significant the fact, firstly, that the litigation involved considering whether the contracts with the Chinese subsidiary were unenforceable on the ground of illegality, a question on which English law has been described as "in a state of flux" and "in some disarray". The Court was of the view that "the application of this body of law through the medium of expert evidence...should not be visited upon the Korean Rehabilitation Court." Secondly, the English Commercial Court proceedings were reasonably well advanced and the parties had incurred considerable costs on them. Thirdly, the English proceedings could more speedily quantify the

applicants' claims, which in turn would enfranchise them in the Korean proceedings. Fourthly, the English proceedings would not hinder the Korean proceedings, since they threatened neither the integrity of the insolvency estate nor the equality of distribution from it. And finally, the English proceedings might assist the Korean Court by resolving a genuinely difficult issue of English law. On these grounds, the Court permitted the English proceedings to continue.

[Robert Amey]

Re BHS Ltd (in administration)[2016] EWHC 1965 (Ch) (Birss J)


DAVID ALLISON QC

Administration – appointment of additional administrators

The administrators of BHS applied to the court for the appointment of concurrent administrators. The applicants and proposed concurrent administrators had agreed the terms of a protocol to delineate their respective responsibilities, namely that once the concurrent administrators were appointed, the applicants would remain in office so as to continue to trade the business with a view to concluding trading activities and making asset realisations, while the concurrent administrators commenced investigatory work into the company's affairs. The application had the support of the creditors, the largest of which was the Pension Protection Fund. Birss J found as follows: (1) The court had the jurisdiction to approve an appointment of the kind envisaged, including an order making the protocol a formal part of the appointment. The conditions laid down in the Insolvency Act 1986 Sch.B1 para.103(1), para.103(5), para.103(6) and para.68(1)(a) were satisfied. (2) The court would exercise its discretion to make the order. The appointment of concurrent administrators was in the best interests of the creditors because it would enable investigations into possible claims they might be entitled to bring against the former and current directors of BHS to take place in the most timely and efficient manner. Real progress could be made in those investigations before the company entered into liquidation at which time the concurrent administrators would be appointed as joint liquidators. Such an approach would also allow a delay on the entry of BHS into liquidation so that the company would be able to conclude its trading in the administration. (3) The protocol in the instant case expressly provided that the two sets of administrators would have unfettered access to all the documents generated during the course of the administration by either set of administrators in their capacity as agents for the company. The protocol also included a provision to allow for its terms to be amended by agreement. It made good practical sense that the administrators as a whole could agree variations to the protocol and, on the footing that they were minor in nature, there was no need to return to court. It could be left to the good sense and judgment of the administrators themselves to determine whether the court's sanction ought to be sought. (4) As regards costs, the original administrators and the concurrent administrators' costs and expenses would be an expense in the administration. However, it was not anticipated that there would be a significant increase in the overall cost of the administrators even though there were to be both the original administrators and the concurrent administrators. Accordingly, the appointment would not materially add to the costs already estimated in the administration.

[David Allison QC]

Re Elgin Legal Ltd [2016] EWHC 2523 (Ch) (Snowden J, 25 August 2016)

Appointment of administrators – locus standi – retrospective effect

The former administrator (S) of the company (E) applied for a second administration order against E. By an administrative oversight, S's previous appointment as administrator had expired. S asked for the new administration order to take effect retrospectively from 1 March 2016, being the date when his previous appointment had accidentally come to an end. Snowden J made an administration order against E, and held as follows: (1) S had locus standi to apply for an administration order on the basis that he was a creditor for unpaid fees incurred during the previous administration (Re Lafayette Electronics Europe Ltd [2007] BCC 890 applied); (2) if S had not been a creditor of the company, then S would not have had standing to apply for an administration order, since a person does not have any interest in

applying for an administration order merely by virtue of his status as a former administrator; (3) on the facts of the case, it was clear that the Court should exercise its discretion in favour of making an administration order, and the only remaining issue related to whether such an order should have retrospective effect from 1 March 2016; (4) it was debatable whether the Court had jurisdiction to make a retrospective administration order (Re G-Tech Construction Ltd [2007] BPIR 1275 considered), but this issue did not need to be decided in the present case because (5) even if the Court had such jurisdiction, it would not be appropriate for the Court to exercise its discretion to make a retrospective administration order, having regard to the potentially prejudicial effect that such an order might have on the company's other creditors.

Re Lehman Brothers International (Europe) [2016] EWHC 2492 (Ch) (Hildyard J, 11 October 2016,)

Statutory interest – income tax

The administrators of LBIE applied to the Court for directions as to whether statutory interest under rule 2.88(7) of the Insolvency Rules 1986 constitutes "yearly interest" within section 874 of the Income Tax Act 2007. The economic consequences of such a finding would be significant: if statutory interest fell to be treated as yearly interest under section 874, then the administrators would be required to deduct income tax from any such interest payments (at the basic rate) and pay the same to the Revenue. Hildyard J held that statutory interest did not constitute yearly interest, on the following basis: (1) statutory interest under rule 2.88(7) does not accrue due from time to time (in the manner of normal contractual interest), but only becomes payable once a surplus arises in the estate of the insolvent company after payment in full of the provable debts (*Re LBIE* [2015] EWHC 2269 (Ch) applied); (2) accordingly, statutory interest lacks the distinguishing quality of yearly interest, namely the continuous accrual of such interest from time to time; (3) the Revenue had caused regrettable confusion by issuing contradictory guidance on the matter, resulting in potential confusion for commercial parties trading LBIE's debts in the secondary markets; and (4) in the future, the Revenue should engage a specialist team and carry out proper internal checks before giving formal confirmation of its position. **[Daniel Bayfield QC]**

Re Bernard Matthew Ltd and others (Hildyard J, unreported, 20 September 2016)

Pre-pack administration – sale of property subject to fixed charge

The Court appointed administrators of Bernard Matthews Limited and 6 associated companies and instantly on their appointment made further orders under paragraph 71 of Schedule B1 to the Insolvency Act 1986 enabling the administrators to sell property of the companies free of fixed charge security. **[Lloyd Tamlyn]**

Preston v Green [2016] EWHC 2522 (Ch) (Mr Registrar Briggs, 11 October 2016)

Rescission of winding-up order – standing – credibility of evidence – extension of time

The applicant, who litigated in person, was a director of a company that had been wound up by the Court. He applied for rescission of the winding-up order. Such an application must be made by a contributory or creditor of the company, and the applicant claimed to be both. At the hearing, he admitted that he was not a contributory. He had, however, submitted a witness statement and two invoices to support the claim that the company owed him money. The Court found several inconsistencies between the statement and the terms of the invoices. It also highlighted the applicant's failure to explain why the invoices had not previously been presented to the Official Receiver or the company's liquidator. Taken together, these factors persuaded the Court on a balance of probabilities that the applicant was not a creditor. He therefore lacked standing. Further, while a rescission application must be made within five days of the winding-up order, there was in this case a period of over two years between order and application. The Court held (following *Re Lehman Bros International (Europe) [2014] EWHC 1687 (Ch)*) that Rule 3.9 of the

Civil Procedure Rules applied to the exercise of its discretion as to whether to extend the application period. This required the Court (following *Denton v White [2014] EWCA Civ 906*) to consider whether the delay was serious and significant, why it had occurred, and whether in all the circumstances it should be overlooked. Here, the delay in seeking rescission was serious and significant; the explanation proffered for it was inadequate; and the interests of established significant creditors of the company were served by the winding-up. Unsurprisingly, the application failed.

Premier Motorauctions Ltd v Pricewaterhousecoopers LLP [2016] EWHC 2610 (Ch) (Snowden J, 24 October 2016)

Insolvency – security for costs – relevance of ATE insurance

In considering whether to order security for costs on the basis that there was reason to believe that the claimant would be unable to pay costs if ordered to do so, pursuant to CPR r.25.13, the existence of an after the event insurance policy was relevant and should not be ignored, even where the claimant was an insolvent company. The question was whether, having regard to the terms of the ATE policy, the nature of the allegations in the case and all the other circumstances, there was reason to believe that the ATE policy would not respond so as to enable the defendant's costs to be paid.

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


ANTONY ZACAROLI QC


WILLIAM WILLSON

Maud v Aabar Block Sarl [2016] EWHC 2175 (Ch), (Snowden J, 8 September 2016)

The impact of an ulterior purpose in the making of a bankruptcy order

This case is a continuation of the cases digested in prior issues that relates to a bankruptcy petition brought against Mr Maud. On 3 June 2016, Mr Registrar Briggs made a bankruptcy order against Mr Maud which was subsequently appealed.

At the hearing before Mr Registrar Briggs there was an issue as to whether the respondent petitioners had an ulterior motive in seeking to make the debtor bankrupt. The Registrar held that: (1) where the debt was undisputed there was a presumption that a bankruptcy order would be made; and (2) if the debtor could show that there was an ulterior motive and that it was not in the interest of the creditors to make an immediate order the presumption would be negated and the burden of proof would fall on the petitioner.

Based on the information before him the Registrar found that the respondents did not have an ulterior object so that burden of proof shifted back to the debtor to show why an order should not be made. The Registrar then concluded that there was no prospect of the debt being paid within a reasonable time and so he made a bankruptcy order.

The debtor appealed the Registrar's order on the basis that he was wrong to find that the respondents were not pursuing an ulterior object. The respondents on the other hand argued that the petitioner's motives were wholly irrelevant where one of the objectives included lawfully seeking a dividend.

At the hearing of the appeal the Judge granted permission to appeal and allowed the appeal against the bankruptcy order.

The Judge held that the presence of an ulterior motive did not render the petition an abuse of process where there was also a legitimate purpose. The Judge referred to and relied on cases in the winding up context such as *Re A Company* [1983] BCLC 492 in support of this. The Judge however made it clear that those cases did not decide that the motives of a petitioning creditor were irrelevant where the petition was opposed by other creditors. In such cases the court had to evaluate the creditors' wishes and attribute weight to the views of individual creditors in deciding whether to grant the relief sought in the interests of the class. Such an approach would necessarily require consideration of all the circumstances including the motives of the petitioning creditor.

As for the shifting burden of proof, the Judge held that the Registrar's approach created a real risk that the court would conflate or not address distinct questions. In particular: (1) whether a petitioner with an undisputed debt was abusing the process by seeking an order that was contrary to the interests of the creditors as a whole; (2) whether the court should grant an order where there was no abuse of process in light of the circumstances as a whole; and (3) whether the court should exercise

its case management powers and adjourn the petition if there was a reasonable prospect of payment. The Judge found that the Registrar had erred in his finding of no ulterior purpose. This was particularly in light of new admissions by the respondents who admitted that they had some other objectives in pursuing the bankruptcy order.

[Antony Zacaroli QC and William Wilson]

Cooke v Dunbar Assets Plc [2016] EWHC 1888 (Ch) (Jeremy Cousins QC, 29 July 2016)

Costs of an unsuccessful appeal of a bankruptcy order

This case relates to the treatment of costs where a bankrupt unsuccessfully appeals a bankruptcy order. The original bankruptcy order was made on 18 December 2014 and the judgment dismissing the appeal was handed down on 6 April 2016. The issue of the treatment of the costs was adjourned to another hearing which formed the basis of the judgment digested.

The bankrupt submitted that the appeal costs should be treated: (1) as a cost and expense of the bankruptcy thus falling to be dealt with in accordance with the order of priority in r.6.224(1) of the Insolvency Rules 1986 (IR); or (2) as a provable debt in the bankruptcy. To this extent reliance was placed on: (1) r.12.2 IR which states that fees, costs, charges and other expenses incurred in the course of bankruptcy proceedings were to be regarded as an expense; and (2) that the appeal was a continuation of the underlying proceedings commenced below such that the parties had submitted themselves to a statutory regime which gave rise to a contingent liability for the costs of any appeal (*Bloom v Pensions Regulator* [2013] UKSC 52).

The respondent argued that r.7.51A IR gave the court an unfettered discretion as to what order should be made for the costs of an appeal. It was further argued that the consequence of the bankrupt's argument was that the costs of the bankrupt's unsuccessful appeal would fall on the creditors. As a result of this the creditors would be worse off which could not be correct. The respondent further argued that the court was able to order that if the bankrupt did not pay the costs then they should be treated as a cost of the bankruptcy.

The Judge ordered that the bankrupt was liable for the costs personally outside of the bankruptcy and to the extent they were not paid by him they should be treated as an expense of the bankruptcy. In relation to the application of r.12.2 the Judge held that it was there to safeguard persons who had incurred costs and expenses which would promote the interests of the creditors. It was not designed for the protection of those who made unsuccessful claims or applications which cause the bankruptcy estate to incur costs. Further, r.12.2 was not an exhaustive statement as to how costs were to be treated. The Judge held that there was no inconsistency between the provisions of r.12.2 IR and the general rules as to costs in CPR Pt 44 (introduced by r.7.51A IR). As a result of this, the starting point was that as an unsuccessful party the bankrupt was liable personally for the costs. In relation to the application of *Bloom* the Court held that the costs of the appeal were not a provable debt.

Grant v Baker [2016] EWHC 1782 (Henderson J, 18 July 2016)

Indefinite postponement of an order for sale not permitted even in the presence of exceptional circumstances

This was an appeal in relation to an order that the sale of a bankrupt's property be postponed until the bankrupt's adult daughter (D) no longer resided at the property. In making the order the first instance Judge considered the effect of a sale on D and whether the circumstances were exceptional and outweighed the sole creditor's interests as required by s.335A of the Insolvency Act 1986 (IA). The Judge concluded that there were exceptional circumstances and that D's needs could not be met in rented accommodation. The appeal by the joint trustees in bankruptcy was allowed. The appellate Judge held that while the first instance Judge was entitled to find that there were exceptional circumstances displacing the presumption in favour of the creditor's interests the Judge was not entitled to postpone the sale indefinitely. The requirement in s.335A(2)(c) IA required the Judge to have regard to "all the circumstances of the case other than the needs of the bankrupt". It was held that those circumstances included the statutory scheme of the bankruptcy legislation which had at its core the vesting of the bankrupt's property in the trustee for the purpose of realisation and distribution among unsecured creditors. With this in mind, the appellate Judge held that the first

instance Judge failed to give appropriate weight to the fact that the indefinite stay was incompatible with the underlying purpose of the bankruptcy legislation. It was further held that in all but the truly exceptional circumstances the purpose of the legisation required realisation in a short timeframe (usually months).

As a result of the appellate court's decision that the first instance judge had erred in the exercise of her discretion, it was for the appellate Judge to form his own view. The appellate court ordered that the longest reasonable postponement was for approximately 12 months.

PROPERTY & TRUSTS

Digested by ANDREW SHAW


ANDREW SHAW

Angove's Pty Ltd v Bailey and another [2016] UKSC 47 (Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath, Lord Hodge JJSC, 27 July 2016)

The applicant, Angove's Pty Ltd ("Angove's"), is an Australian winemaker, which had engaged an English company, D & D Wines International Ltd ("D & D") as its agent and distributor in the United Kingdom under an agency and distribution agreement (the "ADA").

D & D entered administration and then moved into creditors' voluntary liquidation ("CVL"). When it entered administration, there were outstanding invoices for A$874,928.81 in respect of wine which D & D had sold to two customers but for which these customers had not yet paid.

While D & D was in administration, Angove's gave written notice that it was terminating the ADA and thereby D & D's authority to collect the sum due under the invoices from its customers. Instead, Angove's intended to collect these monies itself and then account to D & D for its commission.

After D & D had moved into CVL, its liquidators objected to Angove's course of action. The liquidators maintained that D & D was entitled to collect the monies, deduct its commission and then leave Angove's to proof in the CVL for the sum owing to it. Initially the liquidators contended that the relationship between Angove's and D & D was buyer and seller, not agent and principal. Angove's disputed this and further argued that any monies held by D & D for Angove's account was held on trust.

At first instance, Judge Pelling QC held that the relevant relationship between Angove's and D & D was that of principal and agent and that, consequently, D & D's authority to collect the sums due under the invoices ceased upon the termination of the ADA. On appeal, the liquidators accepted this and instead argued that if D & D did act as agent then its authority to collect the price of the wine sold on Angove's behalf survived the termination of the ADA because D & D required this authority to collect its commission. This argument succeeded before the Court of Appeal; Angove's trust argument failed both at first instance and on appeal.

The Supreme Court allowed Angove's appeal on the basis that the general rule was that a principal could revoke the authority of an agent, even if it were contractually agreed to be irrevocable. An exception to this general rule would apply if the contract provided, either expressly or impliedly, that the authority was irrevocable and that the authority was given to secure an interest of the agent, so that the authority of an agent is irrevocable while the interest persists. However, on its true construction the ADA did not provide for the authority to be irrevocable, nor had the authority been granted to secure D & D's right to collect its commission. Accordingly, Angove's appeal succeeded.

Although it was not necessary for the Supreme Court to deal with Angove's trust argument, it did so because it had been fully argued and was a point of some general importance. In addressing this argument, the Supreme Court proceeded on the basis that Angove's was not able to terminate D & D's authority as agent. Although an agent has a duty to account to his principal for monies received on the latter's behalf, this duty does not give rise to a trust of the monies held by the agent unless the intentions of the parties, determined from the agency agreement or, in some instances, from the parties' conduct, indicates otherwise. At first instance, the judge had held that the liability of D & D to account to Angove's under the ADA was a purely personal liability; whereas sums collected outside the ADA after the termination of D & D's authority would be held on trust. Escrow arrangements put in place rendered these points moot though.

On appeal, the Court of Appeal drew the parties' attention to a passage in *Lewin on Trusts* which stated that even if no express trust existed, money received by an agent might be held on a constructive trust if, "it would be unconscionable for the agent to assert a title to the money having regard to the circumstances of the agent at the time of receipt."

Having considered the authorities, including the decision of Bingham J in *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep 658, the Court of Appeal considered that D & D's contractual right to collect the invoice monies in order to recover its commission on sales meant that it was not unconscionable for D & D to retain those monies and so no constructive trust arose.

Giving judgment in the Supreme Court, Lord Sumption held that where money is paid with the intention that the recipient will hold the entire beneficial interest then a constructive trust will only arise if: (i) that intention is vitiated somehow, for example if the money is paid as a result of a fundamental mistake; or (ii) irrespective of the payor's intentions, in the eyes of equity the money has come into the wrong hands, for example where it represents the proceeds of a fraud. Neither of these conditions had been satisfied in the *Neste Oy* case, which Lord Sumption held was wrongly decided as was *In re Japan Leasing* [1999] BPIR 911, another case considered by the Court of Appeal. The customers had paid D & D in the belief that such payment would discharge their liability under the invoices on the basis that D & D was authorised to collect it and this belief was not mistaken. Consequently, the question of a constructive trust did not arise.

SPORT

Digested by **ROBERT AMEY**


ROBERT AMEY

International Tennis Federation v Maria Sharapova (Court of Arbitration for Sport, 30 September 2016)

Doping – meaning of 'no significant fault or negligence'

The Court of Arbitration for Sport (CAS) has accepted Ms Sharapova's submission that she bore no significant fault or negligence in relation to a positive test for Meldonium, setting aside the contrary decision of the ITF Independent Tribunal (see the August 2016 edition of the South Square Digest, page 31).

On 26 January 2016, Maria Sharapova played against Serena Williams in the quarter-final of the Australian Open. Following that match a sample was taken from Ms Sharapova under the rules of the Tennis Anti-Doping Programme 2016. That sample tested positive for Meldonium, a substance which had been added to the Prohibited List with effect from 1 January 2016.

Before the ITF Independent Tribunal, Ms Sharapova had asserted that she did not know that the active ingredient of Mildronate, a medication which she had regularly been using for over 10 years (and which is not licensed for human consumption in the USA or the EU, although it is in Russia), had been added to the Prohibited List from 1 January 2016. Further, she argued that she bore no significant fault or negligence, such that the period of ineligibility should be reduced to 1 year.

The ITF Independent Tribunal sat for two days and heard evidence from a number of factual and expert witnesses, before giving a judgment describing Ms Sharapova's evidence as "untenable", "remarkable", "wholly incredible" and "unbelievable". Ultimately, the tribunal held that Ms Sharapova had made a "deliberate" decision to conceal her use of the drug from anti-doping authorities, and that she took Mildronate "for the purpose of enhancing her performance". Rejecting her submission that she bore no significant fault or negligence in relation to the ADRV, the tribunal had imposed a period of 2 years ineligibility.

According to its usual procedure, the CAS conducted a *de novo* review of the matter. Setting out the law in relation to the 'no significant fault or negligence' ground of mitigation, the CAS held that a mere failure to exercise 'utmost caution' is not on its own an indicator that an athlete bears significant fault. Nor will an athlete bear significant fault merely because she has left some 'stones unturned'. The CAS held that the failure of Ms Sharapova and her team to realise that consumption of Mildronate would result in an ADRV did not amount to significant fault or negligence. Furthermore, the CAS accepted Ms Sharapova's claim that she had entirely delegated responsibility for compliance with anti-doping rules to her manager, Mr Eisenbud. The CAS considered that this did not involve significant fault or negligence on the part of Ms Sharapova, despite the fact that Mr Eisenbud had received no anti-doping training, and had clearly failed in his duty to ensure that his athlete was not taking a prohibited substance.

As a result of the finding that Ms Sharapova bore no significant fault, the 24 month period of ineligibility imposed by the ITF Independent Tribunal was replaced with a 15-month ban.

UK Anti-Doping v Samuel Barlow (National Anti-Doping Panel, 27 June 2016)

Tampering with doping control – assault on a Doping Control Officer

Mr Barlow was a rugby league player for Leigh Centurions and Scotland. On 31 July 2015, an experienced Doping Control Officer, Mark Dean, attended Mr Barlow's home to carry out an out-of-competition test. What happened next was caught on CCTV.

Mr Dean, wearing a prominently displayed ID badge (visible on the CCTV footage) and a top displaying the words 'Doping Control', parked his car and rang the doorbell. After a few minutes, Mr Barlow's partner came out of the house and was told by Mr Dean that he had come 'to do a drug test on Mark Barlow'. Mr Barlow then appeared at an upstairs window, accusing Mr Dean of attempting to burgle him. Mr Barlow then came downstairs, and after a brief conversation (in which Mr Dean can be seen showing Mr Barlow his ID badge), Mr Barlow invited Mr Dean inside the house.

Once inside the house, Mr Barlow assaulted Mr Dean. He then called the police, saying that he had caught a burglar at his house. The police did not accept Mr Barlow's claim to have mistaken Mr Dean for a burglar, and charged him with perverting the course of justice, false imprisonment, and assault. Mr Barlow pleaded guilty to the assault at Bradford Crown Court on 23 May 2016, and the other charges were not proceeded with.

Before the National Anti-Doping Panel, Mr Barlow persisted with his claim that he had mistaken Mr Dean for a burglar. This version of events was emphatically rejected by the tribunal. The tribunal then considered whether Mr Barlow was guilty of an ADRV in having tampered with a doping control. The tribunal noted that mere offensive conduct towards a doping control official would not amount to the offence of tampering, which normally involved interference with sample bottles. However, it was common ground in the instant case that, subject to UK Anti-Doping establishing Mr Barlow's state of mind (i.e., that he knew Mr Dean was a Doping Control Officer), Mr Barlow's assault on Mr Dean would amount to the offence of tampering.

The tribunal considered that, contrary to his claims to have mistaken Mr Dean for a burglar, Mr Barlow did in fact know that Mr Dean was a Doping Control Officer. Accordingly, Mr Barlow was guilty of the offence of tampering, and was therefore banned for four years. An appeal by Mr Barlow was dismissed by the appeal tribunal in a judgment dated 6 September 2016.

SAMUEL BARLOW: ADMITTED TO HITTING DOPING CONTROL OFFICER MARK DEAN

Waterfalls in Cayman and English Insolvencies

Tom Smith QC, Rocco Cecere and Christopher Levers of Mourant Ozannes discuss how the priority of redemption claims in Cayman liquidations has been clarified in the light of the recent Cayman Islands Court of Appeal decision in *In re Herald Fund SPC.*

Introduction

One of the most important issues which arises in any insolvency proceeding concerns the priority in which the assets in the insolvent estate are to be distributed to the various claimants on the fund.

In the case of the insolvency of a company, the general principle of course is that assets are to be distributed between unsecured creditors *pari passu*, with any surplus remaining then being for the shareholders. However, the position is in practice usually more complicated than that since it is also necessary to take account of (amongst other things) secured creditors, preferential creditors, claims to interest and non-provable liabilities.

The Position in England

So far as an English liquidation or distributing administration is concerned, the distribution waterfall can be summarised broadly as follows. The property held by the liquidator or administrator is required to be distributed in the following order:

1/. Fixed charge creditors;
2/. Expenses of the insolvency proceedings;
3/. Preferential creditors;
4/. Floating charge creditors;
5/. Unsecured provable debts;
6/. Statutory interest;
7/. Non-provable liabilities[1]; and
8/. Shareholders.

See *Bloom v The Pensions Regulator* [2014] AC 209 at [39] per Lord Neuberger.

The Position in Cayman

The priority waterfall in a Cayman liquidation broadly follows the same scheme as the waterfall in an English insolvency, which is not surprising given the common origins of the legislation. However, there are certain differences, primarily relating to the ranking of liquidation expenses. Thus the waterfall in a Cayman liquidation can be

1/. i.e. the category of claims which are not provable in a liquidation but which nevertheless rank ahead of the claims of members. The most well known examples of such claims are "currency conversion" claims which arise for loss suffered by a creditor as a result of his foreign currency claim being converted into sterling for the purposes of proof and where sterling then depreciates against the foreign currency by the time dividend payments are made: see Re Lehman Brothers International (Europe) in administration [2016] Ch 50 CA.

CAYMAN COURT BUILDING: THE PRIORITY WATERFALL IN A CAYMAN LIQUIDATION BROADLY FOLLOWS THE SAME SCHEME AS THE WATERFALL IN AN ENGLISH INSOLVENCY

summarised as follows[2]:

1/. Fixed charge creditors (section 140(2) of the Companies Law);
2/. Preferred creditors[3] (section 140(2), section 141(1));
3/. Floating charge creditors (section 140(2), section 141(1));
4/. Expenses of the liquidation including the liquidator's remuneration (section 109(1));
5/. Unsecured creditors (section 140(1));
6/. Statutory interest on the unsecured claims admitted to proof (section 149(2));
7/. Non-provable liabilities (to the extent such liabilities in fact exist as a matter of Cayman law); and
8/. Shareholders.

Distributions to Shareholders

Many Cayman liquidations concern the winding up of mutual investment funds which have been set up as Cayman companies. In the case of such companies, it is of course the relative priority of the rights of the shareholders which is usually of critical importance. As a result, the focus in a Cayman liquidation will often be on the rights of shareholders and may give rise to issues which are rarely focussed on in English liquidations and administrations, which are typically more focussed on the rights and priorities between creditors. One of the key issues in the winding up of a Cayman mutual fund will often be whether investors who

2/. The difference between the English scheme and the Cayman scheme relates to the ranking of the expenses of the liquidation. The Cayman scheme follows the position in England prior to the amendments introduced by the Companies Act 2006 (introducing a new section 176ZA into the Insolvency Act 1986) and elevating the status of liquidation expenses above floating charge claims and those of preferential creditors. The position in the Cayman Islands follows the law in England prior to these changes as explained by the House of Lords in Buchler v Talbot [2004] 2 AC 298.

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

TOM SMITH QC

sought to redeem their investments immediately prior to the fund's winding up enjoy any sort of priority over the remaining investors.

Re Herald Fund SPC

The recent decision of the Cayman Islands Court of Appeal in *In re Herald Fund SPC,* CICA 17/2015, 19 July 2016, considered, for the first time, the priority enjoyed by the claims of redeemed shareholders in the liquidation of a Cayman Islands mutual fund vis-à-vis "ordinary" or "outside" creditors and remaining shareholders.

The case concerned two Cayman Islands corporate mutual funds: Primeo Fund (Primeo) and Herald Fund SPC (Herald) and the fallout from the collapse of Bernard L Madoff Investment Securities LLC (BLMIS). Primeo invested in Herald, which in turn invested in BLMIS, the world's largest Ponzi scheme.

Primeo, along with a number of other Herald shareholders (referred to as the December Redeemers), submitted redemption requests in respect of certain of its shares (the Shares) for a redemption date of 1 December 2008. Herald accepted those requests and it was common ground between the parties that, as a matter of law and pursuant to Herald's articles of association, the Shares had in fact been redeemed on 1 December 2008. However, on 11 December 2008, before the redemption proceeds in respect of the Shares were paid to Primeo and other December Redeemers, Bernard Madoff confessed that BLMIS was an elaborate fraud. Herald suspended the determination of its net asset value and the payment of unpaid redemption proceeds almost immediately. Herald subsequently went into liquidation, as did Primeo.

This left a question as to how the December Redeemers should be treated in Herald's liquidation: as creditors who have provable claims in the liquidation for the unpaid redemption monies or as shareholders? At first instance in the Grand Court of the Cayman Islands, Jones J agreed with Primeo holding that investors who had been redeemed under a fund's articles of association were to be treated as creditors of the fund and were able to prove in the fund's liquidation for the amount of the unpaid redemption proceeds.

Delivering the unanimous decision of the Court of Appeal, which affirmed Jones J's decision at first instance, Field JA went on to address the issue of where the creditor claims of redeemed investors rank in a liquidation.

Redemption Creditors

The Court of Appeal agreed with Jones J that, since Primeo and the other December Redeemers had in fact redeemed their shares prior to the commencement of Herald's liquidation, they had ceased to be shareholders and therefore had claims as creditors for the unpaid redemption proceeds. This was not itself a surprising conclusion: since it was common ground that the shares had been redeemed, the December

Redeemers were no longer shareholders and any claim to payment to the redemption proceeds had to be in their capacity as creditors. However, the further question was whether the claims of "*ordinary*" creditors ranked ahead of the claims of so-called "*redemption creditors*" such as those of Primeo and the other December Redeemers.

The notion that the claims of redemption creditors should be subordinated to ordinary creditors appears to have its genesis in a number of Victorian cases dealing with the position of withdrawing members of building societies. Perhaps the most well-known of these is *Walton v Edge* (1884) 10 App Cas 33 in which the House of Lords held that the claims of ordinary creditors were entitled to be paid in priority to the claims of withdrawing members who had not been paid.

Although each of these decisions turned on the construction of the bespoke rules of the building society in question, the existence of a common law principle which distinguished the respective priorities of redemption and ordinary creditors appears to have been accepted somewhat uncritically by a number of subsequent decisions. For example, in *Somers Dublin Ltd v Monarch Pointe Fund Limited* [2013] ECSC J0311-10, the Eastern Caribbean Supreme Court seemingly accepted the existence of "*an old common law legal principle that redeemed members are deferred creditors postponed behind ordinary unsecured creditors*".

Whether such a common law principle actually exists in the context of modern company liquidation was, however, largely irrelevant in *Herald*. The Court of Appeal held that the question of ranking or different types of creditors was dependent upon the proper construction of section 49(g) of the Companies Law (substantially identical to section 74(2)(f) of the Insolvency Act 1986) which provides:

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

CHRISTOPHER LEVERS OF MOURANT OZANNES

The effect of section 49(g) is to subordinate the claims of creditors, based on sums due to them in their character as members or former members of the company, to the claims of those creditors whose claims are not based on their character as a member.

In *Soden v British & Commonwealth Holdings plc* [1998] AC 298, the House of Lords considered section 74(2)(f) of the Insolvency Act 1986. Lord Browne-Wilkinson considered that, in order to fall within the ambit of the provision, the claim had to be made by a creditor relying on his status as a member:

The relevant principle is that the rights of members as members come last, i.e. rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of action.

PRIMEO FUND AND HERALD FUND SPC WERE CAUGHT UP IN THE FALLOUT FROM THE COLLAPSE OF THE MADOFF PONZI SCHEME

The issue was, therefore, whether sums due to the December Redeemers were sums due to them in their capacity as members or former members. Field JA found that they were. He considered that *[a]lthough the Claimants ceased to be members of Herald upon redemption of their shares, their claims for redemption proceeds would be founded on the statutory contract between them as members and Herald and as such would be claims for sums "due to any member of a company in his character of a member" within s. 49(g)*.

On this basis, the creditor claims of the December Redeemers would not share *pari passu* in the distribution of Herald's assets with ordinary creditors but rank immediately behind them.

However, the effect of section 49(g) is merely to subordinate such claims as against the ordinary unsecured creditors of the company. So far as the remaining shareholders of the company were concerned, the claims of redemption creditors ranked ahead of the rights of those members to a return of capital on a winding up. Thus, the Court of Appeal confirmed that, although subordinated to the claims of outside creditors, redemption creditor claims will rank ahead of claims of members since *"any adjustment…must give higher priority to former members who have become creditors as a result of a redemption than to mere continuing members*".

Section 37(7) of the Companies Law

The further question which arose in *Herald* concerned the effect of section 37(7) of the Companies Law. As determined by the Grand Court and the Court of Appeal, section 37(7) applies to the claims of an investor who had an accrued right to have his shares redeemed but whose shares had in fact not been redeemed by the time of the commencement of the liquidation of the company. Ordinarily, such an investor would not be entitled to enforce the unperformed contract for redemption against the company in liquidation, thereby converting his status from that of shareholder to that of creditor. However, section 37(7) permits the shareholder to enforce the contract of redemption, subject to the two provisos to the

application of the sub-section being satisfied.

On the facts of *Herald* itself, the Court of Appeal agreed with the Grand Court that section 37(7) had no application to the claims of the December Redeemers to redemption proceeds since their shares had in fact already been redeemed prior to the commencement of the liquidation of Herald.

Where an existing shareholder at the date of commencement of the liquidation is permitted pursuant to section 37(7) to enforce the contract of redemption so as to redeem his shares, notwithstanding the commencement of the liquidation, then the priority of the resulting claim to redemption proceeds is dealt with by section 37(7)(b). In essence, like a claim of a redemption creditor to redemption proceeds, the claim ranks ahead of the claims of existing shareholders to a return of capital, but behind the claims of ordinary unsecured creditors.

Summary

The decisions of the Grand Court and of the Court of Appeal have usefully clarified the priority waterfall which will be applicable in the winding up of a Cayman corporate mutual fund. Subject to any further consideration by the Privy Council[4], this can now be summarised as follows:

1/. Fixed charge creditors;
2/. Preferred creditors;
3/. Floating charge creditors;
4/. Expenses of the liquidation;
5/. Unsecured creditor claims - claims of ordinary third party creditors;
6/. Unsecured creditor claims – claims of redeemed investors – comprising:
(a) redemption creditor claims i.e. creditors who redeemed their shares pre-liquidation and have claims for unpaid redemption proceeds[5]; and
(b) section 37(7) shareholder claims i.e. shareholders who fall within section 37(7)(a) i.e. shareholders whose shares were not redeemed prior to the commencement of the liquidation but who are permitted to enforce the terms of redemption against the company pursuant to section 37(7)(a)[6];
7/. Statutory interest on unsecured creditor claims;
8/. Non-provable liabilities; and
9/. Distributions to shareholders in their capacity as such i.e. the rights of shareholders to a return of surplus capital on the winding up.

ROCCO CECERE OF MOURANT OZANNES

Tom Smith QC, Rocco Cecere and Christopher Levers acted for Primeo Fund before the Grand Court and the Cayman Islands Court of Appeal.

4/. The Additional Liquidator has obtained leave to appeal to the Privy Council.
5/. Such claims rank behind ordinary third party creditors by virtue of section 49(g) of the Companies Law but rank ahead of the rights of remaining shareholders to capital or income.
6/. Such claims rank behind ordinary third party creditors but ahead of the rights of remaining shareholders to capital or income by virtue of section 37(7)(b) of the Companies Law. The Court of Appeal did not address specifically the relative priority of redemption creditor claims and section 37(7) claims as between each other.

Mourant Ozannes and South Square Litigation Forum 2016

Key developments in financial litigation and insolvency and restructuring as reported by Pierre Ali-Noor, Mourant Ozannes and Madeleine Jones, South Square

On 28 September South Square and Mourant Ozannes held their annual Litigation Forum in London. As usual, the event brought together key figures in financial litigation, insolvency and restructuring to analyse the key developments in those areas over the preceding year and consider what they might mean for the future.

The future is never entirely predictable, but the decision of the British people in June to vote "Leave" in the Brexit referendum has left the business community in London and beyond with a sense of uncertainty. The Forum's aim was to take stock of what intelligence we have. However, intelligence itself is a slippery thing. South Square's David Alexander QC, who co-chaired the conference, reminded us in his welcoming address of the categories into which Donald Rumsfeld divided military intelligence during the Iraq war. There are, Mr Rumsfeld said, known knowns (things we know we know) and known unknowns (things we know we don't know). But there are also *unknown* unknowns ("the ones we don't know we don't know"), and as the former US Secretary of Defence observed, with some understatement, "it is the latter category that tends to be the difficult one."

Session 1: Brexit: Possibilities and Probabilities

The first session of the afternoon addressed the implications of Brexit for the legal community and particularly those of us specialising in insolvency and restructuring. Barry Isaacs QC of South Square chaired a panel with a wide range of views on the topic, and featuring voters on both sides of the referendum.

The panellists noted that the outcome of Brexit negotiations - and hence what changes the legal community will have to react to - are themselves far from certain. Views differed as to whether a hard or soft Brexit would be more likely, but the panel agreed that given how closely to its chest the UK Government is holding its cards, at this stage neither possibility could be firmly ruled in or out.

Robert Duggan, managing partner of Mourant Ozannes' London office, made the interesting point that, although unsettling, Brexit offers the UK an opportunity to recast its laws to make it more competitive than EU legislation currently allows. Robert, who works with complex financial products, foresaw a strengthened relationship between Britain and those offshore jurisdictions most important in cross-border financial services. A British government with a greater degree of control over its own policies is also likely to be more robust and responsive in its dealings on the international stage.

Adam Plainer, head of the London Restructuring practice at Weil, Gotshal & Manges, also took the view that Brexit would allow Britain to reshape its restructuring law in response to international competition. He made the point that Brexit will mean the end for the Insolvency Regulation, so that one practical consequence of Brexit will be that cross-border issues in insolvency will be resolved by international agreements such as the Lugano Treaty and the Hague Treaty

BREXIT: POSSIBILITIES AND PROBABILITIES. (L TO R) ERIC LEWIS (LEWIS BAACH) DOROTHY LIVINGSTONE (HERBERT SMITH FREEHILLS), ADAM PLAINER (WEIL), ROBERT DUGGAN (MOURANT OZANNES) BARRY ISAACS QC (SOUTH SQUARE)

on the Choice of Courts. He considered that the English legal system is still a gold standard internationally, and will remain a strong export.

Dorothy Livingston, a consultant at Herbert Smith Freehills and a specialist on EU law and regulation, was slightly less sanguine. She considered that the uncertainty of Brexit was likely to lead to reduced corporate activity in the short term, at least.

Eric Lewis of Lewis Baach in Washington, providing an American's view, pointed out that the uncertainty of Brexit was compounded by the looming US presidential election and next year's French and German elections. Since financial markets generally prefer certainty, this is likely to produce some instability.

The panel's overall impression was that lawyers are going to be busy over the coming years and months. The people of the United Kingdom have, for better or worse, had their say and it is now incumbent upon the Government and those in the legal sector to focus their efforts on effecting Brexit in the most beneficial way possible.

Session 2: Schemes of Arrangement in Corporate Restructuring

This session took the form of a case study of a proposed restructuring of a solvent corporate group with a Dutch TopCo, a Cayman Holdco and two subsidiaries in Germany and Singapore. Both the TopCo and HoldCo are heavily indebted, the TopCo under $1bn notes governed by New York law, and the HoldCo under a £50m term loan facility governed by English law.

The panel of lawyers from around the world considered what steps were possible and most practical to effect a restructuring.

South Square's David Allison QC began by considering whether the restructuring could take place through a Scheme of Arrangement under English law.

SCHEMES OF ARRANGEMENT IN CORPORATE RESTRUCTURING PANEL. (L TO R): MANOJ SANDRASEGARA (WONG PARTNERSHIP), MICHAEL ROSENTHAL (GIBSON DUNN), SIMON DIXON (MOURANT OZANNES), DAVID ALLISON QC (SOUTH SQUARE), KATRINA BUCKLEY (ALLEN & OVERY),

The question for the English courts when considering whether to sanction a scheme involving foreign companies is whether there is a sufficient connection to the jurisdiction and whether the scheme would have a substantial effect. In the case of the Cayman company, the "sufficient connection" test will be satisfied as the rights of the creditors under the loan agreement are governed by English law. In the case of the Dutch company, although the bonds are governed by New York law and so do not themselves establish a connection, the English courts are open to companies establishing a connection for the purpose of bringing a proposed scheme under English jurisdiction. This could be achieved by changing the governing law of the bonds to English law, shifting the COMI to England or having an English NewCo assume liabilities as a co-issuer of the bonds.

Michael Rosenthal, a partner in Gibson Dunn based in New York and the co-chair of the firm's Business Restructuring and Reorganisation Practice Group, explained that the restructuring could also be effected in the American Courts under Chapter 11 of the US Bankruptcy Code. The US Courts take a generous approach to jurisdiction under Chapter 11: Section 109 of the Bankruptcy Code enables any party that "resides or has a domicile, a place of business, or property in the United States" to be a debtor in bankruptcy. The most likely obstacle to jurisdiction is pending plenary proceedings in another jurisdiction: the US Courts may well dismiss a Chapter 11 case in these circumstances.

With David and Michael having convincingly shown that the notional creditors of the group would be able to effect rearrangement in either the English or the US courts, the next question was which creditors would be likely to pick.

Katrina Buckley, a London-based partner in Allen & Overy's global restructuring and insolvency group, considered the commercial factors likely to weigh upon this decision.

The English procedure has several advantages. The court can allow the exclusion of specific liabilities, allowing certain creditors (for example trade creditors) to be unaffected and so streamlining the process. It can also effect releases by the scheme creditors of third parties, for example guarantors, and so protect the scheme companies against claims for indemnities. Furthermore, since a scheme of arrangement is not effected

DAVID ALEXANDER QC (SOUTH SQUARE) FORUM CO-CHAIR

under insolvency legislation, it is less likely than Chapter 11 proceedings to trigger termination rights.

Commercial advantages of the American procedure include an automatic stay on all actions, worldwide. Furthermore, although it is a bankruptcy procedure, under Chapter 11 the debtor remains in possession of all property subject to the proceedings, and may continue to make decisions in the ordinary course of business, so that it may have continued access to financing and can assign unfavourable contracts. Furthermore, the voting thresholds for approval of a Chapter 11 plan are lower than those required by the English courts for approval of a Scheme. A Chapter 11 plan requires the approval of more than one-half in number and two-thirds in amount of voting creditors in each class. In England, the approval of a majority in number and three quarters in value of creditors in each class is required.

However, one potential disadvantage of the Chapter 11 proceedings is that the court order affects all creditors, and may be enforced against any creditor with a connection to the US. This might affect the companies' ability to carry on business.

Katrina concluded that in the circumstances under discussion an English scheme would be a better choice for the clients than a US Chapter 11 procedure.

As David had explained earlier, in order for the scheme to be approved, by the English court, it is necessary to show that it will have a substantial effect. The panel members discussed the question of whether the scheme would be recognised in the various jurisdictions in which the corporate group has a presence.

The position under Dutch and German law is simple. Under the Recast Judgments Regulation, an English scheme of arrangement will be recognised on the basis that any variations to creditors' rights are made pursuant to the governing law of the contract (presuming that this is varied in the case of the Dutch TopCo's notes from New York to English law).

Michael explained that an English Scheme of Arrangement will be recognised in the US under Chapter 15 if the debtor has a place of business or property in the US. The court will then consider whether the foreign proceeding is a main or non-main proceeding based on the debtor's COMI. Foreign main proceedings are entitled to a limited stay protecting assets in the US and certain other forms of relief. Foreign non-main proceedings may receive such relief, but this is within the court's discretion. The US courts are willing to approve foreign restructurings which make provision for broader relief than would have been available under Chapter 11, and will also give effect to foreign proceedings which purport to vary entitlements governed by US law. However, in order to grant approval, the US court will expect to be shown that the foreign proceedings were sensitive to similar matters that a US court would have considered under Chapter 11 proceedings.

In the Cayman Islands, Simon Dickson, Head of the Litigation and Insolvency department in Mourant Ozannes' Cayman office, explained that the Cayman court might recognise variation by the English courts of creditors' rights under the term loan as the facility is governed by English law. Otherwise, it would be necessary either to implement a mirror scheme in the Cayman courts, or to seek recognition and enforcement of the English scheme under Cayman common law. Further, it might be desirable to appoint Provisional Liquidators over the Cayman Holdco to take a monitoring and reporting role and to protect the company from hostile creditors.

Manoj Sandrasegara, Joint Head of the Restructuring & Insolvency Practice at Wong Partnership in Singapore, described the position in Singapore. As with Cayman, the English Scheme would not automatically be recognised, and the best options were a parallel scheme or recognition and enforcement under the common law. Protecting the Singapore company against creditor actions is simpler, since Singapore court will grant a moratorium at an early stage in the scheme's life, even

prior to the calling of a first meeting.

Manoj made some more general remarks on the future of Singapore restructuring law. These were a reminder that this is an exciting time for global restructuring law for reasons beyond Brexit. Singapore is consciously positioning itself as a global restructuring hub, with the Singapore Ministry of Law having earlier this year accepted the recommendations of a committee set up to transform Singapore restructuring law in order to make it more attractive as a centre of international debt restructuring. The Committee's recommendations are based on a comparative analysis of restructuring law in various jurisdictions, including the US and the UK. Manoj reported that we can expect that Singapore's cross-border insolvency laws will be strengthened in the near future, and that the UNCITRAL Model Law will be adopted. The message is very much, watch this space.

COMMERCIAL FRAUD PANEL. L TO R ARE: NICHOLAS FOX (MOURANT OZANNES) BARNABY STUECK (JONES DAY), JUSTIN HARVEY-HILLS (MOURANT OZANNES), ROBERT HICKMOTT (QUINN EMANUEL), AND FELICITY TOUBE QC (SOUTH SQUARE)

Session 3: Commercial Fraud: Complex Problem Solving and Lessons Learned from Recent Cases

The third session, chaired by South Square's Felicity Toube QC, focused on various issues raised by recent commercial fraud litigation.

Robert Hickmott, a partner at Quinn Emanuel in London, discussed the European Arrest Warrant (EAW) regime. An EAW may be issued by a judicial authority in respect of a suspect being prosecuted for a crime carrying a maximum penalty of 12 months or more imprisonment. It requires other EU states to return the suspect to the state in which the prosecution is ongoing. The regime was introduced in order to encourage cross-border co-operation between criminal legal authorities in the EU, but it has proved to be open to abuse, particularly where a state authority is itself subject to recovery proceedings in a different EU jurisdiction. Even where the EAW has been procured on demonstrably flimsy grounds, the recipient country within the EU has no discretion as to whether to adhere to the regime. Thus, the EAW can be used effectively to blackmail litigants into dropping charges against a state or else face extradition and imprisonment.

Justin-Harvey-Hills, a partner in Mourant Ozannes' Jersey office, spoke about some recent attempts by foreign authorities to enforce criminal confiscation orders against assets belonging to Jersey trusts.

The starting point was the landmark case of *Re Esteem Settlement*[2003] JLR 188 where a creditor of a fraudster sought to enforce a claim against the assets of a trust which the fraudster had settled and of which he was a beneficiary. There was no direct proprietary, tracing or other *in rem* claim against those particular assets. The claimant therefore argued that it should be able to "pierce the veil" of the trust. However, the Royal Court dismissed this argument on the basis that the doctrine of "piercing the veil of a trust" simply did not exist. If the claimant did not have an *in rem* claim against the assets, he would have to show that the trust was either invalid or a sham. If he was not able to do that, there was no "third way" of "piercing the veil" of a validly constituted trust on the basis that the settlor/beneficiary exercised a considerable degree of influence or control over the trustee. The integrity of Jersey trusts is therefore a core principle that the Royal Court has both guarded and preserved.

In *Tantular v AG* [2014] (2) JLR 25, the Royal Court held that a *saisie judiciaire* (akin to a freezing order) may not be granted over the assets of a discretionary trust even in circumstances where the alleged offender is both the settlor and beneficiary of a discretionary trust. The rationale for this is that the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008, pursuant to which the *saisie judiciaire* was sought, stipulate that the order has effect only over a defendant's "realisable property." This means property in the hands of a defendant, property to which he is beneficially entitled or property which he has gifted to a third party. In circumstances where the trust assets were not the proceeds of crime and where they were settled prior to any allegation of criminal conduct, they did not constitute the property of one of the beneficiaries or

CHRISTOPHER HARLOWE (MOURANT OZANNES) FORUM CO-CHAIR

of the settlor and neither a beneficiary nor a settlor had any entitlement to the property. All that a beneficiary had was a right to be considered for benefit and a right to hold the trustee to account.

The third case was that of *AG v Rosenlund* [2016] JRC 062. The Danish authorities had prosecuted and convicted the settlor of a Jersey discretionary trust (who was also a beneficiary) of tax evasion on the basis that the assets of the trusts in reality belonged to him. The Danish authorities sought to enforce the resulting confiscation order in Jersey against the assets of the trust, notwithstanding that the trust assets had been settled prior to any allegation of criminal conduct. They also had to accept that the trust was valid as a matter of Jersey law. After the proceedings commenced, *Tantular* was decided (see above) and the AG (on behalf of the Danish authorities) was forced to drop the argument that the defendant was beneficially entitled to the trust assets and that they were therefore his realisable property. The AG argued instead that the retirement of the previous trustee and its replacement with a new trustee had constituted a "gift" of the assets held in trust by the Defendant to the new trustee and that the assets were therefore the defendant's realisable property. However, the Court disagreed with that contention for two main reasons. First, it found that a transfer of trusteeship and the accompanying transfer of assets could not amount to a gift since a gift required the transfer of the beneficial interest in the assets. The beneficial interest had not been transferred and the new trustee held the assets on the same basis and subject to the same obligations as its predecessor. All that had happened was that the legal title to the assets had been transferred. Deconstructing the 'gift' argument further, the Court considered that the transfer of the trust assets from the outgoing to the incoming trustee was not a voluntary act (an essential requirement for a gift), but rather a procedure imposed on the retiring trustee by Jersey trusts law, and was anyway a transfer involving only the outgoing and incoming trustees. Secondly, applying Tantular, the transfer could not amount to a gift by the defendant since the trust assets were not his property and he had no beneficial entitlement to them.

Barnaby Stueck, a partner with Jones Day in London, spoke about the frustrations the victims of fraud can often feel when, even after they have succeeded in civil proceedings against the wrongdoer, criminal prosecuting authorities are unwilling or unable to pursue the case, meaning that the perpetrators of serious frauds are able to escape without any kind of criminal sanction being brought against them. The only prosecuting authority for complex fraud in the UK is the Serious Fraud Office, but it is only able to pursue a relatively small number of prosecutions a year.

There is accordingly an increased tendency for victims to pursue their civil case in such a way as to facilitate the SFO's use of the forensic and expert evidence in a later prosecution. Victims can also engage directly with the SFO and encourage it to bring prosecutions in appropriate cases. One such case was that of Ulf Magnus Peterson of Weavering Capital (UK), a UK company that was advisor to a Cayman Hedge Fund with funds under management of more than US$600m. The liquidators of the UK company threatened judicial review of the SFO's initial decision not to prosecute Mr Peterson, and also gained considerable media coverage of the decision. Eventually, the SFO did prosecute, and Mr Peterson was sentenced to 13 years' imprisonment. However, the liquidators had to get permission from the creditor-victims to put aside money from the distributable assets of the company in order to engage with the SFO to bring about the prosecution. This will clearly not always be possible, and some liquidators may not feel it is their role to undertake this task.

Finally, Nicholas Fox, a partner in Mourant Ozannes in the BVI considered the question of why financial frauds, which can often seem both egregious and, with the benefit of hindsight, large and obvious, are not caught sooner. He cited the famous SEC investigations of Madoff's fraudulent business, which repeatedly gave that business a clean bill of health – despite complaints from industry

insiders for many years before the fraud finally came to light (including the memo from Harry Markopolis entitled "The world's largest hedge fund is a fraud").

However, Nicholas pointed out that this is not exactly unusual – being human beings, investigators rarely go in with a completely open mind. Thus, some of the SEC investigators examined Madoff with the suspicion that his too-good-to-be-true profit margins were the result of insider dealing, and accordingly looked for evidence to confirm or negate this hypothesis, missing entirely the clues that the fund was a Ponzi scheme. A similar inadvertent inattention may also be built into company's due diligence procedures: this was the case in the Weavering fraud, where due diligence was a tick-box exercise.

Another obstacle to prosecution comes after the fraud comes to light. Those who have been taken in by the fraud are left embarrassed. Financial professionals may be reluctant to testify where this means admitting that they were fooled, particularly where they were responsible for due diligence or auditing.

KEYNOTE SPEAKER GREGORY COLEMAN, WHO APPREHENDED JORDAN BELFORT, THE WOLF OF WALL STREET

Keynote Session

The keynote speaker for the session was Gregory Coleman. Gregory was, for over 25 years, a Special Agent at the FBI and is most famous for his investigation and subsequent prosecution of Jordan Belfort, a stock-trader who manipulated the markets in a fraud worth over $200 million. Belfort's extravagant lifestyle at the height of his fraud and his subsequent downfall were portrayed by Leonardo Di Caprio in the *Wolf of Wall Street*. Gregory provided many amusing anecdotes collected from his career as well as a fascinating insider's review of the film itself. Gregory acknowledged that the film had several 'Hollywood' elements to it where the reality of the situation had been embellished for artistic effect but said that 80% of it depicted exactly what happened. For example, Belfort's yacht, *Naomi*, was in fact far more impressive in real life than Scorsese's version, but Belfort really did invite Gregory aboard it when the FBI's investigations of Belfort's fraud were close to their culmination.

Gregory explained how Belfort's market manipulation actually worked. He would first find a company whose stock he could offer in an IPO. However, the offered stock was not in fact sold to the public but to Belfort's own stooges or "flippers". Belfort's brokerage firm, Stratton Oakmont, would then buy the stock back from the flippers, who would make a small profit. Once Belfort controlled all the stock again, he would withhold it from sale while simultaneously creating a buzz around it on the marketplace via his brokers. The combination of increased demand and limited supply naturally caused prices to increase. Only once the stock price had hit a target did Belfort allow customers' orders to be executed. Belfort's victims were falling over themselves to pay high prices for worthless stock.

Gregory explained that his rationale when investigating individuals was always to 'follow the money' and that this had brought him into contact with regulators and authorities from across the world on throughout his career. The trend, as Gregory sees it, is for greater cooperation between different jurisdictions. He ended by praising many of those in the professional services sector who he had worked with for the professional and diligent manner in which they had kept records which had helped him to compile the evidence necessary to prosecute the individuals in question, reserving particular acclaim for the English accountants whose clear record-keeping allowed him to trace the proceeds of a multi-million dollar fraud to the account of a retired English schoolteacher (she was taking care of them for her dishonest son-in-law). Paperwork can seem a thankless task so it was refreshing to hear that compliance work is not only crucial in the fight against corporate fraud, but also very much appreciated by those on the front line in that battle.

Each of the sessions was extremely stimulating, as evidenced by the lively discussions among attendees which continued into the evening drinks. Our thanks go out to all the delegates and attendees for making this event a success.

Key developments in the Indian legal arena

Matthew Abraham outlines the new Insolvency and Bankruptcy Code and reports on the opening of the Mumbai Centre for International Arbitration.

Introduction

The Government of India, recognising that reforms in the bankruptcy and insolvency regime are critical to business in the region, recently introduced the Insolvency and Bankruptcy Bill in parliament. India's parliament passed the Bill in May 2016 and some of its provisions have already come into force. It is hoped that this consolidated code will change India from one of the slowest insolvency regimes of any major economy into one of the fastest.

In addition to the changes in India's insolvency and bankruptcy law, 2016 also marks the launch of the Mumbai Centre for International Arbitration (MCIA). The MCIA offers a new option for parties who agree to resolve India-related disputes by arbitration especially in the face of the withdrawal of the London Court for International Arbitration (LCIA) from the region.

MATTHEW ABRAHAM

This short article outlines some of the key points regarding the new insolvency and bankruptcy code and the launch of the MCIA following this author's recent visit to the country on an inaugural COMBAR trip.

India's new Insolvency and Bankruptcy Code

The regime in India has been based on an elaborate and multi-layered system whereby the legislative process is covered over multiple laws and adjudication is in multiple fora. The inefficiency of the system was noted by the World Bank which stated that average time to resolve insolvency in India in 2014 was over four years.

The new regime seeks to consolidate the existing framework and create a new institutional structure that will ultimately improve the efficiency of the system. The new code applies to companies, limited liability partnerships, partnership firms, other corporate persons, and individuals, and any other body specified by the Government.

For the purposes of this short article it is worth highlighting three aspects of the new code: (1) the New Entities Created; (2) the Insolvency Resolution Process; and (3) the Corporate Liquidation Process and Cross-Border Insolvency.

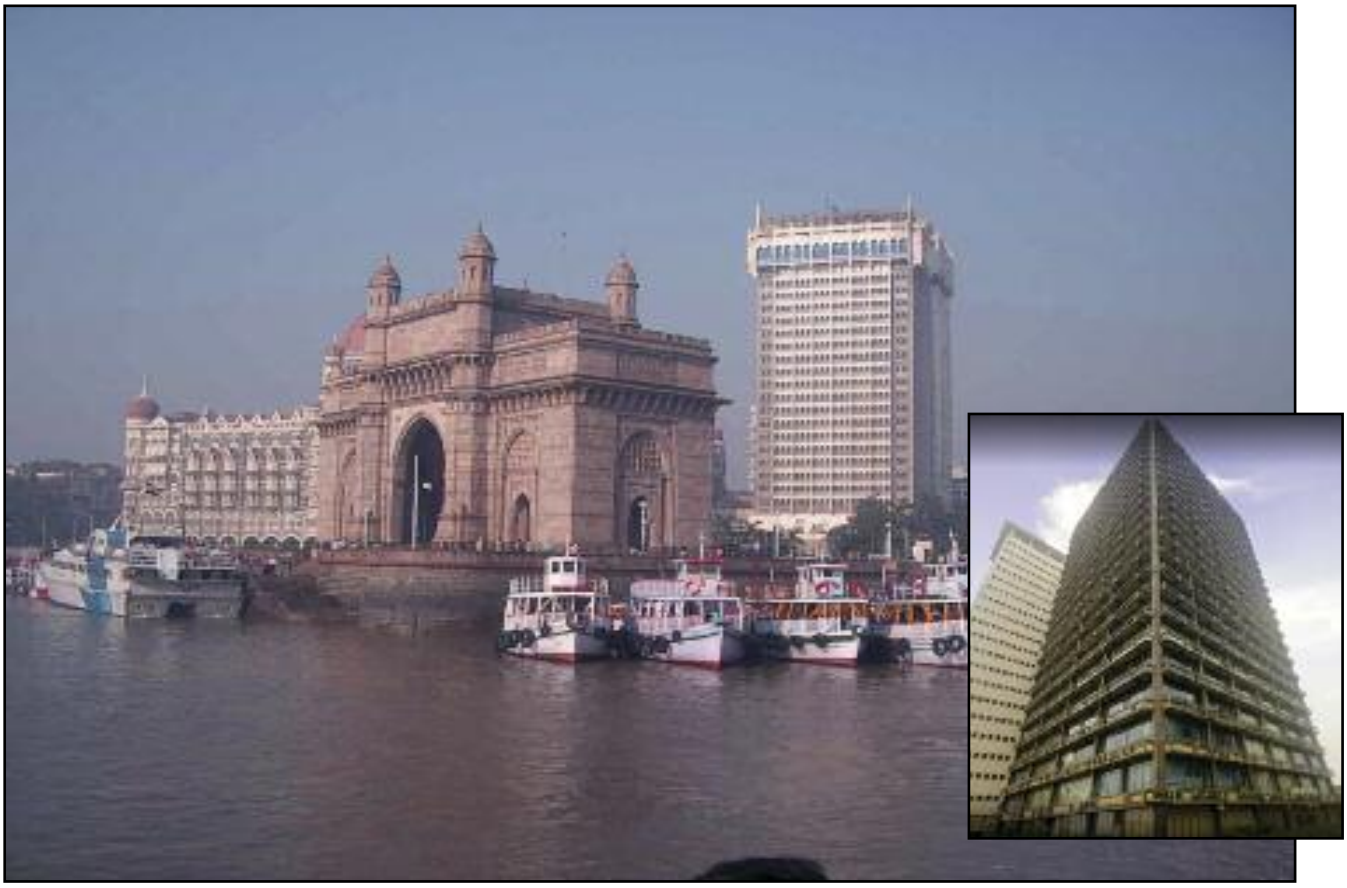
1/. The New Entities Created

The code envisages the establishment of new bodies as well as the introduction of insolvency professionals. The insolvency professionals will be, as in England, licensed professionals regulated by the insolvency professional agencies that will be created. There will also be the establishment of information utilities that will aid in the collection, collation and dissemination of financial information. It is hoped that this will facilitate corporate rescue and insolvency resolution.

The bodies mentioned above will be regulated and operated by an Insolvency and Bankruptcy Board. The adjudication of corporate insolvency disputes will be carried out by the National Company Law Tribunal (NCTL) and the National Company Law Appellate Tribunal. Individual and partnership insolvencies will be dealt with by the Debt Recovery Tribunal and the Debt Recovery Appellate Tribunal.

2/. The Insolvency Resolution Process

The insolvency resolution process is focussed on corporate rescue. The insolvency resolution and restructuring processes may be initiated by either the debtor or the creditors. It sets a time limit of 180 days, with one time extension of 90 days for initiation and completion of the process from the date on which the insolvency application is admitted. The relevant body will appoint an insolvency professional to coordinate and manage the process. A moratorium will also be declared for the duration of the time period. If a resolution plan cannot be agreed upon within the timelines then formal insolvency proceedings will be initiated.



THE MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION (INSET) IS LOCATED IN THE FINANCIAL DISTRICT JUST BEHIND THE GATE OF INDIA

3/. The Corporate Liquidation Process and Cross-Border Insolvency

The new code sets out the key gateways into an insolvency process. Once the liquidation process has been commenced the NCTL will take over all pending and future legal proceedings relating to the corporate debtor. To deal with the siphoning of assets by directors or promoters the new code sets out similar transaction avoidance provisions to those under the English Insolvency Act 1986. The new code also enables the government to enter into bilateral arrangements to deal with cross-border issues. It remains to be seen whether this will be an effective means of dealing with cross-border issues with many critics questioning why the government did not opt for the adoption of the UNCITRAL Model law.

The MCIA

The MCIA was established in a joint initiative between the Government of Maharashtra and the domestic and international business and legal communities. As it stands, most of the global disputes involving Indian parties take place in Singapore and London. MCIA aims to be India's premier forum for commercial dispute resolution. It seeks to achieve this in three ways.

Firstly, it has a set of sophisticated arbitral rules which draw on recent innovations in arbitration practice that have been tweaked for performance in the Indian market. The rules take into account the recent amendments to the Indian Arbitration and Conciliation Act. Secondly, it provides a dedicated secretariat aimed to be on par with the LCIA and the Singapore International Arbitration Centre (SIAC) thereby facilitating efficient, flexible and cost-effective administration of arbitration proceedings. Finally, it has a newly purpose-built venue to conduct arbitrations that meets the high standard expected by international parties who are used to the venues in London, New York, Dubai and Singapore.

The launch of the MCIA combined with the exciting chatter surrounding the opening of the Indian legal market in relation to the practice of non-Indian law has set the stage for interesting developments in international commercial arbitration going forward.

Conclusion

Both the Insolvency and Bankruptcy Code and the new MCIA are welcome developments in the expanding Indian legal market. Whether they will be a success remains to be seen but one thing is clear, India is taking the right steps towards dealing with the criticisms of inefficiencies within its legal system that have hindered progress over the years. India is certainly a jurisdiction that this author will be keeping a close eye on both in terms of developments in insolvency law as well as in relation to its expansion in international commercial arbitrations.

Matthew recently visited India on an inaugural COMBAR trip and is on the Steering Committee of the Young MCIA Practitioners.

Light at the end of the tunnel for Nortel?

Seven years on from the Nortel Group's collapse, **Alexander Riddiford** looks at the recently agreed global settlement

The Nortel Group, founded in 1895 as Bell Telephone Company of Canada, operated a global networking solutions and telecommunications business through more than 130 subsidiaries located in more than 100 countries.

The Nortel Group's parent company was Nortel Networks Corporation, a publicly-traded Canadian company, and the primary Canadian operating company was Nortel Networks Limited, which together with Nortel Networks Corporation and a number of their subsidiaries comprised the Canadian part of the Nortel Group (the "Canadian Companies"). The Nortel Group also included a group of US entities headed by Nortel Networks Inc (the "US Companies"), and a group of 22 entities based in the EMEA regions (the "EMEA Companies").

The Nortel Group collapsed in January 2009.

Events since the Nortel Group's collapse

In January 2009 the Canadian Companies and the US Companies entered insolvency proceedings or filed for bankruptcy protection in the US and Canada, and 19 of the EMEA Companies entered administration in England on the basis that their COMI was in the UK (with the other three EMEA Companies – Norwegian, Swiss and South African entities – remaining solvent and under the control of their directors).

The Administrators of the 19 EMEA Companies in administration (the "Companies") were all partners or executive directors of Ernst & Young. One of the Companies, a French entity called Nortel Networks S.A. ("NNSA"), also entered secondary liquidation in France on 28 May 2009. Otherwise, no secondary proceedings have been opened in respect of any of the Companies, and each of the Companies' administrations is a main proceeding under the European Insolvency Regulation.

After an attempt at a global reorganisation of the Nortel Group, which proved impossible, it was decided to effect a global sale of the Nortel Group's businesses and assets. This global sale was facilitated by an Interim Funding and Settlement Agreement, entered into on 9 June 2009, with the approval of the US, Canadian and English Courts. It was a term of the IFSA that the proceeds of the global sale would be held in escrow pending agreement or Court determination as to how the proceeds should be allocated amongst the parties to the IFSA (which included the Canadian Companies, the US Companies and the EMEA Companies). As a result of the various sales pursuant to the terms of the IFSA, which included sales of business lines, patents, patents applications and other assets, some US$7.304bn in sales proceeds were realised and paid into escrow accounts in New York known as the Lockbox.

In tandem with this global sale process, the Administrators have become seized of a number of factually and legally important issues affecting the Companies (or some of them), some of which have required the Administrators to seek the assistance of the English Court.

Most notably (from a legal point of view), certain novel legal issues arose in respect of any financial support direction ("FSD") pursuant to section 43 of the Pensions Act 2004, and any contribution notice ("CN") pursuant to sections 38 or 47 of the 2004 Act, that might be

NORTEL GROUP, WHICH INCLUDED 130 SUBSIDIARIES LOCATED IN MORE THAN 100 COUNTRIES, COLLAPSED IN JANUARY 2009

issued against certain of the Companies. FSDs and CNs had been threatened against these Companies, the Targets, on the basis that Nortel Networks UK Ltd ("NNUK"), which had a pension scheme (with some 33,000 members), was insufficiently resourced to fund that scheme. Various issues arose in this regard including as to whether any liability arising under or in relation to such an FSD or CN would rank as an administration expense, a provable debt or neither, in the Targets' administrations. This issue was finally determined by the Supreme Court in *In re Nortel GmbH (in administration) & Ors* [2014] AC 209, which held, reversing (in part) the decisions of Briggs J and the Court of Appeal below, that the liabilities were provable debts under rule 12.3(1) IR 1986, on the basis that they fell within the concept of "*obligation*" under rule 13.12(1)(b) IR 1986, which provided (relevantly) that a "*debt*" included "*any debt or liability to which the company may become subject after* [the date of administration] *by reason of any obligation incurred before* [the date of administration]". Lord Neuberger, overruling a series of decisions of the Court of Appeal on the effect of rule 13.12(1)(b) IR 1986, set out the following threefold test: "*in order for a company to have incurred a relevant 'obligation' under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of 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. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether 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 rule 13.12(1)(b).*"

Lord Neuberger's test in *Nortel* has provided welcome clarification on the scope of rule 13.12(1)(b) IR 1986. This test has been applied, for example, by the Court of Appeal in the Lehman Waterfall Application *(In re Lehman Bros International (Europe) (in administration) (No 4)* [2016] Ch. 50), in holding that the liability

ALEXANDER RIDDIFORD

of a member of a company in administration under section 74 of the Insolvency Act 1986 to contribute to the company's assets in the event of a shortfall, which only applies once a company is being wound up, is capable of being a provable debt in the member company's administration (under rules 12.3(1) and 13.12(1)(b) IR 1986).

Various disputes concerning the Nortel Group have also been litigated before the US and Canadian Courts, in some cases with a direct or indirect bearing on the administrations of the Companies. For example, both the US and Canadian Courts have heard motions by various of the US Companies and Canadian Companies for orders enforcing automatic stays against the Trustee of the Nortel Networks UK Pension Trust Limited and the Board of the Pension Protection Fund (together, the "UKPI"), so as to ensure that any (potentially very substantial) FSDs asserted against certain of the US Companies and Canadian Companies would be of no effect in the US and Canada.

Of even greater moment, both for the Companies and for the Nortel Group generally, have been the joint hearings before the Canadian and US Courts as to how the Lockbox monies are to be allocated across the Nortel Group. By agreement, the task of determining how the Lockbox proceeds are to be allocated has been given to the Ontario Superior Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware, with an allocation protocol requiring a joint trial in the two Courts.

A critical issue arising in the allocation trial concerned the ownership of the Nortel Group's intellectual property (the "IP"), with the US Companies, the Canadian Companies and the EMEA Companies contending for different paradigms in this regard: the Canadian Companies relying upon their legal title to the various pieces of IP that were assigned to them by employees and subsidiary entities; the US Companies arguing that the value of the IP came from the ability to exploit it for profit in accordance with licences granted by the Nortel Group (and relying upon the fact that the US was the biggest market and generated the greatest share of global revenues as the basis for claiming enhanced ownership rights in respect of the IP); and the EMEA Companies contending that the IP belonged beneficially to those entities which had contributed to its creation, and that the value of the respective ownership interests should be measured by reference to the amounts spent on research and development over the relevant years by each relevant Nortel entity. The different IP ownership theories propounded by the Canadian Companies, the US Companies and the EMEA Companies respectively gave rise to different allocation theories in the allocation trial, with the EMEA Companies obtaining the following approximate per cent allocation from the Lockbox: (a) 4.1 per cent under the Canadian Companies' theory (the "Canada Theory"); (b) 16.8 per cent under the US Companies' theory (the "US Theory"); and (c) 18.2 per cent under the EMEA Companies' theory (the "EMEA Theory") (together, the "Theories").

A critical issue was the ownership of Nortel intellectual property, with US, Canadian and EMEA Companies contending for different paradigms

The judgments of Judge Gross in Delaware and Mr Justice Newbould in Ontario were handed down on 12 May 2015. The allocation judgments rejected each of the Theories and preferred instead to order that the Lockbox should be split in accordance with a modified pro rata scheme ("Modified Pro Rata"), calculated by reference to the percentage that "Allowed Claims" against each Nortel Group entity's estate bear to the total Allowed Claims against all of the individual Nortel Group entities, subject to certain modifications (that a claim that might be brought against more than one entity can only be recognized once; that inter-company claims are to be included in the calculation; and that cash in hand is to be excluded from the calculation). The Modified Pro Rata basis for allocation is likely to give a substantially better return to many of the EMEA Companies than any of the parties' Theories would (including the EMEA Theory). NNSA, however, stood to do substantially worse from the Modified Pro Rata basis of allocation compared with the likely outcome of the EMEA Theory. Accordingly, a conflicts administrator was appointed on 2 June 2015 in respect of NNSA so as to facilitate NNSA's appeal against the allocation judgments.

LORD NEUBERGER'S TEST IN *NORTEL* HAS PROVIDED WELCOME CLARIFICATION ON THE SCOPE OF PROVABLE DEBTS

The Global Settlement

Following some preliminary rulings in the appeals against the allocation judgments (with NNSA and others appealing), a further round of mediation was held between the parties on 2 and 3 June 2016. As a result, an over-arching settlement was agreed in principle with a view to settling all of the outstanding claims (both present and future) as between the EMEA Companies and other entities within the Nortel Group; between the EMEA Companies and the UKPI; and between the EMEA Companies *inter se*. Piecemeal settlement of certain discrete claims and categories of claims had previously been achieved in the course of the Companies' administrations, most notably the settlement of certain claims by the EMEA Companies against Nortel Networks Corporation and Nortel Networks Limited which was sanctioned by HHJ Hodge QC on 17 July 2014 (see *Re Nortel Networks UK Limited (in administration)* [2014] EWHC 2614 (Ch)). By contrast, the Global Settlement, which was agreed in principle in June 2016, is intended to settle the vast majority of disputes that have arisen in relation to the affairs of the Nortel Group and, importantly, the allocation of the Lockbox monies across the Nortel Group.

The contractual framework for the Global Settlement was finalised in early October 2016, with the parties executing the relevant documentation on 12 October. The Global Settlement falls into the following four parts:

(a) The Allocation Settlement: The Allocation Settlement settles the dispute regarding the division of the funds in the Lockbox. The Lockbox monies shall be released to the relevant Nortel Group entities (including to each of the EMEA Companies) in set per cent proportions, with the EMEA Companies being allocated some 18.5 per cent. Among the EMEA Companies, NNUK is to receive about 14 per cent, NNSA will receive a fixed amount of US$220 million (being about three per cent) and the other EMEA Companies will receive a total of about 1.5 per cent of the Lockbox monies. The Allocation Settlement involves each of the EMEA Companies agreeing a discount from the Modified Pro Rata basis, save

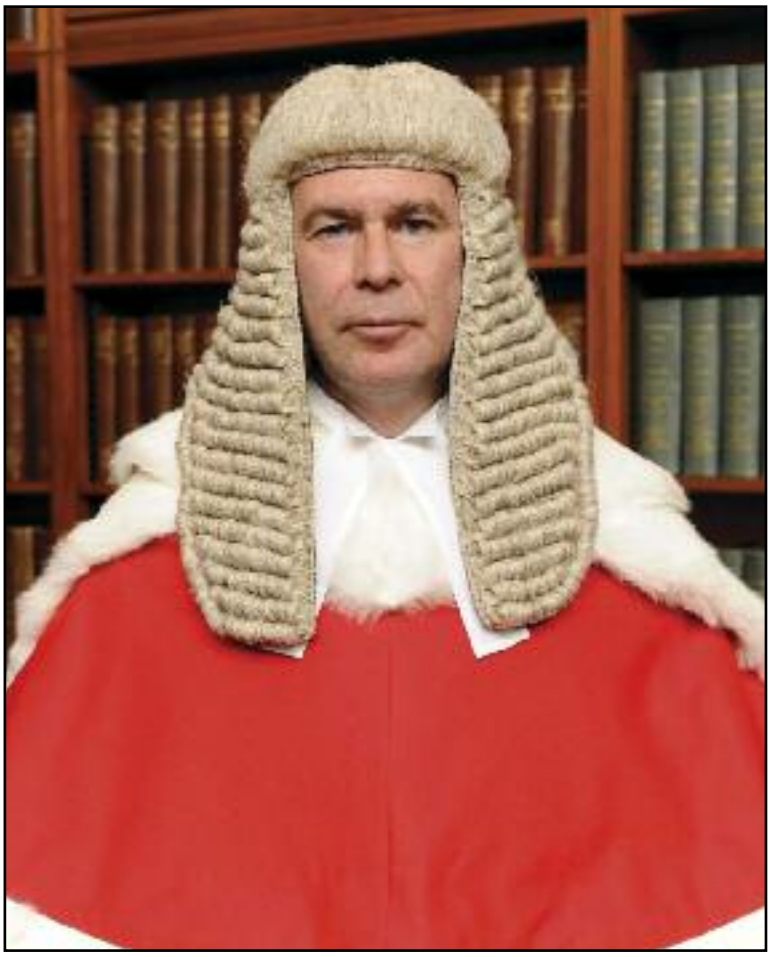
for NNSA which stands to receive a substantial uplift from the Allocation Settlement compared with what it would have received on the Modified Pro Rata basis of allocation.

(b) The Pensions Settlement: The Pensions Settlement settles various claims including the dispute regarding the issue of FSDs and/or CNs between the UK Pensions Regulator, the EMEA Companies and the NNUK Pension Scheme.

(c) The Intra-EMEA Settlement: The Intra-EMEA Settlement serves to settle various matters between the EMEA Companies themselves, including (inter alia): (a) the issue of "top-up" payments to be made by NNUK to some of the other EMEA Companies to compensate them for having continued to trade unprofitably after going into administration in order to facilitate the advantageous global sale of the Nortel Group's assets; and (b) the release of certain restitutionary claims that have been asserted against NNUK by some of the other EMEA Companies who faced a potential liability to the NNUK Pension Scheme.

(d) The NNSA Settlement: The NNSA Settlement settles the claims: (a) between NNSA and the other EMEA Companies; and (b) between the NNSA main proceeding and the NNSA secondary proceeding.

SNOWDEN J WAS SATISFIED THAT THE DECISION TO ENTER INTO THE GLOBAL SETTLEMENT WAS RATIONAL AND PROPER



The decision of Snowden J on 3 November 2016

Each aspect of the Global Settlement, as set out above, was conditional upon (inter alia) the approval of the English Court by 4 November 2016. Accordingly, the Administrators and the NNSA conflicts administrator applied to the Court for Orders under paragraph 63 of Schedule B1 to IA 1986, that they be at liberty to perform and to procure the Companies to perform the terms of the Global Settlement. Snowden J granted these applications and gave judgment on 3 November 2016 (*Nortel Networks UK Ltd (in administration) & Ors* [2016] EWHC 2769 (Ch)).

Administrators of companies have the power to enter into settlement agreements and compromises under paragraph 60 of Schedule B1 to IA 1986 and paragraph 18 of Schedule 1 to IA 1986. Accordingly, administrators only apply to the Court for directions in this regard if there are "*particular reasons*" for doing so (see *MF Global UK Ltd* [2014] EWHC 2222 (Ch), at [41], *per* David Richards J (as he then was)). One "*particular reason*" which might justify such an application is derived by analogy from the second category of case in which trustees can seek directions from the Court, identified by Hart J in *Public Trustee v Cooper* [2001] WTLR 901, 922–924, as being a case "*where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers*." The present case fell within this category, in that the Administrators (and the NNSA conflicts administrator) had determined that it would be in the best interests of the Companies to enter into the Global Settlement, but the issue was one of such moment as to make an application for directions appropriate. In *Nortel Networks UK Ltd (in administration) & Ors* [2016] EWHC 2769 (Ch), at [49], Snowden J summarized the

elements of the test which must be satisfied on applications such as this in the following way: (a) the proposed exercise is within the administrator's power; (b) that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors; and (c) that he is acting rationally and without being affected by a conflict of interest in reaching that view. Snowden J emphasized that the Court should not, however, withhold its approval merely because it would not itself have exercised the power in the way proposed; but also stressed that the Court will require the administrator to put all relevant material before it, including a statement of his reasons, and that the Court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action.

In his detailed judgment Snowden J made it clear that he was satisfied, as regards each of the 19 Companies, that the applicable test was satisfied. It should also be noted that the Judge placed some emphasis on the importance of the Administrators having notified the Companies' creditors of the Global Settlement (and of their application for directions in respect of the same), particularly given that an effect of the Order sought is to prevent subsequent challenge. In addition, he made the following general points in support of his conclusion that it was rational for the Administrators (and the NNSA conflicts administrator) to decide to enter into the Global Settlement:

1/. First, there is a risk that on appeal the Modified Pro Rata basis of apportionment in the allocation judgments might be overturned in favour of a Theory that is less favourable for each of the Companies than the Modified Pro Rata basis of allocation. Indeed, there is also the risk of a divergence of views on appeal as between the US and Canadian appeal Courts, and a consequent deadlock arising.

2/. Secondly, even if the allocation judgments withstand the appeals in both the US and Canada, there will be further delay, uncertainty and expense.

3/. Thirdly, and as noted by the Ontario Court of Appeal, the Nortel insolvencies have been going on at great expense for over seven years, with no return to creditors, and continued litigation over the allocation of the Lockbox proceeds is likely to take several more years and incur substantial further legal and professional costs. The Global Settlement has the obvious commercial merit of ensuring that the creditors of the EMEA Companies will see some money in the near future.

The Global settlement is conditional upon, among other things, the approval of the English Court

4/. Fourthly, the combined result of the Allocation Settlement and the top-up payments payable under the Intra-EMEA Settlement (where applicable) is that it is anticipated by the Administrators that all of the EMEA Companies, except for NNUK, Nortel Ireland and NNSA, will return 100p in the £ to their unsecured creditors and some may also pay a commercial rate of interest.

On this basis, Snowden J was content, having regard to the momentous nature of the decision to enter into the Global Settlement and the exceptional circumstances of the case, to give the directions sought. Echoing sentiments expressed by the Ontario Court of Appeal, the Judge commended the parties for arriving at a commercial solution to the complex disputes in which the Companies have been embroiled for many years.

Conclusion

Snowden J's approval of the Global Settlement represents a critical step towards the Global Settlement becoming effective and, therefore, the vast majority of the Nortel Group's disputes being resolved consensually and without the expense, delay and uncertainty that further litigation would bring. Certain further conditions remain to be satisfied before the Global Settlement becomes effective, in particular the approval of creditors and the Courts in the US and Canada. However, whilst the Global Settlement remains conditional to that extent, it now seems unlikely that the Courts (on either side of the Atlantic) will see any further substantial litigation arising from the Nortel Group's collapse.

William Trower QC and Alex Riddiford acted for the Administrators in Nortel Networks UK Ltd (in administration) & Ors [2016] EWHC 2769 (Ch), instructed by Herbert Smith Freehills LLP.

Planning for a rainy day

Understanding weather derivatives

How can businesses utilise weather derivatives to protect themselves from adverse weather events? Joanna Perkins looks at their development and their role in managing risk.

What are weather derivatives?

The weather risk market is designed to assist users in managing the adverse financial impact of weather through risk transfer instruments based on weather variables (chiefly temperature, rain, snow, wind and sunshine). Solutions to the problem of weather-related financial risk will normally take one of two principal forms: catastrophe insurance or weather derivatives.

While catastrophe insurance is suitable for addressing low probability weather risks with a high potential impact, such as severe drought or flooding, weather derivatives are better suited to low impact/high probability events such as an unseasonably cool August or an unusually wet May Bank Holiday. One of the advantages of standardised weather derivatives for low impact events is that pay-out will occur automatically once the index sinks or rises past a certain point. In contrast, to recover under an insurance policy, the holder must file a claim demonstrating loss. The same characteristic is, however, a disadvantage when it comes to covering high impact weather risks: derivatives do not normally correlate the pay-out to the loss and so do not typically provide good protection against disproportionate or catastrophic loss.

To enter into a weather derivative, the user pays a premium to a risk taker who assumes the risk of adverse weather. In exchange for the premium, the risk taker will promise to pay the buyer an amount of money corresponding to the anticipated loss occasioned by the adverse weather. The purchase price, or premium, will correlate broadly to the perceived chance of the risk materialising and the relevant probabilities will be calculated from historic data. In this respect, weather derivatives are analogous to other 'adverse event' derivatives, such as credit default swaps.

Standardised derivatives, such as options and futures, reference published risk indices calculated from contemporary weather data (such as temperature or precipitation). Over-the-counter (OTC) derivatives are more flexible and include both 'multi-trigger' derivatives referencing customised data and less complex transactions on market standard terms.

Uses and users of weather derivatives

Traditionally, energy companies have been the most significant users of weather derivatives. In the past this has largely meant large gas and electricity providers protecting themselves against the possibility that moderate weather conditions will lead to a reduction in consumption. The renewable energy sector, however, may be one to watch in future. Hydropower, solar power and wind power all depend to a greater or lesser extent on weather conditions for their means of production and therefore carry the risk of weather pattern fluctuations.

Other sectors have also benefitted from the protection that weather derivatives afford. Agriculture, in particular, has been a growth area. Precipitation derivatives can help farmers manage the risks of low rainfall. Urban users may include construction companies, transportation providers, travel operators, tourism centres (eg ski resorts), leisure venues (eg amusement parks) and retailers (eg apparel, food and drink) all of which may be adversely affected by unseasonal weather. For example, an ice cream manufacturer might use a weather derivative to hedge against the commercial risks of a summer that forecasters think will be several degrees cooler than the historical average.

In addition to commercial enterprises, municipalities and public authorities can use weather derivatives to protect themselves from the financial consequences of weather events which require a public response or rescue initiative, such as flooding or heavy snowfall, with a consequential impact on budget and expenditure.

Despite the prevailing view that the risks of high impact, low probability weather events are better managed through the purchase of insurance products, the past decade has seen the

RENEWABLE ENERGY PROVIDERS WILL BECOME MAJOR CONSUMERS OF WEATHER DERIVATIVES

occasional and high-profile use of catastrophe derivatives. For example, a number of sovereign transactions have allowed emerging economies to manage the financial risks associated with severe drought or flooding. An early example is the Malawi Rainfall Derivative of 2008–2009 (renewed in 2009 and again in 2010), which was intermediated by the World Bank and involved a risk transfer to the international financial markets with the object of providing greater food security for the local population. The structure of the transaction was a put option referencing a bespoke rainfall index specifically to act as a proxy for domestic maize production. If the rainfall variable in the index caused proxy production levels to fall beneath the strike point, the government of Malawi would receive a pay-out, size-adjusted according to the extent of the shortfall.

In 2009, the International Swaps and Derivatives Association (ISDA) introduced market standard documentation for natural catastrophe swaps referencing wind events. These provide protection for enterprises looking to manage financial risks relating to tornadoes, hurricanes and similar wind events.

History and popularity of weather derivatives

In July 1996 a contract for the purchase of one month's electricity between Aquila Energy and Consolidated Edison (ConEd) was agreed which is said to have included a novel clause stipulating that Aquila, as the provider, would pay ConEd a rebate if August turned out to be cooler than expected. This is the first reported example of a transaction incorporating an embedded weather derivative.

The first full-scale OTC weather derivatives trades took place one year later, in 1997, involving Willis, Koch Industries, and Enron. The following year, Enron introduced weather derivatives to the UK when it sold a deal to Scottish Hydropower. Then, in 1999, the Weather Risk Management Association (WRMA) was founded by Aquila Power Company, Castlebridge Partners, Enron Capital, Koch Industries, Southern Company Energy marketing and Swiss Re New Markets to represent participants in the newly emerging market sector.

In the same year, the Chicago Mercantile Exchange (CME) introduced the first exchange-traded weather futures and options. At the launch of these standardised products, two temperature contracts (Heating Degree Days (HDDs) and Cooling Degree Days (CDDs)) were listed for trading. These contracts were monthly futures and options reflecting the

accumulated differences between the average daily temperature and a base temperature of 65°F for each day in a calendar month. Given that exposure to weather risks is normally localised, the products referenced ten individual US cities.

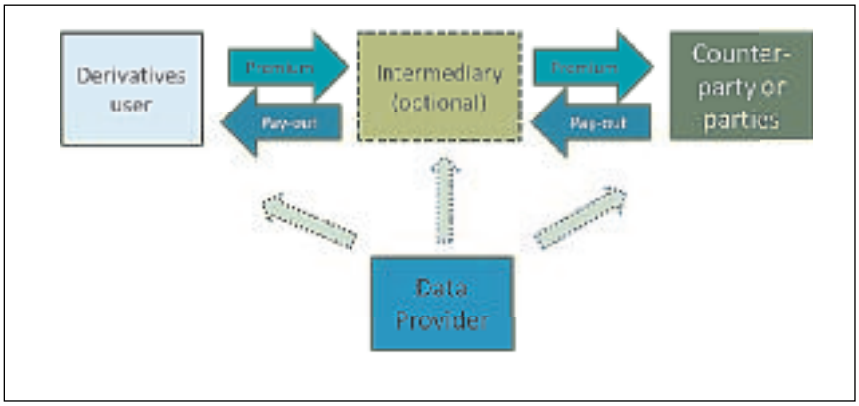
In the first four years of trading, the exchange-traded market consolidated around these early contracts but thereafter it rapidly gained traction and, in 2003, the number of US cities for which weather derivatives could be listed was expanded and seasonal strip combinations (which allow users to string together two consecutive calendar months or more) were sold for the first time. In 2005, new products were introduced, including frost and precipitation derivatives. By 2011, weather derivative contracts were listed by CME for nearly 50 locations worldwide.

Unfortunately, the era of market expansion did not last and the recent years represent a period of contraction for exchange-traded derivatives. In the first few months of 2016, CME slashed its listings by half, delisting products for several US cities and for Paris. Listings remain for products referencing weather indices in eight US cities, London and Amsterdam. Of these, 13 CME weather products are currently active. Ten are either futures or options on HDDs or CDDs at various US locations. The remaining three are for Amsterdam HDD, CDD, and seasonal strip combinations. Today, 'open interest' (ie the number of contracts entered into that have not yet settled) is just short of 33,000 contracts.

Although the market for weather derivatives was born in the US, its centre of gravity may be shifting eastwards. Derivatives are now being transacted on risks from a much wider array of countries, with the most significant non-US OTC markets being found in Europe and Japan. The exchange-traded derivatives market continues to be dominated by CME for the time being but niche products are still being developed outside the US—in 2016, European Energy Exchange (EEX) announced plans to introduce wind power futures.

Transaction structures and documentation

Weather derivatives will utilise one of four possible derivative structures: a forward/future, a put option, a call option or a swap. All four structures are broadly similar and can be represented by the diagram below. (The weather data provider may owe contractual obligations to the principal parties, to the intermediary, to all three or to none at all.)



WEATHER DERIVATIVES UTILISE ONE OF THE FOUR POSSIBLE DERIVATIVE STRUCTURES IN THE DIAGRAM ABOVE

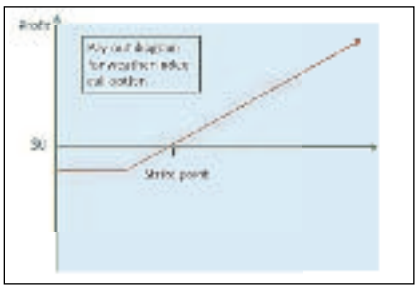
The chief differences between the four derivatives are the pay-out structures. A call option will pay-out if the index rises above a contractually agreed 'strike point' at the point of expiration and a put option will pay-out if the index remains below the strike point.

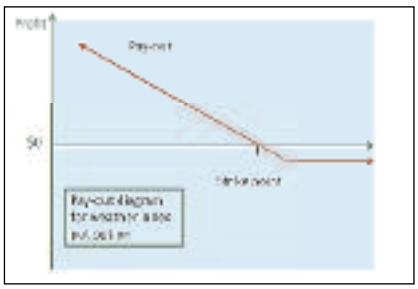
A vanilla swap transaction will, for the user, be equivalent to the purchase of a call or put option on the weather index in question and the sale of a weather-dependent income stream (say, ice cream sales or amusement park ticket sales). The pay-out structure for a swap user will match that for either a call option or a put option depending on whether the user has hedged against risks associated with an outperforming index (eg in the case of an amusement park wishing to buy protection against excessive rainfall) or an underperforming index (eg in the case of an ice cream vendor wishing to hedge the risk of disappointing August temperatures).

The pay-out structure for futures and forwards is simpler: the user will receive a pay-out if a rise in the index values causes the settlement price to exceed the contract price at the time of purchase.

More complex structures may be designed and offered, incorporating features such as caps, floors and collars and investment strategies such as straddles and strangles.

CME exchange-traded weather derivatives are bought and sold (and cleared) on terms set by the exchange and clearinghouse and can be purchased on CME's electronic trading platform. CME options are all 'European' style, which means they can only be exercised at the expiration date.





THE TWO DIAGRAMS ABOVE ILLUSTRATE THE PAY-OUT STRUCTURES OF PUT AND CALL OPTIONS. THE X AXIS IN BOTH REPRESENTS INCREASING INDEX VALUES, THE Y PRESENTS THE SIZE OF THE PAYOUT.

OTC temperature and precipitation derivatives can be executed on market standard terms published by ISDA or the WRMA. Complex or specialist weather derivatives, however, still require bespoke documentation.

JOANNA PERKINS

Regulation of weather derivatives and market abuse

According to Annex 1, Section C(10) of Directive 2004/39/EC on markets in financial instruments (MiFID I), weather derivatives (being 'derivative contracts relating to climatic variables… that must be settled in cash') are financial instruments for the purpose of the regulation of investment services. This means that they are subject to obligations regarding best execution and trade reporting, among others, and to rules on client classification and product appropriateness. Where investment advice on weather derivatives is given stricter standards on product suitability apply.

Directive 2014/65/EU and Regulation (EU) 600/2014 (commonly and collectively referred to as MiFID II) are due to become applicable on 3 January 2018 and replace MiFID I. The status of weather derivatives as financial instruments will not be affected and the obligations and standards listed above will continue to apply, subject to relatively minor adjustments.

MiFID II does, however, introduce a number of key changes aimed at reducing speculative activity in the commodity derivatives markets, including, in articles 57 and 58 of Directive 2014/65/EU, the introduction of position limits and position reporting. In the case of weather derivatives, which are 'commodity derivatives' by virtue of the definition in article 2(1)(30) of Regulation (EU) 600/2014, the basis of the position limit calculation will (according to draft Regulatory Technical Standards published by the European Securities and Markets Authority (ESMA)) be a percentage of total open interest controlled by an entity on EU trading venues and/or reflected in economically equivalent OTC contracts. Position limits will not apply to positions held by or on behalf of a non-financial entity which are aimed at reducing risks directly related to the commercial activity of that non-financial entity.

Where supervised entities invest in weather derivatives, the exposure will attract a regulatory capital charge. For the purposes of the market risk requirements in Title IV of Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (CRR), weather derivatives should be assigned to the commodities risk calculation.

Weather indices themselves may fall under the purview of Regulation (EU) 2016/1011 on indices used as benchmarks. This measure, which applies broadly to benchmarks used for the purpose of valuing contracts, determining settlement prices or measuring performance imposes strict regulatory standards on benchmark administrators and contributors, in particular as to the accuracy and adequacy of input data. The Regulation prohibits the use by EU regulated entities of indices which do not comply with its rules. Bespoke indices which are produced exclusively for a particular transaction, however, and which are not made available to the public are not within scope. There are also exclusions for indices provided for public policy reasons by public authorities and for indices provided by an administrator who could not reasonably have been aware that the index was being used a reference rate or valuation tool.

Manipulation of markets in weather derivatives sold on exchanges or other organised platforms is prohibited by EU Regulation 596/2014 on market abuse which covers, inter alia, financial instruments, as defined under MiFID II, which are traded on a regulated market, multilateral trading facility or organised trading facility.

In 2010 a documentary (What in the World are They Spraying? directed by Paul Wittenberger) was released suggesting that weather patterns had been influenced by the government use of geoengineering techniques to control climate and mitigate global warming. In response, some commentators have hypothesised that the weather derivatives market could be manipulated with similar techniques. For example, it has been suggested that rainfall data could be manipulated by cloud-seeding in areas where the data is collected in order to increase the pay-out under precipitation derivatives.

Re-characterisation risk

In Definition of Insurance, a draft Working Group White Paper published in 2000, the US National Association of Insurance Commissioners concluded that many weather derivatives should be reclassified and regulated as insurance products. The White Paper was subsequently withdrawn from publication following intervention by market representatives, including ISDA and the WRMA, but not before it had given rise to widespread apprehension that weather derivatives may be subject to re-characterisation risk under state law or that state legislatures might amend the law to regulate weather derivatives as insurance.

In the UK, where re-characterisation potentially carries the unfortunate consequence that the would-be derivative provider is in breach of the Financial Services and Markets Act 2000, this risk is likely to be minimal. The accepted definition of a 'contract of insurance' under English law is closely tied to the concept of the loss suffered by the policyholder and weather derivatives typically provide that a pay-out is to be made irrespective of loss. The risk of re-characterisation cannot be wholly discounted, however, in relation to bespoke derivatives which contractually link weather variables to the performance or development of assets owned by the user.

A version of this article fist appeared on Lexis PSL 13th May 2016

Jersey Cream...

Glen Davis QC reviews the recently-published 5th edition of **Jersey Insolvency and Asset Tracing** by Anthony Dessain & Michael Wilkins.

In Re A Debtor (Order in Aid No 1 of 1979) [1981] Ch 384 was a landmark case in the history of cross-border insolvency affecting Jersey and England, and a significant one in the history of our Chambers, which was located at the time in Paper Buildings down in the Temple.

The case involved an application under a letter of request from the Royal Court of Jersey for the Viscount of the Royal Court, its chief executive officer, to be appointed receiver of the moveable assets in England of Mr Myerson, an insolvent English solicitor who had incurred debts he could not pay in Jersey and had since returned to England.

Until this case, the problem of debtors absconding from Jersey had of course been recognised but had generally been dealt with by the procedure of *saisie conservatoire*. This was not a bankruptcy procedure, but a form of *arrêt* available under the customary law of Jersey, essentially a form of injunction under which the assets of the debtor could be frozen and retained in Jersey to protect the claimant(s), subject to a number of safeguards and conditions. The problem in *Re a Debtor* was that Mr Myerson had already left Jersey and had assets abroad. As a result, there needed to be detailed consideration of the jurisdiction in Jersey and the English court's jurisdiction to support it.

The application was brought under section 122 of the Bankruptcy Act 1914, which enabled the English High Court to act in aid of a '*British Court elsewhere having jurisdiction in bankruptcy or insolvency*'. This was the first time an application under section 122 was made from Jersey to the English High Court. A young Michael Crystal was pitted against the venerable Muir Hunter QC and the young John Briggs. In the somewhat more relaxed court atmosphere of that time, the trial in the spring of 1980 lasted some 17 days.

The case reflected many of the familiar issues which arise when dealing with cross-border insolvency, not least the need for lawyers and judges to get to grips with the different practices, norms and terms of another jurisdiction.

Re A Debtor was the first time that the regime in Jersey and the priciples of coroperation has been subject to such detailed consideration

It was necessary for the judge to consider whether the Royal Court was a *British Court* for these purposes, and the legal effect of a Jersey order declaring the goods of the debtor *en désastre*. Evidence on behalf of the Viscount was given by one Michael Wilkins, who at the time was senior administrative assistant in the Viscount's department and head of the *désastre* section.

Expert evidence on the constitutional position and the law of Jersey was given on behalf of the Viscount by Mr (now Sir) Philip Bailhache, who at the time was HM Solicitor-General for Jersey.

The judge rejected Muir Hunter's submission that the Jersey Court was not at *British* Court for these purposes, recording that he differed from the learned authors of Williams & Muir Hunter on Bankruptcy '*in not finding the status of the island courts as British courts at all obscure*'. He considered carefully the law and practice of declaration "*en désastre*", one of several alternative methods

LIKE THE RENOWNED CATTLE OF THE ISLAND, THE AUTHORS OF JERSEY INSOLVENCY AND ASSET TRACKING HAVE AN ILLUSTRIOUS PEDIGREE

available to dispose of the affairs of an insolvent debtor under the law of Jersey, and one which he said '*had been elaborated by the evolving practice of the Royal Court over the last 200 years or thereabouts*', in order to ascertain whether *désastre* is a matter of bankruptcy. He considered it was, and the Viscount's application was successful.

Although this was of course an English authority and not of itself part of Jersey law, it was the first time that the regime in Jersey and the principles for cooperation had been subject to such detailed consideration. As a result, the case was an important milestone for those on both sides of the Channel advising on the principles for recognition and cooperation.

In the course of his reasoning in *Re a Debtor*, Goulding J observed that:

'*...the written materials for the ascertainment of modern Jersey law are comparatively meagre, and textbooks are very few. The reasons for decisions in the Royal Court are often expressed concisely and without lengthy discussion of principle. Accordingly, important parts of the law still reside in the breasts of the judges and legal practitioners of the island, and it is not always possible to find a persuasive answer to a legal problem by mere study of published material.*'

That remained the case for most of the following two decades, during which Jersey faced (and on occasion members of these Chambers assisted with) the challenges of a number of significant insolvencies, not least the liquidation of Laker Airways Limited, a Jersey-incorporated company whose collapse was at the time the largest corporate insolvency there had been in England, let alone Jersey.

It was not until 1999 that the lack identified by Goulding J was remedied by the publication of the first edition of *Jersey Insolvency and Asset Tracking*. By then, Anthony Dessain was probably the leading practitioner specialising in insolvency in Jersey, and his firm, Bedell Cristin, had been at the centre of many (if not all) of the significant cases to reach the Jersey Courts. Michael Wilkins had himself become Viscount in 1981 (an appointment he continued to hold until June 2015). They were well qualified to write with authority on the subject and the benefit of practical experience.

Publication of the First Edition was

GLEN DAVIS QC

welcomed in a Foreword by Sir Philip Bailhache, who by then had been appointed Bailiff of Jersey (ie Chief Judge of the Royal Court, President of the Jersey Court of Appeal, and Speaker of the States (Jersey's parliament)). He looked forward to the work helping to lay foundations for further development of the law to suit the commercial needs of Jersey.

That has proved to be the case. To take just one example, the Jersey court has ancient power to appoint an *administrateur* (administrator) of a person who is *absent l'isle*. In *Rumasa v W&H Trademarks (Jersey) Ltd* 1985-86 JLR 308, the Royal Court adapted and developed the common law to meet the needs of changing times, and appointed the Viscount as administrator of a Jersey company which was wholly controlled and managed outside Jersey, explaining that the appointment was to be *'likened to the appointment of a receiver in England'*. In an earlier edition, the authors suggested that it was only a matter of time until the Viscount was appointed receiver of a Jersey-based entity or assets. And as they record, that has now been done: see *Viscount as the Receiver of the business assets of KR Manning & Co* - Act of Court 2014/350.

For this fifth edition, the headline authors are supported by Advocates Robert Gardner and Edward Drummond of Bedell Cristin and Ed Shorrock, FCA of Baker & Partners, with expert input from Advocates Mark Dunlop and William Austin Vautier (again of Bedell Cristin, on security interests and employment respectively), and the redoubtable Deborah Gregory of Hogan Lovells on guarantees.

It is not possible to understand the development and idiosyncracies (from an English lawyer's perspective) of the insolvency law of Jersey without understanding its historical foundations and context. The authors provide a succinct and lucid account from the recognition of Rollo as Duke of Normandy in 911 to the Security Interests Laws of 1983 and 2012, and developments up to 30 June 2016.

Broadly, the book is divided into two parts.

The narrative text in Part 1 explains the background and deals in logical sequence with Jersey's law of property and claimants' rights, and its approach to contract, tort and *dol* (fraud), as well as trusts which have long been recognised in Jersey (although a Jersey immovable cannot be held on trust), articulating the similarities to and differences from the law in England. (As the authors comment, '*equity' in Jersey does not correspond exactly with the English term*".)

The text then proceeds to describe and discuss the insolvency procedures (*désastre* for individuals, *désastre* or creditors' winding up for companies), although as the authors

point out, the Viscount may also be able to use his good offices to promote a voluntary scheme to avoid a *désastre*, and the Royal Court has power to assist in order to avoid a *désastre*. There is discussion of the statutory processes of *dégrèvement and réalisation* under which property can be liquidated for the benefit of certain creditors, and the availability of relief for debtors under the procedure of *remise de biens*. There is a brief discussion of the position of traditional, limited and limited liability partnerships. There is also useful discussion of Human Rights law as it applies and may affect and insolvency in Jersey under the Human Rights (Jersey) Law 2000.

Given the importance of Jersey as an international finance centre, one of the most useful chapters addresses cross-border insolvency from a Jersey perspective, dealing both with the assistance Jersey will give to a foreign court and with outward requests for assistance by the Royal Court, with a comprehensive review of cases up to and including the English Court of Appeal decision in *HSBC Bank v Tambrook (Jersey) Limited* [2013] EWCA Civ 576 and the Isle of Man decision in *Capita Asset Services (London) Limited v Gulldale Limited* CHP 2013/145.

In Part 2 of the book, one finds detailed commentary on particular aspects: on Guarantees; on Enforcement in Jersey of Foreign Judgments; on Special Situations – Foreign Taxation and Trusts and Estate Planning; on Company Winding Up; on Employment Law; a practitioners' guide to applications under Art 49 of the Désastre Law; on the principle of Universality; on Limited Liability Partnerships; on Jersey Foundations; on *Saisies Judiciaires*; and an overview of the Security interests (Jersey) Law 2012.

For those of us who are reasonably confident that at one time we understood the formal difference between the *Hypothèque Conventionelle Simple* and the *Hypothèque Judiciare* but could not quite put our finger on it just at this moment, there is an invaluable glossary explaining the terms used in the text.

The work remains the leading textbook for anyone interested in Jersey's law of insolvency and asset tracking

I am told that for this edition there were over 100 updates as a result of judicial decisions and of changes to primary and secondary legislation, and that this Fifth Edition contains expanded sections on various bankruptcy procedures, aspects of trusts, recognition and disclosure orders and an update on a range of technical matters including employment law changes, cross border co-operation, human rights, foreign taxation, backward tracing, schemes of arrangement and the new aircraft registry.

One change from previous editions is that the book no longer needs to contain extracts from Jersey statutes, because all such statutes are freely available in revised form on the Jersey Legal Information Board's website at www.jerseylaw.je.

From a purely personal perspective, I have found it invaluable whenever a case has a Jersey dimension to be able to consult *Dessain & Wilkins,* to refresh my memory and re-orientate myself in a foreign landscape where it can be dangerous to assume that apparently-familiar terms bear familiar meanings, and so avoid complete embarrassment when working with those who are expert in the laws of the Bailiwick. The work remains the leading textbook for anyone interested in Jersey's law of insolvency and asset tracing, and I have no doubt that this Fifth Edition will be a very welcome addition to my shelves.

3rd Regional Conference Singapore 2016

Matthew Abraham reports from the recent 3rd Regional conference in Singapore.

Introduction

On the 15 and 16 September 2016, South Square sponsored the 3rd Regional Insolvency Conference in Singapore. The conference was organised by the Insolvency Practice Committee of the Law Society of Singapore and the Insolvency Practitioners Association of Singapore. The conference brought together the leading legal, accounting and financial practitioners in the region focussing on cross-border insolvency and general developments in the Singapore insolvency regime. South Square was represented at the event by Anthony Zacaroli QC and Matthew Abraham. Anthony Zacaroli QC was invited to speak on the Common Law Perspectives of Cross-Border Insolvency.

The Conference

The first day of the conference started with a talk on the impact of technology on the restructuring and insolvency industry. This was followed by a Judicial Colloquium which brought together Judges from Singapore, the United States, Indonesia and England. The English contribution to the colloquium came from the Honourable Mr Justice Richard Snowden. The colloquium covered various hypothetical scenarios that related to the facilitation and regulation of cross-border restructuring and insolvency. There was a lively debate between the judges on a variety of issues including avenues for judicial cooperation, recognising and assisting foreign insolvency proceedings (including those not in the company's place of incorporation) and approaches to resolving conflict of law issues (including issues with the rule in *Gibbs*).

ANTONY ZACAROLI QC

The second day of the conference consisted of five key sessions. The first two sessions focussed on cross-border insolvency. In particular, one from a civil law perspective and the other from a common law perspective. The civil law session looked at the impact of the UNCITRAL Model Law in civil law countries and the trends in those countries in the context of cross-border insolvency issues. The impact of European Union legislation on the laws of civil law countries in Europe was also looked

HANJIN: FILED FOR COURT RECEIVERSHIP ON AUGUST 31.

at. The common law session focused on the impact of the UNCITRAL Model law and its interaction with the common law. The session gave rise to interesting discussions on issues as to whether the approach of the common law jurisdiction promoted or detracted from the objectives of cross-border insolvency.

The third and fourth sessions focussed on dispute resolution and litigation funding in the face of insolvency as well as financing and effecting successful restructuring. Both sessions dealt with key issues facing a number of jurisdictions with common law backgrounds. In particular, how common law doctrines of champerty and maintenance have prevented the development of litigation funding. During the discussions reference was made to the landmark Singapore High Court decision in *Re Vanguard Energy Pte Ltd [2015] SGHC 156* that confirmed for the first time that litigation funding may in the context of insolvency be permitted in Singapore.

The final session of the conference dealt with Singapore as an international centre for debt restructuring. Although this session focused specifically on issues in the insolvency context, it nevertheless dealt with a key issue in the world today: whether, as a result of the slowing global economy and heightened uncertainty from Brexit and the US presidential election, there would be a greater shift of trade towards the East with Singapore as the gateway into the region. The panellists focused on the current developments in Singapore in particular innovative legislative changes, changes to the judicial infrastructure and growing industry expertise in the region.

SINGAPORE'S FULLERTON HOTEL, VENUE FOR THE 3RD REGIONAL CONFERENCE

Key Takeaways

The general feeling at the conference was that we are heading into a global economic downturn where businesses around the Asian region are going to become increasingly exposed to cross-border insolvency risk. The most recent and famous example being Hanjin Shipping. With Singapore pushing to become an international centre for debt restructuring it is certainly a jurisdiction to keep an eye out for.

South Square was privileged to be invited to the conference and will continue to support its friends in the region through the sharing of experiences and knowledge in these very testing times.

Matthew spent 5 months on secondment in Singapore from 2015 to 2016 and continues to strengthen his ties in the region.

INSOL 2017 10th World Congress

Sydney, Australia

For the third time Australia will host the INSOL Quadrennial World Congress, with the Tenth Congress taking place from Sunday 19 to Wednesday 22 March 2017 at the International Convention Centre in Sydney.

INSOL conferences are always insightful and enjoyable and members of South Square much look forward to catching up with old friends and meeting new faces. Some 800 insolvency professionals from around the world are expected to attend. At present from South Square Gabriel Moss QC, William Trower QC, Fidelis Oditah QC, David Alexander QC, Tom Smith QC and Hilary Stonefrost are due to be there with many others keen to join should other commitments permit.

The Congress kicks off with a welcome cocktail reception on the Sunday evening, sponsored by BDO LLP. There then follows a three-day technical programme, culminating in the Gala Dinner, sponsored by AlixPartners LLP, on the Wednesday evening. South Square is delighted to be supporting the event by sponsoring Monday's breakfast, at which members of Chambers look forward to catching up with fellow delegates.

The theme for this year is "Embracing Change", which feels particularly topical following the UK Brexit vote and uncertainty surrounding the outcome of the US Presidential elections, both of which may have a major impact on the legal and economic landscape around the globe. INSOL has, as always, drawn together experienced professionals and specialists from around the world to discuss current issues that face both the clients of restructuring professionals and also the changes that our own professions are facing. The INSOL Technical co-Chairs (Peter Gothard of Ferrier Hodgson and John Martin of Henry Davis York) have catered for both macro-national and international interests, and have also provided a diverse range of breakout sessions that are domestically relevant.

SYDNEY'S NEWLY-OPENED INTERNATIONAL CONVENTION CENTRE WILL BE THE VENUE FOR INSOL'S 10TH WORLD CONGRESS.

Topics covered by the main technical sessions include the key themes and dynamics involved in global restructuring as illustrated by the TopOil crisis; the challenges and likely future development of sovereign and municipality debt restructurings; a dynamic question and answer session on the future of the insolvency and restructuring profession; and a look at the economies of Indonesia, China and India and what to expect over the next year or so.

Break-out sessions cover topics as varied as "When disaster strikes" where an international panel will explore the duties, obligations and expectations of stakeholders, and "Swelling the insolvent estate" which takes a look at asset-tracing and recovery in the post-Panama universe and how appointment-takers can preserve the scene of the crime. Fidelis Oditah QC is part of an expert panel assembled to discuss "Rescue Capital – the value of new money to a distressed

GABRIEL MOSS QC

SOME 800 INSOLVENCY PROFESSIONALS FROM AROUND THE WORLD ARE EXPECTED TO WEND THEIR WAY TO SYDNEY NEXT MARCH.

WILLIAM TROWER QC

situation", which will investigate how and why new capital is attracted to a situation that many would run away from. "Financial sector restructuring: the problem with giants and zombies" examines whether the 'too big to fail' problem has been or is likely to be resolved, together with the problem of zombie banks around the world. Other session topics include a discussion around the increase in third party litigation funding, national and regional insolvency law reforms, and the groundswell of movement away from formal insolvency proceedings towards more fluid and flexible restructurings and reorganisations.

Gabriel Moss QC is part of an expert panel assembled on the Wednesday afternoon to discuss "Hot and heating topics", both current and controversial. The panel will provide diverse perspectives on key developments in insolvency practice worldwide. The final Congress session is the always useful "Views from the bench" where a panel of eminent judges will participate in an interview-style forum on a range of topical issues.

Registration for the conference is now open online (www.insol.org). The deadline for early registration rates is 12 December 2016 with a closing deadline of 15 February 2017.

We hope to see you there.

FIDELIS ODITAH QC

HILARY STONEFROST

TOM SMITH QC

DAVID ALEXANDER QC

New tenants arrive at South Square

South Square is delighted to welcome Riz Mokal, Madeleine Jones and Eduardo Lupi as new practising tenants. Riz, who completed pupillage at South Square in 2005 and subsequently became an academic member of Chambers, now returns as a full-time practising member. Both Madeleine and Eduardo successfully completed their pupillages with South Square and took up tenancy in October this year.

Riz Mokal

Riz returns to Chambers after having completed his pupillage here in 2005. He practices in all aspects of domestic and cross-border insolvency, restructuring, bank resolution, and trust law, and is currently instructed with David Allison QC in relation to an aspect of the Lehman Brothers insolvency.

From 2009 to 2013, Riz served as Senior Counsel to the World Bank and Head of the Bank's Global Initiative on Insolvency and Creditor/Debtor Regimes. In this capacity, and subsequently as a Consulting Counsel to the Bank, Riz worked with the governments of some twenty countries in Africa, Asia, Europe, and the Middle East on reform of insolvency and creditor/debtor systems. His work involved policy analyses of existing laws and practices, the development of new legislation, and the training of judges, lawyers, insolvency practitioners, central bankers, and other stakeholders.

Riz has also held full-time academic positions at University College London since 2001, was the UCL Chair of Law and Legal Theory until 2016, is a Visiting Professor at the University of Florence, and has previously held a research position at Cambridge University. His scholarship — which ranges over financial sector regulation, insolvency, property and trusts, and legal theory — has influenced law reform in the UK, and has been cited with approval by several courts, including the House of Lords, the Australian High Court, and the Courts of Appeal of England & Wales, New Zealand, Ontario, and Victoria.

As part of the World Bank's delegation to the United Nations Commission on International Trade Law from 2009 to 2013 and of the United Kingdom delegation since, Riz has been an active participant in UNCITRAL's work on insolvency law. He sits on the Editorial Boards of a number of key publications including *International Corporate Rescue*, and is a member of the World Bank's Global Insolvency Task Force, and of the International Insolvency Institute.

Madeleine Jones

Madeleine studied Classics at Cambridge, where she obtained a double first class degree, and at Princeton, where she wrote a PhD on Seneca, a Roman philosopher who believed that perfect happiness is to be attained only through the contemplation of divine justice. Inspired by this, she returned to England to become a lawyer, assisted by Gray's Inn's most prestigious scholarships for the GDL and BPTC, the David Karmel Entrance Award and the Bedingfield Scholarship. During her pupillage at South Square, Madeleine was supervised by Adam Al-Attar, Daniel Bayfield QC, Marcus Haywood, Georgina Peters, Stephen Robins, Tom Smith QC and William Willson. Consequently, she has been exposed to all of chambers' principal areas of practice, including insolvency, bankruptcy, general commercial, company and finance. She gained extensive experience in drafting and advisory work relating to insolvency matters (including cross-border insolvency), financial regulatory matters and banking disputes, and assisted in the preparation for several substantial cases, including the *Saad* and *Primeo* litigation (which are ongoing in the Cayman Islands). Madeleine is delighted to have been invited to be a tenant at South Square and is looking forward to getting stuck in to practice.

Edoardo Lupi

Edoardo graduated from Oxford University with a Congratulatory First Class degree in Classics, obtaining the second highest mark in his year. He was awarded the De Paravicini prize by the University, and the Haigh Prize by Corpus Christi College. He then completed the Graduate Diploma in Law at City University, where he was runner up to the 7KBW Contract Law Prize. He was called to the Bar by Inner Temple in 2015, from which he received a prize for achieving a grade of 'Outstanding' on the BPTC, an Exhibition Award for both his law conversion and BPTC years, and the Allan Levy Award. Edoardo has spent time working at McKinsey in Milan, where he was part of a team reorganizing one of Europe's largest credit institutions, and in the Economic Crimes and Governance Division at the Attorney General's Chambers in Singapore. He also marshalled for Mr Justice Dingemans in the High Court. During pupillage at South Square, Edoardo was exposed to all of chambers' core areas of practice, including cross-border and domestic insolvency, banking, company law, commercial litigation and offshore. He sat with Tom Smith QC, Daniel Bayfield QC, Richard Fisher, Stephen Robins, Marcus Haywood, William Willson, Georgina Peters and Adam Al-Attar. Notable cases he assisted on as a pupil include the *Lehman Brothers Waterfall II* Application, *Heis v MF Global UK Services Limited* in the Court of Appeal, and *Primeo Fund v HSBC*.

EU/EEA LAW UPDATE


GABRIEL MOSS QC

Gabriel Moss QC looks at an interesting CJEU decision on a move of both Registered Office and establishment, and an English decision on 'good' forum shopping

COMI again?

Leonmobili Srl v Homag (C–353/15)

On 24th May 2016 the Court of Justice of the European Union ("CJEU") came out with an interesting decision on COMI. At the time of writing, the judgment is only available in Italian and French.

Leonmobili was an Italian limited liability company whose business was the wholesale and retail sale of furniture and such like. Whilst registered in Italy, the company was administered by Mr Leone and had its registered office in Italy.

On 18th July 2012, a meeting of shareholders of the company decided to transfer the registration of the company to Bulgaria. Following this resolution, the registration of the company for VAT was closed in Italy along with membership of various social organisms. It ceased to be registered in Italy on 12th September 2012. The same day it was registered in the companies' registry in Bulgaria with its registered office in Sofia at a provisional address.

On 9th November 2012 a resolution of shareholders decided to change the registered address to another place in Sofia and appointed another company administrator, one who had Bulgarian nationality. On 12th November 2012 the company hired an office in Bulgaria with equipment and employees to carry on a new phase of its activities.

Between 19th November 2012 and 22nd March 2013, Homag and 7 other creditors owed a total of €3 million requested from the court in Bari in Italy a declaration of insolvency for the company. The matter wound its way up to the highest court in Italy, the Supreme Court of Cassation. In short, the Italian courts held that the change of registered office was fictitious ("fictif" in the French) but the Court of Appeal of Bari agreed to pose preliminary issues for the CJEU. In particular, the questions posed to the CJEU raised the issue of allocation of jurisdiction to open main proceedings in a situation where the registered office had moved from one EU Member State to another and where no establishment had been retained in the original place of registration, being the situation in the Leonmobili case. Did the presumption of COMI being in the place of registered office apply to give sole jurisdiction under Regulation 1346/2000 (the original insolvency regulation) to the place of the new registered office in such a situation?

The Court of Justice reviewed the previous case law, including the cases of *Eurofood* (C-341/04) and *Interedil* (C-396/09). Based in particular on *Interedil*, it repeated the interpretation of Article 3 of Regulation 1346/2000 as meaning that if it could be established by facts which were objective and verifiable by third parties that the direction and control of a company was to be found in a Member State other than the place of the registered office then the presumption of COMI being based on the place of the registered office could be overcome.

It followed, as far as the Court was concerned, that the absence of any establishment in the other Member State (Italy), being the original place of registration, was not fatal to the possibility that COMI was still located there. The question remained whether the direction and control of the company, based on objective facts verifiable by third parties, was in Italy.

It follows that the maintenance of COMI in Italy could not be ruled out merely because there was no establishment remaining in Italy after the transfer of the registered office to Bulgaria. It all depended on whether the effective centre of direction and control of the company remained in Italy. That of course was a decision for the Italian courts on the facts of the case.

For insolvency and pre-insolvency proceedings opened on or after 26 June 2017, the Recast insolvency Regulation 2015/848 will apply. The new Article 3(1) will disapply the presumption of COMI being at the place of the registered office where the registered office has moved to another member State during the 3 month period prior to the request for opening main proceedings. On facts similar to Leonmobili, if the creditors get their request to open main proceedings into court within 3 months of the change of registered office, they will no longer need to rebut the presumption based on the

new location of the registered office. This will alter the onus of proof but may not make a huge difference in practice, as the court will still be faced with the same basic question as to where the company is being controlled from, rather than where it is doing its daily business.

English courts approve 'good' forum shopping

Article 4 of the original Insolvency Regulation (1346/2000), if read literally, disapproves of forum shopping generally:-

"It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)."

The realities of cross-border restructuring show that one needs to distinguish between "good" and "bad" forum shopping. As a generalisation, as far as the English situation has been concerned, corporate moves of the "centre of main interests" (COMI) have been a good form of forum shopping, designed to achieve benefits for creditors. On the other hand, individual insolvency shifts of COMI have tended to be a bad form of forum shopping, seeking to escape or disadvantage the individual's creditors. The case law has generally involved "bankruptcy tourists" from Ireland and Germany, where getting a discharge is a much lengthier and more difficult process. In reality, however, when one looks at the facts of such individual insolvency cases, in many cases they are not so much examples of "bad" forum shopping as examples of 'fake' forum shopping, where the move of COMI has been illusory.

The corporate and individual insolvency cases are summarised in Moss Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings, 3rd Edition 2016. At paragraph 8.115 it is pointed out that:

"The courts in England have not, thus far, drawn a clear distinction between 'good' forum shopping

THE DECISION AROSE FROM THE RESTRUCTURING OF THE GROUP OF COMPANIES OWNED BY CODERE SA, A SPANISH COMPANY, WHICH CARRIES ON BUSINESS BY WAY OF GAMING AND SIMILAR ACTIVITIES IN LATIN AMERICA, ITALY AND SPAIN.

(usually by a legal person) which occurs where a debtor moves COMI to benefit creditors and 'bad' forum shopping (usually by a natural person) where the debtor moves COMI to escape creditors. Advocate General Colomer has pointed out in his opinions in *Staubitz-Schreiber* [footnote omitted] and *Seagon v Deko Marty Belgium* **...** [footnote omitted] that Community law combats opportunistic and fraudulent choices of jurisdiction and not 'forum shopping' per se."

The good news is that in *Re Codere Finance (UK) Limited* (17 December 2015) Mr Justice Newey had in fact recognised the distinction between good and bad forum shopping. Predictably, this was a corporate forum shopping case.

The good news is that in *Re Codere* Mr Justice Newey recognised the distinction between good and bad forum shopping

The decision arose from the restructuring of the group of companies owned by Codere SA, a Spanish company, which carries on business by way of gaming and similar activities in Latin America, Italy and Spain. Group activities were financed principally by the issue of notes by a Luxembourg subsidiary of Codere SA. The notes were governed by New York law and guaranteed by Codere SA and other group companies, subject to an English law inter-creditor agreement.

Using insolvency proceedings in Continental jurisdictions to restructure would have put at risk licences on which the group depended. A decision was therefore taken in the interests of the creditors to use an English law scheme. For this purpose Codere SA incorporated an English company, Codere Finance (UK) Limited which agreed to assume both a primary and a joint and several obligation in respect of all the Luxembourg company's obligations. The Scheme of Arrangement for the English company thus became a key part of the restructuring. No less than 98.78% by value of the creditors voted in favour of the Scheme and not a single creditor voted against it. Nevertheless, the question of 'forum shopping' had to be considered. Newey J at paragraph 18 stated as follows:

"In a sense, of course, what **...** is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the Scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debt but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, must be on the basis that there can sometimes be good forum shopping."

Newey J went on to say that in the circumstances of that case he could not see that the fact that the company had been acquired only recently and with a view to invoking the scheme jurisdiction, should cause him, in the exercise of his discretion, to refuse to sanction the Scheme. He took into consideration the overwhelming support from creditors, the lack of opposition, the lack of alternatives available in other jurisdictions and the fact that declining to sanction the scheme would cause the group and its creditors a loss of around **€**600 million.

We have therefore a clear statement from the English courts differentiating between good and bad forum shopping. This decision suggests that two different approaches are possible. Firstly, it could be said that in this type of case what is being done is not forum shopping but simply finding the most convenient jurisdiction for the restructuring. "Forum shopping" as a concept should be reserved for fraudulent choices of jurisdiction designed to defeat, delay or otherwise disadvantage creditors. Alternatively, one could say that it is forum shopping but "good" forum shopping rather than "bad" forum shopping. What is clear however is that the policy of both English law and EU law stands against the idea that a debtor could go to a different jurisdiction in order to disadvantage his creditors but supports the position that he can go to a different jurisdiction to create a substantial benefit for his creditors. Both the English courts and the Advocate General of the CJEU should be congratulated for taking a pragmatic view, rather than a dogmatic one held by some Continental commentators.

In terms of the recast Insolvency Regulation (2015/848), which will apply to proceedings opened on or after 26 June 2017, the recitals have taken on board the difference between good and bad forum shopping. Recitals (29) and (31) refer to "fraudulent or abusive forum shopping" and recital (30), refers to a filing which "**...**would materially impair the interests of creditors whose dealings with the creditor took place prior to the relocation."

The EU Regulation on Insolvency Proceedings

Third Edition

Gabriel Moss QC, Barrister, 3-4 South Square; **Ian Fletcher QC**, Emeritus Professor of International Commercial Law, University College London; and **Stuart Isaacs QC**, Partner and Barrister, King & Spalding

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NEWS in brief

South Square is Set of the Year for Insolvency/Company at Bar Awards

SOUTH SQUARE'S ROBIN DICKER QC - CHAMBERS & PARTNERS' INSOLVENCY SILK OF THE YEAR 2017

Earlier this autumn both Chambers & Partners and the Legal 500 released their updated guides for 2017 to identify the outstanding members of the London Bar.

Once again, both guides highlight Chambers' commercial work as being a particular strength (with South Square the only set to be ranked in Band 1 for Restructuring/Insolvency in both guides).

Our strong and growing profile in financial services and offshore work, together with the diversity and breadth of our Members' practices (including sport and civil fraud) is also noted. We thank all our clients who have contributed to our success.

We are particularly delighted that at the Chambers and Partners Bar Awards South Square was awarded Set of the Year for Insolvency/Company law, with William Trower QC and Richard Fisher nominated respectively in the same category as Silk and Junior of the Year. In the Legal 500 UK Awards 2017 Robin Dicker QC was awarded Insolvency Silk of the Year.

We are also delighted that, in both the Legal 500 and Chambers & Partners our clients appreciate the service provided by our clerking team who are praised for their knowledge, responsiveness and constructive attitude.

Investors lured by bogus film with John Travolta as a Gummy Bear

Two companies which secured over £3million from film investors by making false claims, including one about a film starring John Travolta, have been shut down at the High Court.

Spice Factory (UK) Limited and Gummy Bear Films Limited told investors the Hollywood star was voicing the main character in Gummy Bear 3D: The Movie. They took millions of pounds but never made the film. Instead, funds were split between company director Michael Cowan and business partner Steven Wilkinson.

Cowan and Wilkinson have been associated with another film which also raised millions of pounds from investors but never materialised. In July 2015, Warlord Productions – where Cowan was a director – was wound up after receiving almost £6million. The company claimed to be remaking Shakespeare plays starring Tom Hardy and Sacha Baron Cohen.

According to Companies House, Cowan is listed as the director on dozens of film companies, many of which no longer exist. The Insolvency Service can ban him from being a company director for 2 to 15 years.

Businesses with assets seized increases 145 percent

The number of businesses that have had assets seized by HMRC has more than doubled in the past year, according to a recent study.

Funding Options, a finance matchmaker, found that businesses who had assets seized to settle outstanding debts increased from 649 for the year ending March 2015, to 1,592 for the same period ending in 2016 – a total increase of 145 percent.

Under the 'taking control of goods' regulations, HMRC can seize assets in order to settle debts from businesses that have been unable to pay their overdue tax bills. The assets seized are then sold at auction to recover the debt.

Funding Options said that although this tactic is often a last resort for the tax authority, the growing number of these cases suggests that HMRC is cracking down and using increasingly aggressive methods to recover overdue tax.

Research also found that the amount of debt these assets were seized to cover amounted to £43m in the last year, a dramatic increase of 175 percent on last year's figure of £15m.

RISA Cayman Conference 2016

RITZ CARLTON GRAND CAYMAN VENUE FOR THIS MONTH'S RISA.

South Square is once again collaborating with The Restructuring and Insolvency Specialists Association (RISA) in Cayman on the RISA Conference 2016. This year's half-day event will be held on Tuesday 22 November at the Ritz-Carlton, Grand Cayman. The three panel sessions will cover the implications of China Shenshui, obtaining documents abroad and developments of common law of cross-border insolvency outside the EU framework.

South Square speakers - Mark Arnold QC,Jeremy Goldring QC, Barry Isaacs QC and Felicity Toube QC – will be joined by guest panellists: Hugh Dickson - Grant Thornton (RISA chair), Tony Heaver-Wren - Appleby, Margot MacInnis – Borrelli Walsh, Guy Manning - Campbells, Fraser Hughes - Conyers Dill & Pearman, Mike Pearson - Fund Fiduciary Partners, Jeremy Hollembeak - Kobre & Kim New York and Rachael Reynolds – Ogier.

Antony Zacaroli QC will be moderating the event and a number of other South Square barristers will also be attending.

New Master of the Rolls: Sir Terence Etherton

Sir Terence Etherton took over from Lord Dyson as Master of the Rolls, the second most senior judge in England and Wales, on 3 October 2016.

Sir Terence Etherton was called to the Bar (Gray's Inn) in 1974 and became a Queen's Counsel in 1990. He was appointed a High Court Judge on 11 January 2001 and assigned to the Chancery Division, receiving the customary knighthood. In August 2006, he was appointed Chairman of the Law Commission. In 2008 he was appointed a Lord Justice of Appeal and received the customary appointment to the Privy Council. In 2009 he was appointed President of the Council of the Inns of Court. On 11 January 2013 he was appointed the Chancellor of the High Court, head of the Chancery Division.

He is an honorary fellow of Corpus Christi College, Cambridge University, and of Royal Holloway, London University, a Visiting Professor of Law of Birkbeck, London University, and an Honorary Professor of Law of Kent University. He has an honorary doctorate in law from City University.

Brexit already has negative impact on insolvency levels

The trade credit insurer Atradius has published an economic report citing how Brexit has already been a catalyst for negativity across global economies.

Looking ahead to the rest of this year and 2017, the report reveals that there will be no overall improvement of insolvency levels in advanced markets - insolvencies in the UK are projected to rise by two percent in 2016 and by three percent in 2017. According to Atradius, this is both a cause and effect of a weakening business cycle.

The report warns that Brexit is likely to affect confidence in many advanced markets and has created financial market volatility; the Eurozone insolvency level is already 68 percent higher than it was in 2007.

Simon Rockett, senior risk manager for Atradius, said that Brexit is already impacting confidence in the UK and the "fallout is likely to extend further across European markets".

He recommends businesses employ a robust risk management strategy to protect themselves "in what has become a more fragile economic climate."

Wells Fargo CEO sold over $60m of stock before fraud charge

Former CEO and chairman of Wells Fargo, John Stumpf, sold $61million worth of stock in the month leading up to the bank being charged with fraud.

Wells Fargo was hit with charges of allegedly falsifying more than two million customer accounts in a bid to increase sales and fees. The San Francisco bank was fined $185million for creating the accounts.

CBS News reported Stumpf, who has appeared before Congress, made $26million in profits from the sales, and said the shares he sold were: "incentive stock options purchased at a discount to Wells Fargo's current market price and then immediately sold at a profit."

Stumpf resigned in October with immediate effect and was denied $41million in compensation as punishment for the scandal.

The Justice Department was called on by senators to open a criminal investigation of Wells Fargo executives over the fake account revelations. Regulators said employees issued and activated debit cards and signed customers up for online banking without permission. The fraudulent practices are said to have gone on for years.

WELLS FARGO FORMER BOSS, JOHN STUMPF

Half UK businesses have no fraud risk policy

Over half of UK businesses have no agreed written fraud risk policy in place to prevent and detect fraud, according to new research by R3, the insolvency and restructuring trade body.

The survey of 500 senior financial decision-makers found that 54% of businesses had no such policy in place, while 11% were not sure.

Frances Coulson, Chair of R3's Fraud Group comments: "Fraud is a staggeringly expensive problem for the UK economy, yet half of the country's companies don't have precautions in place to protect themselves against fraudsters. Businesses in every sector and of all sizes are at risk. An agreed written risk policy should outline a company's strategy for preventing, detecting and dealing with fraud."

Other findings reveal 53% of companies with a website do not have an agreed fraud policy and neither do 48% of businesses that accept online payments, leaving not only the company but also their clients exposed.

Fizzy rascal - jail for cyber-fraudster

The mastermind behind one of the UK's biggest 'vishing' bank frauds has been jailed for 11 years after taking £113m from 750 small businesses.

Feezan 'Fizzy' Choudhary, 25, who also called himself 'King', grew so rich from his scams that he flew his personal valets 8,000 miles from Scotland to Pakistan to polish his Porsches. Dressing in designer labels and dripping in gold, he would send his 'butlers' shopping to luxury stores with bin bags full of cash, approving purchases via FaceTime.

Hundreds of British firms had been conned by the fraudster to fund his extravagant lifestyle. He stole millions by cold-calling bank customers from Lloyds and banks in the RBS group, destroying lives and putting small businesses at risk of bankruptcy. Fizzy and his gang employed a technique called 'vishing', using details of company accounts provided by corrupt bank employees, as opposed to the more common internet scam 'phishing' where fraudsters use email.

FIZZY CHAUDHARY: £113M IN VISHING SCAM

Unwitting bank customers were told their accounts had been hacked and were duped into giving their internet banking passwords over the phone. Using sophisticated malware software, funds were transferred to multiple accounts before being withdrawn by 'money mules'. The scam enabled the fraudster to steal £2.1m in minutes from one law firm alone.

According to Scotland Yard at least 750 businesses were affected between January 2013 and October 2015 and there could be others. Nearly £70m was laundered in London and sent to Dubai and Pakistan but only £47m has been recovered. Fizzy and his gang were finally caught after an operation involving 16 police forces deploying anti-terror techniques.

In all, 16 gang members were given sentences totalling more than 35 years at Southwark Crown Court.

At the sentencing, Judge Peter Testar said the case was a "complex, clever, persistent and pitiless fraud" with cash "frittered away on frivolous junk".

Rising star - Supreme Court film debut with Bridget Jones

Makers of the latest Bridget Jones film have created legal history by using the UK Supreme Court as a location.

Scenes in Bridget Jones's Baby - based on the series by author Helen Fielding and starring Renée Zellweger as Bridget - were shot in Court One of the Supreme Court building in London. Barrister Mark Darcy, Bridget's on-off beau played by Colin Firth, can be seen arguing his case at a hearing before fictional Supreme Court justices.

SUPREME COURT - MOVIE STAR

A Supreme Court spokesman confirmed this was the first time the courtroom had been used as a film location as part of a wider programme of generating income.

"A film crew spent one weekend in the building, avoiding any disruption to court business. We were pleased to have the chance to open up the building to a new audience through the cinema screen", said the spokesman.

Other London legal 'hotspots' which appear in the film include the Old Bailey and Middle Temple.

Late payment and other business failures cause 1-in-5 corporate insolvencies

At least one fifth of UK corporate insolvencies in the past year were caused by late payment or the insolvency of another company, according to research by insolvency and restructuring trade body R3.

A survey of the insolvency profession reveals that late payment for goods or services was a primary or major cause of 23 per cent of insolvencies in the last twelve months, while the failure of a supplier or customer was the primary or major factor in 20 per cent of cases.

The latest research reveals the extent of the problem has not improved since 2014, when a previous survey of the insolvency profession found that late payment was a primary or major factor in 20 percent of corporate insolvencies.

Andrew Tate, R3 president, says: "The serious implications of late payment is recognised by the high profile the issue now commands. Unfortunately, government promises and other initiatives don't appear to have yet made any real impact on the scale of the problem."

Rt Hon Sir Geoffrey Vos appointed new Chancellor

Following the elevation of Sir Terence Etherton to the post of Master of the Rolls, the Queen has appointed The Rt Hon Sir Geoffrey Vos as Chancellor of the High Court with effect from 24 October 2016.

The Rt Hon Lord Justice Vos was called to the Bar in 1977, and took silk in 1993. He sat as a Deputy High Court Judge from 1999 until 2009. He was the Chairman of the Chancery Bar Association from 1999 to 2001 and of the Bar Council in 2007. Between 2005 and 2009 Sir Geoffrey was a Judge of the Courts of Appeal of Jersey and Guernsey, and a Judge of the Court of Appeal of the Cayman Islands between 2008 and 2009. He was appointed as a Justice of the High Court assigned to the Chancery Division in October 2009 and was appointed as a Lord Justice of Appeal in 2013. Among a string of prominent cases, he handled the phone-hacking cases brought against News International.

The Chancellor of the High Court is the president of the Chancery Division of the High Court and vice-president of the Court of Protection. The Chancellor of the High Court is also an ex officio judge of the Court of Appeal. As a member of the Privy Council, he is entitled to the prefix 'The Right Honourable'.

RT HON JUSTICE VOS

Article 50 leapfrog date set

The Supreme Court has accepted a leapfrog appeal (which jumps the Court of Appeal) from the government and will hear the appeal on the High Court judgment on 5-8 December 2016. The High Court ruled that Ms May could not use royal prerogative powers to trigger Article 50 of the Lisbon Treaty, launching official Brexit talks.

Lord Thomas, Sir Terence Etherton and Lord Justice Sales determined that the government's arguments were "contrary to fundamental constitutional principles of the sovereignty of parliament", and as such must be put to a vote. Certain sections of the British media, instead of viewing the decision as an illustration of the separation powers, appeared to launch personal attacks on the judges involved with the Mail Online branding them as "enemies of the people".

Meanwhile, the Scottish First Minister, Nicola Sturgeon, has ordered the Lord Advocate (the nation's most senior law officer) to lodge a formal application at the Supreme Court to intervene in the case. Ms Sturgeon said it "simply cannot be right" that rights linked to membership of the European Union "can be removed by the UK Government on the say-so of a Prime Minister without parliamentary debate, scrutiny or consent".

No squawk in court

A Kuwaiti court has declared that the main witness in an adultery case is unreliable - because it is a parrot. A woman who suspected that her husband was having an affair with the housemaid produced the parrot to repeat what her husband had allegedly said to the maid.

The court, whilst accepting that the parrot had repeated flirty phrases, decided that there was no evidence that the bird had copied these phrases from conversations between the man and maid, and that it could have mimicked remarks overheard on the television.

Other parrots, however, have been more successful stool pigeons. In 2014 a murderer was convicted in India after the victim's widower read out a list of the names of a number of suspects in front of his late wife's pet parrot, Heera. When Ashutosh Goswami's name was called out the parrot allegedly squawked "Usne maara, usne maara", or 'he's the killer, he's the killer', which assisted the police force in rather narrowing down the number of suspects and eventually led to a successful conviction! Currently, prosecutors in America are trying to work out whether the words of an African Grey Parrot, named Bud, are admissible in court as it apparently describes the last words of the victim and assailant in a murder case. Glenna Duram is charged with murdering her husband, Martin (late owner of Bud) in 2015. Relatives of Mr Duram, including his ex-wife who now looks after Bud, believe that the parrot witnessed the couple's final argument and is now parroting back their final words, switching between a male and a female voice. "Get out", he has squawked, followed by "Where will I go", and "Don't f***ing shoot".

BUD, THE AFRICAN GREY PARROT: AN 'UNRELIABLE WITNESS'

South Square members on the road

Over the last quarter, South Square barristers have attended and/or spoken at various external conferences in the UK and overseas. Matthew Abraham participated in the inaugural COMBAR trip to India visiting Mumbai and New Delhi; Matthew Abraham also attended the 3rd Regional Insolvency Conference in Singapore, organised by the Law Society and the Insolvency Practitioners Association of Singapore (IPAS), with Antony Zacaroli QC invited to speak; Fidelis Oditah QC attended the INSOL Africa Round Table (ART) in Accra, Ghana, which South Square also sponsored; Gabriel Moss QC was a panellist at the Implementation of the New Insolvency Conference in Luxembourg; Felicity Toube QC spoke at the TMA UK Annual Conference held in London.

Former BHS owner Dominic Chappell to refile accounts?

Former BHS owner Dominic Chappell is poised to file amended accounts for his family firm showing £650,000 of loans previously left out of the figures.

The loans were made by Swiss Rock Ltd, which he jointly owned with his father, at the time he was working on his takeover of BHS.

Swiss Rock was also liquidated last month owing more than half a million pounds in tax and VAT, according to Revenue & Customs.

Chappell is working with accountant David Rubin & Partners on the accounts.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the November 2016 edition. All you have to do is name the nine people in the pictures and then say what the connection is. Please send answers by email to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by Monday 9 January 2017 please. To the winner, if necessary drawn from the wig tin, will go a Magnum of Champagne and an ever so useful South Square umbrella. Good luck.

David Alexander QC

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And the connection is?

JULY CHALLENGE

The answers to the August 2016 challenge were: 1/. Lord Justice Vos. 2/. Lord Justice Floyd. 3/. Lady Justice Arden. 4/. Lord Justice Briggs. 5/. Lord Justice David Richards. 6/. Lord Justice Sales. 7/. Lord Justice Patten. 8/. Lord Justice Lewison.

Whilst we had many answers that were nearly right, the only completely correct answer came from Graham Lane of Willkie Farr & Gallagher, who not only correctly identified the eight Court of Appeal Judges but recognised that they were all the Court of Appeal judges who had previously been in the Chancery Division. Many congratulations to Graham, to whom goes a magnum of Champagne and an ever so useful South Square umbrella!

Diary Dates

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

TMA UK Annual Conference
17 November 2016 – The British Library, London

RISA Conference 2016 (in association with South Square)
22 November 2016 – The Ritz Carlton, Grand Cayman

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

R3 Annual Conference 2017
26-28 April 2017 – Dublin

International Insolvency Institute 17th Annual Conference
19-20 June 2017 – Rosewood Hotel, London

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

SOUTH SQUARE

'THEY ARE SUPER-SMART, SUPER-CLEVER, AND YOU KNOW THAT YOU CAN GO TO THEM FOR VERY TECHNICAL ISSUES'

Chambers & Partners 2017

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

Mark Arnold QC
Jeremy Goldring QC
David Allison QC
Tom Smith QC
Daniel Bayfield QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Richard Fisher
Stephen Robins
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
Riz Mokal
Madeleine Jones
Edoardo Lupi

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