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JUNE 2015

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FROM THE EDITOR

DAVID ALEXANDER QC

Tory turn up for the books..

In the last Digest editorial I said that by the time we got to the election on May 7 2015, we were probably all going to be pretty fed up with it. How true that was, the general verdict being that it was a dull campaign.

The same cannot, however, be said for the result. The polls had led us to believe right up until the last minute that we were on for a heavily hung Parliament. How wrong they were from the moment the exit poll was released at 10pm on that Thursday night. What's more the events that unfolded over the next 24 hours were even more extraordinary.

The Tories crept towards an overall majority and eventually got a small one to what must have been great jubilation among all Conservatives, in particular our own Lucy Frazer QC who was elected as MP for South East Cambridgeshire with a majority of more than 16,000. Labour had a poor night - doing worse than Gordon Brown had done, indeed worse than in any election since Neil Kinnock lost to John Major in 1992. They also lost some big names - Ed Balls, Douglas Alexander and Jim Murphy to name but three. For the Lib Dems, being in coalition with the Tories seems to have been nothing short of a disaster electorally. They lost 49 MPs and were left with just eight of a previous 57. They also lost big names - Vince Cable, Danny Alexander and Charles Kennedy for example. Nigel Farage's party polled something like 3.8 million votes (about 12.6% of the whole) but got just one seat, with Farage himself not winning in Thanet South. The Greens polled 1.1 million (3.8% of the whole) and also only got one seat. But up in Scotland Nicola Sturgeon's party turned that country SNP yellow with only 4.8% of the whole UK vote but winning all but three (56 out of 59) of the Scottish seats. I am not sure that everything adds up here. It seems to me that there may be some people who are legitimately disenchanted with our first past the post system.

THE EDSTONE WAS INTENDED TO BE DESTINED FOR THE GARDEN OF NO. 10

So next the country was presented with a slew of resignations. Farage said that he was a man of his word and having not won his seat he resigned (though he held the door open to a return after a summer break and then UKIP refused his resignation so he stayed on). Ed Miliband took full responsibility for Labour's defeat after his slip at the interview and his "Ed Stone" moment and fell on his sword

(although he is apparently going to stay on in politics following the leads of William Hague and Iain Duncan Smith). Nick Clegg also quit as leader of the Lib Dems. These were scenes that no one had seen for years (all three resignations on Friday 8th May came within about an hour of each other). And the whole day brought about a surge in the £ and the markets.

So what now? Well I guess all the English opposition parties will have to pick themselves up and start preparing for the 2020 election. In the meantime, the next two years I suspect will be dominated by whether Cameron can re-negotiate the UK's position inside Europe and, once that has been done (assuming our partners there will agree to change), whether the UK should stay in or out of Europe. So, perhaps to the dismay of some, politics will go on for us all even outside of a general election.

So what has happened of note in the last few months beyond the election sphere? Three positive events stand out. First, the US and Cuba seem to have reached some form of rapprochement, with the two countries having the first high-level meetings in half a century. Second, we got a new royal baby, Princess Charlotte who, probably conveniently for the Conservatives, arrived just in time to make people feel a little bit better. Finally we had VE Day celebrations almost immediately after the election to honour those who enabled us now to live in a free country.

LUCY FRAZER QC MP WITH HOME SECRETARY THERESA MAY

FARAGE'S UKIP POLLED 3.8 MILLION VOTES FOR ONE SEAT

So what of this edition of the Digest? As always there is lots to read. We have Dan Bayfield and Ryan Perkins, the latter a pupil in Chambers, on the Apcoa Schemes of Arrangement, class composition and new obligations. We also have Alexander Riddiford on the Court of Appeal's recent decision on the Waterfall Appeal and Charlotte Cooke on lessons to be learned from City Link. In addition there is Marcus Haywood, together with another pupil in Chambers, Oberon Kwok, on piercing the Corporate Veil. Then there is an article by Stephen Robins and myself on the Court of Appeal decision in Samba and its implications for IPs, as well as an article by William Willson entitled "The Banana Bankrupt". Finally there is an article by Glen Davis QC and Marcus Haywood on recent insolvency legislative changes that feature in the new Butterworths Insolvency Law Handbook.

As regards our normal offshore sections, this time we have contributions from Allens in Sydney (where INSOL's Tenth World International Congress will take place on 19-22 March 2017) and Bell Gully in New Zealand, a report from Mathew Abraham on a COMBAR Singapore Roundtable and something on INSOL in San Francisco. In addition we have Gabriel Moss QC's latest update from Euroland, the usual Case Digests section, this time edited by Hilary Stonefrost, a report on South Square's recent reception at the Wallace Collection, news in brief (including on the upcoming INSOL event in Bermuda in June 2015), the South Square Challenge and diary dates.

As ever I hope that you find something of interest to you in this edition of the Digest. If you wish to be added to the circulation for future editions of the Digest (and it is free) please just email kirstendent@southsquare.com and we will do our best to ensure that you get the next edition of the Digest promptly. We at South Square wish you all a good summer until then.

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The Apcoa schemes of arrangement

Class composition and new obligations

by Daniel Bayfield and South Square pupil barrister, **Ryan Perkins.**

Key Points

- It would seem, following Hildyard J's reasoning in Apcoa, that if intercreditor subordination is achieved through turnover arrangements, certain class issues might be avoided.

- New obligations cannot be imposed through a scheme – and schemes which purport to extend the duration of lending commitments in respect of revolving credit facilities, for example, will need to be scrutinised with real care.

Abstract

This article discusses the recent case of *Re Apcoa Parking Holdings GmbH & Ors* [2014] EWHC 3849 (Ch), in which Hildyard J sanctioned schemes of arrangement (the schemes) between nine companies in the Apcoa group (the scheme companies) and their main creditors. The schemes were contested at both the convening hearing and the sanction hearing by a minority creditor (FMS). *Apcoa* is the latest case to consider the court's jurisdiction to sanction schemes of arrangement in relation to foreign companies, and has attracted significant attention in this regard: see *e.g.* Pacey, "APCOA schemes of arrangement: take II", Insolv Int (2015) 28(2) at 29-31. The judgment in *Apcoa* also discusses the nature of class composition and the difficulties associated with seeking to use schemes of arrangement to impose new obligations on creditors. The present article focuses on the latter two issues.

I. Introduction

The financing structure

The debt targeted by the schemes fell into three basic categories: senior debt (of which EUR 660m was outstanding), second lien debt (of which EUR 68m was outstanding), and so-called super senior debt (of which EUR 34m was outstanding). The senior debt and the second lien debt were secured on the Apcoa group's assets pursuant to the terms of an intercreditor agreement governed by German law (the ICA). As its name suggests, the second lien debt was subordinated behind the senior debt. All nine scheme companies were obligors in respect of the senior debt and second lien debt, but only two scheme companies were obligors in respect of the super senior debt. FMS, which opposed the schemes, held approximately 8% of the senior debt. A distressed debt fund (Centerbridge) held 56% of the senior debt and 89% of the super senior debt.

Notwithstanding the name given to it, the super senior debt was in fact unsecured and not super senior as regards all of the senior debt. The ICA did not provide for a contractual subordination of the senior debt behind the super senior debt, or any form of structural subordination. Rather, the senior lenders – with the important exceptions of FMS and another minority creditor (Litespeed) – had entered into a turnover agreement with the super senior lenders and with the two scheme companies which were obligors in respect of the super senior debt. Pursuant to the turnover agreement, each consenting senior lender was obliged to remit (or "turn over") any recoveries it received in respect of the senior debt to the super senior lenders (primarily Centerbridge), until the super senior debt was discharged in full. Because FMS was not a party to the turnover agreement, its share of the senior debt would, in insolvency

APCOA IS PRESENTLY THE MARKET LEADING PROVIDER OF CAR PARKING (BY NUMBER OF SPACES MANAGED) IN GERMANY (225,000 SPACES), NORWAY (96,900), DENMARK (61,900), AUSTRIA (48,100), ITALY (42,400), AND POLAND (12,600)

proceedings, be paid in priority to the super senior debt. (Adding a further layer of complication, the turnover agreement was terminated before the convening hearing took place and replaced with a materially identical turnover agreement to which none of the Apcoa companies was a party. The significance of this fact is discussed below.)

For the purposes of this article, the precise details of the schemes are irrelevant. The essential point is that the schemes provided for the super senior debt to be fully repaid in cash, whereas the senior debt (including the senior debt owned by FMS) was to receive less favourable treatment. One part of the senior debt was to be (contractually) subordinated behind new super senior debt and the balance of the senior debt was to be "hived up" to a new holding company, so as to facilitate the deleveraging of balance sheets at the operating company level. This had the effect of structurally subordinating the hived-up senior debt behind the liabilities of the operating companies in the Apcoa group. The schemes formed part of a wider restructuring involving a debt for equity swap in favour of the senior lenders. (An earlier "amend and extend" scheme in relation to the Apcoa group was sanctioned in previous proceedings: see [2014] BCC 538.)

II. Class composition

The Test

At the convening hearing, the scheme companies argued that the senior lenders should be treated as constituting a single class. FMS argued that it should not be placed into a class containing the consenting senior lenders, because the consenting senior lenders, unlike FMS, had already consented to the subordination of their senior debt such that they were not, in fundamental respects, interested in the proposed schemes. If accepted,

Notwithstanding its name, the super senior debt did not rank in priority to all of the senior debt

It is arguably artificial to treat turnover subordination differently from other types of subordination

FMS's argument would have enabled it to have blocked the schemes.

After reviewing the authorities, Hildyard J held that class composition should be determined as follows:

"*The modern approach … is to break the question into two parts, and ask first whether there is any difference between the creditors in point of strict legal right … and if there is, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous motivation operating in the case of any particular creditor(s).*" [52]

Thus, FMS was required to prove both (i) that there was a difference between FMS and the consenting senior lenders "*in point of strict legal right*" and (ii) that, if the schemes failed, there would be more to divide than to unite FMS and the other senior creditors. The second component of this test appears to be a novel reformulation of the traditional rule that "*persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings*": see *UDL Holdings Ltd* [2002] 1 HKC 172 at [27] (*per* Lord Millett).


RYAN PERKINS

The Effect of the Turnover Agreement

FMS argued that its legal rights were materially dissimilar from the legal rights of the consenting senior lenders who had acceded to the turnover agreement, on the basis that such consenting senior lenders ranked lower in the priority waterfall than FMS (as a matter of substance). The court rejected this argument. Hildyard J held that although the turnover agreement modified the rights of the consenting senior lenders and the super senior lenders inter se, it had no material effect on the rights of anyone against the scheme companies. The turnover agreement metaphorically operated "behind the curtain" [92]. Class composition is traditionally determined by reference to creditors' rights against the company itself, rather than their rights inter se.

In response to this argument, FMS observed that two scheme companies (which acted as obligors in relation to the super senior debt) were, in fact, parties to the turnover agreement. These two companies assumed new obligations towards the super senior lenders in the turnover agreement, including covenants governing the distribution of repayments and prepayments of the senior debt and super senior debt. Further, in an ill-drafted clause, the two scheme companies prospectively consented to a novation of the super senior debt to the consenting senior lenders under certain circumstances. However, Hildyard J held that the joinder of the two scheme companies to the turnover agreement was merely "*nominal*", and did not confer rights of any significance against the scheme companies in question.

Hildyard J's reasoning may prove to have significant practical implications. It is not uncommon for legal advisors to draft intercreditor agreements between the creditors of a distressed company. If intercreditor subordination is achieved through turnover arrangements rather than (*e.g.*) structural subordination, a scheme of arrangement will be much easier to implement: there will be fewer classes and less opportunity for minority veto. (As to structural subordination, see Wood, *Project Finance, Securitisations and Subordinated Debt* (2nd Edition, 2007), Part III).

On the other hand, until the Court of Appeal considers the issue, it is impossible to be certain. Arguably, it is artificial to treat turnover subordination in a fundamentally different manner from other types of subordination, given that all forms of subordination are aimed at the same basic objective (*viz.* the consensual modification of priorities in insolvency). For example, consider a traditional contractual subordination, where the junior creditor covenants with the debtor that his debt will not be payable until the senior creditor has been paid in full (as in *Re Maxwell Communications Corp plc (No 2)* [1993] 1 WLR 1402 at 1411-12). If ten tranches of debt are contractually subordinated in this manner, a scheme of arrangement may necessitate the division of creditors into ten classes: but if

substantially the same effect is instead achieved through turnover arrangements to which the debtor company is not a party, there may be only one class of creditors. It is difficult to conceive of a plausible policy rationale for this outcome.

Furthermore, if creditors' rights against third parties are irrelevant to class composition, then creditors with a claim against a solvent guarantor (in addition to a claim against the scheme company as principal debtor) can fall within the same class as creditors without the benefit of such a guarantee. Given that a scheme can be used to release claims against third party guarantors (*Re Lehman Brothers (International) Europe* [2010]] BCC 272 at [63]-[65]), this might be considered to be an undesirable outcome.

Termination of the Turnover Agreement

Several months after the turnover agreement was executed, the consenting senior lenders and the super senior lenders entered into a lock-up agreement, by which the parties made a binding covenant to vote in favour of the schemes, and not to procure the enforcement of any security. Thereafter, and prior to the convening hearing, the turnover agreement was terminated. In its place, the consenting senior lenders executed a new turnover agreement, which had been intentionally modified to ensure that none of the scheme companies was a party to it. It was common ground that these arrangements were designed to prevent any argument that FMS and Litespeed fell into a different class from Centerbridge and the other consenting senior lenders.

Hildyard J held that the termination of the turnover agreement was fatal to FMS's case on class constitution. Even if, contrary to the judge's primary view, the turnover agreement had the effect of modifying the consenting senior lenders' rights in a material manner, the termination of the turnover agreement was said to render any such modification otiose [93]. In response, FMS contended that the lock-up agreement substantially preserved the effect of the turnover agreement, by compelling the consenting senior lenders to vote in favour of a restructuring which reflected the order of priorities contained in the turnover agreement itself (at a time when the latter agreement had yet to be terminated).

DANIEL BAYFIELD

The judge rejected this argument for a number of reasons. First, applying *Re Telewest Communications (No 1)* [2005] 1 BCLC 752 at 769 (*per* David Richards J), the judge held that lock-up or voting agreements are usually irrelevant to class constitution: "*though the lock-up agreement undoubtedly affected each party's enjoyment of the relevant rights affected (voting and enforcement), I am not persuaded that it affected the rights themselves*" [100]. Second, Hildyard J found that the lock-up agreement was unlikely to have

Schemes exist for the purpose of varying creditors' rights, not varying or imposing obligations

altered the parties' existing voting intentions. Finally, the judge rejected the suggestion that the termination of the existing turnover agreement involved any form of objectionable class manipulation [173]. An attempt to prevent the proliferation of classes is not, in itself, objectionable (*ibid*).

It remains to be seen whether the distinction between rights and the enjoyment of rights gains general acceptance in the field. If A is a secured creditor whose rights of security are valid but unenforceable (*e.g.* due to illegality: see *Paros Plc v Wordlink Group Plc* [2012] EWHC 394 (Comm) at [80]), and B has an enforceable security interest in the same asset, then it might be considered artificial to treat A and B as members of the same class.

III. New obligations

On one point, however, FMS was successful. One of the senior facilities was known as the bank guarantee facility. It operated in the following manner: (i) certain banks (known as issuing banks) would agree to act as guarantors in relation to the obligations of Apcoa group companies; (ii) the issuing banks were entitled to an indemnity from the bank guarantee lenders in respect of such guarantees; and (iii) the bank guarantee lenders were, in turn, entitled to an indemnity from the scheme companies.

In their original form, the schemes imposed an obligation upon the bank guarantee lenders to indemnify new and different issuing banks in respect of new guarantees issued by them for a period of up to six further years. FMS objected to this provision on the basis, *inter alia*, that it purported to impose a new obligation on certain lenders which was outwith the scope of a "*compromise or arrangement*" for the purposes of Part 26 of the Companies Act 2006.

FMS argued that creditor schemes of arrangement under Part 26 of the Act must amount to an arrangement between the company and its creditors which varies the creditors' existing creditor rights and concerns their position as creditors: *Re T&N Ltd* [2006] 1 WLR 1728 at [45]; *Re Lehman Brothers International (Europe)* [2010] BCC 272 at [63] - [66]. It is not enough that what is proposed might be characterised as an arrangement in a general sense. It must constitute a compromise or arrangement of the existing (actual or contingent, present or future) rights of the creditors: it is not a means by which creditors can be forced to undertake new and further obligations.

FMS made the point that at the heart of the reasoning of the Court of Appeal in *Re Lehman Brothers International (Europe)* was that part of the proposed scheme did not involve the re-arrangement of the rights of the creditors in their capacity as such. Neither the fact that the creditors were creditors (which was assumed) nor the fact that the scheme would also affect their rights as creditors in other ways was an answer to the fact that the scheme purported to release the creditors' property rights which was something which was beyond the scope of Part 26 because the release of property rights was not a variation of the creditors' rights *as creditors*.

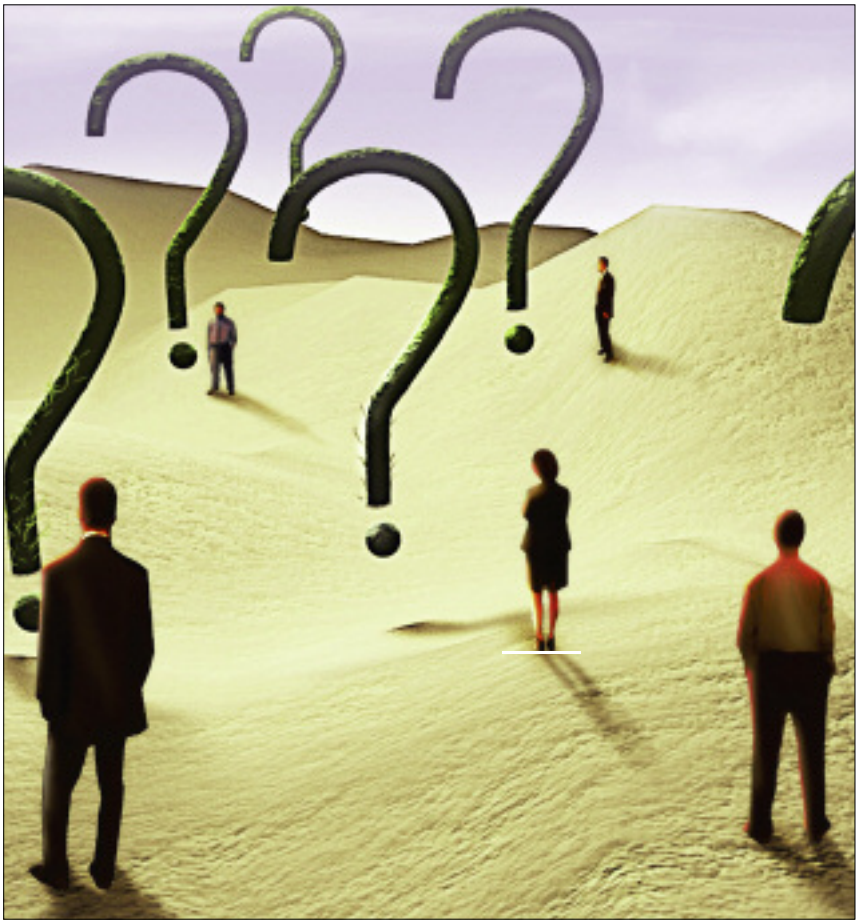
After the hearing, Hildyard J announced that he had "*… sufficient concerns on both jurisdictional and discretional grounds that* [he]*would not feel able to approve the schemes insofar as they indirectly impose the new obligations*" [162]. In response, the scheme companies agreed to remove the offending provisions from the schemes, which were then sanctioned in their modified form.

As a result of this concession by the scheme companies, Hildyard J did not consider it "*necessary or wise to express a final view*" on the new obligations issue [163]. However, after reviewing a number of domestic and commonwealth authorities, the judge commented:

"*All I will say for the present is that in my view, the imposition of a new obligation to third parties is very different from the release in whole or in part of an obligation to such third parties. More generally, I am not persuaded that obligations may be imposed under a scheme of arrangement under Part 26: in creditors' schemes, it appears to me likely that the jurisdiction exists for the purpose of varying the rights of creditors in their capacity as such, and not imposing on such creditors new obligations.*" [164]

It is suggested that the Judge was correct to take that view the correctness of which can be demonstrated with reference to the tests which are applied at the convening hearing and sanction hearing stages of a creditor scheme of arrangement:

At the convening hearing stage, the law requires that the rights of those included in a single class must be "*not so dissimilar as to make it impossible for them to consult together with a view to their common interest*": *Sovereign Life Assurance Co v Dodd*[1892] 2 QB 573 at 583 per Bowen LJ. The application of this test requires a consideration of: (a) the rights of creditors in the absence of the scheme; and (b) any new rights to which the creditors become entitled



FOR THE TIME BEING, A DEGREE OF UNCERTAINTY PREVAILS

under the scheme: *Re T&N Limited (No. 4)* [2007] Business LR 1411 at [86]. The focus is on rights, not on obligations because the jurisdiction to enter into an arrangement with creditors exists for the purposes of varying rights, not varying or imposing obligations. It is, after all, a jurisdiction to sanction a compromise or arrangement between a company and its creditors, or any class of them. What makes a creditor a creditor is its rights against the scheme company, not any obligations it may owe.

At the sanction stage, the Court must consider, among other things, the fairness of the scheme. If a scheme could impose obligations on scheme creditors, it would make consideration of the fairness of the scheme all the more difficult for the Court. For example, as David Richards J stated in *Re T & N Ltd* [2005] 2 BCLC 488 at [82]:

"While I am wary of laying down in advance of a hearing on the merits of any scheme or CVA any particular rule, there is one element which can be mentioned at this stage. I find it very difficult to envisage a case where the court would sanction a scheme of arrangement, or not interfere with a CVA, which was an alternative to a winding up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of a the company, assuming that the return in a winding up would in reality be achieved and within an acceptable time-scale: see Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385."

New obligations are not imposed on creditors in a winding-up such that the Court, when comparing the outcome for a creditor on a winding up and under the scheme, is comparing apples with apples. If new obligations could be imposed through a scheme, the Court might be compelled to compare apples with pears.

A further feature of the jurisdiction which bears on this question is the statutory requirement to secure the support of 75% *in value* of the creditors (or of each of the relevant classes) before a scheme can be sanctioned: section 899(1) of the Act. The value requirement focuses on the rights of the creditors as a proxy for their financial stake in the company as compared with the other members of their class. The focus is on rights because the jurisdiction facilitates the variation of rights. If it facilitated the imposition of new obligations, the voting requirement would be different.

The Judge's dictum is likely to be of real practical significance in future restructurings. Schemes which purport to extend the duration of lending commitments in respect of revolving credit facilities, for example, will now need to be scrutinised with real care. The distinction between objectionable and unobjectionable arrangements may ultimately depend on the subtle difference between the imposition of a new obligation and the bare rollover of an existing obligation [163].

For the time being, a degree of uncertainty prevails. The leading cases on schemes of arrangement rarely proceed beyond first instance (including the instant case, which was compromised before the appeal was heard), which has resulted in a dearth of Court of Appeal authority. It is hoped that the Court of Appeal will have an opportunity to consider the issues raised in *Apcoa* in the near future.

This article first appeared in the April 2015 edition of Corporate Rescue and Insolvency

Court of Appeal hands down judgment in the Waterfall appeal

Alexander Riddiford reports on the recent Court of Appeal decision in In re Lehman Brothers International (Europe) (in administration) [2015] EWCA Civ 485.

On 14 May 2015 the Court of Appeal handed down its judgment in the appeals against the decision of David Richards J in *In re Lehman Bros International (Europe) (in administration) (No 4)* [2014] EWHC 7004 (Ch), [2015] Ch 1.

This was an application, which has come to be known as the "Waterfall Application", brought by the joint administrators of three companies in the Lehman group in administration for the determination of a number of issues that have arisen in very unusual circumstances, in particular: (a) one of the companies (LBIE) being an unlimited company with a surplus arising in its administration; and (b) that company's members (LBHI2 and LBL) having unlimited liability as contributories.

The Waterfall Application takes its name from the order (or "waterfall") for payment out of the assets of a company in liquidation or distributing administration. This order of priority was summarized by Lord Neuberger of Abbotsbury PSC in *Re Nortel GmbH [2013]* UKSC 52, [2014] AC 209, at [39], as follows:

(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; and
(8) Shareholders.

The ten appeals before the Court of Appeal (each of David Richards J's directions was appealed) concerned matters arising from the unusual circumstances of LBIE's administration such as what exactly is to happen with the surplus left after the estate has discharged all proved debts in full, i.e. category (5) in Lord Neuberger's waterfall. The issues fall broadly into four categories, as set out in Sections A to D below.

Subordinated debt

The first issue before the Court of Appeal concerned the ranking in the waterfall of the subordinated debt owed by LBIE to LBHI2, i.e. whether it ranked immediately after the payment in full of proved debts (as category 5A) or immediately after non-provable liabilities (as category 7A).

The subordinated debt formed part of LBIE's regulatory capital for the purposes of capital adequacy rules (whose principal aim is to ensure that firms provide financial resources to protect their customers against failure). The loan was made on a form approved by the FSA which was printed as part of the Interim Prudential Sourcebook (INPRU), the document that set out the financial resources requirements applicable to LBIE at the relevant time.

The extent of the subordinated debt's subordination was established by clause 5 of the subordinated debt agreement (the "SDA"),

THE WATERFALL APPLICATION TAKES ITS NAME FROM THE ORDER (OR "WATERFALL") FOR PAYMENT OUT OF THE ASSETS OF A COMPANY IN LIQUIDATION OR DISTRIBUTING ADMINISTRATION.

which set out (inter alia) the conditions qualifying LBHI2's right to repayment. The critical question of construction was whether non-provable claims are capable of being "*established or determined in the Insolvency*" for the purposes of the condition provided by clause 5(2)(a) of the SDA.

The Court of Appeal, construing the SDA in the context of its specific regulatory purpose, decided unanimously that LBHI2's claims under the SDA were provable but ranked immediately after the payment of non-provable liabilities (as category 7A). This was because, on the proper construction of the terms of the SDA, the subordinated debt is repayable on conditions that include (a) payment of statutory interest and (b) payment of any non-provable liabilities. Such claims may be proved as contingent claims along with other provable debts but the proofs must be valued so as to take account of both contingencies (a) and (b). As a result, according to Lewison LJ at [62], the "*lodging of a proof will not adversely affect the subordination*".

Currency conversion claims

The next issues for the Court of Appeal concerned the existence and nature of what has become known as "currency conversion claims" (or "CCCs"). The issues were:

(1) Whether, if a creditor receives less in sterling on its proved debt than it would have received in the foreign currency in which its claim was originally denominated (as a result of an adverse FX movement between the date of conversion to sterling and the date of payment in sterling of the proved debt), the company is liable to pay the shortfall (i.e. a CCC), and;

(2) If so, where this CCC liability ranks in the waterfall.

Briggs and Moore-Bick LJJ considered that such a claim does exist and that it ranks as a non-provable claim. Lewison LJ, dissenting on the CCC issues, considered that CCCs did not exist.

The Court of Appeal's analysis proceeded on the basis that the surplus in the hands of the adminstrator is impressed with an obligation to pay interest...

At the heart of the debate was whether or not rule 2.86(1) of the 1986 Rules, which provides that "*for the purpose of proving a debt incurred or payable in a currency other than sterling*" the amount in question is to be converted into sterling at the rate prevailing on the date of administration of the company, has a substantive effect and operates so as to substitute an obligation in sterling for what had previously been an obligation in a foreign currency.

Lewison LJ considered that this provision did have a substantive effect. However, Briggs and Moore-Bick LJJ considered that such a conclusion was inconsistent with the highest authority, for example Lord Hoffmann's comments in *Wight v Eckhardt Marine G.m.b.H. [2003]* UKPC 37, [2004] 1 A.C. 147 ("Nortel"), at [27]: "*The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced… The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced.*"

Accordingly the Court of Appeal decided (Lewison LJ dissenting) that CCCs do exist and that they rank as non-provable claims (i.e. category (7) in Lord Neuberger's waterfall).

Statutory interest

The next issues concerned what is to happen, if the administration of LBIE were immediately followed by a liquidation, to any entitlement to interest in respect of the period of the administration which has not been paid before the commencement of the subsequent liquidation.

In essence the issues were: (a) whether such a right to interest would be lost altogether in a subsequent liquidation or whether it would be payable in the subsequent liquidation; and (b) if such a liability for interest would be payable in the subsequent liquidation, on what basis it would be payable, e.g. under rule 2.88 of the 1986 Rules (which governs statutory interest in administration), under section 189 of the 1986 Act (which governs statutory interest in liquidation), or as a non-provable claim.

The difficulty in this context arises from the tension between rule 2.88 of the 1986 Rules and section 189 of the 1986 Act which (as they apply to the facts of the case) are in the following terms:

"Any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company entered administration" (rule 2.88(7) of the 1986 Rules);

Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation" (s.189(2) of the 1986 Act)."

In short, the Court of Appeal decided unanimously that, where a surplus has arisen (or can retrospectively be shown to have arisen) in the hands of the administrator, the creditor who has proved in the administration has an accrued statutory right to be paid interest out of that surplus under rule 2.88(7) of the 1986 Rules and this right will not "*disappear into a black hole*" simply because LBIE moves from administration into liquidation (*per* Lewison LJ at [108]).

The Court of Appeal's analysis proceeded on the basis that the surplus in the hands of the administrator is impressed with an obligation to pay interest under rule 2.88(7) and that this obligation does not evaporate simply because that surplus passes into the hands of a subsequent liquidator. Whereas Lewison LJ preferred not to "*become bogged down in selecting a suitable private law label by which to describe this statutory instruction*" (at [107]), Briggs LJ considered a *Quistclose*-type trust analysis to be the best way to explain the effect of rule 2.88(7) on the surplus in the

hands of the administrator.

As both Lewison and Briggs LJJ noted, the solution provided by their judgments is only a partial solution to the infelicities of the drafting of rule 2.88 of the 1986 Rules and s.189 of the 1986 Act. For example, there will be many combinations of administration and liquidation where no surplus is thrown up during the administration to which rule 2.88(7) can attach, but where the statutory scheme gives rise to an inexplicable gap between the ending of the period for which contractual interest can be proved and the beginning of the period for which statutory interest is payable. Their Lordships both agreed that the sooner this inexplicable gap between contractual and statutory interest is remedied by amendment to the Act or to the Rules, the better.

Contributory issues

The issues that arose in respect of the liability of LBIE's members as contributories to contribute to LBIE's assets fell into three parts as follows.

(a) **The extent of the contributory's liability**

First, it fell to the Court of Appeal to determine whether the liability of LBIE's members to contribute to LBIE's assets under section 74(1) of the 1986 Act extended to provide for statutory interest and non-provable liabilities (categories (6) and (7) of the statutory waterfall). Section 74(1) of the 1986 provides: "*When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of winding up, and for the adjustment of the rights of the contributories among themselves*." The question was in essence whether the phrase "*its debts and liabilities*" means only the provable debts of the company being wound up, or includes (under "*liabilities*") statutory interest and non-provable liabilities.

The Court of Appeal decided that the liability of LBIE's members to contribute to LBIE's assets under section 74(1) of the 1986 Act does extend to provide for statutory interest and non-provable liabilities.

The reasons given by the Court of Appeal were broadly in accord with those given by

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David Richards J below. In particular, the Court was persuaded that it would be anomalous for section 74(1) to contemplate expressly that a call could be made on members to contribute "*for the adjustment of the rights of the contributories among themselves*" (i.e. category (7) in the waterfall) but not for statutory interest and non-provable claims (i.e. categories (5) and (6) in the waterfall).

Further, whereas the Appellants argued that a call on members to create a surplus out of which statutory interest might then be paid would amount to a "*boot straps*" position where a surplus might only arise where a call had in fact been made (and would not arise otherwise), Briggs LJ agreed with the LBIE Administrators that this argument was wrong for various reasons, in particular because (as the Court below had held): (a) the right to

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make calls was itself an asset of the company; and (b) where the aggregation of that right with the other assets of the company disclosed a surplus, the making of the call and the payment by contributories in response to it simply enabled the payment of statutory interest (rather than "creating" the surplus in the first place).

(b) Proving in the contributory's insolvency proceedings

The next issue was whether LBIE can, by its administrators, prove in the administration of LBL, and in the administration of LBHI2 if and when it becomes a distributing administration, in respect of those companies' contingent liabilities under section 74(1) as contributories of LBIE.

It was common ground that an accrued obligation to contribute under a call already made prior to the commencement of the contributory's insolvency proceedings was a provable debt.The issue in dispute was whether a company in administration could prove for a call which had not yet been made at that date (and which, indeed, only a subsequent liquidator would be able to make).

In short the Court applied the threefold test, as set out by Lord Neuberger in Nortel, for the provability of a statutory liability (which has not crystallised at the date of the commencement of insolvency proceedings) under rule 13.12(1)(b) of the 1986 Rules. That rule provides that a "*debt*" includes "*any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date*". Lord Neuberger's threefold test is as follows (at [77]):

"*…at least normally, 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).*"

Briggs LJ considered that stages (a) and (b)

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of the test were plainly satisfied. As for (c), this was the focus of the dispute between the parties. However, Briggs LJ attached importance to "*the policy that all debts and liabilities should, as far as possible, be dealt with in any process for the winding-up or distributing administration of the debtor*" (at [226]) and "*the policy that the members of an unlimited company are required to make their resources available to the fullest possible extent to ensure that their company discharges all its liabilities*" (at [232]), as outweighing the concerns raised by LBHI on this point.

Accordingly, it was decided that limb (c) of the test was satisfied and that therefore LBIE could prove in its contributories' administrations for contingent liabilities under section 74(1).

(c) The contributory rule

The final issue was whether the contributory rule, which prevents a contributory from recovering anything in a liquidation until he has fully discharged his liability, applies in administration.

In practical terms the Court's decision on the previous issue (the provability of contingent claims in respect of calls in the contributory's insolvency proceedings) took "*much of the steam out of this issue*" (*per* Briggs LJ at [236]).

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RICHARD FISHER

In the event, however, the Court decided that it would be a serious injustice to a solvent contributory to be disabled from ever proving in a distributing administration because, in the absence of a call, there was nothing which he could pay to free himself from the shackles of the rule. Indeed, the company might (and usually would) distribute all its assets to its creditors without ever going into liquidation, leaving the contributory high and dry, even though its liability as a contributory might be very small, and its claim as a creditor very large (*per* Briggs LJ at [239]).

Further, the Court rejected the submission that the absence of the contributory rule in administration would make an adverse inroad into the *pari passu* principle (the protection of which was, the parties agreed, the basis for the contributory rule), since a company in administration might fend off this adverse consequence by moving into liquidation.

In all the circumstances, therefore, the Court declined to extend the contributory rule to the context of administration.

City Link: Lessons to be learned...

A report suggests that the example of City Link makes an overwhelming case for improvements to legislation and practice to protect workers, writes **Charlotte Cooke**.

At 7pm on 24 December 2014, Christmas Eve, courier company City Link went into administration following several years of losses. Many of the company's 2727 members of staff, and around 1000 contractors, only found out about the company's demise from reports in the media on Christmas Day. This extremely unfortunate turn of events, and the fallout from the company's insolvency more generally, prompted the Joint Report of the Business, Innovation and Skills and Scottish Affairs Committees on the Impact of the Closure of City Link on Employment. The report, which was published on 23 March 2015, addresses a number of issues and suggests there are several of lessons to be learned from the City Link case, in particular as regards the chaotic way in which staff and suppliers discovered that City Link had gone into administration. The example of City Link, the report suggests, makes an overwhelming case for making of improvements to current practices and the overarching legislative framework, in order to better protect the rights of workers.

Much of the report focuses when and how City Link's employees and contractors found out that the company had gone into administration, it being noted that "*employees and contractors feel that they were deliberately deceived by the company in the weeks and months leading up to the closure of City Link*." In this regard, the report urges the government to support dialogue between unions, employers and insolvency professionals in order to develop best practice for sharing information with employees and unions when it is likely that a company will go into administration. Whilst that is, of course, to be encouraged, quite what steps could and should be taken insofar as any particular company potentially facing administration is concerned will depend on all the specific circumstances of that case, particularly where attempts to save the company and avoid going into administration are still ongoing.

The report's recommendations in this regard tie in with another important issue addressed, requirements in relation to consultation on redundancies. In the ordinary course, where a company intends to make more than 20 members of staff redundant a statutory consultation period applies

Much of the report focuses on when and how City Link's employees and contractors found out that the company had gone into administration

THE CHRISTMAS EVE ADMINISTRATION CAUSED MISERY FOR CITY LINK'S EMPLOYEES AND CREDITORS, AND FOR THOSE AWAITING CHRISTMAS DELIVERIES.

(30 days for redundancies affecting between 20 and 99 members of staff and 45 days for redundancies affecting over 100 members of staff). Such consultation did not happen in City Link's case and, moreover, it will often be in the financial interests of a company to dispense with the statutory redundancy consultation period if the fine for doing so is less than the cost of continuing to trade for the consultation period. It might also be pointed out that sometimes the company's financial situation will be such that consultation, at least in any meaningful sense, is impossible.

The report, however, expresses concern that where decisions are based solely on the aforementioned purely financial calculation, the high human cost of ignoring the consultation period is side-lined. It is therefore suggested that the government review and clarify the requirements for consultation on redundancies during an administration, in order that employees can understand what they can expect and company directors and insolvency professionals have a clear understanding of the responsibilities they owe to the company's employees. Since the report's publication, the Insolvency Service has launched a call for evidence on consultations on redundancies in insolvency.

The report also notes that in the immediate aftermath of City Link's entry into administration a lack of information as to the situation as a whole left scope for misunderstandings and rumours. In order to address this, the report suggests that the government and insolvency professionals should work together to agree a format for a short initial statement, to be made publically available within a week of a company going into administration. Such a statement would set out a high-level summary of the circumstances which led to the company going into administration, as well as details as to who to contact with concerns as to directors' conduct, when the last payment to staff and suppliers was made and the period it covered, as well as an early assessment of whether there would be any funds available to make a payment to unsecured creditors (aside from the prescribed part).

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Moving on from lessons that might be learned in relation to the provision of information to stakeholders, the report also addresses the order of priority in which creditors are paid, questioning in particular whether the present legislation provides sufficient protection for workers. As readers will be aware, under the Employment Rights Act 1996 the National Insurance Fund pays (a) arrears of pay in respect of a period or periods not exceeding eight weeks; (b) any amount which the employer is liable to pay the employee for the relevant statutory period of notice; (c) any holiday pay in respect of a period or periods of holiday (not exceeding six weeks in total) to which the employee became entitled during the 12 months immediately preceding the employer's insolvency; (d) any basic award of compensation for unfair dismissal; and (e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by any apprentice or articled clerk. On making such payments the National Insurance Fund is then subrogated to the employee's claim against the company (see section 189 of the Employment Rights Act 1996). That claim will rank as preferential (i.e. will be paid before claims secured by a floating charge) under section 175(2)(b) of the Insolvency Act 1986, save that wage arrears will, however, only be treated as preferential up to a limit of £800.

The preferential treatment of employees in this regard has its origins in the Preferential Payments in Bankruptcy Amendment Act 1897. One policy justification for the preferential treatment of employees being introduced by that piece of legislation was explained by George Kemp in the House of Commons as follows:

"First of all, the mortgagee got his money, because it was on the lands and buildings, which were not in any way affected by, nor did they affect, the work of the workpeople. Secondly, why should the workpeople come in priority to the debenture holders under a floating charge? For the reason that the raw material and the articles partly or wholly manufactured were part of the assets of the debenture holders. This raw material had benefited by the work of the workpeople to the extent of the time for which their wages were in arrear. Therefore it was only right and just that the workpeople should have the benefit of the enhanced value

Any change to the order in which a company's creditors are paid will need to be considered very carefully

of these articles, which, as the law stood at the present time, would be first claimed by the holders of debentures or debenture stock". HC Deb., cols 72-73 (February 20, 1897) (see Goode, *Principles of Corporate Insolvency Law*, para 8-51).

Further justification for such preferential treatment stems from the fact employees typically rely on a single company for their income and, indeed, their livelihood.

It should, however, be borne in mind that often the National Insurance Fund will receive only a small part of what it has paid and the report notes in this regard that "*it is a matter of great concern that, under current legislation, taxpayers are left to pick up the bill, allowing private investors to recover more of their investment*". On the other hand though, secured creditors will naturally be at pains to point out that they have (as is often the case) suffered a shortfall and, were it not for their provision of funding, jobs may not be been created in the first place. Whether the right balance is struck by the present legislation is, however, certainly food for thought.

City Link's Administrators' proposals explain that its administrators believe all outstanding overtime and commission owed to employees has been, or will be, paid in full, with the exception of an estimated 29 employees whose claims exceed the limit for preferential treatment. However, according to the proposals, City Link's unsecured creditors will receive no payment, save for the prescribed part (likely to be £600,000) to be shared between all unsecured creditors.

This is, perhaps, particularly important in circumstances where changes to working practices have seen increasing self-employment such that the current legislation regarding preferential creditors no longer covers all those who work for, and rely on a single company for their income; changing working practices mean that works seem to no longer be sufficiently protected. Indeed, City Link's contractors (and sub-contractors) were hit particularly hard by its demise, particularly in circumstances where many felt they had been encouraged to take on additional staff and vehicles and work longer hours in the lead up to Christmas. They are unsecured creditors and, as such, unlikely to receive the majority of the money owed to them. Some of City Link's contractors were therefore left in serious financial difficulties themselves.

As times change it is imperative to monitor whether legislation continues to be fit for purpose

There are a number of aspects to the report's recommendations in this regard. The review initiated by the Secretary of State for Business, Innovation and Skills into the problem of bogus self-employment is welcomed.

Further, the report notes that the current order of priority of payments in insolvency just does not reflect modern employment practice and questions whether the current regime "*where those who have given secure credit to a company are cushioned from the full impact of an insolvency because of the losses borne by those who work for a company on a self-employed basis, or as contractors or suppliers represents the appropriate balance*." It is recommended that the government revises the order of priority in order to give preference to all workers, whether or not they are directly employed. There seems to be much to commend in this approach, though questions as to where to draw the line will need to be investigated.

One other point worth noting on the issue of whether the current legislation provides adequate protection for workers is that the aforementioned limit of £800 on claims for wage arrears being treated preferentially (which is set by the Insolvency Proceedings (Monetary Limits) Order 1986) was originally set out schedule 1 to the Insolvency Act 1976 and not been adjusted since, notwithstanding that other monetary limits applicable to insolvency proceedings were amended in 1986 and some have been further adjusted since (for example, the minimum bankruptcy petition debt was £50 in 1869, £200 in 1976 and now £750). This issue might also be revisited.

Perhaps then the real lesson to be learned from the City Link case is that as times change it is imperative to monitor whether legislation continues to be fit for purpose, achieving what it is supposed to achieve. Consideration of the City Link case provides plenty of food for thought and does suggest that improvements could be made to current practices and the overarching legislative framework in order to ensure that workers are afforded the appropriate level of protection. That said, there will, of course, always be those who lose out when a company is insolvent and goes into administration and, that being the case, any change to the order in which a company's creditors are paid will need to be considered very carefully, bearing in mind the need to balance the interests of all stakeholders (including taxpayers), as well as the need to ensure credit and investors for the future.

Case Digests

The "*Waterfall Application*", an epithet chosen for the case concerning the order of priority of payments out of the assets of Lehman Brothers International (Europe), has now been decided by the Court of Appeal. The problem in this case is not one that is commonly encountered in insolvency proceedings: what to do with the surplus that remains after all the provable debts have been paid? The order of priority was summarised by Lord Neuberger in *Re Nortel GmbH* and, by reference to this ranking, there were four issues decided by the Court of Appeal: first, the ranking of the subordinated debt; the existence and nature of currency conversion claims, which arise as a consequence of exchange rate movements between the date of conversion (the date of the administration) and the date of payment in sterling; the right to statutory interest of a creditor who has proved in the administration where the interest has not been paid before the commencement of a subsequent liquidation; and, a number of issues relating to proving in the contributory's insolvency proceedings. This case is summarised at page 33 and a detailed analysis appears from page 12.

Unsurprisingly, the Supreme Court dismissed the appeal in the *Jetivia* case (p32) that the claim against two former directors should be struck out on the grounds of the illegality defence because their unlawful conduct should be attributed to the company in liquidation in accordance with *Stone & Rolls*. The Supreme Court held that whether a director's conduct or state of mind is attributed to the company depends on the context. Where a company is seeking damages against directors for perpetrating a fraud against a third party that also caused loss to the company it was inappropriate to attribute the fraud to the company. *Stone & Rolls* was different; the claim in that case was against a third party, the auditor. The Supreme Court also held that section 213 of the Insolvency Act, fraudulent trading, has extra-territorial effect.

The Court of Appeal has also considered the position where a company in insolvency proceedings applies for a freezing injunction and the circumstances in which the court will accept a limited cross-undertaking in damages. In the *Pugachev* case (page 31) the court considered whether the Judge was wrong to require a cross-undertaking in an unlimited amount as the price of a liquidator (a Russian state entity acting as a liquidator) obtaining a freezing injunction. The CA upheld the decision of Rose J who refused to accept a limited cross-undertaking. The main reason for Rose J's decision was the fact that there was evidence that there were major creditors and the only evidence as to why they would not support the cross-undertaking was a "*rather vague statement*" that "*The DIA understands that major creditors are not willing to expose themselves to further potential losses.*" There was no evidence that the liquidator had tried to obtain insurance to support a cross-undertaking, or had sought an indemnity from the creditors for an unlimited undertaking or that they were in danger of putting their personal assets at risk (as in *DPR Futures*). Lord Justice Lewison (with whom the other Lord Justices agreed) did say that he did not wish to cast doubt on the many cases in which judges have been prepared to accept limited cross-undertakings from liquidators and other office holders and that he was not saying he would necessarily have exercised an original discretion in the same way as the Judge.

For further case law on schemes of arrangement see *Re Welcome Financial Services Ltd* (page 30) and *Re DTEK Finance BV* (page 30)

HILARY STONEFROST

Hilary Stonefrost

BANKING AND FINANCE

Digested by TOBY BROWN


TOBY BROWN


TOM SMITH QC

Tael One Partners Ltd v Morgan Stanley & Co International plc [2015] UKSC 12 (Supreme Court, 11 March 2015)

Interpretation - Loan Market Association standard terms

Unusually this appeal before the Supreme Court involved no dispute as to the legal principles. It concerned solely a question of contractual interpretation of Loan Market Association standard terms and conditions for par trade transactions ("LMA terms"), which are commonly used in the secondary loan market. The claimant T participated in advancing $32m of a $100m loan to the borrower under a facility agreement which provided for both payment of interest and for a premium payment to be paid upon prepayment or repayment of the loan. T transferred $11m of its participation to the defendant MS, documented by a transfer certificate, an LMA trade confirmation which incorporated the LMA terms, and a purchase price letter. The latter provided that the purchase price was $11m plus accrued interest to date, but made no provision for any payment to be made by MS in respect of the payment premium. MS later sold its participation to S. In due course the borrower prepaid the loan in full and paid the payment premium to all lenders, including T (which was still a participant) and to S, but not MS. Condition 11.9(a) of the LMA terms prescribed how interest and fees would be allocated between the seller and buyer of a loan. It provided that "any interest or fees (other than [payment in kind] interest)…which are expressed to accrue by reference to lapse of time…shall, to the extent they accrue in respect of the period before (and not including) the settlement date, be for the account of the seller". T claimed that MS was required by the LMA terms to pay it the payment premium in respect of the $11m participation, so far as it accrued at the date of transfer. Popplewell J granted T summary judgment but was overturned by the Court of Appeal. Lord Reed gave the Supreme Court's judgment. The starting point for interpreting condition 11.9(a) was the words used by the parties. Although there was room for argument whether the payment premium would naturally be described as "interest or fees" or would fall within the definition of "payment in kind", it was clear that it is not "expressed to accrue by reference to lapse of time". The word "accrue" is generally used to describe the coming into being of a right or an obligation. An entitlement to a payment premium under the facility agreement accrues on a defined event. The purpose of the payment premium was to reward a lender for use of their money over a period of time. Interest and time entered into the calculation, and it might be said that part of the payment premium relates to the period before the settlement date. This did not mean, however, that the payment premium can be regarded retrospectively as having notionally accrued over the period. This conclusion was reinforced by the commercial context, namely that the LMA terms are intended for use in a market where the loan is traded. Indeed, a loan may be traded many times to different parties. One would not readily infer that a contract of sale of a loan in such a market was intended to create continuing rights and obligations in respect of payment which might exist over a substantial period of time. The LMA terms contain no mechanism enabling the seller to know that their putative right to the payment premium has vested or in what amount. Accordingly, if a lender sold his participation, unless as here he retained some partial participation, he would not know when he had become entitled to payment of the payment premium from the buyer, nor the amount. The Court of Appeal's decision was therefore upheld and T was not entitled to payment from MS of any payment premium. **[Tom Smith QC]**

Financial Conduct Authority v Capital Alternatives Ltd [2015] EWCA Civ 284 (Court of Appeal, 25 March 2015)

Financial regulation – collective investment schemes

The appellants appealed against the Judge's decision that four schemes constituted collective investment schemes ("CIS") under s. 235 Financial Services Markets Act 2000 ("FSMA"). The establishment, operation and winding-up of CISs are regulated activities under FSMA and cannot lawfully be carried out by unauthorised persons. To constitute a CIS under s. 235 the arrangement must not involve the participants

having day-to-day control over the management of the property. Secondly their contributions and profits/income must be pooled and/or the property must be managed as a whole by the operator.

The first scheme involved exploitation of a rice farm in Sierra Leone and had attracted £8.1m from over 1,160 investors. The Court of Appeal upheld the Judge's decision that the "property is managed as a whole" under s. 235. Those words are ordinary language and so no gloss was needed - it was not appropriate to attach a test based on whether the elements of individual management were "substantial". The critical question was whether a characteristic feature of the arrangements was that property was managed a whole, and this required an overall assessment and evaluation of the relevant facts. The "arrangements" were therefore central to the understanding of a CIS. For this purpose it was necessary to identify (i) what is "the property" and (ii) what is the management thereof which is directed towards achieving the contemplated income/profit. It is not necessary that there should be no individual management activity, only that the nature of the scheme is "in essence" that the property is managed as a whole. Applying that test, it was plain that the property, i.e. the farm, was managed as a whole. In truth, the management activity here involved in separating the individual farm plots was not designed to generate profits but to try to ensure the scheme was not a CIS. The case law illustrated that in construing "managed as a whole" the court must focus on the investment objectives of the arrangements.

The three other schemes concerned carbon credits related to forest areas in Australia, Sierra Leone and the Amazon and had attracted £8.8m from nearly 919 investors. As to the Australian scheme, the Court of Appeal upheld the Judge's ruling that there had been no pooling of income but that collective management was present. As to the first issue, in order to determine the nature of the scheme it was necessary to understand the way in which the scheme was intended to (or in time did) operate in practice, since here the contractual documentation and brochure did not specify the method of attribution of income or profit. The Judge's decision that the properties of the Sierra Leone and Brazil schemes had been managed as whole was also affirmed. Accordingly each of the 4 schemes was properly to be regarded as a CIS.

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


HENRY PHILLIPS


ALEXANDER RIDDIFORD

Avonwick Holdings Ltd v Webinvest Ltd [2014] EWCA Civ 1436 (Court of Appeal, 17 October 2014)

Without prejudice communications – subject to contract - disclosure

The underlying dispute was a claim for money alleged to be due under a loan agreement and a guarantee. The subject matter of the appeals was an order holding that certain correspondence marked "Without prejudice" was admissible in evidence and another order relating to disclosure of documents leading up to the settlement of arbitration proceedings. Lewison LJ, giving the Court of Appeal's judgment, set out the principles derived from the authorities on the without prejudice rule, and concluded that there are two bases for the operation of the without prejudice rule; public policy and contract. The policy is to encourage people to settle disputes. In order for public policy to be engaged there must be a dispute. The concept of dispute is given a wide scope so that an opening shot of negotiations may fall within the policy even though the other party has not rejected the offer. In order to decide whether this head of public policy is engaged, the Court must determine on an objective basis whether there was in fact a dispute or issue to be resolved. If there was not then this head of public policy is not engaged. In addition, if parties agree, for valuable consideration, that their communications will not be used in civil proceedings in court, as a matter of principle, the court will uphold that agreement. In this case the Court of Appeal upheld the decision of the Court below that there was no dispute at the time of the relevant communications and that they were admissible in evidence. There was no contract in this case to the effect that communications would not be used in civil proceedings in court.

[Tom Smith QC; Henry Phillips]

Kazakhstan Kagazy PLC v Baglan Abdullayevich Zhunus [2015] EWHC 404 (Comm) (Leggatt J, 20 February 2015)

Costs – payments on account – interim applications

Leggatt J had to consider an application for payment on account of costs in the context of a large fraud claim. There had been an unsuccessful application to amend the particulars of claim and the claimants had been ordered to pay the defendants' costs of the application. A worldwide freezing order had been granted over the defendants' assets and the claimants had been ordered to pay the costs of the fifth defendant's application to vary the freezing injunction.
The Judge ordered payment on account of the costs and the parties consented to the Court dealing with that interim payment issue on paper, in the event that agreement could not be reached. The defendants provided statements of their costs amounting to around £945,000. The claimants did not attempt to agree interim payments but instead applied for an order referring the costs for detailed assessment. The Judge decided that the request for a hearing was contrary to the terms of the agreed order (which provided for the matter to be dealt with on paper) and that it was also a disproportionate and wasteful request. The Judge considered that, notwithstanding that a party to fraud proceedings might consider it reasonable to spare no expense that might help him win, the test for the Court for determining costs recoverable from the other side was what, on an objective basis, was the lowest amount which a party could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.

Avanesov v Shymkentpivo [2015] EWHC 394 (Comm) (Popplewell J, 25 February 2015)

Default judgments – delay – non-compliance

The defendant applied to set aside a default judgment (July 2013) and a subsequent judgment (April 2014) on assessment of damages that had been obtained against it. On this application the defendant now advanced a defence that it had been entitled to rescind the share purchase agreements which were the subject of the dispute. The issues for the Court were: (1) whether the defendant had made out a realistic defence; and (2) whether, in all the circumstances, the Court's discretion should be exercised to set aside the judgments. Popplewell J held that the defendant's defence was realistic. However, for the purpose of CPR r.13.3(2), promptness was not to be measured solely by reference to the length of delay but also by considering the reasons for any delay (applying *Denton v TH White Ltd* [2014] 1 WLR 3926). The Judge concluded that the delay in this case was the result of a conscious decision by the defendant to ignore the proceedings and default judgment until faced with the threat of enforcement, despite being aware of the 21-day period within which a default judgment is to be challenged. The delay of eight months and six weeks in respect of the two judgments respectively was lengthy, serious and highly culpable. The application was refused.

Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm), (Carr J, 26 March 2015)

Amendments – delay

The claimant applied two weeks before the trial date for permission to amend her claim, amounting to a substantial re-pleading of her case. The defendant applied for the claim to be struck out and for summary judgment on the counterclaim.
The claimant stated that the lateness of her application was caused by the strain she was under from other proceedings, such that she was not in a fit state of mind to monitor the progress of the claim and had suffered from a lack of funding.
Carr J struck the claim out and granted summary judgment on the counterclaim. In relation to very late applications to amend, a heavy burden lay upon the party seeking the amendment to show the strength of the new case and why it was in the interests of justice that he should be permitted to pursue it. It was no longer sufficient for the amending party to argue that no prejudice had been suffered by the delay, save as to costs.

COMMERCIAL LITIGATION & ARBITRATION

Digested by CHARLOTTE COOKE


MARK PHILLIPS QC

Edgeworth Capital (Luxembourg) Sarl v Rambals Investments BV [2015] EWHC 150 (Comm) (Hamblen J, 30 January 2015)

Contract – Fees – Penalties

To purchase a property, the Defendant borrower had entered into a senior loan agreement for €1.5 billion, a junior loan agreement for €200 million and a personal loan agreement for €75 million. Further, the Defendant entered an "upside fee agreement" ("UFA"), the amount of the fee depending on the payment event. A subsequent failure by the personal borrowers to make payments under the personal loan triggered cross-default provisions in the junior loan. The Claimants argued that on the outstanding principal amount of the junior loan becoming due and payable as a result of the event of default under the personal loan, a payment event had occurred, within the meaning of the UFA and the fee provisions did not amount to a penalty. The judge held that the Claimants' construction of the UFA was not uncommercial. Though the fees payable under the agreement were sizeable, the agreement had been entered into when the borrower needed finance to complete the property purchase. A clause would be a penalty where it was extravagant and unconscionable with a predominant function of deterrence; it would not be a penalty if it was a genuine pre-estimate of loss, but even if it were not a genuine pre-estimate of loss it would not be a penalty where it was commercially justifiable and it could be shown that its predominant function was not deterrence (*Makdessi v Cavendish* [2013] EWCA Civ 1539 applied) EWCA Civ 1539 applied). The rule against penalties was inapplicable. Under the agreement, the fee was payable at some point and the effect of the triggering event was only to advance the time for payment; it did not increase the borrower's overall obligation. Further, if the borrower had performed the junior loan according to its terms and repaid the loan after five years, the fee would have then become due and there could have been no suggestion that it was a penalty. It would be perverse if the borrower was somehow placed in a more advantageous position by breaching rather than performing the junior loan.

[Mark Phillips QC; William Willson]

Decura IM Investments LLP and others v UBS AG, London Branch [2015] EWHC 171 (Burton J, 30 January 2015)

Contract – Interpretation – Material

The Claimants and the Defendant entered into an agreement in May 2012 whereby the Defendant agreed to purchase "Exclusive Business Services" needed for its investment bank business (UBS IB) from the Claimants. The agreement provided that an "additional termination event" would occur if the Defendant ceased to carry on a material part of its investment banking business and such cessation had a material effect on its ability to market the "Exclusive Business Services". The Claimant sought a declaration that, following changes made to the Defendant's investment banking business, that it was entitled to terminate the agreement. The Court considered the meaning of the word "material" in the relevant clause, concluding that, on a proper interpretation, "material" meant "significant" or "substantial". However, on the evidence, the Defendant had not ceased to carry on a material part of its investment banking business. Although the Defendant's strategy involved significant changes to and the shrinking of its investment banking business, that did not amount to a cessation of a part of the business. The court therefore did not need to consider the question of materiality.

Spar Shipping AS v Grand China Logistics Holding (Group) Ltd [2015] EWHC 718 (Popplewell J, 18 March 2015)

Shipping – Charterparty – Condition

The claimant was the registered owner of three vessels. By three charterparties the vessels were let on a long term charter to GCS, with guarantees given by GCL (GCS' parent company). From April 2011 GCS was in arrears. The claimant withdrew the vessels and terminated the charterparties.

The claimant brought proceedings against GCL seeking the balance of hire and damages. GCL contended that the employee who had signed the guarantees did not have authority to do so and that it was therefore not liable. The Court held that the employee had been authorised to sign the guarantees (which was a matter of Chinese law) and GCL was therefore bound by the guarantees. It was further held that payment of hire by GCS in accordance with the charters was not a condition, but GCS had renounced the charterparties at the date of the termination notices, which were to be treated as an election to terminate the charters preserving the claimant's common law right to damages for loss of bargain, such damages to be quantified.

PCL and others v The Y Regional Government of X [2015] EWHC 68 (Comm) (Hamblen J, 18 March 2015)

State immunity – Arbitration

The defendant, a regional government, applied to set aside two without notice orders, one permitting the claimant to serve an arbitration claim form on the defendant's UK solicitors and the other abridging time for the filing an acknowledgment of service. The defendant filed an acknowledgment of service, indicating that it intended to dispute jurisdiction. The issues for the Court were: (i) whether section 12(1) of the State Immunity Act 1978 (which provides that documents instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State) did not apply as the claimants were not "instituting proceedings"; (ii) whether the defendant had agreed to service on its solicitors; (iii) whether the defendant had waived its right to rely on section 12(1) by acknowledging service; and (iv) whether the without notice orders should be set aside on the ground that the claimant had failed to give full and frank disclosure. Setting aside the orders, the Court held: (i) that the claimant's application had involved "instituting proceedings" under section 12(1); (ii) that there had been no operative agreement as to the manner of service and, even if there had been such an agreement, it no longer applied; (iii) the defendant had not waived its right to object that section 12(1) had not been complied with as a state only "appeared" in proceedings when it filed an acknowledgement of service and did not issue an application to dispute jurisdiction in the specified period; and (iv) the claimants had been in breach of duty when they failed to refer to the potential applicability of the 1978 Act.

Reveille Independent LLC v Anotech International UK Ltd [2015] EWHC 726 (Comm) (Judge Mackie QC, 20 March 2015)

Contract – Acceptance – Conduct

In March 2011, the claimant, a US television company, sought to enter into an agreement with the defendant, a British cookware distributor, whereby the claimant would licence US intellectual property rights to the defendant for a five year period and permit the promotion of the defendant's products on a number of episodes of a television show. An issue had arisen in the course of negotiations as to a possible conflict in view of the words "the Master Chef" being used on a website relating to Gordon Ramsey (who was associated with the show). A note on a deal memorandum ("the Memo") stated that this conflict was yet to be resolved. The claimant brought proceedings, alleging that the defendant was in breach of contract. The defendant submitted that there was no binding contract as the Memo had not (as the claimant alleged) been signed by its representative and there had been no acceptance by conduct. The defendant further averred that, even if there was a contract, it was subject to a condition precedent that had not been fulfilled. The claim succeeded. Although the claimant had not shown that the defendant's representative signed the memo, the work envisaged by the memo had been carried out and the claimant had communicated its acceptance by conduct. The Court did not consider that the conflict issue was a condition precedent.

COMPANY LAW

Digested by ANDREW SHAW


ANDREW SHAW

Sebry v Companies House [2015] EWHC 115 (QB) (Edis J, 26 January 2015)

Negligence – Duty of care

The Registrar of Companies registered a winding up order made in respect of "Taylor and Son Ltd" against a different company called "Taylor and Sons Ltd" ("the Company"). This mistake arose in part from the fact that the winding up order did not contain the registered company number of Taylor and Son Ltd. This should have caused it to be rejected by the Registrar. On discovering this error, the Company's solicitor informed Companies House and the online register was corrected immediately. The information had already been disseminated though, and the consequences were disastrous for the Company, which rapidly lost business and subsequently entered administration. The administrators assigned a claim for negligence and breach of statutory duty against Companies House and the Registrar of Companies to the former managing director of the Company. Following the commencement of proceedings, the court directed that three matters be tried as preliminary issues: (i) whether the defendants owed a duty of care to the Company; (ii) whether the defendants had breached any such duty; and (iii) whether any such breach of duty had caused the Company to enter administration. It was subsequently conceded that if the defendants did owe a duty to the Company, then it had been breached. On the facts, Edis J held that the error of the Registrar of Companies had caused the Company to go into administration. Edis J was not satisfied that there was any cause of action for breach of statutory duty against the defendants. The Companies Act 2006 regulates the keeping of the register of companies and imposes certain duties on the Registrar of Companies for that purpose. As the register can be accessed over the internet, it is available to the whole world. If anyone with access to the register were able to claim for any economic loss suffered by any act or omission of the Registrar of Companies that amounted to breach of statutory duty, it would impose a very wide duty on the Registrar; there was nothing to suggest that this was Parliament's intention. In recording the making of a winding up order against a company on the register though, the Registrar of Companies assumes a responsibility to that company alone to take reasonable care to ensure that the winding up order is correctly registered. The necessary special relationship between a company and the Registrar arises from the foreseeable harm that a company will suffer if it is wrongly recorded as being in liquidation. Thus the duty does not arise in every case when the Registrar of Companies alters the status of a company in the register but only when the register is altered in a way that will probably cause serious harm to the company if it is done carelessly. The common law duty of care to a company does not extend to checking information provided by third parties, but simply to ensuring that information supplied is entered on the register accurately.

Integral Petroleum SA v SCU-Finanz AG [2015] EWCA Civ 144 (Jackson LJ, Kitchin LJ, Floyd LJ, 26 February 2015)

Conflict of laws – Formal validity – Corporate capacity

The claimant and defendant were both Swiss companies, the business of which was trading in oil. They had entered into a contract with each other by which the defendant agreed to sell, and the claimant agreed to buy, various fuels. This supply contract was expressly stated to be governed by English law.
Subsequently, the claimant brought a claim for breach of the supply contract against the defendant and default judgment was entered in favour of the claimant for an amount of USD 1,078,547.
At the material time, the two officers of the defendant were an Albert Bass and a Marine Vartanyan. Their names were recorded on the Swiss register of companies as "prokurists". Their power of signature was joint, but only Ms Vartanyan had signed the supply contract with the claimant. This was relevant to the first defence advanced by the defendant, namely that the contract was not binding upon it, because it had only one of the two authorised signatures required by Swiss law. In setting aside the default judgment, Popplewell J held that Swiss law was the applicable law to this question and that on the evidence before him the defendant was bound to succeed on this issue. Default judgment was therefore set aside. The claimant

appealed against this decision. On appeal, the claimant argued that the issue to be determined should be characterised as the effect of the absence of a second signature. This was an issue of the formal validity of the supply contract and therefore engaged Article 11 of the Rome I Regulations. Accordingly, the issue fell to be determined under English law, because this was the substantive law of the contract.

The claimant also argued that under s44 of the Companies Act 2006, as modified by the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, assisted them because under s44(3) the claimant was a purchaser and the document purported to be signed in accordance with s44(2) by a person acting under the authority of the Company. The defendant's position was that the issue to be decided was whether the acts of a single prokurist could be attributed to it. It argued that the attribution of the acts of a person to a company are governed by its constitution, relying on the judgment of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. The question was therefore whether Ms Vartanyan's act in signing the supply contract counted as an act of the defendant. This was not a matter of the formal validity of the contract. It was therefore to be decided not by reference to the Rome I Regulation but to the common law rules set out in *Dicey, Morris & Collins*: The Conflict of Laws ("Dicey"). These provide that the laws of a company's place of incorporation govern all matters concerning its constitution. The Court of Appeal agreed that the correct characterisation of the defendant's first defence was the question of the authority of a single prokurist to bind a company. This was a matter to be determined by the company's constitution and was therefore outside the scope of the Rome I Regulation. It fell instead to be determined by reference to the common law rules set out in Dicey. Consequently, the applicable law was Swiss law. Under Swiss law, a single prokurist did not have the authority to bind the Company. Further, s44 of the Companies Act, as amended, provided no assistance to the claimant because to determine whether a document purported to be signed in accordance with the requirements of Swiss law, it was necessary to understand those requirements. As Swiss law required the signature of two prokurists, it could not be said that the document purported to meet this requirement. The appeal was therefore dismissed.

Allfiled UK Limited v Eltis, Saunders & Ors [2015] EWHC 1300 (Ch) ChD, (Hildyard J, 7 May 2015)


WILLIAM WILLSON

Interlocutory Injunctions – Intellectual Property/Confidential Information – Restrictive Covenants

The applicant software development company ("A") applied for wide-ranging injunctive relief against three of its former directors and thirteen former employees ("the Rs") preventing them from using, disclosing or disseminating A's intellectual property/confidential information ("IP/CI") and carrying on trade in breach of various non-compete/non-solicitation clauses until trial. A sought damages for breach of fiduciary duty and contractual covenant, damages for tortious interference and for unlawful means conspiracy. The Rs had resigned en masse from A and started working for a newly incorporated company ("Port Tech") which they contended was developing/innovating a different technology to A. Further, A's largest client, Magpie, had terminated its agreement with A and entered a similar agreement with Port Tech. The Rs contended that an injunction in the form sought would put Port Tech out of business/into liquidation. The judge applied the *American Cynamid* principles (rejecting the submission that, per Cayne v Global Natural Resources [1984] 1 All ER 225, this was a case where a higher threshold should be applied). There was a serious issue to be tried in relation to the claims for violation of IP/CI, breach of fiduciary duty (*Foster Bryant Surveying Ltd v Bryant* [2007] BCC 804), tortious interference and breach of restrictive covenant, damages was an inadequate remedy (particularly because of the quasi-proprietary nature of the IP/CI claims) and the balance of convenience favoured the continuation of some kind of injunctive relief until an expedited trial, albeit in a more limited form. Port Tech would be allowed to continue using its own IP/CI as defined but could not enter into any contract/arrangement for the supply of Personal Data Storage technology with anyone without prior notice to A. These and other provisos would effectively attenuate the threat of Port Tech's insolvency before trial.

[William Willson]

Re Welcome Financial Services Ltd [2015] EWHC 815 (Ch) (Rose J, 27 March 2015)


DAVID ALLISON QC

Scheme of arrangement – bar date – definition of "scheme creditor" – definition of "scheme liability"

In March 2011, the company (W) became subject to a scheme of arrangement under Part 26 of the Companies Act 2006. W carried on business as a lender to (*inter alios*) individuals with poor credit ratings. If a scheme creditor failed to submit a claim form to the scheme supervisors prior to the specified bar date, the creditor lost the right to receive a defined share of the scheme consideration. After the bar date, a number of W's former customers asserted claims against W, which the judge divided into five categories: (i) claims under the Consumer Credit Act 1974, including claims founded on the alleged mis-selling of PPI (the CCA claims), (ii) claims founded on the alleged mis-selling of general insurance other than PPI, (iii) claims to recover overpayments to W, (iv) claims by holders of uncashed cheques issued by W, and (v) claims for the refund of default charges and administration charges, which were alleged to be unlawful. In order to determine whether the customers' claims were barred, the scheme supervisors applied for directions in relation to three questions. First, did the customers constitute "*creditors*" within section 895 of the Companies Act 2006? Second, did the customers' claims arise out of obligations incurred by W prior to March 2011, so as to constitute "*scheme liabilities*" which incorporated the contingent creditor definition found in rule 13.12(1) IR 1986? Third, were any of the customers' claims "*excluded liabilities*" under the terms of the scheme? The detailed answer to each question (in relation to each category of claims) can be found in the judgment, and is not repeated herein. The Judge's two most significant findings are as follows. (i) Applying the decision of the Court of Appeal in *Re LBIE* [2009] EWCA Civ 1161, the judge held that customers asserting the CCA claims did not act in their capacity as creditors (and, therefore, were not bound by the scheme) if they were not asserting a claim for financial relief against W. The mere fact that a customer had a claim against W did not entail that the customer asserted that claim in his capacity as a creditor. (ii) Many CCA claims accrued by reason of matters occurring after the bar date. In order to determine whether such claims arose out of an "*obligation incurred*" prior to March 2011, the judge applied Lord Neuberger's three-fold test in *Bloom v Pensions Regulator* [2013] UKSC 52. The judge held that entering into a credit agreement created a legal relationship between W and the relevant customer; that the relationship resulted in W being vulnerable to CCA claims; and that it was consistent with the regime of the Consumer Credit Act 1974 for the court to reach this conclusion. Accordingly, the CCA claims constituted scheme liabilities even where all the matters relied upon by the customer in support of the claim occurred after the Bar Date.

[David Allison QC]

Re DTEK Finance BV [2015] EWHC 1164 (Ch) (Rose J, 27 April 2015)


CHARLOTTE COOKE

Scheme of arrangement – Jurisdiction – Governing law – COMI

DTEK Finance BV ("DTEK"), a company incorporated in the Netherlands and part of a group which carries on an energy business primarily in Ukraine, sought an order sanctioning a scheme of arrangement with holders of US$300 million worth of notes due to mature on 28 April 2015 ("the Notes"). Rose J was satisfied the governing law of the Notes had been changed from New York law to English law and this created a sufficient connection to confer on the court jurisdiction to sanction the scheme. She also accepted that a sufficient connection was provided by: (i) guarantees given by group companies being governed by English law; (ii) DTEK having moved its centre of main interests to England; and (iii) DTEK having substantial assets in the jurisdiction. The court was also satisfied the scheme would have substantial effect. The fact noteholders were offered a payment as an incentive for giving an early indication they supported the scheme did not create a class issue. A single meeting of creditors, as ordered by Nugee J at the convening hearing, had therefore been appropriate. The court was satisfied that the statutory requirements as to voting had been fulfilled. Noting that the scheme had been opposed by Alden (a hedgefund who claimed to hold the beneficial interest in a number of the Notes), but that its opposition had been withdrawn the day before the hearing, Rose J considered it appropriate to exercise her discretion to sanction the scheme.

[Tom Smith QC; Charlotte Cooke]

CORPORATE INSOLVENCY

Digested by RYAN PERKINS


RYAN PERKINS

JSC Mezhdunarodiy Promyshlenniy Bank & Anor v Pugachev [2015] EWCA Civ 139 (Arden, Lewison and Clarke LJJ, 27 February 2015)

Liquidator – Freezing Order – Cross-Undertaking in Damages

The second appellant (the DIA) was a Russian state entity, acting as the liquidator of the first appellant (the Bank). The DIA obtained a freezing injunction against the respondent (P). At first instance, Rose J required the DIA to give an unlimited cross-undertaking in damages. The DIA appealed, contending that a liquidator should not be required to give an unlimited cross-undertaking, having regard to the limited financial resources of the insolvent estate. The Court of Appeal dismissed the DIA's appeal (on this point), holding that: (i) the default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages; (ii) the mere fact that the applicant is a liquidator does not compel the conclusion that the cross-undertaking must be capped: rather, the quantum of the cross-undertaking is within the discretion of the court; (iii) where the applicant is a liquidator, the court is entitled to consider, *inter alia*, whether the liquidator has made any efforts to persuade substantial creditors to indemnify the liquidator in respect of the cross-undertaking, whether the liquidator has made any efforts to obtain insurance in respect of the cross-undertaking, and whether the liquidator is backed by the state; and (iv) although it would, in many cases, be appropriate to accept a limited cross-undertaking from a liquidator, Rose J was entitled to reject such an undertaking in the present case.

Pui-Kwan v Kam-Ho & Ors [2015] EWHC 621 (Ch) (Sir Terence Etherton, 10 March 2015)

Administration – irregular appointment by directors – date of conversion into CVL

The articles of association of the second respondent (M) required two directors (C and H) to be present in order for a directors' meeting to be quorate. A directors' meeting purportedly resolved to appoint the applicant (P) as the administrator of M, pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986. However, the court found that H was not present at the directors' meeting. In consequence, the meeting was inquorate and the appointment of P was *prima facie* invalid. P relied on rule 7.55 of the Insolvency Rules 1986, which provides that "*no insolvency proceedings shall be invalidated by any formal defect or by any irregularity …*" The court rejected P's argument, holding that: (i) rule 7.55 only applies where insolvency proceedings have actually commenced; (ii) in the present case, there were no insolvency proceedings unless the directors validly resolved to appoint P under paragraph 22 of Schedule B1; and (iii) there was no such resolution (having regard to H's absence from the meeting), so that rule 7.55 had no application. On a different point, the court held that paragraph 83(6) of Schedule B1, which provides for the conversion of an administration into a creditors' voluntary winding-up, takes effect at the date when the notice of conversion is sent by the administrator to the registrar of companies, rather than the date when the notice is received by the registrar of companies.

Re Kombinat Aluminjuma Podgorica AD [2015] EWHC 750 (Ch) (Mr Registrar Jones, 16 March 2015)

Recognition of foreign proceedings – lifting the stay under the CBIR – declarations

The company (K) entered into insolvency proceedings in Montenegro, which were recognised as foreign main proceedings pursuant to the Cross-Border Insolvency Regulations 2006 (the CBIR), resulting in the stay of an arbitration between K and a bank (VTB). VTB applied for the stay to be lifted under Article 20(6) of the CBIR, to enable it to pursue claims for certain declarations in the arbitration. The court declined to lift the stay, holding that VTB had failed to demonstrate that the arbitration would be likely to benefit VTB or other creditors. The mere fact that VTB sought to achieve legal clarity as to its position, by seeking a declaration of its rights and obligations in relation to K, was not an automatic justification for lifting the stay. However, if K itself had continued to pursue a counterclaim against VTB in the arbitration, the court would have lifted the stay in VTB's favour as a matter of basic fairness.

Jetivia SA & Anor v Bilta (UK) Ltd & Ors [2015] UKSC 23 (Lords Neuberger, Mance, Clarke, Sumption, Carnwath, Toulson and Hodge, 22 April 2015)

Illegality – ex turpi causa – attribution – Section 213

The first respondent (B) was wound up in 2009, pursuant to a petition presented by HMRC. B's liquidators brought proceedings against two former directors (who were not parties to the present appeal) and against the appellants. The liquidators alleged that the directors and the appellants conspired to perpetrate a VAT carousel fraud. B (acting through its liquidators) sought damages from the directors and the appellants for (*inter alia*) unlawful means conspiracy. The liquidators also made a direct claim against the directors and the appellants for a contribution under section 213 of the Insolvency Act 1986. The appellants argued that B's claim should be struck out under the principle *ex turpi causa non oritur actio* (also known as the defence of illegality), because the directors' unlawful conduct should be attributed to B in accordance with *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39. The appellants also argued that the liquidators' direct claim under section 213 should be struck out on the basis that section 213 does not have extra-territorial effect. The Supreme Court unanimously dismissed the appeal on both points and distinguished *Stone & Rolls*, holding that: (i) section 213 does have extra-territorial effect, in accordance with well-known principles in *Re Paramount Airways* [1993] Ch 223, and any contrary conclusion would seriously handicap the efficient winding-up of a company in an increasingly globalised economy; (ii) whether the directors' conduct or states of mind should be attributed to the company depends on the context in which the question arises; and (iii) in the present case, where B sought damages against the directors and the appellants for perpetrating a fraud against a third party (HMRC) which also caused loss to B itself, it would be inappropriate to attribute to B the very fraud to which B's claim related, even if the fraud could properly be attributed to B in other contexts (such as a claim against an auditor). By a majority, the Supreme Court declined to address the general principles of the illegality defence.

The Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2015] UKSC 27 Supreme Court (Lords Neuberger, Mance, Sumption, Reed and Toulson, 29 April 2015)


GABRIEL MOSS QC


MARCUS HAYWOOD

EC Insolvency Regulation - Establishments

The Supreme Court has ruled on the meaning of the term "establishment" in the EC Regulation on Insolvency Proceedings. In so doing the Supreme Court has held that the English court could only entertain secondary insolvency proceedings in respect of a company which had its centre of main interests in another Member State if the company was conducting business activities in the UK which extended to dealing with third parties and did not merely consist of acts of internal administration.

Olympic Airlines SA ("the Company") was the Greek national airline. It was placed into special liquidation in accordance with a decision of the Athens Court of Appeal ("the Greek Liquidation Proceedings"). The Greek Liquidation Proceedings were main proceedings for the purposes of the EC Insolvency Regulation. Accordingly, the only insolvency proceedings that could be opened in this jurisdiction were secondary proceedings. Under Article 3(2) of the EC Insolvency Regulation such proceedings could only be opened if the Company possessed an "establishment" in the jurisdiction. An "establishment" is defined by art.2(h) of the EC Insolvency Regulation as a "place of operations" where the debtor carried out "non-transitory economic activity with human means and goods."

The Appellants were the trustees of the Company's pension scheme. They appealed against a decision of the Court of Appeal that the English court had no jurisdiction to entertain secondary insolvency proceedings against the Company.

The Company had ceased flight operations in September 2009. In July 2010, it dismissed all but three of its UK staff members, whom it retained in its remaining UK office on short-term contracts, principally to deal with communications from the liquidator and supervise the disposal of its UK assets. On 20 July 2010, the trustees petitioned the English court to wind up the Company so that the pension scheme could enter the Pension Protection Fund.

At first instance the Chancellor made a winding-up order on the basis that the Company's UK activities were

sufficient to qualify as economic activity. The Court of Appeal overturned that decision, finding that economic activity had to consist of more than activity relating to the winding up of a company's affairs. The Supreme Court dismissed the appeal. It held that the definition of "establishment" in art.2(h) had to be read as a whole. It was not to be broken down into discrete elements, because each element coloured the others. The relevant activities had to be "economic", "non-transitory" and carried on from a "place of operations" using the debtor's assets and human agents. That suggested a fixed place of business. The requirement that the activities should be carried on with assets and human agents suggested a business activity consisting of dealings with third parties, not merely acts of internal administration. The 1996 Virgos-Schmit report, an authoritative commentary on the European Convention on Insolvency Proceedings 1995, suggested that the activities had to be "exercised on the market" i.e. externally. That could not sensibly be read as requiring that the debtor should simply be locatable or identifiable by a brass plate on a door. It referred to the character of the economic activities, which had to involve business dealings with third parties. Some activities carried on by a company in liquidation might be sufficient, for example where a liquidator carried on the business with a view to its disposal, or where he disposed of stock in trade on the market. However, where the company had no subsisting business, the mere internal administration of its winding up would not suffice. On any reasonable view, the Company was not carrying on any business activities on 20 July 2010. The three remaining employees were simply handling matters of internal administration associated with the disposal of the means of carrying on business. Therefore, the Company did not have an "establishment" in the UK at the relevant time.

[Gabriel Moss QC, Marcus Haywood]

In re Lehman Brothers International (Europe) (in administration) [2015] EWCA Civ 485 (Moore-Bick LJ, Lewison LJ, Briggs LJ, CA 14 May 2015)


ROBIN DICKER QC


WILLIAM TROWER QC


STEPHEN ROBINS

Waterfall Application – Subordinated Debt – Currency Conversion Claims Statutory Interest – Contributory Issues

In its judgment in what has become known as the "Waterfall Application", an application for directions that has been made by the administrators of three Lehman entities, the Court of Appeal has clarified a variety of issues relating to a very unusual set of circumstances, namely: (a) one of the companies (LBIE) being an unlimited company with a surplus arising in its administration; and (b) that company's members (LBHI2 and LBL) having unlimited liability as contributories.

In brief, the Court of Appeal's decision was as follows:

(1) LBHI2's claims under certain subordinated debt agreements are provable but rank to be paid, on the proper construction of those agreements, immediately after the payment in full of all non-provable liabilities;

(2) Currency conversion claims, i.e. claims for any shortfall suffered by a foreign currency creditor who receives less in sterling on its proved debt than it would have received in the foreign currency in which its claim was originally denominated (as a result of an adverse FX movement between the date of conversion to sterling and the date of payment of the proved debt), do exist and rank as non-provable claims (Lewison LJ dissenting);

(3) Where a company moves from administration into liquidation in circumstances where all debts proved in the administration have already been paid and there is a surplus in the hands of the administrator, the liquidator must apply that surplus (once received) first in satisfaction of any accrued but unpaid entitlement to statutory interest under rule 2.88(7) of the 1986 Rules in respect of the relevant period;

(4) The liability of a company's members to contribute to the company's assets under section 74(1) of the 1986 Act extends to statutory interest and non-provable liabilities;

(5) A company in administration can prove in the insolvencies of its contributories for the amount of the contingent liability to contribute under section 74(1) of the 1986 Act;

(6) The contributory rule, which prevents a contributory from recovering anything in a liquidation until he has fully discharged its liability, does not apply in administration.

[Robin Dicker QC, William Trower QC, Barry Isaacs QC, Daniel Bayfield, Richard Fisher, Stephen Robins, Charlotte Cooke, Alexander Riddiford]

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


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JSC Bank of Moscow v Vladimir Kekhman [2015] EWHC 396 (Ch) (Morgan J, 3 March 2015)

Bankruptcy – Annulment – Foreign Resident Debtor

This case involved an appeal against the order of Chief Registrar Baister made on 15 April 2014 in which he declined to annul the bankruptcy order based on the Respondent's own petition. Morgan J upheld the decision of the Chief Registrar but for different reasons. In particular, he held that the Chief Registrar had erred in principle by conflating the issue of whether the court ought to have made the order with the exercise of the Court's discretion.

As at the date of his bankruptcy petition, and at all times since, Mr Kekhman has been a Russian citizen, domiciled and resident in the Russian Federation. Bank of Moscow is a Russian bank which claims to be a creditor of Mr Kekhman in the region of $150 million based on damages for an alleged conspiracy to defraud. Jurisdiction was claimed by Mr Kekhman on the basis that he was present in the country on the day his petition was presented. Mr Kekhman stated that his centre of main interests was not in a member state within the meaning of the EC Regulation on Insolvency Proceedings. In his bankruptcy petition Mr Kekhman attributed his insolvency to "*overwhelming demands made on* [him] *personally under guarantees*". The guarantee referred to in the petition was in favour of a security agent. It was governed by English law with an arbitration clause that had the seat of arbitration in London. The security agent had the ability to elect that a dispute regarding the guarantee should be resolved by litigation before a court of law. In the circumstances of an election by the security agent the English Courts had exclusive jurisdiction and it was agreed that the English Courts were the most appropriate and convenient courts.

In relation to the legal test that applies when dealing with an application to annul a bankruptcy order under s.282(1)(a) of the Insolvency Act 1986, Morgan J held that the legal test is whether it appears to the Court that the bankruptcy order "ought not to have been made". If the Court finds that the order ought to have been made the Court has no discretion under s.282 but instead is bound to dismiss the annulment application. Having found that the Chief Registrar conflated the test set out above with the exercise of discretion, Morgan J held that it was necessary for him to form his own view as to whether, on the grounds existing at the date of the bankruptcy order, that order ought not to have been made.

When determining whether the bankruptcy order to have been made Morgan J held that the following questions needed to be addressed: (1) What were the grounds existing when the bankruptcy order was made? (2) Was there a sufficient connection with this jurisdiction? (3) Was there a reasonable possibility of a benefit resulting from a bankruptcy order? (4) Did the making of an order breach obligations of international comity? (5) Are there reasons not to make a bankruptcy order? (6) By way of an overall assessment, whether the order ought not to have been made? Having gone through those questions Morgan J found that the bankruptcy order ought to have been made: see para [135]. It is worth noting that Morgan J found that there was a sufficient connection with this jurisdiction as a result of the guarantee that was governed by English law. In this respect he relied on and drew comparisons with the authorities in relation to the winding up of overseas companies.

Shepherd v The Official Receiver [2015] EWHC 561 (Ch)

Bankruptcy – Extended Civil Restraint Order

In this case Morgan J made a bespoke extended civil restraint order in the context of bankruptcy proceedings. The order was made against a former solicitor (S) who had acted persistently in bringing six separate unsuccessful claims against the Official Receiver (three of which had been found to be totally without merit). The power of Court to grant a civil restraint order is set out in CPR r.3.11. The jurisdiction to make such an order is described in Practice Direction 3C. Paragraph 3 of the Practice Direction relates to extended civil restrain orders which states that the Court is able to make such an order "*where a party has persistently issued claims or made applications which are totally without merit*". Paragraph 3.2 describes the effect of such an order as a restraint being placed on applications or claims "*concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the*

permission of a judge identified in the order". The period for which an extended civil restraint order can be made may not exceed two years (see paragraph 3.9 of the Practice Direction). Morgan J held that, if the Court complies with the test set out in the Practice Direction, the Court is given the power to make an extended civil restraint order. Whether or not the Court exercises the power is a matter of discretion and the Court must have regard to all the circumstances of the case. When determining whether he had the power to make an order, Morgan J first focused on the question of whether the applications that had been made were totally without merit and then whether the respondent had been persistent. Morgan J found that the applications made by S were totally without merit in circumstances where three judges had previously described three of the applications as totally without merit. Morgan J also found that S had been "*most persistent*" in circumstances where six applications had been made challenging the actions of the Official Receiver on "*more or less the same point*".

Morgan J stated that extended civil restraint orders are designed to afford a measure of protection to respondents against continuing applications. He found that the Official Receiver fully deserved to have the protection from further applications which are likely to be totally without merit. He also found that, if a civil restrain order was made and S were to apply for permission to bring an application of the kind he has already brought, it is almost inevitable that permission would be refused. Morgan J therefore held that it was appropriate to make an extended civil restrain order.

In relation to the terms of the order, Morgan J stated that, although the Practice Direction identifies one way in which a civil restraint order can be expressed, in some cases the wording can cause real difficulty. In such circumstances it is possible to have a wider order to give effect to the intention of the Practice Direction. Morgan J stated that he would draft the appropriate order in the case. He stated that the order would not just restrain S from bringing a specific type of application but also restrain S from calling into question any action of the Official Receiver in the course of S's bankruptcy.

Mills v Stuart-Smith 30 March 2015 (Unreported)

Application to Set Aside Statutory Demand – Appeal

Rose J held that a Deputy Registrar had not erred in dismissing an application to set aside a statutory demand on the papers under r.6.5(1) of the Insolvency Rules 1986 and that the case at hand did not have special circumstances such that a rehearing ought to be ordered.

The Deputy Registrar had dismissed the appellant's application to set aside a statutory demand presented against him on the basis that the grounds for setting aside the statutory demand were wholly unparticularised. The appellant appealed seeking permission to put in proper evidence challenging the statutory demand. In particular, the appellant submitted that: (1) the Deputy Registrar had been wrong to dismiss the application summarily when there was evidence that showed that the debt was disputed; and, (2) there should be a rehearing of the application in the interests of justice at which the Court could consider all the material put forward. In relation to the first submission of the appellant, Rose J held that it was not the Deputy Registrar's job to expand or perfect the set aside application. Further, r.6.5(3) of the Insolvency Rules 1986 explicitly referred to the Court considering the evidence then available to it. Rose J considered the case of *Platts v Western Trust & Savings Ltd* [1996] B.P.I.R. 339 and found that the Court could decide the matter on incomplete evidence without adjourning it. Further, Rose J found that no proper reasons had been given for not putting forward initially the material on which the appellant sought to rely on the appeal.

As for the second submission, Rose J followed the decision in *Ealing LBC v Richardson* [2005] EWCA Civ 1798 and stated that an appeal by way of rehearing pursuant to CPR r.52.11(1)(b) required special circumstances. Rose J held that, the argument that the material on which the appellant sought to rely could and should be considered at a rehearing of the set aside application rather than at the hearing of a petition was not a good reason. It was noted that if a rehearing was granted it would give the appellant three bites of the cherry rather than two.

PROPERTY & TRUSTS

Digested by ANDREW SHAW

AIB Group (UK) Plc v Mark Redler & Co Solicitors [2014] UKSC 58 (Supreme Court, 5 November 2014)

Breach of trust – Equitable compensation

The claimant had agreed to advance £3.3 million to a Mr and Mrs Sondhi, to be secured by a first legal charge over their home, which had been valued at £4.25 million. At the time of this agreement, this property was already subject to a first legal charge in favour of Barclays Bank Plc ("Barclays"), which secured borrowings of around £1.5 million on two accounts. Accordingly, the claimant instructed its solicitors in accordance with the Council of Mortgage Lenders' Handbook for England and Wales (2nd edn). This stated, inter alia, that where a mortgage lender required a fully enforceable first charge over a property by way of legal mortgage, all existing charges must be redeemed before completion and the loan must be held on trust for the claimant until completion. The defendant solicitors established the outstanding amounts owed to Barclays. As completion approached, they sought a redemption figure from Barclays but in error the amount given related to only one of the accounts. The defendants therefore remitted this amount to Barclays and paid the balance of the funds to Mr and Mrs Sondhi. There remained outstanding a sum of £309,000 to Barclays, which consequently refused to release its charge. Mr and Mrs Sondhi promised to pay this sum but did not, and subsequently defaulted. Barclays repossessed the property and sold it for £1.2 million. The claimant was paid £867,697 of this amount. The claimant then brought an action against the defendant solicitors for breach of trust, breach of fiduciary duty, breach of contract and negligence. It claimed in relief: (i) reconstitution of the trust fund paid away in breach of trust/breach of fiduciary duty; (ii) equitable compensation for breach of trust and breach of fiduciary duty; and (iii) damages for breach of contract and negligence. The defendants admitted that they had acted negligently and in breach of contract but denied the other allegations.

At trial, Judge David Cooke found that the defendants had acted in good faith but were liable for a breach of trust arising from the failure to retain an additional £300,000 odd to discharge the remaining debt to Barclays. He held that the claimant was *prima facie* entitled to reconstitution of the trust fund. He awarded equitable compensation to the claimant of £273,777 plus interest on the basis that this was the loss caused to the claimant by the defendants' breach of trust. Both parties appealed. The Court of Appeal held that the trial judge had been wrong to treat the breach of trust as limited to that part of the advanced monies which was paid to the borrowers rather than used to discharge the debt to Barclays but upheld the relief granted. In so doing, the Court of Appeal applied the decision of the House of Lords in *Target Holdings Ltd v Redferns* [1996] AC 421. In that case, it had been held that where a breach of trust occurred in the context of a commercial transaction, the equitable principles of compensation allowed the compensation recoverable to be based upon a proper causal connection between the breach and the subsequent loss. On this basis, it was held that the loss suffered by the claimant was that arising from the fact that it had less security for the mortgage than it would have done but for the defendants' breach of trust. The defendants' appeal was dismissed. The claimants appealed against this finding, arguing that the transaction had never been completed because of the failure to discharge the outstanding sums owed to Barclays. It was therefore possible to distinguish *Target Holdings*, in which Lord Browne-Wilkinson had held that in a commercial transaction it would be artificial to import an obligation to reconstitute the trust after the underlying transaction giving rise to it had been completed. The defendants were therefore under an obligation to reimburse the claimant to the extent of the full £3.3 million advanced, less the sum paid by Barclays following its sale of the mortgaged property. The Supreme Court upheld the decision of the Court of Appeal. Lord Toulson held that in the absence of fraud, it would be wrong to impose a rule that gave redress to a beneficiary for loss that would have been suffered in the event that the trustee had carried out his duties properly. The Court of Appeal had correctly applied *Target Holdings*, the basic principle of which was that the beneficiary of a trust is entitled to be compensated for any loss that he would have suffered but for the breach of trust. In this case, the loss was the reduced security enjoyed by the claimant due to the failure to discharge the full amount of the debt owed by the Sondhi's to Barclays.

Graham-York v York [2015] EWCA Civ 72 (Moore-Bick LJ, Tomlinson LJ, Vos LJ, 10 February 2015)

Real property – Beneficial interests – Constructive trusts

Miss Graham-York had lived with Norton York from 1976 until the latter's death in 2009. For the last 24 years, they had lived together at 17 Marlborough Road, London W4 ("the property"). The property was registered in Norton York's sole name and was subject to a mortgage, also in Norton York's sole name. Miss Graham-York continued to live at the property after Norton York's death in 2009. Following the development of arrears on the mortgage, the mortgagee sought and obtained judgment in respect of the entire amount outstanding under the mortgage, together with an order for possession against Adrian York, Norton York's son and the personal representative of his estate. Miss Graham-York subsequently applied to be joined to these proceedings. Following a trial, HHJ Diana Faber, sitting at Central London County Court, determined that Miss Graham-York was entitled to a beneficial interest in the property amounting to 25% and should be paid this proportion of the net sale proceeds of the property following discharge of the mortgage. Miss Graham-York appealed against this finding, maintaining first that the judge should have found that her beneficial interest was 50% of the property; and second, that the judge had erred in directing that the 25% of the net sale proceeds should be paid to her before, rather than after, the payment of the sums owed to the mortgagee. The Court of Appeal accepted the trial judge's findings of fact, which included findings that Miss Graham-York's financial contribution to the relationship with Norton York did not "*amount to much*"; and that there had been no express agreement between Miss Graham-York and Norton York as to the way in which the beneficial interest in the property was to be shared. Miss Graham-York's beneficial interest therefore arose from a constructive trust arising from a common intention deduced objectively from her and Norton York's conduct. Tomlinson LJ, with whom Moore-Bick and King LJJ agreed, applied the approach set out by Lord Walker and Lady Hale in *Jones v Kernott* [2011] 1 AC 776. In that case, it was held that where a family home was in the name of one party only, the presumption of joint tenancy in the case of a home bought in joint names did not apply and the starting point was whether the unnamed party had any interest in the property at all. This should be deduced objectively from the conduct of the parties. If a common intention that the unnamed party has a beneficial interest can be deduced, but the extent of the interest cannot be, then it is to be determined by the court. In carrying out this determination, the court will have regard to what is fair, having regard to the whole course of dealing between the parties in relation to the property in question. Tomlinson LJ recognised that Miss Graham-York had been frequently ill-used by Norton York. He nonetheless held that in determining what share of the property it was fair for Miss Graham-York to have a beneficial interest in, the court was not concerned "*with some form of redistributive justice*". However much sympathy Miss Graham-York's situation might attract, this was not relevant to determining what was fair with regard to the whole course of dealing between the parties in relation to the property (emphasis in original). In other words, the quantification of the size of Miss Graham-York's beneficial interest in the property was not akin to awarding her compensation for the wrongs done to her by Norton York. Given the fact-sensitive nature of this exercise, evaluations made by judges in other cases were not of especial assistance. The trial judge's finding of a beneficial interest of 25% was upheld. Miss Graham-York's second ground of appeal was effectively abandoned, following her concession that she was in fact bound by the mortgage over the property.

Re Portman Estate [2015] EWHC 536 (Ch) (Birss J, 4 March 2015)

Powers of a trustee – Civil procedure

The Portman Estate comprises a series of trust funds held for the benefit of the Portman family. The total assets in the Estate amount to some £1.4 billion. There were discrepancies between the trusts as to the remuneration of the trustees and the administrative powers conferred on the trustees. In particular, some of the trusts conferred a general power to trade on their trustees, while others did not. The trustees of all the funds made a number of applications: (i) under s57 of the Trustee Act 1925 for the administrative powers of the trustee's to be harmonised; (ii) a declaration as to the meaning of provisions in certain of the trust instruments relating to conflicts of interest; and (iii) an application under the court's inherent jurisdiction concerning the trustees' remuneration. A preliminary matter for consideration by the Judge concerned the manner in which the

applications had been made. The action had been started under CPR Pt 8 with all of the trustees named as claimants but without any defendants being named, in accordance with CPR r.8.2A. Birss J was unaware of any Practice Direction relating to r.8.2A and so held there was no requirement for permission to be sought in order to issue a claim form without any named defendants. Considering the manner in which the applications were commenced in the light of the overriding objective at CPR r.1.1, Birss J took into account the negligible effect of the changes sought on the beneficiaries of the trusts and the fact that two key beneficiaries had provided express written consents to the applications. While he considered that, given the size of the Estate, it would not necessarily have been disproportionate to join all the beneficiaries there was no good reason to do so, especially given the large number of beneficiaries.

In considering the application under s57 of the Trustee Act 1925, Birss J took the same approach as in *Alexander v Alexander* [2011] EWHC 2721 (Ch), in which Morgan J held that the court needed to be satisfied of three matters:

(a) the provisions governing the trust contain no power which allows the trustees to carry out the transaction that is the subject of the application;

(b) it is expedient that the trustees should be able to enter into the relevant transaction; and

(c) the court should exercise its discretion to confer the power sought on the trustees. In considering whether to confer a general power to trade upon all of the trustees, Birss J held that the first two of these conditions were met. In considering whether the court should exercise its discretion to grant the application, he considered it relevant that one of the trust instruments already expressly contained such a power. Further, such a power was usually included in modern trust instruments, and there was no evidence that such a power was contrary to the intentions of the settlors. Taking these factors together with the nature of the funds and the overall value of the Estate, Birss J conferred a general power to trade upon those trustees who did not already possess such a power. He also granted the trustees' application for various administrative powers to be harmonised across the various funds.

The trustees' application under s57 of the Trustee Act 1925 also included an application that the trustees should be able to confer further administrative powers on themselves. Although this aspect of the application was subsequently withdrawn, Birss J indicated that he would not have granted it. To do so would have been to put the court's powers under s57 into the hands of the trustees, in relation to further powers which were presently unforeseen and which it was difficult to see the requirement for, given the broad powers the trustees already had. The trustees had also applied for an alteration to the remuneration provisions of the various funds, such that the trustees of different funds would be paid the same amount for doing the same work. Birss J held, applying *Duke of Norfolk Settlement Trusts* [1982] Ch 61, that the court had an inherent power to modify a trustee's remuneration, either by varying existing powers of remuneration or by conferring new powers. The overriding principle guiding the court was whether altering remuneration provisions was the efficient administration of the trust, even if this is achieved at some increased cost to the beneficiaries. Accordingly, Birss J granted the trustees' remuneration application.

Guidance was also sought on conflicts of interest related to clauses in certain of the trust instruments.

SPORT

Digested by **ROBERT AMEY**

Ticket2final OU v Wigan Athletic AFC Ltd (John Baldwin QC sitting as a deputy judge of the Chancery Division, 22 January 2015)


ROBERT AMEY

Breach of contract

Ticket2final OU (T2F) had developed a business model whereby it sold options to sports fans to purchase a ticket to a particular sporting event should the event take place. For example, a football fan might purchase an option to see his club play in the FA Cup Final. If the fan's club were to reach the final, then the fan would have the option to purchase a ticket at a reduced price. If the fan's club did not reach the final, then T2F would keep its fee. The model has been successful overseas and is widely used in relation to Euroleague Basketball events and the Champions League of the European Handball Federation. Having entered into a similar arrangement with FC Barcelona, T2F sought to introduce the model to England, and entered into an agreement with Wigan Athletic.

In the course of the 2012/2013 FA Cup season, Wigan performed unusually well, and T2F sold a large number of options to eager fans. Wigan reached the finals, and ultimately won the FA Cup in 2013. However, ticket sales at Wembley (where the finals and semi-finals are held) are controlled not by the clubs but by the FA. T2F was therefore unable to obtain from Wigan the tickets it needed to sell on

to fans, and made a substantial loss. T2F sued Wigan for fraudulent misrepresentation, since Wigan had expressly represented that the performance of the agreement (in particular, the delivery of 10,000 tickets to T2F for finals day) was "within its power". The court rejected the allegation of fraudulent misrepresentation, but held that Wigan had made such a representation, which was false, and which had induced T2F to enter into the contract. Furthermore, the representation had been incorporated as a term of the contract, and had been breached. T2F was therefore entitled to damages.

Hamed v Tottenham Hotspur Football Club & Athletic Ltd [2015] EWHC 298 (QB) (Hickinbottom J, 16 February 2015)

Breach of duty of care

The Football Association's protocol requires all new entrants to a football academy to undergo screening to identify whether they were at risk of heart problems, most importantly, hypertrophic cardiomyopathy (HCM). Before being signed by the defendant football club, Mr Hamed had an electrocardiogram (ECG) which showed abnormalities indicative of underlying heart disease. The cardiologist recommended a scan and clinical review. The scan did not reveal HCM, but did not exclude HCM either. The cardiologist confirmed to the defendant club that there were no indications of HCM, but that the ECG results were worrying.

The club's doctor later recorded that the footballer was not at risk and that the cardiologist was "happy" for Mr Hamed to continue playing. Three days after signing with the club, Mr Hamed suffered a cardiac arrest during a match, resulting in catastrophic brain injury.

The cardiologist admitted that he had been negligent by failing to make specific reference, in his letters to the club, of the clinical review he had previously recommended, and which had never been carried out. The club denied liability. The court held that the club's doctor had acted in a way which no reasonably competent sports physician could have acted. The ECG had unequivocally shown an abnormality suggestive of a risk of HCM. Although the scan had been inconclusive, any reasonably competent sports physician would have known that there was a small chance of some other pathology that could not be excluded by the scan. The cardiologist's letters to the club could have been more explicit, but the club's doctor had been clearly negligent nonetheless. Had she appreciated, as she ought to have done, the risk borne by the footballer, she would have ensured that he and his parents were made aware of it by arranging a clinical review with the cardiologist. Had this been done, the footballer would have stopped training and playing football. The doctor's failure to notice that no clinical review had taken place was caused, in part, by the very poor state of the club's medical records. However, 30% of the liability was apportioned to the cardiologist, in the light of his admitted negligence in failing to flag the necessity for a clinical review in his letters to the club.

IAAF v Yanit (Court of Arbitration for Sport, 6 March 2015)

Athletics – doping scheme – Biological Passport

In June 2013, Nevin Yanit was found guilty of an anti-doping violation by the Turkish Athletics Federation (TAF) Disciplinary Board after two prohibited substances were found in a sample she had provided. The TAF imposed a two-year sanction. The International Association of Athletics Federations (IAAF) appealed to the Court of Arbitration for Sport (CAS), seeking to increase the ineligibility period to four years. The IAAF relied on aggravating circumstances within the meaning of IAAF Rule 40.6. The IAAF supported this request with evidence of violations of the IAAF Rules based on data taken from Ms Yanit's "Athlete Biological Passport", which, while not admissible as evidence of an additional violation, could constitute an aggravating factor for the purpose of determining the sanction. The CAS considered that there were aggravating circumstances which warranted the imposition of a period of ineligibility in excess of the two-year ban imposed by the TAF Disciplinary Board, noting specifically that Ms Yanit had (1) used two prohibited substances (stanzolol and testosterone); (2) used those substances on multiple occasions between August 2012 and February 2013; (3) committed a separate anti-doping rule violation, namely blood doping, between June 2012 and February 2013; and (4) committed all these violations as part of a doping scheme. Taking account of the sentences passed in similar cases, in particular Alemitu Bekele v. TAF (athlete suspended for 2 years and 9 months), as well as the particular circumstances of this case, the CAS substituted a period of three years ineligibility.

Piercing the Corporate Veil

Marcus Haywood and his pupil, **Oberon Kwok**, explore the ways in which the corporate veil can be bypassed in the aftermath of two Supreme Court decisions.

Introduction

In what circumstances can the corporate veil be pierced or lifted? This article reflects on the decisions of the Supreme Court in *VTB Capital plc v Nutritek International Corp* [2013] 2 A.C. 337 and *Prest v Petrodel Resources Ltd* [2013] 2 A.C. 415. *Prest* in particular laid down a rationalisation of past cases in which courts have disregarded the doctrine of separate corporate personality - a doctrine laid down more than a century ago by the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

The Decisions in *VTB* and *Prest*

In *VTB*, VTB advanced loan monies to RAP to purchase certain properties from Nutritek. The contract was governed by English law and contained an English non-exclusive jurisdiction clause. The loan was alleged to have been induced by fraudulent misrepresentations from Nutritek. Given that RAP and Nutritek were both non-EU companies, VTB sought and obtained permission to serve claims in conspiracy and deceit against, amongst others, Mr Malofeev, who was the ultimate controller of both RAP and Nutritek. The defendants applied to set aside service.

Putting the issue of *forum non conveniens* aside, VTB argued in the Supreme Court that Mr Malofeev could be held liable for breach of the agreements on the basis that the corporate veil could be pierced, thus establishing the jurisdiction to serve out on Mr Malofeev. In effect, VTB argued that Mr Malofeev should be treated as if he were, or had been, a co-contracting party with RAP under the relevant agreements. The Supreme Court rejected that ambitious argument.

Lord Neuberger (with whom the other members of the Supreme Court agreed) held that for Mr Malofeev to be treated as a joint contracting party alongside his company would be contrary to *Salomon v A Salomon*, for a company must be "*treated as being a person by the law in the same way as a human being*" ([138]). Moreover, none of the parties objectively intended Mr Malofeev to be a contracting party ([140]). Nor could it be said, on the facts, that RAP was a mere façade for Mr Malofeev ([142]-[143]). In Lord Neuberger's view, if the corporate veil is to be pierced, "*the true facts*" must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). By contrast, here, on VTB's case, "*the true facts*" related to the control, trading performance or to the genuineness of the nature of the underlying arrangement. None of these features could be said to involve RAP being used as a "*façade to conceal the true facts*". An extension of the court's jurisdiction to pierce the corporate veil in these circumstances was contrary to authority and principle ([145]).

In *VTB* the Supreme Court expressly left open the question of

whether, unless a statute expressly or impliedly provides otherwise, the court could pierce the corporate veil at all ([130]).

A few months afterwards, the Supreme Court handed down judgment in *Prest*. That was a claim for ancillary relief by a wife for the assets owned by her husband's company. The question for the Supreme Court was whether the company's assets could be treated as her husband's. The Court ultimately allowed the claim on the basis that the husband was the beneficial owner of the property under a resulting trust. However, it rejected the wife's argument that the corporate veil could be pierced.

In *Prest* the Supreme Court answered the question it had left open in *VTB* and accepted that there was a limited power to pierce the corporate veil and to disregard the separate personality of a company.

It is veil-lifting, not the court's insistence on the corporate veil, that accords with common sense and justice (*Conway v Ratiu*)

In Lord Sumption's view that power was necessary if the law were not to be disarmed in the face of abuse, provided that the limits were recognised and respected.

Lord Sumption drew a distinction between lifting and piercing the veil ([16]). Lifting the veil concerned situations in which the controller of the company can be held to be personally liable without disregarding the company's separate personality. The court could look to see who the real actors in a transaction were, pursuant to what he termed the "*concealment principle*" ([28]). The concealment principle could be invoked where a company, or perhaps several companies, had been interposed so as to conceal the identity of the real actors. This would not deter the courts from identifying those real actors, assuming that their identity was legally relevant. In these cases the court is not disregarding the veil, but only looking behind it to discover the facts which the corporate structure is concealing.

Piercing the veil concerned "*true exceptions*" to *Salomon*; that is, the limited situations where the owner or controller of a company is identified with the company by virtue of his ownership and control ([16]). The court could pierce the veil

THE REAL ACTORS BEHIND A COMPANY CANNOT BE HIDDEN FROM THE COURT

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only where the separate corporate personality was being "*abused*" ([27]). This, Lord Sumption termed the "*evasion principle*" ([28]). Piercing the veil was limited to situations where "*a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control*", in which case the court may pierce the veil solely to deprive him of the advantage deriving from the company's separate personality ([35]). That was the sole situation in which the veil could be pierced. Lord Neuberger agreed with Lord Sumption's approach in this regard.

Lord Mance and Lord Clarke differed slightly in their approach to Lord Sumption. They made it clear that they were not foreclosing new situations in which the courts could pierce the veil. Indeed, they considered that it would be "*dangerous*" to do so, though new situations justifying piercing were likely to be "*novel and very rare*" ([100]).

Baroness Hale (with whom Lord Wilson agreed) also differed slightly from Lord Sumption. She cited the basic proposition that legislation, including companies legislation, could not be used as an engine of fraud, and said that piercing was but an example of that proposition ([89]). She was "*not sure*" that the law could be adequately analysed by reference to the concealment vs. evasion distinction, suggesting that that distinction stemmed from the broader principle that controllers of companies cannot "*take unconscionable advantage*" of the people with whom they do business ([92]).

While *VTB* and *Prest* provide a much needed rationalisation of the law, the freedom with which judges can develop and innovate this area of the law in the future is open to debate. We discuss this further below.

Piercing the Corporate Veil - The Evasion Principle

The new formulation of piercing, laid down by Lord Sumption in *Prest*, applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control ([35]). Classic examples include *Gilford Motor Co Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832. In *Gilford Motor*, the defendant had covenanted not to solicit the plaintiff's customers, but subsequently did so through a company he controlled. Both the defendant and the company were restrained against soliciting the plaintiff's customers. In Lord Sumption's view, the relief against the company involved piercing because "*the company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company*".

In *Jones*, a vendor who had a

change of heart after contracting to sell a piece of freehold land conveyed the property to a company he controlled so as to defeat the purchaser's right to specific performance. The purchaser sued for breach, with the result that both the vendor and the company were ordered to convey the property to the purchaser.

In both *Gilford Motor* and *Jones*, the controller had a pre-existing legal obligation which he was attempting to evade by setting up a company. In both cases, the court was prepared to disregard the separate personality of the company in order to grant a remedy not only against the company but also against the person who owned and/or controlled it.

It appears clear from *Prest* that the corporate veil may be pierced only to prevent the abuse of the separate legal personality of a company. The principle is a limited one because the corporate veil should not be pierced unless it is necessary to do so. If some other basis exists which would allow the same result without veil piercing, it will not be appropriate to pierce the corporate veil because there would be no public policy imperative to justify such a course. Indeed, Lord Sumption was of the view that in almost every case where the evasion principle was found to apply, it would not have been necessary to pierce the corporate veil because the facts would have disclosed some other legal relationship between the company and its controller. Veil-piercing is, in short, a remedy of very last resort.

In these circumstances (and notwithstanding that Lords Mance and Clarke explicitly stated that the door was not closed to novel situations in which piercing may be justified), the circumstances in which the corporate veil may truly be pierced would appear to be extremely limited.

Lifting the Corporate Veil - The Concealment Principle

In *Prest*, Lord Sumption seemed altogether more enthusiastic for the lifting jurisdiction, referring to the "*range of situations*" in which the acts or property of a company can be attributed to those who control it. After *Prest*, the possibility of judicial creativity and innovation to lift the corporate veil appears to remain open.

We suggest that the following categorisation is the best way to analyse the cases in which the veil has been lifted:

- 'Cause of action lifting'
- 'Company law lifting'
- 'Agency lifting'
- Fraud

'Cause of action lifting' denotes the situation where a claim is brought directly against the company's controller or parent. This topic has been comprehensively discussed elsewhere, and we do not propose to give a full account here[1]. In contract, the liberalisation of the process of construction after *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, combined with the doctrine of rectification, gives the court substantial leeway to identify the real parties to a contract. In tort, companies within the same group can conspire with each other (*Digicel (St. Lucia) Limited v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at Annex I [77]), and so can a human controller and his company - even if the company is his *alter ego*: *Twentieth Century Fox Film Corp v Harris* [2014] EWHC 1568 (Ch) at [150]. Nor can a person escape liability for fraudulent acts (e.g. deceit) by saying that he was acting on behalf of his company (*Standard Chartered Bank v Pakistan*

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National Shipping Corpn [2003] 1 A.C. 959 at [22]). In the tort of negligence, a parent company can justifiably be said to have assumed a duty to its subsidiary's counterparties in certain circumstances (*Chandler v Cape plc* [2012] 1 WLR 3111 at [69]). As to claims to property, the controller of the company in *Prest* was held to be the beneficial owner of the company's assets under a resulting trust.

It is, however, a mistake to think that the veil can be lifted only by reference to specific causes of action. 'Company law lifting' denotes the use of company law principles to lift the veil. In *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852, DHN operated its business from land owned by its subsidiary. When the land was compulsorily acquired by the defendant, DHN sued for compensation. The defendant relied on the corporate veil to defeat DHN's claim. Lord Denning MR responded that the companies were partners:

"*These subsidiaries are bound hand and foot to the parent company and*

1/. For an in-depth discussion, see Day, "Skirting Around the Issue: the Corporate Veil after Prest v Petrodel" [2014] LMCLQ 269

must do just what the parent company says… This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point… The three companies should, for present purposes, be treated as one, and the parent company DHN should be treated as that one." (at 860)

There is no reason why the reverse should not also be true. If the parent company is entitled to sue for the loss of its subsidiary's property, then it should also be liable for loss caused by its subsidiary to third parties on the ground that it and its subsidiaries are in partnership together and hence jointly and severally liable for the partnership's liabilities.

Although doubt has been cast on *DHN* in *obiter dictum*[2] the Court of Appeal has since applied it in *Lewis Trusts v Bambers Stores Ltd* [1983] FSR 453 at 470-471. *DHN* was not discussed in *Prest*, and the Supreme Court in *VTB* did not comment on *DHN*, despite the fact that it had been cited in argument. It is possible that the development of partnership law along the lines of *DHN* may provide a potential ground for veil-lifting.

As to 'agency lifting', in *Smith, Stone and Knight Ltd v Birmingham Corp* [1939] 4 All ER 116, it was held that the company was carrying on business as agent for the members. At 121 Atkinson J identified six principles by which he identified the company as the members' agent, including how the profits were treated, who made the business decisions, by whose effort profits were generated and the degree of control over the company[3]. The agency relationship has also been applied to corporate groups: *William Cory and Son Ltd v Dorman Long and Co Ltd* [1936] 2 All ER 386.

MICHAEL PREST AND YASMIN PREST

The fourth category is fraud. Fraud unravels all, and the creation and running of a company as part of a fraudulent scheme means that its founder must not be allowed to retain any advantage whatsoever, including the protection of the corporate veil. In *Prest*, Lord Sumption endorsed this as a means to lift the corporate veil, and that "*there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose*"

2/. Woolfson v Strathclyde RC 1978 S.C. (H.L.) 90 at 96 per Lord Keith of Kinkel.
3/. While later first instance decisions have deprecated the importance of these 6 factors for the purpose of establishing agency (Yukong Line Ltd v Rendsburg Investments Corp (No. 2) [1998] 1 WLR 294, Alberta Gas Ethylene Co Ltd v Minister of National Revenue (1988) 24 FTR 309), they have been directly applied by the Federal Court of Australia in Spreag v Paeson Ptd Ltd (1990) 94 ALR 679.

([18]). But it is notable that none of the Justices, not even Lords Sumption and Neuberger, restricted fraud to 'actual fraud'[4] and it remains an open question as to whether equitable fraud (i.e. unconscionability) only would be sufficient for these purposes[5].

The concept of unconscionability in this context is illuminating because it is a reminder that the court cannot and ought not to neglect the techniques of equity when mitigating the effects of the corporate veil. Equity looks to substance over form. As Lord Romilly MR said in *Parkin v Thorold* (1852) 16 Beav 59 at 66-67, "*Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.*" Thus the court's assessment of unconscionability need not be trammelled by the strait-jacket of *Salomon*.

A good illustration of the use of the court's equitable techniques to lift the veil is *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734. The claimant company brought an equitable action for account against its director, Dalby, who had directed a secret commission from a third party into Burnstead, corporate entity under his control. Dalby argued that he was not accountable because he never actually received anything while Burnstead was not accountable as it owed no fiduciary duty to the claimant. Rimer J at [26] rejected that argument: "*I do not accept that argument which, if correct, would provide the easiest possible escape from the rigours of equity's strict principle of accountability… If the arrival at this result requires a lifting of Burnstead's corporate veil, then I regard this as an appropriate case in which to do so… The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby*".

OFFSHORE COMPANIES ARE NO REFUGE FROM EQUITY'S JURISDICTION

Ultimately, the policy behind a robust approach to veil-lifting is the need for the court to have regard to the realities of the situation. In *Conway v Ratiu* [2006] 1 EGLR 125 (a libel case), Auld LJ at [75] referred to "*the readiness of the courts, regardless of the precise issue involved, to draw back the corporate veil to do justice when common sense and reality demand it.*" Laws LJ agreed at [186]. Sedley LJ stated at [188] "*I recognise that there is an asymmetry between the law's long-standing insistence upon the discrete legal personality of limited liability companies and its willingness to lift the veil, as the expression is, in a case like the present. But it is the latter, not the former, that accords with common sense and justice*".

In view of the foregoing, the concealment principle may be understood as both a restatement of the law as well as a prescription for its development. It underscores the important fact that the respective rights and liabilities of companies and their controllers can often be determined by reference to conventional principles without in any way encroaching on the separate entity rule.

4/. If they had done so, then only dishonesty/common law fraud would suffice: see Armitage v Nurse [1998] *Ch. 241 at 250 per Millett LJ.*
5/. See the approach of Baroness Hale in Prest at [92].

AUSTRALIA

Allens insolvency update: Recent developments in Australia

The vexing issue of "vesting": the Personal Property Securities Act 2009 (Cth). **Chris Prestwich** and **Przemek Kucharski** report.

More than three years have passed since the coming into effect of the *Personal Property Securities Act* 2009 (Cth) (the Act) in Australia. The Act has undoubtedly had a profound effect on banking and finance and insolvency practice in Australia. The changes include:

- Where previously credit transactions secured by personal property were governed by a myriad of disparate, State-based regimes and required recording of interests on various registers, the Act revolutionised law and practice in Australia by replacing these regimes and registers with a new single Federal law regulating the creation, registration, enforcement and priority of interests over personal property that secure credit arrangements;
- The types of transactions recognised as giving rise to security interests in personal property have been broadened to include arrangements such as retention of title terms, hire purchase agreements and consignments as well as certain types of long-term or indefinite leases or bailments of goods (together termed "*PPS leases*");
- The legal lexicon has been transformed. Out have gone fixed charges and floating charges, replaced with "*non-circulating security interests*" and "circulating security interests"; and
- To be enforceable, a security interest must have "*attached*" to relevant personal property. Where a security interest has "*attached*" to personal property, it may be "*perfected*" under the Act. That usually occurs through registration of the interest on the Personal Property Securities Register.

Below we reflect on one aspect of the operation of the Act that has proven particularly controversial in an insolvency context, being the impact that the so-called "vesting" provisions have on unperfected security interests when the grantor of the interests enters administration or liquidation.

The Act operates so that any security interest that is unperfected at a time when an administrator or liquidator is appointed over the grantor "*vests in the grantor*" at that time. Such a security interest may be

unperfected for any number of reasons, including a failure by the secured party to register it on the PPSR or some defect in any registration.

The outcome of such "*vesting*" may be that the secured party, irrespective of whether or not they have title in the personal property the subject of the security interest, could lose all rights to the property.

By way of example of the operation of vesting in practice, where a supplier provides goods to a customer on hire purchase or retention of title terms, the supplier will as against the customer have the benefit of a security interest in the goods for the purposes of the Act because the supplier has an interest (that is, title) in personal property (that is, the goods) that secures payment or performance of an obligation (that is, the customer's debt owing to the supplier for the goods). In such circumstances, if the supplier fails to perfect this security interest over the goods through registration on the PPSR against the customer, and the customer goes into administration or liquidation, the security interest (that is, title to the goods) will vest with the customer. The customer's administrator or liquidator may then deal freely with the goods for the benefit of the customer's unsecured creditors, subject to any perfected security interest with priority granted by the customer to any secured creditor (for example, an all-assets fixed and floating charge in favour of a financier).

This vesting effect represents perhaps the high watermark of the degree to which the Act disregards ownership and title rights and reverses the status quo existing prior to its operation. It is therefore not surprising that vesting under the Act has attracted considerable controversy, especially where it has resulted in loss of rights for suppliers and windfall gains for financiers.

Nonetheless, in a number first instances decisions, various Australian courts have confirmed the operation of vesting under the Act as described above (most notably, in the decision of the Supreme Court of New South Wales in *In the Matter of Maiden Civil (P&E) Pty Ltd* [2013] NSWSC 852 and the decision of the Supreme Court of Western Australia in *White v Spiers Earthworks Pty Ltd* [2014] WASC 139). While a recent review of the PPSA has recommended some narrowing of their operation, it has not proposed any substantial changes to the vesting provisions of the Act. It seems therefore that vesting is now a well-established part of Australian insolvency law.

Three years on

Having been in operation for a little more than three years, the Act is still relatively new and untested. It will probably take some time yet for its effects to permeate through the Australia economy.

However, from an insolvency practitioner's perspective, one impact of the Act that may be noted already is the improved transparency that the PPSR offers in allowing for easy identification of security interests granted by a particular grantor in specific personal property. In this respect, the emphasis of the Act on the substance over the form of transactions and its disregard for ownership and title, has arguably gone some way to addressing the so-called 'ostensible ownership' problem. This is the concern that a secured party could take a security interest in a grantor's property but leave the grantor in possession of the property, and in so doing mislead outsiders into believing that the grantor has a better title to the property than is in fact the case. Through the Act creating strong incentives to register security interests on the PPSR, including via the effects of vesting, it facilitates the public notification of such interests. In this way the Act has arguably made it easier for insolvency practitioners to determine competing claims to personal property.

Chris Prestwich and Przemek Kucharski

Cross border insolvency: putting the modifications into modified universalism

In a cross-border insolvency under the UNCITRAL Model Law, the usual position is that all of an insolvent company's foreign assets are collected, remitted to the company's "centre of main interests" and all creditors will prove in the foreign main proceeding. The Full Court of the Federal Court of Australia has recently upheld orders modifying the operation of the Model Law to protect the interests of a domestic creditor.[1] The result of that decision is that all of the Australian assets of an insolvent Cayman Islands company will be applied to pay an Australian tax debt rather than being remitted to the Cayman Islands for distribution amongst all creditors.

Saad Investments Company Ltd (***Saad Investments***), a Cayman Islands company, collapsed in 2009 and the Grand Court of the Cayman Islands made orders for the company to be wound up. The liquidators brought proceedings in Australia, and obtained orders recognising the Cayman Islands

1/. Akers (as joint foreign representative) v Saad Investments Company Limited; In the matter of Saad Investments Company Limited (in official liquidation)[2014] FCAFC 57

CHRIS PRESTWICH (LEFT) AND PRZEMEK KUCHARSKI (RIGHT)

proceeding as the foreign main proceeding. The liquidators sold the company's Australian assets, realising approximately $7 million, and gave notice to the Australian Deputy Commissioner of Taxation (***the Commissioner***) of their intention to remit those funds to the Cayman Islands for distribution to creditors.

The Commissioner claimed that Saad Investments owed $83 million in unpaid Australian tax and penalties. However, that was a revenue debt which would not be admitted to proof in the Cayman Islands. As such, the Commissioner brought proceedings seeking to have the recognition orders modified to prevent the Australian assets being remitted overseas and granting it leave to issue statutory notices and take other enforcement steps.

At first instance, the Commissioner succeeded.[2] The Court held that, as the Commissioner's claim was not admissible to proof in the Cayman Islands, the recognition orders did not adequately protect the Commissioner's interests and the remission of the Australian assets overseas would result in a windfall to the other creditors of Saad Investments.

On appeal, the main issue was the whether the Court's exercise of its jurisdiction to protect the Commissioner was inconsistent with the universalist approach under the Model Law. The Full Court held that:

- There is nothing in the Model Law that would justify the stripping of rights of a local creditor by reason of making recognition orders (which would be the practical impact on the Commissioner if the Australian assets were remitted overseas);
- The modification orders did not have the effect of elevating the Commissioner to the status of a preferred creditor. The orders made prevented the Commissioner from benefitting from the exercise of rights beyond a pari passu amount that he would have received had the tax debt been recognised in the Cayman Islands; and
- It was not necessary for the modification orders to permit other foreign creditors to participate in the distribution of the Australian assets. Drawing an analogy with an ancillary liquidation, foreign creditors would be required to bring to account, in the nature of hotchpot, the value of their participation in the Cayman Islands winding up. Even with the full benefit of the Australian assets, the Commissioner stood to receive fewer cents in the dollar than foreign creditors, so no unfairness would follow from the Commissioner receiving all of the Australian assets.

Drawing an analogy with *Rubin*, the liquidators also sought to rely on the fact that the Commissioner had

All of the Australian assets of an insolvent Cayman Islands company will be applied to pay an Australian tax debt

2/. Akers (as joint foreign representative) v Saad Investments Company Limited; In the matter of Saad Investments Company Limited (in official liquidation)[2013] FCA 738

submitted a proof of debt in the main liquidation as preventing the Commissioner from seeking relief from the Australian courts. However, the Full Court held that submitting a proof of debt in the main liquidation did not disentitle the Commissioner from bringing an application for a modification of the Australian recognition orders.

In October 2014, the High Court declined an application by the liquidators for special leave to appeal, holding that it was not persuaded that there are sufficient reasons to doubt the correctness of the appellate decision. As a result, all of the Australian assets of Saad Investments will be paid to the Commissioner.

The decision illustrates the potential, in a cross-border insolvency, for domestic courts to make orders departing from a strict universalist approach, by protecting local creditors if those creditors will receive insufficient protection in the foreign main proceeding. Other examples given by the Court where similar issues might arise are in relation to penalties that are unenforceable in the foreign main proceeding, or if the law of the foreign main proceeding refuses to recognise claims of citizens or companies of a particular state. However, even in those circumstances, the Court will have regard to the requirement for rateable distribution.

Chris Prestwich

Shareholder class actions: proving reliance in market disclosure claims

In March 2015, the Federal Court of Australia handed down judgment in a shareholder class action brought against an insolvent company: *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149. The shareholders of Babcock & Brown Limited (***BBL***) were seeking to have a damages claim admitted to proof in the liquidation arising from an alleged failure by BBL to comply with the continuous disclosure regime.

By way of background to that claim:

- On 31 January 2007, the High Court held in *Sons of Gwalia Ltd v Margaretic*[3] that a claim by a shareholder for loss to the value of shares caused by failure of the company to inform the market would rank equally with the claims of other unsecured creditors in an external administration;
- The prospect of the claims of unsecured creditors being diluted in an insolvency by shareholder claims led to significant criticism, and the Federal Government introduced theCorporations Amendment (Sons of Gwalia) Act 2010 to reverse the position. Going forward, all claims by shareholders arising out of their buying and selling of shares in the company would be postponed until such time as all other debts and claims had been satisfied in full. However, that legislation was not retrospective.

The shareholders advanced a theory of *indirect causation*, contending that they did not each need to prove individual reliance

The Babcock & Brown group collapsed in 2009, prior to that legislative change. 77 shareholders sought to establish a claim for damages arising out of their acquisition of shares on-market in circumstances where they contended that Babcock & Brown Limited (***BBL***) had failed to comply with its continuous disclosure obligations. The share price fell from over $34 to just 33 cents in the period of alleged non-compliance. It was alleged that in that period BBL had, for example, failed to disclose to the market that it was insolvent and that it had paid dividends other than out of profit.

The shareholder claim was brought by the shareholders as a class action and judgment was handed down in March 2015. The most interesting aspect of the judgment is the Court's analysis of the shareholders' causation arguments:

- The shareholders did not advance a positive case that the matters that they said resulted in BBL contravening its continuous disclosure obligations were material to their individual decisions to acquire shares in BBL. In other words, no ***direct causation*** case was advanced;
- Instead, the shareholders advanced a theory of ***indirect causation***, contending that they did not each need to prove individual reliance. The shareholders' case was that BBL's alleged contraventions led to the market price of the shares being artificially inflated and that market based causation was sufficient to satisfy the causation element of the shareholders' claims.

The question of whether market-based causation/indirect causation is sufficient under Australian law is undecided in market-disclosure claims. In this case, Justice Perram did not need to

3/. (2007) 231 CLR 160

RICHARD HARRIS

determine the issue one way or another because he held that BBL had not breached its continuous disclosure obligations. However, Justice Perram concluded that, if it had been necessary to come to a view, he would likely have decided that indirect causation was sufficient for the following reasons:

- While reliance will be sufficient to establish causation, it is nonetheless possible to establish causation without reliance;
- The obligation on a listed entity is to disclose price sensitive information, and the relevant statutory provision requiring disclosure assumes the existence of a price effect on the market in general;
- There is no requirement for damages under Australian law that the disclosing entity directly misleads the plaintiff shareholder. It is sufficient if that entity misleads the market generally and that ultimately causes loss to an individual shareholder; and
- While ordinarily a claim for misleading conduct requires a plaintiff to show that they would have acted in a different way but for that conduct, it is artificial to speak of reliance in non-disclosure cases.

As such, his Honour's obiter view was that provided that the shareholder was not aware of the non-disclosed information, a shareholder who acquired shares on market was entitled to recover compensation for price inflation arising from a failure to disclose price sensitive information.

While the legislative changes that followed the Sons of Gwalia decision limit the significance of this issue in the context of corporate collapses, the question of causation remains very much alive in ordinary market disclosure shareholder class actions. Whether market-based causation is sufficient in a shareholder class actions is a question that will be of critical importance to the conduct class actions in Australia. Should a concept of indirect causation be adopted it would represent a material additional incentive to the commencement of class actions in the coming years.

Richard Harris

Court approved expropriation of shares?

When a company in Australia goes into voluntary administration, the most commonly used restructuring tool is a deed of company arrangement (DOCA). To be implemented, a DOCA requires the support of only 50% of creditors by number and value (the voluntary administrator has a casting vote if only one majority can be obtained). Court approval is not required. If approved by the requisite majority, a DOCA binds all unsecured creditors of the company, along with any secured creditors who voted in favour.

One feature of the *Corporations Act 2001* (Cth) that has been the subject of two recent cases in Australia is section 444GA. It provides that the administrator of a DOCA may transfer shares in a company with the consent of the owner of the shares or leave of the court. The court may grant leave only if it is satisfied that the transfer '*would not unfairly prejudice the interests of the members of the company*'. The recent cases have involved applications brought by administrators for orders for the transfer of all of the shares held by the members to the proponent of the DOCA, for no consideration.

The first of two recent cases to consider this provision was *In the matter of Mirabela Nickel Ltd (subject to deed of company arrangement*)[2014] NSWSC 836. Mirabela Nickel was an ASX listed mining company with interests in an open pit nickel sulphide mine located in Brazil. Following financial difficulties and a failed recapitalisation attempt, Mirabela entered voluntary administration. It was clear that the unsecured creditors were owed substantially more than the value of the company. A group of these noteholders proposed a DOCA in which their claims against Mirabela would be met by transferring the company's shares to them for nil consideration. The administrators applied to the Court for an order granting leave to enforce that transfer. In considering the application, the Court developed the statements of principle that:

- the law gives deed administrators the ability to compulsorily sell company shares for the purpose of implementing a DOCA, where payment to creditors depends on the share transfer occurring;


KIM REID

- whether a transfer of shares is unfairly prejudicial to shareholders depends on the value of their shares in a (hypothetical) liquidation scenario. That test applies if a winding up is the likely or necessary consequence of the transfer of shares not being approved; and
- members do not suffer any prejudice if the shares have no value, the company has no residual value to members and if the members would be unlikely to receive a distribution in a winding up.

The Court ordered that the listed shares be transferred to the noteholders for no consideration.

The issue arose again in *Re Nexus Energy Ltd (subject to deed of company arrangement)* [2014] NSWSC 1910. The Nexus group comprised Nexus Energy Ltd and several subsidiaries with interests in natural resources. From at least 2013, the Nexus Group was in financial distress, entering administration in 2014. The voluntary administrators sought proposals in respect of Nexus, its subsidiaries and their respective assets. Only one bid was received, from the primary secured creditor, in the form of a DOCA proposal. The proposal was for the payment of secured creditors in full, a 75c to the dollar return to unsecured creditors. That proposal was conditional on the administrators obtaining court orders for the transfer of all ordinary shares in Nexus to the bidder for nil consideration. The court application was supported by the bidder and various creditors, but opposed by a core group of shareholders.

In determining the matter, the court re-iterated the principles set out in *Mirabela*. Applying those principles, and on the basis of the expert evidence filed by the administrators, the Court found that there would be no residual value to shareholders in a liquidation, and therefore no unfair prejudice to the compulsory transfer. As such, the Court granted leave under section 444GA.

In the context of an insolvent group of companies, it is likely that a DOCA can be used to transfer the operating companies or businesses to an acquirer without the need to acquire the ultimate shareholders' shares (which in many cases will be a suitable alternative strategy), particularly given the evidentiary challenges and costs of the court approval process. However, the Court's decision reinforces the effectiveness and flexibility of DOCAs as a tool to extract value for a company's creditors and to restructure its share capital.

Kim Reid

The Octaviar saga: extensions of time for bringing unfair preference claims

In Australia, a 3 year limitation period applies to any voidable preference and uncommercial transaction claims brought by liquidators. Section 588FF(3) of the *Corporations Act* (Cth) 2001 provides that liquidators may only apply to bring voidable transaction proceedings within the later of 3 years after the day the winding up is taken to have begun (the "relation-back day") or 12 months after the first appointment of a liquidator.

That three-year limitation period imposes a tight timeframe on liquidators to investigate and bring voidable transaction proceedings, particularly in complex liquidations. Liquidators might, for example, need additional time to investigate the claims or to arrange litigation funding to meet the costs of the proceedings.

In order to mitigate the rigours of those time limits, section 588FF(3)(b) confers a discretion on the court to extend the period of time in which voidable transaction proceedings may be commenced on application by the liquidator during the initial three-year limitation period.[4]

In two decisions arising from the Octaviar liquidation (Octaviar was an investment management group which collapsed with debts in excess of $1 billion), the High Court has given guidance on liquidators' ability to seek extensions of time under section 588FF(3)(b).[5]

4/. Section 588FF(3)(b) provides that a liquidator may apply to bring a voidable transaction claim: "within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period."
5/. Grant Samuel Corporation Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher [2015] HCA 8 and Fortress Credit Corporation (Australia) II Pty Limited v Fletcher [2015] HCA 10.

Any application for an extension of time by a liquidator is replete with risk… the liquidators lost their ability to pursue some claims altogether

The decisions also highlight the risks of such applications.

In the case of *Grant Samuel Corporation Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* the High Court considered whether the court has the power to vary an extension order granted pursuant to s 588FF(3)(b) after the initial three year limitation period has expired.

In that case, before the expiry of the limitation period, the Octaviar liquidators obtained a four-month extension. Shortly before expiry of that extension, the Octaviar liquidators made another application to the court, and obtained orders varying the earlier extension orders and extending the period for bringing claims by another six months. This second application was obtained not under s588FF(3)(b), but using the court's apparent procedural powers to vary its earlier orders.

When the proceedings were eventually served on the defendants, they challenged that six-month extension, on the basis that the Corporations Act only permits extensions of time to be made during the limitation period. The liquidators argued that the court rules permit a variation of earlier orders, and that provided a means by which the limitation period could be further extended, even after the three year period had passed.

On 11 March 2015, the High Court unanimously rejected the argument that the court rules could be used to vary its earlier orders in these circumstances. It was held that those rules cannot rise above the strict words of the Corporations Act, which provide that any application for an extension of time 'may only be made' during the time limit stated in 588FF(3)(a). As such, once the three-year period from the 'relation-back day' has expired, no further extensions of time are permitted, even if framed as a variation of earlier orders. As a consequence, the voidable transaction claims that the liquidators served during the six month extension period were time-barred and those claims will fall away.

In *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher*, the High Court considered whether, in relation to extensions of time for bringing voidable transaction claims, an extension can only be ordered in relation to specified transactions, or if the extension can extend to transactions that are not able to be identified at the time of the order. The latter form of order is sometimes referred to as a 'shelf order'. Shelf orders are attractive to liquidators whose investigations of the company's affairs are not yet sufficiently advanced to identify specific claims.

At the time that the first extension was granted, the Octaviar liquidators were still in the process of investigating and uncovering transactions that may give rise to potential claims. They were not aware of the possibility of a voidable transaction claim against the Fortress Investment Group LLC. Consequently, Fortress was not named in the application for the extension or notified of the application. A 'shelf order' was, however, made, extending the time for bringing all voidable transaction claims.

The liquidators subsequently brought a voidable transaction claim against Fortress. Fortress sought to have the extension of time against it set aside, on the basis of a number of 'policy factors' as to why shelf orders should not be permitted (such as certainty for creditors and requiring liquidators to promptly identify claims and expedite the liquidation).

The High Court unanimously held that a liquidator may seek an order extending time under s.588FF(3)(b) without having, specifically and exhaustively, to identify every transaction to which that order may apply. The 'policy factors' relied upon by Fortress were a matter that could be considered by the court in the exercise of its discretion when deciding whether or not to grant an order on a case-by-case basis. As such, 'shelf orders' are permitted.

The High Court decisions provide welcome clarification about the options available to liquidators. However, any application for an extension of time by a liquidator is replete with risk. In this case, the consequence for the liquidators of relying on extensions of time granted by the court and that were then successfully challenged was that the liquidators lost their ability to pursue some claims altogether. The safest course for a liquidator to take is to file the proceeding within the limitation period, rather than risk later losing the ability to make the claim at all.

Chris Prestwich

NEW ZEALAND

Directors defence costs denied

New Zealand Supreme Court rulings clarify third-party rights to insurance monies. **Murray Tingey** and **Tim Fitzgerald** of **Bell Gully** report.

Introduction

The collapse of New Zealand's secondary finance markets between 2006-2008 led to a surge of important insolvency litigation, much of which is only now reaching its conclusion. As receivers and liquidators pursued those responsible, many of whom lacked the assets necessary to meet the claims against them, significant attention was focussed on one important but infrequently-litigated provision: section 9 of the Law Reform Act 1936. This provision allows plaintiffs to assert a charge over insurance monies payable to defendants in respect of their claim, and allows plaintiffs to enforce their charge directly against defendants' insurers.[1] Section 9 has taken centre stage in many cases, as defendants (and directors in particular) have been reliant on insurance to meet the claims against them.

There have been three important appellate decisions on the section in recent years.

The first considered the situation in which a director is entitled to be indemnified under the same policy limit for both their defence costs and for their substantive liability to the third party. Which claim takes priority, when the limit of liability under the policy is insufficient to pay both claims? Can the director's mounting defence costs erode or exhaust the insurance that would otherwise be available for the third party? Or does a third party's (unproven) claim effectively preclude an insurer from paying defence costs that are otherwise due under the policy? These were the questions the New Zealand Supreme Court faced in *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304.

Separately, offshore insurers (including Lloyds syndicates) have argued that section 9 does not apply to payments under their policies, because the section was not intended to have extra-territorial effect. Does the section need to apply extra-territorially to apply to them? Did Parliament intend to include or exclude payments from foreign insurers to New Zealand insureds, payable in New Zealand, under contracts governed by New Zealand

1/. The claim may be made without leave of the Court if the insured party has died insolvent, is bankrupt, or (in the case of a corporation) is being wound up. Otherwise, leave is required: s 9(2) and s 9(4) Law Reform Act 1936.

This left the insured directors in the unfortunate position of having no insurance cover available for their defence costs

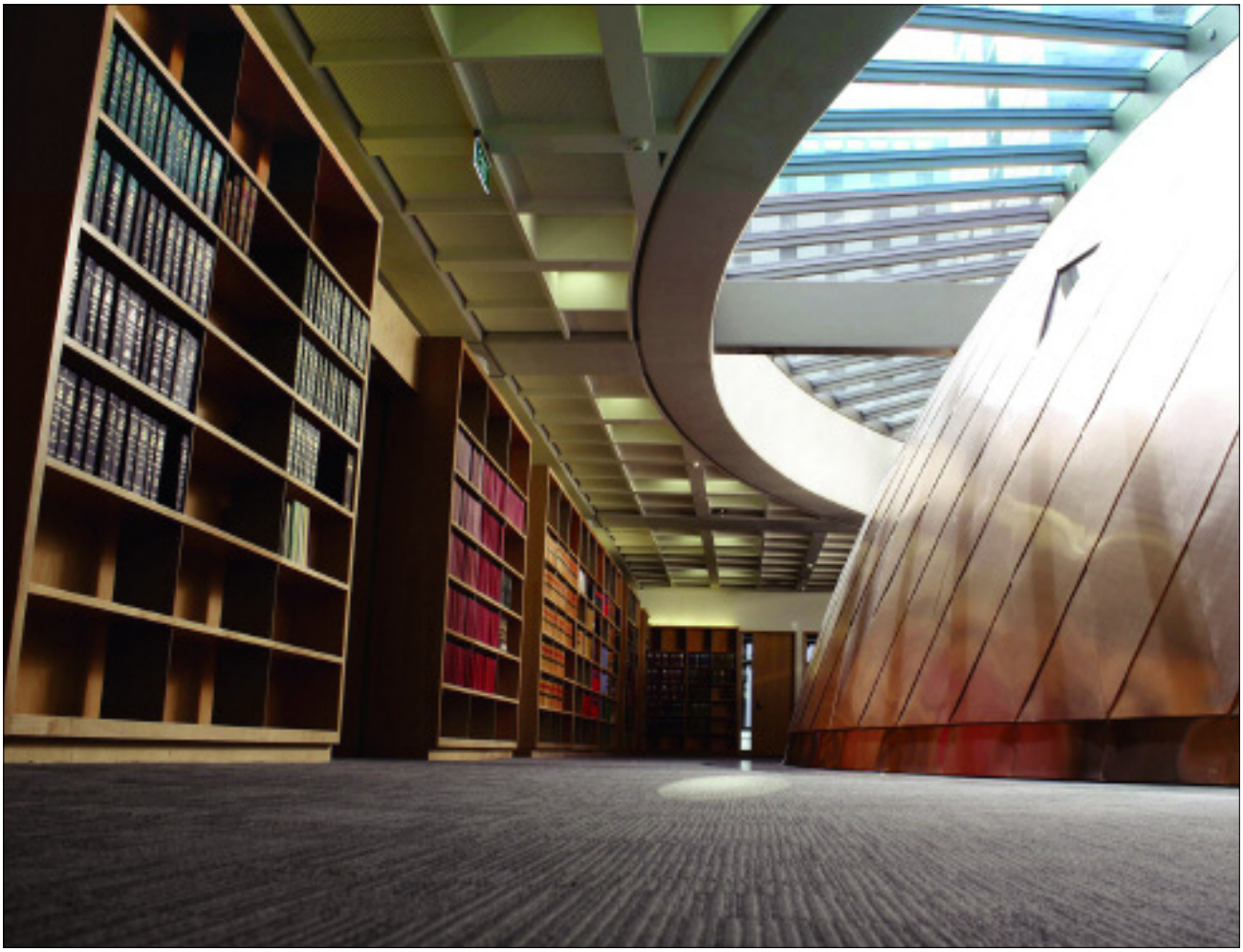
law and enforceable only in New Zealand? The Supreme Court considered these issues in *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713, and for the Court of Appeal in *Bridgecorp Ltd (in rec and liq) v Certain Lloyd's Underwriters* [2014] NZCA 571, [2015] 2 NZLR 285.

The statutory charge

Section 9 is designed to address the perceived unfairness of insurance proceeds entering an insolvent insured's general pool of assets and being distributed *pari passu* among its unsecured creditors, in circumstances where the money would never have been payable to the insured but for the loss suffered by the third-party claimant.

Although most comparable jurisdictions have legislation directed at the same goal, the mechanism they use is not consistent. In the United Kingdom, the Third Parties (Rights against Insurers) Act 1930 (UK) relies on an assignment: it assigns to the third party the insured's rights under the insurance policy to the claimant, which allows the claimant to proceed directly against the insurer (provided that it can first establish the insured's liability). In 2010, legislation was passed to amend the 1930 Act. The Third Parties (Rights against Insurers) Act 2010 (UK) has still not come into force, but will eventually allow third parties to bring claims against insurers directly without needing to first establish liability against the insured.

Section 9 of the Law Reform Act 1936 (NZ) operates by way of charge, rather than assignment. It creates a statutory charge in favour of the third-party claimant over any insurance money that is or may become payable in respect of an insured's liability to pay damages or compensation. The third-party



THE SUPREME COURT HELD THAT PARLIAMENT DID NOT INTEND FOR S 9 TO APPLY EXTRA-TERRITORIALLY

claimant is able to proceed directly against the insurer, in the same manner and in the same Court as if it were suing the insured. Legislation in New South Wales and the Australian Capital Territory operates on virtually the same model as New Zealand's section 9.

Defence costs

BFSL 2007 Ltd v Steigrad concerned the Bridgecorp property development group, which collapsed in July 2007 owing investors nearly $500 million.

Bridgecorp (under the control of its receivers) commenced proceedings against three former directors of the group. It alleged breaches of their directors' duties and sought damages in excess of $340 million. Separately, the directors were prosecuted for alleged offences under the Securities Act 1978.

The directors were insured parties under the group's D&O liability insurance policy. The policy provided an indemnity for any liability incurred to third parties as a result of their actions as directors. It also provided cover for costs incurred in defending civil or criminal proceedings seeking to establish the directors' liability. The limit of liability was $20 million. In addition, the directors had a statutory liability policy with a $2 million limit of indemnity. That policy covered directors' defence costs, but did not cover the directors for any liability to third party claimants.

By August 2011, all but one of the directors had exhausted their entitlements under the statutory liability policy. The directors estimated that they would each incur at least another $3 million in costs to defend their criminal trial. The directors sought to claim these defence costs, as well as the mounting defence costs in their criminal proceeding, under the D&O policy. If the insurer continued to pay these defence costs, the limit of liability under the D&O Policy was likely to be exhausted before Bridgecorp could obtain judgment against the directors.

MURRAY TINGEY

To avoid the available insurance monies being eroded, Bridgecorp asserted its charge under section 9. It put the insurer on notice that any further defence costs payments would be made in breach of the charge, and so would not reduce the amount available to Bridgecorp if it successfully established its claim. This caused the insurer to cease to pay defence costs. The insured challenged Bridgecorp's interpretation of section 9. The issue for the Court was whether the statutory charge secured the full amount of the insured's liability to

The debt must be located in the jurisdiction where the debtor resides, irrespective of the parties' agreement as to the jurisdiction in which it is enforceable

TIM FITZGERALD

Bridgecorp, even before that liability had been determined.

The High Court found for Bridgecorp. The Court of Appeal found for the insured. The case went to the Supreme Court. Buy a 3-2 majority, the Court restored the High Court's judgment in favour of Bridgecorp. It reasoned that the statutory charge arose immediately on the happening of the event giving rise to the claim, and secured the full amount of the liability eventually established through liability or settlement. The amount secured by the charge was not to be diluted by paying the insureds' defence costs out of the money available to the claimants.

This left the insured directors in the unfortunate position of having no insurance cover available for their defence costs. Glazebrook J, writing for the majority, noted that this was the result of a poorly-designed policy, rather than any unfairness inherent in the Law Reform Act 1936. The issue arose only because defence costs and third-party liability were subject to the same overall limit of liability (i.e. it was impossible to pay defence costs without reducing the amount available to third parties).[2] The Court left open the question of whether the insurer or insured should bear the cost of this poor drafting. One possible consequence of the Supreme Court's decision is that insurers may be contractually obliged to pay more than the limit of liability in certain circumstances. This issue remains unresolved in New Zealand.

This decision sets New Zealand apart from other jurisdictions that have adopted comparable third-party claim regimes. The New South Wales Court of Appeal reached the opposite conclusion in relation to materially identical legislation in *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 212, (2013) 302 ALR 101. In the United Kingdom, the issue arises in a different way because the legislation operates by way of an assignment, rather than a charge. Under the 1930 Act, the issue is unlikely to arise, because the statutory assignment only takes effect once liability is established, by which time defence costs will already have been incurred. It is less clear whether there is scope for a *Steigrad*-like argument under the 2010 Act, which will transfer the insured's "rights… against the insurer in respect of the liability" to the third party even before the claim is established and enforceable. The Australasian cases may be of relevance in assessing the scope of the "rights in respect of the liability", and the effect on the limit of liability of a claim having been transferred before it is enforceable, under the new legislation.

Foreign insurers

Complex jurisdictional issues can arise in relation to s 9 when there is a foreign element to the insurance policy.

In *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49; [2010] 3 NZLR 71, Ludgater's building in New Zealand was damaged in a fire allegedly caused by a negligently manufactured capacitor. The manufacturer, Atco Controls Pty Ltd, was a company registered in Victoria, Australia. Atco had a liability insurance policy with the defendant Gerling, a New South Wales company. Atco went into liquidation soon after the fire, and the Ludgater brought a claim directly against Gerling under section 9. Gerling protested the jurisdiction of the High Court on the basis that it lacked both personal jurisdiction and subject-matter jurisdiction to determine a claim under section 9.

The case reached the Supreme Court on the question of subject-matter jurisdiction. The Court held that Parliament did not intend for section 9 to apply extra-territorially, and that as a result the New Zealand courts would

2/. As a result of this decision, most D&O Policies in New Zealand now provide separate limits of liability for defence costs and third party claims.

not have subject-matter jurisdiction over a claim under section 9 unless the relevant insurance debt was situated in New Zealand.

The decisive issue in the case was the situs of the insurance debt. As to this, the Court held that the situs of a debt is ordinarily where the debtor is resident. It then went on to consider a range of other factors, including where the insured was located (Victoria, Australia), where the policy was issued (Australia), and where the insurance monies were payable (Australia). It held that the debt was situate in Australia, and that as a result section 9 did not apply to it.[3]

The reasoning in *Ludgater* led to some uncertainty as to the circumstances under which an insurance liability is situate in New Zealand (and hence when section 9 would apply to it). This was clarified last year, in *Bridgecorp Ltd (in rec and liq) v Certain Lloyd's Underwriters* [2014] NZCA 571; [2015] 2 NZLR 285.

The case concerned a policy issued by a Lloyd's syndicate. Though the insured did not know it when the policy was incepted, the only name in the syndicate was based in London. However, unlike the *Ludgater* policy, the insured was based in New Zealand, the policy was payable in New Zealand, in New Zealand dollars, and was subject to the exclusive jurisdiction of the New Zealand Court. The third party claimant argued that, the parties having agreed that the policy was payable and enforceable only in New Zealand, the relevant debt must be located in New Zealand.

The High Court and Court of Appeal disagreed. They held that the debt must be located in the jurisdiction where the debtor resides, irrespective of the parties' agreement as to the jurisdiction in which it is enforceable, and irrespective of whether the insured knew which jurisdiction the underwriter resided in at the time they entered into the policy. As the Lloyd's syndicate was resident in London, the New Zealand courts lacked subject-matter jurisdiction to hear the claim. The decision in *Bridgecorp* is not being appealed to the Supreme Court.

BRIDEGCORP: THE NEW ZEALAND COURTS LACKED SUBJECT-MATTER JURISDICTION TO HEAR THE CLAIM.

Unlike section 9, which contains no express indication of whether it should apply in cases with a foreign element, the Third Parties (Rights against Insurers) Act 2010 (UK) when it comes into force will provide for its territorial scope. The Act will apply where one of a series of insolvency-type events listed in the Act occurs within the United Kingdom. The third party may bring proceedings in whatever part of Great Britain it resides or the insured resides. This reform should avoid many of the difficulties that have arisen at common law.

Conclusion

There are many ways to validate the rights of third-party claimants to insurance money paid as indemnity for damages. It is not surprising that jurisdictions vary in their favoured solution. The 2010 Act, when it comes into force, will refine the existing model in the United Kingdom. The New Zealand cases discussed above may be of interest to practitioners both in the interpretation of the new legislation, and in illustrating the practical consequences of the models used in different jurisdictions.

3/. This meant that the Court did not have to consider the "more difficult question" of whether the Court lacked personal jurisdiction.

Samba and its implications for insolvency practitioners

David Alexander QC and Stephen Robins

KEY POINTS

- This article considers the decision of the Court of Appeal in *Akers v Samba Financial Group* [2014] EWCA Civ 1516 and the relevance of this decision for insolvency practitioners in cross-border cases where assets are said to be held on trust.
- Previously it had been thought that Art 4 of the Hague Convention meant that the Convention did not apply to identify the law for determining whether or not a trust exists.
- The Court of Appeal has held that Art 4 has a more limited meaning.

Introduction

Where insolvency proceedings have commenced in respect of a company or an individual, it is important for the liquidator or trustee in bankruptcy to be able to identify the assets which fall within the estate available for distribution to the creditors.

In many cases, third parties will assert that assets held in the name of the insolvent company or individual are subject to a trust in favour of those third parties and are therefore not available for distribution to the creditors of the insolvent company or individual. In other cases, the liquidator or trustee in bankruptcy will have grounds for concluding that assets held in the name of third parties are owned beneficially by the estate and that the third parties should therefore deliver them up so that they can be realised for the benefit of creditors.

Express trusts generally pose no problem: there will ordinarily be a trust deed and evidence to show that it is valid. Constructive and resulting trusts pose more difficult questions: there is no trust deed and the existence of the trust is a matter of law.

The question whether or not a trust exists can, therefore, be difficult to answer in a purely domestic case. In a case involving foreign elements, the question becomes even more difficult, because there is a preliminary question that must be answered: which law is to be applied to decide whether or not the trust exists? It may be the case that the answer applying one law would be different from the answer applying another law. For instance, the law of the place where the supposed trust assets are located may say one thing, but the law of the domicile of the supposed trustee may say another. In such a case, the identification of the beneficial owner of the assets in question will be principally a "choice of law" issue. In other words, the identification of the law applicable to determine whether or not a trust exists will itself determine the question of beneficial ownership of the assets in question.

The facts of Samba

Akers v Samba Financial Group [2014] EWCA Civ 1516 involved the liquidation of a company incorporated in the Cayman Islands. The beneficial owner of the company, Mr Maan Al-Sanea, had purported to sign six declarations of trust in favour of the company in respect of the shares in certain Saudi Arabian banks. Some of those declarations were expressly governed by the laws of Bahrain.

After the presentation of a winding-up petition in respect of the company, Mr Al-Sanea purported to transfer some of those shares to a third party, Samba. The liquidators sought to challenge the transfer under s 127 of the Insolvency Act 1986, contending that the shares in question were owned beneficially by the company, pursuant to the declarations of trust.

Samba's response was to say that the declarations were expressly governed by the laws of Bahrain, which would therefore apply to decide whether or not a trust existed, and that the laws of Bahrain did not recognise the concept of a separation of legal and beneficial interest, so that the declarations were ineffective and there could be no trust at all.

In reply, the liquidators relied on the Hague Convention (the Convention), which applies to determine the law applicable to trusts. Art 6 of the Convention provides:

"A trust shall be governed by the law chosen by the settlor…Where the law

DAVID ALEXANDER QC

chosen…does not provide for trusts…the choice shall not be effective and the law specified in Art 7 shall apply."

Relying on this, the liquidators said that, if Samba were right in saying that Bahranian law did not provide for trusts or the category of trust involved, Art 6 rendered ineffective Mr Al-Sanea's express choice of Bahranian law and that the law to be applied to determine whether or not a trust existed at all would have to be identified by applying Art 7 of the Convention. The liquidators said that, applying Art 7, Caymanian law was applicable and that, according to Caymanian law, the declarations of trust were valid and effective.

By way of rejoinder, Samba relied on Art 4 of the Convention, which provides:

"The Convention does not apply to preliminary issues relating to the validity of…acts by virtue of which assets are transferred to the trustee."

Samba argued that Art 4 of the Convention excluded the preliminary question as to whether or not a trust had arisen. The argument put forward by Samba on this point was a widespread view, which had received considerable support. See, for example, para 29-076 of *Dicey & Morris*, which states:

"It is important to appreciate that the 'preliminary' question of whether a resulting or constructive trust of property arises lies outside the scope of the Hague Convention."

The decision of the Court of Appeal

The Court of Appeal rejected Samba's arguments and adopted a narrow interpretation of Art 4. According to the Court of Appeal's reasoning, Art 4 is applicable only to the validity of the transfers of property to the trustee. The Court of Appeal held that Art 4 does not exclude from the scope of the Convention the question of identifying the law applicable to decide whether or not a trust exists, which is a separate question.

Vos LJ identified the competing positions in para 39 before considering, in paras 40 and 41, the Scottish case of *Joint Administrators of Rangers Football Club plc 2012 SLT 599* and the views of various leading academics and commentators, including those of Professor David Hayton, who sat on the Convention's drafting committee.

Vos LJ said in para 50: *"It is important to start the evaluation of the parties' competing positions by reference to the words of article 4 itself, in the context of the entirety of the Convention."*

He noted that Art 4 provides only that "[t]he Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee". He held that those words "should be construed as

"Although Samba was dealing with express trusts rather than constructive and resulting trusts, it would seem that the same approach may be applicable to constructive and resulting trusts"

meaning what they say, namely that the article is concerned with 'preliminary issues' (as Professor von Overbeck pointed out) relating to acts by virtue of which 'assets are transferred to the trustee' ... Adopting the most purposive possible construction, one is forced to the conclusion that the line is to be drawn once the assets have been transferred to the trustee, whether or not that distinction is entirely logical for all purposes".

In para 51 Vos LJ held:

"The lex situs must govern whether the trustee has the capacity to alienate the property at all. It would, as they say, make no sense to hold that a trust could be created by a person who owned inalienable property. But...once it is clear that the trust property can be alienated in some form according to the lex situs, that law cannot govern the trust or its validity or effects. All that must be a matter for the law identified by Chapter II of the Convention."

STEPHEN ROBINS

Constructive and resulting trusts

Although *Samba* was dealing with express trusts rather than constructive and resulting trusts, it would seem that the same approach may be applicable to constructive and resulting trusts.

First, in England, the Convention has force of law by reason of the Recognition of Trusts Act 1987 (RTA 1987). Section 1(1) of RTA 1987 provides:

"The provisions of the Convention set out in the Schedule to this Act shall have the force of law in the United Kingdom". Section 1(2) of RTA 1987 then provides:

"Those provisions shall, so far as applicable, have effect not only in relation to the trusts described in Arts 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere."

Constructive and resulting trusts are capable of being described as trusts which arise under the law and/or by virtue of judicial decisions. As a result of s 1(2), therefore, the provisions of the Convention may be applicable in England to constructive trusts and resulting trusts.

Secondly, while the Court of Appeal in Samba considered how Art 4 would apply to a two-stage process involving a conveyance of legal title followed by a declaration of trust, the result would appear to be the same where the two stages have been compressed into a single step. The Court of Appeal's analysis would therefore seem to be applicable where, in the case of constructive and resulting trusts, the money arrives in the hands of the trustee and at that moment is impressed by law with a trust in favour of a third party beneficiary.

On this basis, para 29-076 of *Dicey & Morris* could be said to be incorrect in stating that Art 4 of the Convention excludes "the 'preliminary' question of whether a resulting or constructive trust of property arises". According to the Court of Appeal in *Samba,* Art 4 would seem to exclude the preliminary question of whether the transfer of legal title to the trustee is effective. It would apparently not exclude the subsequent question of identifying the law to decide whether the property so transferred has become subject to a trust.

Choice of law applying the convention

Assuming that the Court of Appeal was correct to say that the Convention applies, it is necessary to apply the provisions of the Convention to

identify which law is applicable to the question of whether a trust exists.

As stated above, Art 6 of the Convention provides that a trust shall be governed by the law chosen by the settlor. It further provides that the choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Importantly for cases in which the express law would not result in the existence of a trust, Art 6 goes on to provide:

"Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Art 7 shall apply".

When considering Art 6, it is important to recognise that the Convention was drafted to apply to express trusts evidenced in writing: see Arts 2 and 3 of the Convention. In such a case, the creation of the trust is the consequence of a voluntary act by the settlor, who has expressed an intention to create a trust in a written instrument. As a matter of English law, however, as noted above, s 1(2) of RTA 1987 extends the Convention to apply "not only in relation to the trusts described in Arts 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom". As a result, in English law, the Convention as a whole may become applicable to constructive and resulting trusts. The key differences in the case of the additional types of trust brought within the scope of the Convention as a result of s 1(2) of RTA 1987 are that:

- the settlor may not actually have contemplated the creation of a trust at all;
- the intention to create a trust(if it exists at all) may not have been clearly spelt out by anyone; and
- there will ordinarily be no written instrument by which the trust is created (and may not even be any document evidencing the creation of the trust).

> "In the case of the additional types of trust brought within the scope of the Convention as a result of s 1(2) of the RTA 1987, it may be appropriate to pass over Art 6 altogether and to move straight to Art 7"

In a case involving a constructive or resulting trust, therefore, it is very difficult to apply Art 6 at all. There will not be any express choice of governing law for the trust and it may be impossible to talk of a choice of governing law "implied in the terms of the instrument creating or the writing evidencing the trust" because there is ordinarily no such instrument.

Where Art 6 does not supply the answer, it is necessary to consider Art 7. Therefore, in the case of the additional types of trust brought within the scope of the Convention as a result of s 1(2) of the RTA 1987, it may be appropriate to pass over Art 6 altogether and to move straight to Art 7, which provides:

"Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference shall be made in particular to: (a) the place of administration of the trust designated by the settlor; (b) the situs of the assets of the trust; (c) the place of residence or business of the trustee; (d) the objects of the trust and the places where they are to be fulfilled". (There is an open question following Samba as to whether "objects" in this context means "purposes" or "beneficiaries".)

The answers to the questions posed by Art 7 will turn on the facts of each case. In a case involving insolvency proceedings, the insolvency practitioner and his or her advisers will have to investigate the facts to identify the relevant matters. Where did the persons who provided the assets intend that they should be administered? Where are the assets in fact located? Where is the place of residence or business of the trustee? Where are the beneficiaries located? If the trust has arisen as a result of a particular purpose (as in the case of a Quistclose trust), what was that purpose and where was it intended that it should be fulfilled?

Article 8 provides that the law specified by Art 6 or 7 "shall govern the validity of, its effects and the administration of the trust". The question whether the trust exists at all will be decided by the law so chosen.

Conclusion

In an era of increasing numbers of cross- border insolvencies, officeholders and those advising them are encountering more complex issues of fact and law in the task of identifying whether assets held by the insolvent company or individual belong beneficially to third parties and/or whether assets held by third parties belong beneficially to the insolvent company or individual. The decision of the Court of Appeal in *Samba* sheds valuable light on the question of which law to apply to resolve such questions. However, the law in this field is novel and developing and the Court of Appeal's decision in *Samba* is unlikely to provide the final word on the issue. It remains to be seen whether the Supreme Court adopts the same analysis to the meaning of Art 4.

This article first appeared in the April 2015 edition of Corporate Rescue and Insolvency.

The Banana Bankrupt

William Willson considers the decision in JSC Bank of Moscow v Kekhman & Ors [2015] EWHC 396 (Ch)

Introduction

This article analyses the recent decision of Mr Justice Morgan ("*the Judge*") in *JSC Bank of Moscow v Vladimir Kekhman & Ors* [2015] EWHC 396 (Ch) ("the Judgment").

In the Judgment, the Judge considered an appeal by JSC Bank of Moscow ("JSC") against a decision of Chief Registrar Baister ("the Chief Registrar") in which the Chief Registrar had dismissed applications by JSC and another Russian bank, ZAO Sberbank Leasing ("Sberbank"), to annul and/or rescind a bankruptcy order made on a debtor's petition by Mr Kekhman ("Mr Kekhman") on 5 October 2012.

The Facts

Mr Kehkman was and remains a Russian citizen domiciled and resident in the Russian Federation.

Mr Kekhman went into the fruit business in 1994, forming the JFC Group in 1997, the ultimate holding company of which is JFC (BVI) Limited and which operates through companies in Russia, the BVI, Costa Rica, Cyprus, Ecuador, Luxembourg and Panama. He is the beneficial owner of the VK Family Private Foundation ("the Foundation"), a Dutch Antilles entity, which holds 70% of the shares in the JFC Group. From modest beginnings the JFC Group expanded to become the largest importer of fruit into the former Soviet Union.

Separately, Mr Kehkman was and remains the general director of the St Petersburg Theatre of Opera and Ballet, commonly known as the Mikhailovsky Theatre.

In 2011 the businesses got into financial difficulties. Negotiations and restructuring attempts failed, and a number of lending banks took steps to enforce their securities and called in their guarantees. On 20 February 2012 insolvency proceedings were initiated by JFC Russia. A Russian supervisor was appointed over a number of Russian companies in the JFC Group. On 11 September 2012 JSC obtained a worldwide freezing order against the BVI companies in the group. A receiver in Curaçao was appointed over the Foundation in late 2012/early 2013.

On 25 September 2012, during a brief 48-hour stay in London (the petition specifies the Corinthia Hotel in Whitehall Place), Mr Kekhman presented a debtor's petition in the High Court ("the Petition"). According to his statement of affairs he had creditors of over £300 million, was subject to nine sets of legal proceedings in Russia and his assets consisted of £200,000 cash-in-hand and some land in St Petersburg.

On 5 October 2012 the adjourned Petition came before the Chief Registrar. Mr Kehkman submitted that there were a number of points in favour of making a bankruptcy order, namely: 1) the absence of a personal bankruptcy regime in Russia; 2) the availability of assets in the jurisdiction (being £200,000 cash-in-hand that Mr Kekhman

undertook he would make available to the Official Receiver); 3) a connection to the jurisdiction in the form of an English law choice of law/jurisdiction clause in one of the guarantees; 4) the opinion of Mr Kekhman's Russian lawyer that the courts in Russia would recognise the bankruptcy; 5) the fact that the bankruptcy would allow for the investigation of Mr Kekhman's financial affairs; 6) the prospect of Mr Kekhman's financial rehabilitation.

The Chief Registrar made a bankruptcy order ("the Bankruptcy Order") and trustees in bankruptcy were appointed ("the Trustees").

The Jurisdiction

Under Section 264 (1)(b) of IA86 a debtor may present a petition for their own bankruptcy.

Section 265 identifies the conditions to be satisfied in respect of a debtor as follows:

"*(1) A bankruptcy petition shall not be presented to the court under section 264(1)(a) or (b) unless the debtor—*

(a) is domiciled in England and Wales,

(b) is personally present in England and Wales on the day on which the petition is presented, or

(c) at any time in the period of 3 years ending with that day—

(i) has been ordinarily resident, or has had a place of residence, in England and Wales, or

(ii) has carried on business in England and Wales".

As appears from Section 265 (1), the court has jurisdiction in relation to a bankruptcy petition, including a debtor's petition, if the debtor is personally present in England and Wales on the day on which the petition is presented. If this qualification is satisfied, the domicile or the ordinary residence or the place of business of the debtor is irrelevant on the question of jurisdiction.

The Applications

In early 2013 JSC and Sberbank applied under Section 282/Section 375 of the Insolvency Act 1986 ("IA86") to annul and/or rescind the Bankruptcy Order ("the Applications").

Neither of the banks disputed the court's jurisdiction to make the Bankruptcy Order – merely the Chief Registrar's exercise of his discretion.

VLADIMIR KEKHMAN (RIGHT) TALKS TO THE PRESS ON HIS ACQUISITION OF THE MIKHAILOVSKY THEATRE IN ST. PETERSBURG

The application to annul was brought on the basis that the order ought not to have been made having regard to the facts as they existed at the date of the Bankruptcy Order, and, in particular, that Mr Kekhman had not established a sufficient connection with the English jurisdiction and shown that the bankruptcy would be beneficial to his creditors as a whole. Further, it was argued that Mr Kekhman had breached his duty of full and frank disclosure.

The Applications were vigorously opposed by Mr Kekhman, funded by undisclosed third parties.

The trial was atypical of the standard annulment/rescission application in bankruptcy. It lasted a week, featuring three Queen's Counsel, a simultaneous translation booth, extensive evidence as to Russian law, voluminous evidence about the corporate structure underpinning Mr Kekhman's banana empire in central/South America and a court room filled with some 50 barristers/solicitors/interpreters/bankers/journalists.

The Chief Registrar's judgment can be found at (1) *JSC Bank of Moscow (2) ZAO Sberbank Leasing v Kekhman & Ors* [2014] BPIR 959.

As to the issues of Russian law, the Chief Registrar concluded that, having heard expert evidence, the Bankruptcy Order was

(contrary to what he had been told by Mr Kekhman's Russian lawyers on 5 October 2012) unlikely to be recognised or enforced in Russia and that the £200,000 which Mr Kehkman had brought from Russia to England had been brought in breach of a Russian "arrest" order (which should have been disclosed to him at the hearing on 5 October 2012).

Having set out his reasoning, the Chief Registrar concluded that the discretion to annul ought not to be exercised for the following reasons:

"*The arguments are finely balanced. Two major bases on which the bankruptcy order was sought (recognition in Russia and the existence of assets that that might come into the bankruptcy estate) have fallen away. However, notwithstanding the fact that it now appears there can be no recognition of the bankruptcy order in the Russian Federation, and notwithstanding what we now know to be the true position regarding the assets in that country, I conclude, for the reasons explored above, that the bankruptcy order still had utility when it was made, and that the matters about which the Applicants complain do not outweigh such utility, so that even if this court had known the true position regarding the problems of recognition and resulting from the arrest of the Russian assets, it still could and probably would have made the bankruptcy order on the basis that there was commercial subject matter on which it could operate, it would have enabled Mr Kekhman's affairs to be looked into, made possible an orderly realisation of his non-Russian assets and assisted his own financial rehabilitation even if only outside the Russian Federation (a potentially important consideration to someone with international interests).*"

The Appeal

The appeal was only pursued by one of the Russian banks, JSC.

JSC presented thirteen separate grounds of appeal.

Though it accepted that jurisdiction had been conferred on the court by Mr Kekhman's presence, the bank submitted that Mr Kekhman had to persuade the court of three things for it to make a bankruptcy order: 1) that there had been a sufficiently close connection with England; 2) that there was a reasonable possibility of a benefit resulting from the bankruptcy order; 3) that there was one or more persons interested in the distribution of assets who were persons over whom the English court exercised jurisdiction.

This three-limbed test can be found, of course, in the jurisprudence relating to the winding up of unregistered companies under Section 221 of IA86 (see in particular *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116), though it has more recently been considered in a number of cases involving schemes of arrangement under Part 26 of the Companies Act 2006 (*Re Rodenstock GmbH [2011] Bus LR 1245; Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849)

The Judge dismissed Mr Kekhman's submissions that the court only needed to consider the utility of bankruptcy order (citing *Re Thulin [1995] 1 WLR 165*) and that this three-limbed approach was not relevant in the context of a bankruptcy (Judgment, [59]). Nor was he persuaded that a court should leave out of account the position of creditors when it considers whether to exercise its discretion to make a bankruptcy order on a debtor's petition (Judgment, [63]).

The principle ground of appeal relied upon was that the Chief Registrar had applied the wrong test.

The Judge set out what he described as "the correct approach", namely that when dealing with an application to annul the court normally needs to decide: 1) what were the grounds existing at the time the order was made ("Question 1"); 2) whether on those grounds, the order ought not to have been made ("Question 2"); and 3) if the answer to question 2 is: "the order ought not to have been made", whether it should annul the order ("Question 3") (Judgment, [88]).

The Judge was not "*persuaded that the Chief Registrar applied the right test*" (Judgment, [96]) because he did not decide "*in terms that the bankruptcy order ought not to be made*" (Judgment, [97]): he therefore concluded that the "*Chief Registrar erred in principle in his approach to his jurisdiction*" and that it was necessary for him to form his "*own view as to whether, on the grounds existing at the date of the bankruptcy order, that order ought to have*

been made" (Judgment, [99]-[100]).

In re-exercising his discretion the Judge concluded, applying the three-limb test, that Mr Kekhman's liability under the guarantees for £86 million constituted a sufficient connection to the English jurisdiction (where the Bankruptcy Order would lead to the discharge of that liability) (Judgment, [109]) and that there was a benefit from the Bankruptcy Order to both Mr Kekhman, through this discharge (Judgment, [112]) and to his general creditors, through the orderly realisation of assets (Judgment, [116], [127]-[134]). The Bankruptcy Order was not opposed by the creditors generally and there was not unfairness that should persuade the court not to make the order.

Finally, the Judge concluded that the making of the order did not offend obligations of international comity. It was not contrary to the principles of comity for an English court to make an order which would be effective in England and in jurisdictions which chose under their law to recognise it, but which would be wholly ineffective in a jurisdiction which under its law refused to recognise it. It was not contrary to the principles of comity for an English court to make an order which would be effective to discharge the debtor's liability under a contract which the parties had agreed should be governed by English law and which was the subject of an English jurisdiction clause (Judgment, [121]-[124]).

Accordingly, though the Judge held that the Chief Registrar's reasoning was wrong in principle, in re-exercising his discretion applying the "correct approach" he reached the same decision as the Chief Registrar and the appeal was dismissed.

Comments

The case is novel, being the first of its kind to deal with debtors' petitions based on personal presence by individuals from non-EU Member States.

The decision confirms the willingness, in principle, of English courts to allow international individuals to choose an English bankruptcy to manage the administration of their debts and assets.

However, unlike the scheme of arrangement cases cited in the Judgment, it would appear that a debtor can seek a discharge through bankruptcy from their English law liabilities even if the bankruptcy order is not of legal effect in their home jurisdiction (c.f. *Re Magyar Telecom* and *Re Rodenstock*). That has the potential to discriminate between foreign creditors who choose to submit to the jurisdiction of the English court and those who choose to stay away. Further, it potentially opens the floodgates to a raft of non-EU foreign debtors seeking bankruptcy in England on the basis of temporary personal presence only. In short, the jurisdiction to make bankruptcy orders under Section 265 appears vulnerable to abuse whereas the jurisdiction to enter schemes is better protected by the need for majority voting and the ultimate sanction of the court.

WILLIAM WILLSON

William Willson acted for Sberbank at first instance. He has a particular interest in cases arising out of the CIS/the former Soviet Union.

Plus ça change... ? Recent insolvency-related legislative reforms

The 17th edition of the Butterworths' Insolvency Law Handbook has just been published. Editors, Glen Davis QC and Marcus Haywood, describe some of the recent insolvency related legislative changes that will feature in this latest edition.

In the dying days of the last parliament, Royal assent was given to two Acts which make some significant changes to insolvency legislation:

- The Small Business, Enterprise and Employment Act 2015 ("SBEEA"); and
- Deregulation Act 2015 ("the Deregulation Act")

What follows is a brief description of the most significant changes made by these Acts. These affect (among other things) directors' disqualification and liabilities on disqualification, the powers of administrators and the rights of creditors.

Some of the changes come into force automatically in May 2015 but others will require secondary legislation to be passed. There will be a possible window in October of this year, but those changes requiring modification of the Insolvency Rules are likely to be tied in with the introduction of the new Insolvency Rules 2016.

PART 9 OF SBEEA

In July 2013, the Department for Business, Innovation and Skills consulted by seeking feedback to a discussion paper, amongst other things, on measures to strengthen the director disqualification regime. The Government's response to that consultation was published in April 2014, and the proposals made included: providing a new ground for disqualifying a director convicted abroad of a company-related offence; changes to the matters that a court must take into account when considering a disqualification; and measures to provide a process for pursuing compensation for creditors following the disqualification of a director. Part 9 of SBEEA contains measures that seek to put these proposals into legislation. No date has yet been set for the commencement of these provisions. The main amendments are described below, and the changes, when they come into force, will be significant.

Convictions abroad

Section 104 of SBEEA introduces a new ground for bringing disqualification proceedings under the Company Directors Disqualification Act 1986 ("CDDA 1986"). It allows the Secretary of State to apply to the court for the disqualification as a director of a person who has been convicted of certain offences overseas.

Persons instructing unfit directors

Section 105 of SBEEA inserts new sections into the CDDA 1986 to introduce a new ground for disqualification for persons who

are not directors but who exert requisite influence over a director. This applies where a director has been disqualified, or has given a disqualification undertaking. If any of the conduct for which the director was disqualified was caused because the director followed the instruction or direction of someone else, the person giving that direction or instruction may also be disqualified. Applications to court for disqualification orders on these grounds will be subject to a public interest test.

Determining unfitness

Section 106 of SBEEA amends the CDDA 1986 to broaden the matters to which the court must have regard when determining whether a person should be disqualified as a director. This includes a director's conduct in relation to an more than one company, including any overseas companies.

Reports of office-holders on conduct of directors of insolvent companies

Section 107 of SBEEA inserts a new section 7A into the CDDA 1986 with the aim of simplifying the procedure for office-holder reports on the conduct of directors of insolvent companies. Currently the CDDA 1986 requires office holders to submit a report to the Secretary of State if it appears to them that the conduct of the director makes them unfit to be concerned in the management of a company. The new section requires submission to the Secretary of State of a conduct report on every director of a company that becomes insolvent. The conduct report must describe any conduct which may assist the Secretary of State in deciding whether it is in the public interest to apply for the making of a disqualification order. The report must be submitted in all cases within 3 months of the insolvency date.

Compensation orders

Section 110 of SBEEA gives the court a new power to make a compensation order against a person, on the application of the Secretary of State, where the conduct for which that person has been disqualified has caused loss to one or more creditors of an insolvent company of which they have at any time been a director. The factors which the court will have regard to when deciding the amount of any such compensation order include the amount of the loss caused, the nature of the conduct and whether the person has made any other financial contribution in recompense for the conduct.

GLEN DAVIS QC

Insolvency office holders and creditors of insolvent companies will, no doubt, be encouraged by the possibility of enhanced recoveries possible under compensation orders when the relevant provisions come into force.

PART 10 OF SBEEA

The Insolvency Red Tape Challenge, which was established by the Government in 2012, identified a number of measures designed to improve the efficiency of insolvency processes and reduce the costs of administering insolvency proceedings. The

MARCUS HAYWOOD

Insolvency Service consulted on these measures in July 2013 and published the Government's response to the consultation in January 2014. Part 10 of SBEEA contains measures that result from these proposals. The main changes to be brought about by Part 10 of the SBEEA are described below.

Power for administrators to bring claims for fraudulent or wrongful trading

Section 117 amends the Insolvency Act 1986 ("IA 1986") to permit an administrator to bring an action for wrongful or fraudulent trading where a director (or in the case of fraudulent trading, any person) has caused the business of an insolvent company to trade wrongfully or fraudulently. The new sections 246ZA and 246ZB of the IA 1986 mirror the analogous provisions which apply to liquidators under sections 213 and 214 of the Insolvency Act 1986. The new sections will only come into force once further secondary legislation has been passed. There is, however, no precise indication yet as to when this will be.

Power to assign statutory causes of action

Section 118 of SBEEA amends the IA 1986 to allow a liquidator or administrator to assign causes of action in respect of, amongst other things, fraudulent trading, wrongful trading, transactions at an undervalue and preferences. The section allows the office-holder to assign not only the right to bring the action itself but also the proceeds of such an action. Again, these new sections will only come into force once further secondary legislation has been passed.

Meetings

Section 122 and 123 of SBEEA amend the IA 1986 so that physical meetings will no longer be the default mechanism for seeking decisions from creditors and contributories in insolvency proceedings. The changes apply to England and Wales and Scotland in respect of company insolvency, and to England and Wales in respect of individual insolvency. Again, these new sections will only come into force once further secondary legislation has been passed.

When they do come into force, the sections allow office-holders to choose the most appropriate way of engaging with creditors and contributories when required to do so, with the exception that there will only be a physical meeting if this has been requested by certain numbers of the creditors or contributories, as the case may be. Those numbers are stated as being 10% of the total value of claims, 10% of the total number of creditors or contributories, and an absolute number of 10 requests. There is provision for these thresholds to be altered by regulations.

The new sections also set out a process of deemed consent, where office holders will be able to write to creditors or contributories with a proposal, and provided that objections are received from less than 10% of creditors or contributories by total value of claims, the proposal will be deemed to be approved. In the event that more than that amount object to the proposal, the office holder will be required to use an alternative decision making process if they still wish to seek a decision on the matter.

Deemed consent may not, however, be used for approval of an office holder's remuneration, or where a particular decision is expressly required to be made by way of a decision-making procedure, either in legislation or by the court.

Extension of administrator's term of office

Administration automatically ends after one year. Currently paragraph 76(2)(b) of Schedule B1 to the IA 1986 provides that an administration may be extended with the consent of creditors for a specified period not exceeding six months (extensions may also be granted by the court). Section 127 of SBEEA amends paragraph 76 of Schedule B1 to IA 1986 to extend the maximum time period to which creditors may consent for an extension of an administration to a specified period not exceeding one year. These changes come into effect on 26 May 2015.

Administration: payments to unsecured creditors

Section 128 of SBEEA amends Part II and Schedule B1 of the Insolvency Act 1986 to provide that the court's permission is not required where the administrator makes the prescribed part payment to unsecured creditors. These changes also come into effect on 26 May 2015.

Administration: sales to connected persons

Section 129 of SBEEA creates a power for the Government to make regulations in respect of sales in administration to connected parties. Such regulations could prohibit such sales or stipulate conditions to be met to allow such sales to proceed. This follows the 'The Graham Review into Pre-Pack Administration' which recommended a package of voluntary reforms to improve the transparency and outcomes of pre-pack administrations. That report also recommended that the Government take a power along the lines set out in section 129 to cover all business sales to connected persons in administrations, not just what are traditionally thought of as pre-packs (in case the market did not adopt the Review's voluntary reforms). The conditions and requirements that could be stipulated include, in particular, the requirement to seek the approval of creditors, the court or an independent person. These changes will only come into force once further secondary legislation has been passed.

Regulation of the regulators

Sections 137 to 146 of SBEEA amend Part 13 of the IA 1986 to introduce:

- regulatory objectives for the "Recognised Professional Bodies" ("RPBs") that regulate IPs;
- a range of sanctions so that action can be taken where the Secretary of State (as oversight regulator) is satisfied that an RPB is not adequately fulfilling its role as a regulator, or where it is in the public interest to do so, apply to court for a direct sanctions order against an IP; and
- a reserve power for the Secretary of State to designate a single regulator of IPs. This power will lapse if not used within 7 years of it coming into force.

Again these changes will only come into force once further secondary legislation has been passed.

The Deregulation Act

The main changes to be brought about by this Act are as follows:

- A new regime will allow for the partial authorisation of insolvency practitioners. In the future, insolvency practitioners will be able to be authorised in relation to companies, individuals or both (as is currently the case). The Secretary of state will no longer directly authorise insolvency practitioners so, in future, all insolvency practitioners will be authorised by RPB's.
- Changes will be introduced to prevent unnecessary delays to the appointment of administrators, for example, by clarifying that winding-up petitions presented during the interim moratorium preceding administration do not prevent the appointment of an administrator.

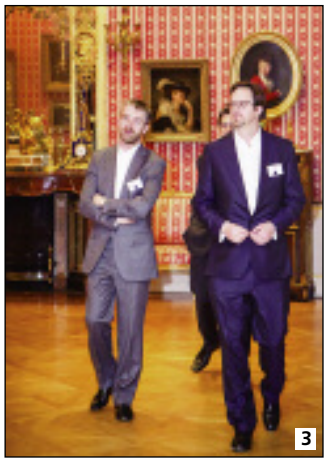
The majority of these changes will be introduced in or after October 2015.

Conclusion

As always with such changes, the devil is likely to be in the detail of the implementing rules, and it will only be after the provisions have been tested in practice and considered by the courts that we fill find out how they really work.

The 17th edition of the Butterworths' Insolvency Law Handbook is available from LexisNexis. 0845 3701234.

South Square at The Wallace Collection



The South Square Spring Reception was this year held at the Wallace Collection on Wednesday 13 May when members and staff welcomed clients and friends of Chambers on one of the sunniest evenings of the year so far. The Wallace Collection comprises a magnificent collection of French 18th-century painting, furniture and porcelain housed in an imposing building on Manchester Square.

The reception, held in the more modern Courtyard with a wonderful glass ceiling, included a private viewing of the first floor galleries. As can be seen from the photographs, a good time was had by all socialising and viewing the exhibits.

CLOCKWISE FROM TOP: 1/. THE COURTYARD AT THE WALLACE COLLECTION. 2/. (L TO R) AMANDA BANISTER AND LIBBY ELLIOTT OF STEPHENSON HARWOOD. 3/. (L TO R) BRYAN SHACKLADY AND CHRIS BACON OF FORSTERS. 4/. THE EXTERIOR OF THE WALLACE COLLECTION, HERTFORD HOUSE. 5/. (L TO R) SOUTH SQUARE'S TOBY BROWN AND WILLIAM WILLSON

Photography by Serena Bolton

CLOCKWISE FROM ABOVE. 1/. (L TO R) JEREMY GOLDRING QC, ALLEN & OVERY'S MARC FLORENT, ROBIN DICKER QC AND MARK ARNOLD QC. 2/. (L TO R) CHARLES FERGUSON OF FERGUSON SOLICITORS, ERNST & YOUNG'S MAURICE MOSES AND SOUTH SQUARE'S STEPHEN ROBINS. 3/. (L TO R) GLEN DAVIS QC, GEORGE BROWN OF REED SMITH, RICHARD BAINES OF DRUCES. 4/. (L TO R) ANDREW GOODSON OF GRIFFINS AND RICHARD SAUNDERS OF MOON BEEVER. 5/. (L TO R) ZIP JILA OF AKIN GUMP, CHRISTINA FRANZESE OF FRESHFIELDS, BRUCKHAUS, DERINGER AND SOUTH SQUARE'S GEORGINA PETERS. 6/. (L TO R) ANTONY ZACAROLI QC AND PETER BLOXHAM OF BP LEGAL. 7/. (L TO R) JAMIE LEADER OF EVERSHEDS, MARK LAWFORD OF WEIL, GOTSHAL & MANGES, MARCUS PALLOT OF CAREY OLSEN AND SOUTH SQUARE'S ADAM GOODISON AND ANDREW SHAW

2015 COMBAR Singapore Round Table Event

Matthew Abraham reports on the first COMBAR roundtable for Honorary Overseas Members, held in Singapore in January of this year.

On 5 January 2015, at the opening of the legal year in Singapore, the Singapore International Commercial Court ("SICC") was officially launched. The opening of the SICC is yet another feather in Singapore's plumed cap furthering its position as a leader in the provision of services for international litigation. According to the SICC website the SICC seeks "*to further boost Singapore's value as a leading forum for legal services and international commercial dispute resolution, offering litigants the option of having their disputes adjudicated by a panel of experienced judges comprising specialist commercial judges from Singapore and international judges from both civil law and common law traditions.*"

SINGAPOREAN JUDGES OUTSIDE THE SINGAPORE INTERNATIONAL COURT

It is against this backdrop that the first COMBAR Round Table meeting for Honorary Overseas Members was held in Singapore on 30 and 31 January 2015. The event was attended by a select group of COMBAR members both from London and Singapore. The delegation of barristers from London consisted of individuals who have developed or wish to develop their practices in Singapore and the surrounding regions.

The event opened with a buffet lunch which was a great opportunity to break the ice with the other delegates prior to the commencement of the round table meeting. The meeting itself was split into roughly four sessions with four key speakers.

The first discussion centred on Bribery and Common Law Remedies. The discussion started with an introduction to the English perspective and the recent developments in the law including the decision in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. Following the

introduction there was a lively discussion which included issues that the Singaporean lawyers have faced. Understanding how the Singaporean Courts have dealt with similar issues provided a fruitful comparative discussion.

Following the opening discussion, Mr Justice Eder gave a judicial perspective on heavy trial management. In particular, Eder J went through the various stages of a heavy trial and provided examples of both efficient and inefficient ways of dealing with complex cases. Complementing the discussions, the delegates were given a presentation by a representative from Opus 2 International Presentation on their computer platform for heavy trial management.

The final part of the round table meeting was a presentation by a Singaporean lawyer, Paul Tan of Rajah & Tann LLP, on the problems of enforcing arbitration awards in the context of illegality and bribery. Paul provided a detailed review of a recent decision in Singapore which again laid down fertile ground for comparative discussion and was a great way for the round table meeting to end.

The event closed with a dinner on 31 January hosted by the Singaporean delegation, which provided a wonderful opportunity to either develop on the prior legal discussions and/or talk more generally about life at the respective bars.

On the whole the trip has made it clear to me that Singapore is a jurisdiction that is and will continue to host very interesting and complex litigation especially given the current rapid development in countries in Asia.

MATTHEW ABRAHAM WAS PART OF THE DELEGATION OF LONDON BARRISTERS ATTENDING THE ROUNDTABLE

THE MERLION IS THE NATIONAL PERSONIFICATION OF SINGAPORE, A CITY NOW FAR-REMOVED FROM ITS ORIGINS AS A FISHING VILLAGE

South Square attends INSOL in Bay City

At the end of March, the INSOL International Annual Regional Conference took place in San Francisco. The event followed the very successful conference in Hong Kong the previous year and once again South Square was represented in numbers – Michael Crystal QC, David Alexander QC, Martin Pascoe QC, Glen Davis QC, Felicity Toube QC, Tom Smith QC and Hilary Stonefrost were all present.

Once again the conference drew a capacity crowd, this time to the Fairmont Hotel in San Francisco, and delegates were treated to a beautiful spring weekend on the West Coast. With most delegates arriving on the Saturday and the Sunday, the conference kicked off on the Sunday evening with a drinks reception and dinner. On Monday the conference began in earnest with a thought-provoking presentation on trends in the global economy

OPENING NIGHT DINNER AT THE FAIRMONT

FELICITY TOUBE QC (RIGHT) HOSTS A SESSION ON INFORMATION EXCHANGE IN CROSS-BORDER INSOLVENCY

from Ken Moelis of Moelis & Co. This was followed by breakout sessions including, notably, a session on the recent US municipal bankruptcies discussing the novel issues which these raised and a session on information exchange in cross-border insolvency, chaired by Felicity Toube QC.

The Monday concluded with events hosted at a number of stylish locations across the city including by KPMG at the "Top of the Mark" restaurant, where guests had the benefit of brilliant views across San Francisco and the bay, and by PwC at the Clift Hotel.

On the Tuesday the conference resumed with a fascinating and topical session on bank resolution discussing the problems involved with restructuring banks and the techniques which have been developed to deal with these institutions. Another informative session followed discussing the important (and varying) roles of hedge funds in many corporate restructurings. After the lunch sponsored by South Square, the final sessions discussed hot topics in corporate reorganisation and, ending on a philosophical note, the competing tensions of nationalism and universalism in cross-border insolvency.

The conference closed with the gala dinner on the Tuesday night. As ever, the South Square contingent enjoyed catching up with so many of you in San Francisco, as well as making many new acquaintances. We look forward to seeing you again soon, including at the Dubai conference next January.

PROFESSOR IAN FLETCHER GREETS PROFESSOR ROSALIND MASON TAKING OVER AS CHAIR OF THE INSOL ACADEMICS GROUP (ABOVE) AND THE TOP OF THE MARK VENUE WITH GREAT VIEWS (LEFT)

EU/EEA LAW UPDATE

Gabriel Moss QC and Robert Amey look at EU/EEA developments outside the UK

Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2015] UKSC 27

Olympic Airlines SA ("Olympic") was ordered to be wound up by an Athens court on 2 October 2009. Since then, main liquidation proceedings have been in progress in Greece. The rules of Olympic's pension scheme (the "Pension Scheme") require it to be wound up upon the liquidation of Olympic. Upon the Pension Scheme's winding up, a deficit of around £16m was discovered, which Olympic is bound to make good under section 75 of the Pensions Act 1995. On 20 July 2010, the Pension Scheme presented a winding-up petition against Olympic in England on the ground that it was unable to meet this liability. Olympic had very limited assets in England: the purpose of the petition was to allow the Pension Scheme to qualify under section 127 of the Pensions Act 2004 for entry into the Pension Protection Fund, which required English winding up proceedings to be afoot.

Since Olympic's centre of main interests (COMI) was in Greece, the EC Insolvency Regulation applied. English winding up proceedings would therefore only be possible if Olympic had an "*establishment*" in England, an establishment being "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.*"

Olympic had had a number of offices in England, but the only one still occupied on 20 July 2010 was its former UK head office in London. Olympic had ceased commercial operations on 29 September 2009, and its remaining 27 staff had been terminated with effect from 14 July 2009. Three individuals were retained thereafter on ad hoc

THE PENSION SCHEME PRESENTED A WINDING-UP PETITION AGAINST OLYMPIC IN ENGLAND ON THE GROUND THAT IT WAS UNABLE TO MEET THIS LIABILITY

contracts, essentially to deal with paperwork on behalf of the Greek liquidator, to pay outstanding bills and to sell remaining office equipment.

At first instance, the Chancellor held that Olympic had been carrying on "economic activity" in England on 20 July 2010, and was therefore liable to be wound up. The Chancellor thought it unnecessary that there be any "*external market activity*". The Court of Appeal overruled him, and thought that "*economic activity*" must consist of more than simply winding up the company's affairs.

Subsequently, the Secretary of State promulgated secondary legislation under the Pensions Act 2004 to enable the Pension Scheme to qualify for entry into the Pension Protection Fund. However, the issue whether Olympic had been liable to be wound up in England on 20 July 2010 still had significance for the purpose of potential claw-back proceedings, so the Pension Scheme appealed to the Supreme Court.

In a brief judgment, Lord Sumption (with whom the others all agreed) dismissed the appeal, holding that "*economic activity*" had to involve at least some subsisting business with third parties. Reliance was placed upon the Virgós Schmit Report, which referred to "*economic activities exercised on the market (ie externally)*", and upon the ECJ's decision in *Interedil* [2012] Bus LR 1582, which held that an establishment must be "*ascertainable by third parties*" and could not consist solely of "*the presence of goods in isolation or bank accounts*". His Lordship also approved *Re Office Metro Ltd* [2012] BCC 829, where Mann J held that a Luxembourg company could not be wound up in England simply because it had an English office dealing with the settlement of liabilities to associated companies, the forwarding of post and the taking of legal and accountancy advice.

Perhaps surprisingly, given the lack of direct ECJ authority on the matter (and the fact that the Chancellor had previously reached the opposite conclusion), the Supreme Court was sufficiently confident of the result it had reached that it refused to refer the matter to the Court of Justice of the European Union.

C-557/12 Hermann Lutz v Elke Bäuerle

In this case, the ECJ considered the interplay between Articles 4 and 13 of the Insolvency Regulation. Article 4 provides that the law applicable to insolvency proceedings shall be the law of the place where those proceedings are opened. This law shall govern all matters, including "*the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors*." Article 13 provides, however, that this will not be the case where "*the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case.*"

Mr Lutz, an Austrian resident, had purchased a car from an Austrian company, ECZ. ECZ turned out to be a fraudulent operation, and did not deliver the car. Mr Lutz therefore obtained judgment against ECZ in Austria, and sought to enforce it by attaching ECZ's Austrian bank account.

Main proceedings were subsequently opened in August 2008 respect of ECZ in Germany, and Ms Bäuerle was appointed as officeholder. Shortly after proceedings were opened, ECZ's bank paid Mr Lutz pursuant to his charge over ECZ's account. Ms Bäuerle sought to set aside the payment to Mr Lutz, and was initially successful before the German court.

Mr Lutz, however, appealed on the basis that his relationship with ECZ was governed by Austrian law, which had a one-year limitation period, commencing with the opening of insolvency proceedings. Ms Bäuerle's application was issued just over a year after the commencement of insolvency proceedings (the relevant period under German law was three years). Mr Lutz therefore argued that Austrian law "*does not allow any means of challenging*" the security within the Article 13 sense. Ms Bäuerle argued that Article 13 could not apply where the payment to Mr Lutz was made after her appointment, and that in any event, Austrian law did allow a means of challenging such a payment, but simply would have imposed a procedural time bar in that particular case. The German court referred the question to the ECJ.

The ECJ agreed with Mr Lutz. It did not matter that Mr Lutz had only been paid after the commencement of the German proceedings. Ordinarily it would, but Mr Lutz' security had been conferred before the commencement of proceedings, it was therefore protected under Article 5, and the payment was simply a realisation of that security. Nor did it matter that the Austrian law time bar could potentially be characterised as procedural rather than substantive: the Regulation did not distinguish between the two, but required that the action brought in Germany must also be capable of being brought in Austria. The EC Regulation therefore requires not only that the *lex fori concursus* and the *lex causae* both have a means of challenging the relevant transaction, but that the relevant transaction could in fact be attacked under both systems of law.

NEWS in brief

Glen Davis QC appointed to GFSC expert panel

Glen Davis QC has been appointed to the Guernsey Financial Services Commission's (GFSC) panel of Senior Decision Makers.

The GFSC is the regulatory body for the finance sector in the Bailiwick of Guernsey. Its primary objective is to regulate and supervise financial services to uphold Guernsey's international reputation as a leading finance centre.

Senior Decision Makers determine the outcome of the Commission's major enforcement cases. Panel members hear cases involving serious findings against a licensee or individual director where those findings are contested and, in the event a case is proven, determine the penalties imposed.

Chairman of the Commission, Cees Schrauwers, said: "I am delighted that Glen Davis QC has accepted this appointment. His previous experience and areas of expertise make him an ideal member for our panel."

GLEN DAVIS QC

British businessman on FBI's Most Wanted

A British businessman has been placed on the FBI's 10 Most Wanted 'white collar criminals' list following allegations he conducted a multi-million pound luxury car scam.

Afzal Khan, known to his clients as 'Bobby', opened Emporio Motor Group in New Jersey in 2013. He featured on popular US reality television series The Real Housewives of New Jersey and counted members of the show's cast among his clients.

He is now accused of obtaining loans for cars which were never delivered, obtaining loans for cars without proper title, and offering to sell cars on consignment without returning the vehicles or funds from sales.

One company is understood to have lost $1.7 million from its dealings with Khan and more than 70 further individuals have come forward to issue complaints.

Federal agents hunting the 32-year-old, originally from Edinburgh, have offered a $20,000 reward for information leading to his arrest.

Richard Snowden QC becomes High Court Judge

Richard Snowden QC of Erskine Chambers has been appointed as a High Court Judge with effect from 30 April 2015 and will sit in the Chancery Division. His appointment follows the elevation of Mr Justice Sales to the Court of Appeal. Richard Snowden was called to the Bar by Lincoln's Inn in 1986, taking silk in 2003. He was appointed as a Recorder in 2007. He was also approved to sit as a deputy High Court judge.

Sir Bernard Eder retires

The Honourable Sir Bernard Eder retired early from the High Court (Queen's Bench Division) with effect from 2 April 2015 at the age of 62. Sir Bernard Eder was called to the Bar in 1975, took silk in 1991 and was appointed as a Judge of the High Court (assigned to sit in the Commercial Court) in 2011.

Mr Registrar Briggs

The Queen has appointed Nicholas Briggs as a Registrar in Bankruptcy of the High Court, with effect from 2 February 2015. Briggs, aged 50, was called to the Bar in 1994 and was appointed as a Deputy Bankruptcy Registrar in 2007.

Barristers subject to emotional exhaustion

According to a report from the Bar Council one in eight barristers are 'emotionally exhausted' and more than half do not sleep properly. These are among the shocking findings of the most comprehensive survey of barristers' well-being yet conducted by the Bar Council.

Stress and the absence of leadership role models were among the factors that weighed most on well-being among barristers, with many practitioners reluctant to seek help because of stigma around stress at the bar.

Of 2,456 respondents to the survey – one sixth of the profession – at least 300 experienced emotional exhaustion, while 1,364 said they did not get enough good quality sleep.

Half of the respondents (1,152) said they faced high levels of stress at work, with two-thirds (1,614) admitting that their current level of stress had a negative impact on their performance.

Financial concerns, high expectations, devaluation of the profession in the eyes of the public and government, and long unsocial working hours were shown as the most challenging aspects of life at the bar.

At the self-employed bar, half of respondents said they felt disengaged at work. At the employed bar the proportion was one-third.

However, employed barristers reported facing challenges caused by a lack of autonomy and a reduced sense of status compared with their self-employed colleagues. Those experiencing the highest work pressure and life satisfaction were aged between 35 and 55, while those at the criminal bar reported the highest level of pressure.

Formal or informal mentoring was shown to 'significantly' reduce stress, although few respondents reported receiving mentoring. The bar plans to extend its mentoring service and produce guidance for chambers.

Alistair MacDonald QC, chairman of the bar, said. 'For too long, stress, mental health and wellbeing have been taboo subjects of discussion at the bar and in the wider legal sector.'

Cross-Border Insolvency Research

With recent high-profile decisions in mind, including the Privy Council in *Saad Investments* and *Singularis,* South Square in collaboration with Grant Thornton have carried out a survey polling the views of the international insolvency community on dealing with insolvencies across different common law jurisdictions.

Lawyers and other experts from 50 leading organisations across 12 jurisdictions have taken part in the research. The findings will be summarised in a report due to be published in June.

South Square and GT are very grateful to clients and contacts who have taken part in the research and look forward to sharing useful insights, to continuing the debate, and to helping address the challenges together.

If you have any questions about the research and/or would like a copy of the report findings, contact Jo Colton at joannacolton@southsquare.com.

Conman bluffed his way out of prison

A conman who brazenly walked free from Wandsworth Prison having tricked staff into believing he had been released on bail was jailed for seven years in April.

Neil Moore, 28, was on remand for a £1.8million fraud when he issued wardens a bogus email posing as a court clerk manager. Moore's great escape became apparent several days later, when solicitors attended the prison for a meeting with him only to discover he was gone.

Using an illicit mobile phone from his prison cell, Moore registered a website in the name of investigating officer Detective Inspector Christ Soole, giving the address and contact details of the Royal Courts of Justice. He created a domain name similar to the court service's hmcts.gsi.gov.uk – emailing the custody mailbox from an account ending hmcts-gsi-gov.uk.

Moore pleaded guilty to escape from lawful custody in addition to eight counts of fraud having posed as staff from Barclays, Lloyds and Santander to dupe organisations into handing over significant sums of money.

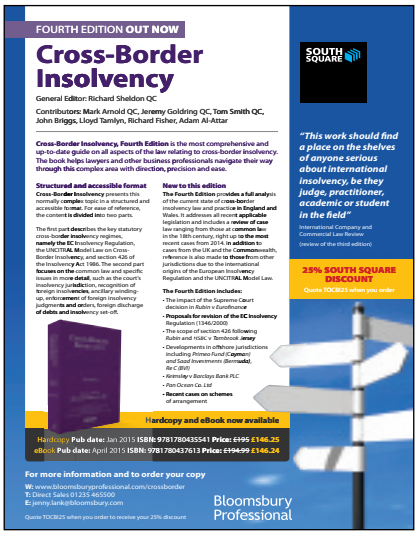
The conman used four aliases, occasionally putting on a woman's voice so convincing that his transgender lover, Kirsten Moore, was initially believed to have been involved in the scams.

Sentencing at Southwark Crown Court, Recorder David Hunt QC described the ploy as "ingenious".

New Publications

Cross-Border Insolvency 4th Edition - eBook

As reported in the February issue of the Digest, the Cross-Border Insolvency Fourth Edition, edited by Richard Sheldon QC, was published in January. The eBook is now available in addition to the hardcopy. Full details can be found on this issue's inside back cover.



Insolvency Law Handbook

The latest edition of Butterworths Insolvency Law Handbook will be published in May. Edited by Glen Davis QC and Marcus Haywood, the Handbook is the most comprehensive single collection of statutory source material and practice directions relating to insolvency law in England, Wales and Scotland. More information is on the inside front cover.

Marathon Man....

Congratulations to William Willson for surviving the London Marathon in a creditable time of 4 hours 2 minutes.

This year William was running for CRISIS, one of the UK's leading charities for the homeless. If you would like to sponsor him, click here ***http://tinyurl.com/q3pr6cb***

Corporate insolvencies at lowest level since 2007

Company insolvencies in England and Wales have dropped to the lowest number since the end of 2007, figures from the Insolvency Service revealed in April.

According to the agency's latest statistics, 4,052 companies entered into formal insolvency in the first quarter of 2015 – one per cent less than the last quarter of 2014, and 11 per cent lower than the corresponding period last year. Creditors' voluntary liquidations have also fallen to their lowest level since June 2008. During the first quarter of this year, 2,481 companies entered into a creditor's voluntary liquidation. This marks a four per cent drop on the previous quarter and a six per cent decline from the same period in 2014.

By contrast, 904 companies were subject to a compulsory winding-up order from January to March 2015, a nine per cent increase on the preceding quarter.

INSOL One Day Seminar Bermuda

The INSOL Bermuda Seminar will take place on 4 June at the Fairmont Hamilton Princess.

South Square's Gabriel Moss QC is a panellist, with William Trower QC, David Alexander QC, Hilary Stonefrost and William Willson attending.

The day will cover the latest cross-border insolvency issues and developments, commencing with a discussion led by Bermuda Chief Justice, Dr Ian Kawaley, entitled "Statutory Star Trekkers vs. Common Law Dinosaurs".

The panel, which includes Gabriel Moss QC, will debate the relative merits of legislation vs. common law. The next issue of the Digest will include an overview of this event.


WILLIAM TROWER QC


GABRIEL MOSS QC


WILLIAM WILLSON


HILARY STONEFROST

Transfer of cases from Registrars to Central London County Court

In a bid to reduce long waiting times to appear before a registrar in the High Court, the Chancellor has produced a note setting out the criteria for the transfer of work from the registrars to the Central London County Court. It is important to note the following:

1/. With effect from 6 April 2015 the following proceedings will be issued and heard in the Central London County Court: (a) applications for the restoration of a company to the register; (b) applications to extend the period allowed for the delivery of particulars relating to a charge; and (c) applications to rectify the register by reason of omission or mis-statement in any statement or notice delivered to the registrar of companies or to replace an instrument or debenture delivered to the registrar of companies.

2/. When deciding whether proceedings which have been issued in the High Court should be transferred to the County Court sitting in Central London, the registrar should have regard to the following factors: (a) the complexity of the proceedings; (b) whether the proceedings raise new or controversial points of law; (c) the likely date and length of the hearing; (d) public interest in the proceedings; and (e) (where it is ascertainable) the amount in issue in the proceedings.

3/. Subject to the matters set out in (2) above, where the amount in issue in the proceedings is £100,000 or less, the proceedings should be transferred.

4/. Subject to the matters set out in (2) above, the following will be transferred to be the Central London County Court: (a) private examinations (but not necessarily the application for the private examination); (b) applications for the extension of an administrator's term of office; (c) applications for permission to distribute the prescribed part; and (d) applications to disqualify a director and applications for a bankruptcy restrictions order where it appears likely that an order will be made for a period not exceeding five years.

5/. The matters set out above do not affect winding up petitions, bankruptcy petitions and all High Court proceedings which are to be listed before a registrar in accordance with the Practice Direction on Insolvency Proceedings.

R3 names new president

The Association of Business Recovery Professionals (R3) has announced Phillip Sykes, head of Baker Tilly's London restructuring practice, as its new president.

Sykes has specialised in corporate restructuring since 1980, working across multiple sectors including retail, property and construction, financial services, insurance, manufacturing, commodities and international trade, engineering and agriculture. His 12-month term as president has now commenced.

Sykes' predecessor, Giles Frampton, will take up a new role as R3's policy group chairman.

R3 PRESIDENT, PHILLIP SYKES

Lee Ryan the 4th member of Blue to go bankrupt

Singer Lee Ryan has become the fourth - and final - member of the boyband, Blue, to declare himself bankrupt.

Ryan now faces a challenge from creditors to reclaim cash he owes.

Ryan follows bandmates Duncan James, Anthony Costa and Simon Webbe who have all been forced to do the same.

Even the band's company Blueworld Ltd went bust in May 2013 - with the band members blaming poor decisions made by their former management.

Ryan was forced into bankruptcy by a company called Capquest Investments Limited, who purchase debts from various credit card companies who have been unable to collect cash - in the hope that a more "persuasive" approach might encourage payment. Ryan, currently on tour with the band, will now have his assets frozen and be asked to attend an interview with his Official Receiver to determine if he is in a position to repay.

The official order was made in the Central London County Court last month.

South Square's Lucy Frazer QC elected as MP for SE Cambridgeshire

South Square's Lucy Frazer QC has been elected as the conservative member of parliament for South East Cambridgeshire.

Lucy won the seat with 28,845 votes, with her liberal democrat rival Jonathan Chatfield trailing on 12,008 – increasing an already healthy majority by another 0.5%, and taking 48.5% of all votes cast.

She has replaced Sir Jim Paice, who had held the constituency since 1987.

Speaking after her victory Lucy said "I feel honoured and extremely excited to have won, and I'd like to thank everyone who voted for me..I'm aware there's some hard work ahead of me but I'm certainly not afraid of that."

We wish her all the very best of luck in her new Parliamentary career.

LUCY FRAZER QC MP ON THE CAMPAIGN TRAIL

Anthony Scrivener QC

Reforming and charismatic barrister with a fantastic court room presence and former Bar Council Chairman, Anthony Scrivener QC, died on 27 March 2015, aged 79.

Born in July 1935, the son of a Canterbury ironmonger, he was educated at Kent College, Canterbury and then at University College, London. He was then called to the Bar by Gray's Inn in 1959.

After a spell lecturing in law in Ghana he came back to the Bar. Scrivener took Silk in 1975 becoming a Crown court Recorder in the same year. He was Chairman of the Bar in 1991. Scrivener was also a Bencher of Lincoln's Inn.

Known to his friends and colleagues as "Scriv" he was a champion of the cab-rank principle by which a barrister, if available to work, is required to take on any case however unpopular. Scrivener represented diverse clients in some of the most high profile cases of the day. They included Guinness defendant Jack Lyons, Guildford Four member Gerry Conlon, Winston Silcott, acquitted of the murder of PC Keith Blacklock, as well as Norfolk farmer Tony Martin, who shot dead an intruder at his home, Dame Shirley Porter over the homes-for-votes scandal and disgraced Polly Peck tycoon Asil Nadir. He once famously quipped: "A common law barrister like myself has seen every type of depravity possible and can say it in Latin."

Judge removed from Brazilian billionaire trial

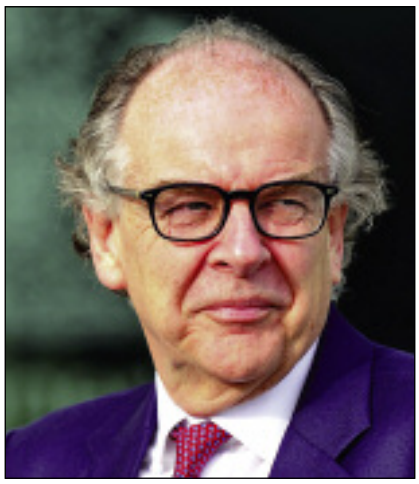
EIKE BATISTA AND HIS PORSCHE

The Brazilian judge presiding over criminal proceedings against fallen tycoon Eike Batista has been removed from the trial after he was photographed by a newspapers driving Batista's white Porsche Cayenne. A number of vehicles and luxury goods belonging to Batista, once Brazil's richest man, had been confiscated by police.

Flavio Robert de Souza said he had been driving the car because the federal police had no safe place for it and he was worried it would be "exposed to sun, rain and possible damage." The Brazilian judicial ombudsman cited the news reports as the reason for Souza's dismissal. A new judge has been assigned to the trial.

Lord Falconer returns to shadow cabinet

Lord Falconer of Thoroton, the former lord chancellor (2003-2007) under Tony Blair who oversaw the creation of the Ministry of Justice, has replaced Sadiq Khan as shadow justice secretary. Falconer, 63, was called to the bar in 1974 and made a life peer following the 1997 general election, when he joined the government as solicitor general. As secretary of state for constitutional affairs from 2003 he proposed the abolition of the post of lord chancellor, a plan eventually abandoned because of the constitutional implications. Lord Falconer has also famously lost more than five stone over the last couple of years apparently on a diet of apples and Diet Coke.



LORD FALCONER

Dog Days

William Willson's short film, 'DOG DAYS', enjoyed its first screening at the Curzon Soho on 30 April. 'DOG DAYS' tells the story (in 12 minutes) of a chance meeting between two young Londoners that culminates in an illicit midnight swim at Hampstead Mixed Ponds. The film stars up-and-comers Ivanno Jeremiah and Melanie Gray – but congratulations to receptionist Emily Bell for a fine cameo (despite performing in the 'extras' scene, we hear that Hilary Stonefrost, Adam Al Attar, Hannah Pini, Orietta Bergamo and Chris Brinklow all ended up 'on the cutting room floor'). The premiere was attended by 350 guests, followed by an after-party at The Ivy. The plan it to take it on the festival circuit in Europe and the US. If you want to follow and/or support the film, go to www.dogdaysshortfilm.com.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the May 2015 edition of the Digest. This time all you have to do is work out what the eight pairs of pictures represent. Then you have to identify what connects them. When you have done that please send your answers to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. To the winner, if necessary drawn out of the wig tin, goes the usual magnum of champagne and a South Square umbrella – the latter is less useful at this time of year, but it will come into its own by October! Answers by Friday 3 July 2015 please. Good luck.

David Alexander QC

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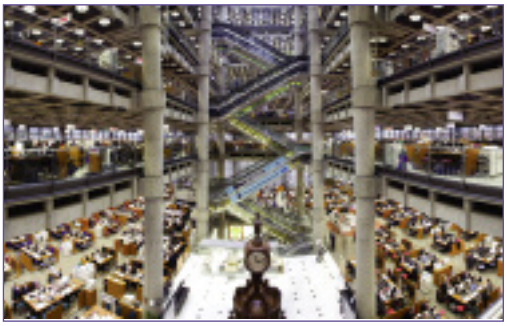

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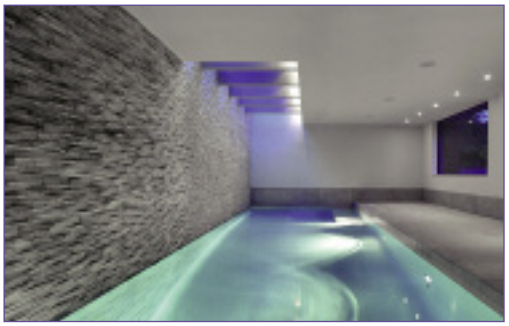

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And the connection is?

FEBRUARY CHALLENGE

The correct answers to the February 2015 South Square Challenge were (1) Mount Fuji (Japan), (2) Mount Licancabur (Chile), (3) Table Mountain (South Africa), (4) Mount Stanley (Uganda) (5) Mount Rushmore (USA), (6) Ben Nevis (UK), (7) Mount Cook (New Zealand) and Castle Mountain (Canada). The connection between the eight countries where the mountains are located is that they have all adopted legislation based on the UNCITRAL Model Law of Cross-Border Insolvency. As always there were a number of correct entries. But the winner is Iben Madsen of Wilkie Farr & Gallagher (UK) LLP to whom go our congratulations, a magnum of champagne and a South Square umbrella.

Diary Dates

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

INSOL Bermuda One Day Seminar
4 June 2015 - Bermuda

III 15th Annual Conference
15-16 June 2015 - Naples

INSOL Europe Annual Conference
1-4 October 2015 - Berlin

INSOL Dubai Annual Regional Conference
24-26 January 2016

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

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

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FOURTH EDITION **OUT NOW**

Cross-Border Insolvency

General Editor: Richard Sheldon QC

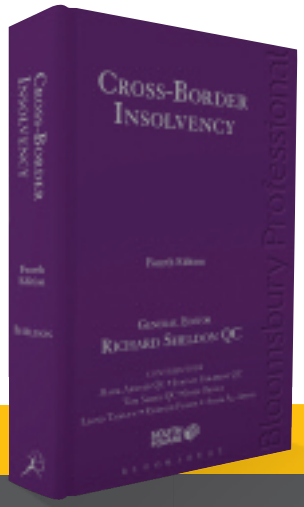
Contributors: Mark Arnold QC, Jeremy Goldring QC, Tom Smith QC, John Briggs, Lloyd Tamlyn, Richard Fisher, Adam Al-Attar

Cross-Border Insolvency, Fourth Edition is the most comprehensive and up-to-date guide on all aspects of the law relating to cross-border insolvency. The book helps lawyers and other business professionals navigate their way through this complex area with direction, precision and ease.

Structured and accessible format

Cross-Border Insolvency presents this normally complex topic in a structured and accessible format. For ease of reference, the content is divided into two parts.

The first part describes the key statutory cross-border insolvency regimes, namely the EC Insolvency Regulation, the UNCITRAL Model Law on Cross-Border Insolvency, and section 426 of the Insolvency Act 1986. The second part focuses on the common law and specific issues in more detail, such as the court's insolvency jurisdiction, recognition of foreign insolvencies, ancillary winding-up, enforcement of foreign insolvency judgments and orders, foreign discharge of debts and insolvency set-off.



New to this edition

The Fourth Edition provides a full analysis of the current state of cross-border insolvency law and practice in England and Wales. It addresses all recent applicable legislation and includes a review of case law ranging from those at common law in the 18th century, right up to the most recent cases from 2014. In addition to cases from the UK and the Commonwealth, reference is also made to those from other jurisdictions due to the international origins of the European Insolvency Regulation and the UNCITRAL Model Law.

The Fourth Edition includes:

- The impact of the Supreme Court decision in *Rubin* v *Eurofinance*
- Proposals for revision of the EC Insolvency Regulation (1346/2000)
- The scope of section 426 following *Rubin* and *HSBC* v *Tambrook Jersey*
- Developments in offshore jurisdictions including *Primeo Fund (Cayman) and Saad Investments (Bermuda), Re C (BVI)*
- *Kelmsley* v *Barclays Bank PLC*
- *Pan Ocean Co. Ltd*
- Recent cases on schemes of arrangement

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