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AUGUST 2016

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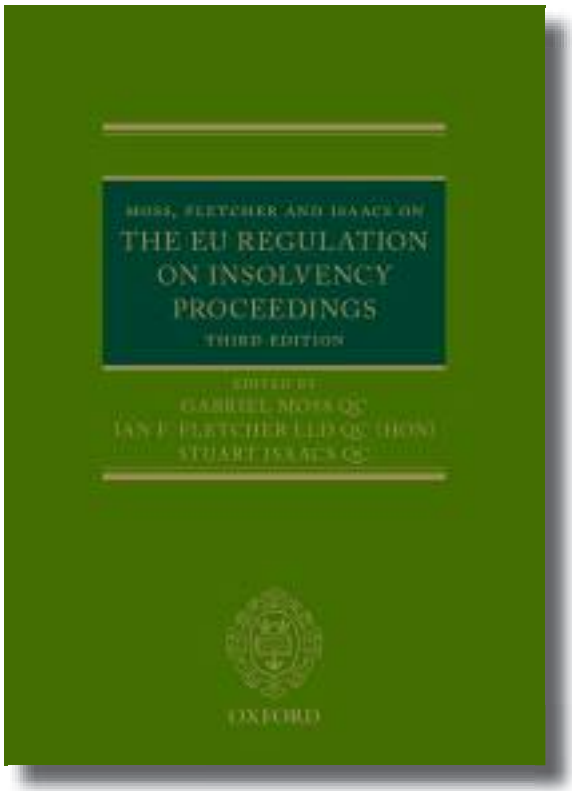

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FROM THE **EDITOR**

DAVID ALEXANDER QC

A week is a long time...

In the mid-1960s Harold Wilson is reputed to have said that "a week is a long time in politics". Well, the week surrounding the Brexit referendum in the United Kingdom certainly was. First, perhaps to everyone's surprise, the British people voted to leave the EU, a result which finally became clear at about 4.30am but which had been on the cards for some hours before that. Secondly, the Prime Minister, David Cameron, who is famous for saying that the Brits were not quitters, did precisely that a few hours later triggering a leadership battle which itself has had twists and turns that even the best short story writer would not get away with. Thirdly, the Labour party went into complete and utter meltdown. Fourthly, the whole union came under threat again with Nicola Sturgeon saying that a second referendum was on the cards for Scotland, which had voted to stay in the EU, and with Martin McGuinness of Sinn Fein calling for a referendum on whether there should be a united Ireland after Northern Ireland had also voted to stay in the EU. What a mess...

FROM THE MORNING AFTER THE BREXIT VOTE, THE LABOUR PARTY WENT INTO MELTDOWN

So what was the immediate reaction to Brexit? Well, the Remainers were saddened, albeit that many of them took the view that the British people had spoken and their will had to be respected. The lead Brexiteers were pleased but largely magnanimous (although all of them then proceeded to depart the stage fairly quickly). Many of those who had voted Leave were probably a bit shocked by what they had done. And some did not know what had happened at all with Google's second highest search on the day after the vote being "what is the EU?".

So what happens from the position in which the UK now finds itself? Well, judging from what has happened over the last few weeks, the one thing that is absolutely plain is that the UK had no plan in place for leaving the EU should that be the way the vote went. Matters were then made worse by the total vacuum which followed. For a while it appeared to many – including those in the EU - that we were effectively a leaderless country. But hopefully all that has now changed with the election of a

THERESA MAY BECAME THE NEW PRIME MINISTER, SOME TWO MONTHS EARLIER THAN EXPECTED

new Conservative leader and Prime Minister in Theresa May whose job it will now be to come up with a plan and negotiate with our European friends. It will be interesting to see how it goes. As Mrs May herself said "Ken Clarke says I am a bloody difficult woman. The next man to find that out will be Jean-Claude Junker".

Turning to other news, one principal thing comes to mind. Although it has largely been drowned out by the Brexit referendum and what has followed, the US election campaign has continued to rumble on and we now (after what has seemed a very long process) have the combatants. Hilary Clinton – probably not surprisingly – and Donald Trump – perhaps surprisingly. One will emerge victorious in November 2016 following what I suspect will be a pretty bloody battle between the two of them. But oh to be an American. What a choice to have to make.

So what do we have for you in this edition of the Digest? Well topically we start with an article by Mark Arnold QC and Matthew Abraham on Brexit and its potential ramifications. We also have an article by John Briggs and Giorgio Corno who examine the treatment of legal acts detrimental to creditors in English and Italian insolvency law and under the EU Regulation. In addition we have articles by Antony Zacaroli QC on mis-selling liabilities and the banks and by Jeremy Goldring QC on the perils of late evidence at trial. We also have articles by Adam Al-Attar on the weight to be given to extrinsic evidence in deciding questions of construction and by Manolete Partners Plc on certain issues relating to officeholder claims. Finally, in our offshore spotlight, we have an article by Brian Simms QC and Sophia Rolle-Kapousouzoglou of Lennox Paton on some recent cases in the Bahamas.

Apart from articles, we have a number of other things. Reviews of the ILA Conference in Oxford and INSOL's conference in Jersey. Gabriel Moss QC and Robert Amey's EU/EEA Law Update. A piece on South Square's party at Spencer House and, of course, the usual Case Digests, news in brief, diary dates and the South Square Challenge.

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

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Brexit - What next?

Following the vote to leave the EU, Mark Arnold QC and Matthew Abraham look at the potential ramifications of a historical change.

Brexit: what next?

On Thursday 23 June 2016, as the storm clouds gathered over London and elsewhere in the British Isles, 72 per cent of the British electorate voted in a referendum on the question whether the UK should remain in the EU, or leave. As the sun rose on Friday, it was clear 52 per cent of those voting (that's almost 37.5 per cent of Britons entitled to vote) had decided we should leave. At the time of writing, Europe is reeling from the shock of the unexpected result, Westminster is in some disarray and there is talk of threats to the union forming the United Kingdom itself.

There may be more shock waves to come, and the dust will not settle for a very long time. Our aim in this article is to describe the next steps from the legal perspective, the likely impact of the decision in the short term, and to offer some very preliminary thoughts on some of the issues that will arise in the restructuring and insolvency context in the longer term.

Brexit: the legal steps

According to Article 50 of the Lisbon Treaty, any Member State of the EU may decide to withdraw from the Union, in accordance with its own constitutional requirements. The British Government called a referendum, and the British people have voted to leave the EU. So what happens now?

Article 50 of the Lisbon Treaty provides the barest outline of the route-map to be followed. In summary:

- it is for the UK to notify the European Council of its intention to leave, but Article 50 does not say when;
- the UK and the EU must negotiate and conclude an agreement, setting out the arrangements for the UK's withdrawal, taking account of the framework for its future relationship with the EU;
- that agreement is to be concluded on behalf of the EU by the Council, acting by a qualified majority (after obtaining the consent of the European Parliament);
- a "qualified majority" for these purposes will be at least 72 per cent of the members of the Council representing 65 per cent of the population of the Member States;
- the Treaties (see below) will cease to apply to the UK from the date the withdrawal agreement comes into force or, failing that, two years after the UK Government notifies the Council of its intention to leave pursuant to Article 50 *unless* the Council, in agreement with the UK, *unanimously* decides to extend the two-year period.

As will be apparent, the two-year negotiation period starts when Article 50 is invoked. It remains to be seen when that will be. This will be a matter for Theresa May and the new look Conservative government. The prevailing view in the UK seems to be there is no need for haste. Some prominent voices in the EU have said the UK should invoke Article 50 without delay, in order to avoid uncertainty. If Article 50 is the

only guide, the manner and timing of notification under Article 50 is a matter for the UK, and the UK alone, assuming it is given at all.

Once Article 50 has been invoked, it remains to be seen how long the negotiation of the withdrawal agreement will take. It seems likely that it will take longer than two years. Assuming it does, it also remains to be seen whether the two-year deadline will be extended with the requisite unanimity.

Most significantly, it remains to be seen just what the terms and effect of the withdrawal agreement will be, once they have been negotiated and assuming they are approved by the European Parliament and the qualified majority of members of the Council.

European Communities Act 1972

Constitutionally, the European Communities Act 1972 is the most important piece of UK legislation that will need to be addressed. It is by the provisions of this statute that EU law is given effect in the UK. The manner as well as the timing of its repeal will form a critical element of deliberations in the months ahead.

Simple repeal is surely not an option, and Vote Leave did not suggest otherwise in their framework document released in mid-June. That is because of the large number of Orders in Council made pursuant to s 2(2), which confers authority on the enormous number of regulations that have been promulgated in order to give domestic effect to EU Directives. It is not easy to see that there is any alternative but to consider each set of regulations separately with a view to determining what is to be kept, and in what form, what (if anything) may now be jettisoned and what new legislation is required to fill any voids. That in itself promises to be a lengthy process.

Assuming it is repealed in due course, however, EU law will no longer take priority over UK law and formally the decisions of the CJEU will no longer be binding in courts in the UK.

Short term impact

Until notice is given under Article 50 and thereafter while negotiations are taking place, the EC Act will remain in force and the Treaties will continue to apply. The Treaties for present purposes are the Treaty of Lisbon and the Treaty on the Functioning of the European Union.

JEAN-CLAUDE JUNKER WANTS NO DELAY IN INVOKING ARTICLE 50

For as long as the Treaties continue to apply, the goals set by EU Directives will continue to apply to the UK, just as the domestic legislation promulgated in the UK in order to achieve those goals will remain in force, unless and until revised, amended or repealed, as the case may be.

So what of the plethora of other regulations, decisions, recommendations and opinions that have over the years emanated from Europe: what is their status?

Regulations promulgated by the EU will continue to have direct effect in the UK until the Treaties cease to apply. What will happen thereafter will depend, at least in part, on the terms of the withdrawal agreement once it has been negotiated and approved.

On the other hand, it is to be noted that Recommendations and Opinions are non-binding in any event: they create no legal obligations and have no legal consequences if any Member State chooses to reject them. No

MARK ARNOLD QC

doubt the UK's response to any Recommendations and Opinions that may be published in the next few years will depend on their subject-matter, the stage reached in withdrawal negotiations and the likely timing of any agreement coming into effect.

In (at least) the short term, therefore, all EU Regulations and domestic legislation introduced in the UK in order to give effect to EU Directives will continue to apply as before, as will new Directives coming into effect. Of the many instruments with which we are all familiar, that will include:

- the Insolvency Regulation (1346/2000): that means that insolvency proceedings opened in the UK will continue to be automatically recognised in other Member States, just as such proceedings opened in other Member States will be automatically recognised here;
- the revisions to the Insolvency Regulation, recast as Regulation (EU) 2015/848, which will come into effect in relation to insolvency proceedings opened in the EU after 26 June 2017;
- the Judgments/Brussels Regulation (EU) 44/2001 and the recast Judgments/Brussels Regulation (EU) 1215/2012, Rome I and Rome II;
- the Financial Collateral Arrangements (No 2) Regulations 2003;
- the Insurers (Reorganisation and Winding Up) Regulations 2004;
- the Credit Institution (Reorganisation and Winding Up) Regulations 2004;
- the regulations giving effect to MiFID, CRD, AIFMD and (from 3 July 2016) the new Market Abuse Regulation.

Longer term position

The full impact and consequences of Brexit are yet to be realised. It is too early to say what the legal landscape will look like after withdrawal negotiations have been concluded, and thoughts offered now are no more than speculative. Much will depend on whether the UK remains in the single market or the EEA on a Norwegian or Swiss or some other model or, indeed, whether there is any deal at all.

In the insolvency and restructuring context, however, it is instructive to ponder (by way of example and necessarily briefly at this stage) what may happen if the Insolvency Regulation were to cease to apply in the UK. Generally, and despite a few teething problems especially in relation to COMI, a concept previously unknown to English law, it is considered the Insolvency Regulation has worked reasonably well. It provides a coherent scheme for mutual recognition and enforcement of insolvency judgments and conflicts of laws rule applicable throughout the EU, and the courts have shown themselves adept at overcoming any potential shortcomings. Practitioners in the UK contributed positively to the consultation that preceded its revision last year. It is quite possible that consideration may be given to retaining at least some of the substantive provisions of the Regulation, albeit in a different form (another Treaty?), but that will depend on the withdrawal negotiations. What if they are not retained?

- There would be no automatic recognition elsewhere in the EU of insolvency proceedings opened in the UK, and vice versa.
- Recognition would depend instead on the

availability of some other mechanism including, for example, the UNCITRAL Model Law on Cross-Border Insolvency, assuming it has been adopted by the Member State in which recognition is required.

■ As the UK has done so, that would work to the advantage of foreign representatives in foreign (insolvency) proceedings in other Member States: they would be able to seek recognition and assistance in the UK under the Cross Border Insolvency Regulations 2006. For UK officeholders seeking recognition and assistance in the EU, however, the Model Law would be less helpful. That is because, as matters stand, only a handful of Member States other than the UK have done so, namely Greece, Poland, Romania and Slovenia.

■ Even where the Model Law has been adopted, the consequences of recognition will not be as far-reaching as they are currently under the Insolvency Regulation. That is because the Model Law contains no equivalent set of the conflict of laws rules currently to be found in Articles 4-15 of the Insolvency Regulation, which (with certain exceptions) give primacy to the law of the state of the opening of insolvency proceedings.

MATTHEW ABRAHAM

Good or bad, Brexit is going to result in significant changes to the economic and legal landscape as we know it

■ For those Members States which have not, or do not adopt the Model Law, however, recognition of the insolvency proceedings opened in the UK will depend on the domestic conflict of laws rules of the Members State in which recognition is sought, or the negotiation of separate bilateral arrangements (in the absence of any agreement pre-dating the Insolvency Regulation itself).

What of the Commission's current interest in the harmonisation of certain aspects of substantive insolvency law throughout the EU? Its recent consultation (to which the Bar Council responded) closed in June this year, and the questions posed seemed to suggest that close attention is being paid to the possibility of harmonising laws relating to the early and effective restructuring of businesses in financial difficulty, the early rehabilitation of entrepreneurs and other honest debtors, and proceedings to set aside antecedent transactions amongst other things. It remains to be seen whether anything comes of these initiatives, and what form they may take. Whether they would apply to the UK, however, now seems rather doubtful, just as it seems likely that less heed will be paid to views we may express on this harmonisation initiative.

Conclusion

Good or bad, Brexit is going to result in significant changes to the economic and legal landscape as we know it. This is only a brief outline of some of the issues that seem likely to arise. South Square hosted a Brexit roundtable discussion on 12 July, and there will also be a Brexit session at the Litigation Forum we jointly host with Mourant Ozannes, to be held on 28 September this year.

Cross-Border Insolvency: An Italian Job

John Briggs and Giorgio Corno[1] examine the treatment of legal acts detrimental to creditors in English and Italian insolvency law, and under the European Insolvency Regulation

Introduction

This article is based on a short seminar which the Authors gave to the British Italian Law Association (BILA) on 22 September 2015 in London.

It is intended as a brief account of the main features of the legislation in these two jurisdictions[2] designed to avoid transactions carried out prior to the commencement of the insolvency proceedings and which have had the effect of prejudicing creditors of an insolvent legal or natural person.

Thereafter, the article deals with how this legislation applies in the European cross-border context where the insolvency proceedings are opened in one or other of these jurisdictions due to the "centre of main interests" (COMI) of the debtor being in Italy or England but the "detrimental act" in question is subject to the law of a Member State of the EU other than that of the State of the opening of the insolvency proceedings (namely Italy or England).

The seminar was given to a wide range of attendees both knowledgeable in insolvency matters and less so and the aim of the article is similarly to educate the less well-informed and say something interesting to those with greater knowledge. So, apologies are given in advance if some aspects are rather basic.

It is also pointed out that in order to make comparisons between the avoidance regimes of the two countries easier to follow, the English categorisations of transaction at undervalue and preferences in favour of creditors have been adopted. These are not recognised as such under Italian law which speaks broadly of "acts prejudicial to creditors" and does not specifically recognise these individual sub-categorisations.

This article will contain:

1) an outline of what is a "legal act detrimental to creditors",

2) consideration of whether the debtor or debtor company's centre of main interests ("COMI") is in a Member State of the EU since by Art 4.1 and 4.2(m) of the European Insolvency Regulation (Council Regulation (EC) No 1346/2000[3]– hereafter "the Insolvency Regulation") the insolvency law of the Member State of the debtor's COMI is the law applicable to the insolvency proceedings including the avoidance or adjustment of such "detrimental acts" (subject to exceptions),

3) discussion of the main features of the domestic avoidance of transaction legislation of England or Italy applicable with a few words on comparisons and,

4) examination of the "saving [of transaction] provisions" of Art 13 ("Detrimental acts") of the Insolvency Regulation where the detrimental act is governed by the law of another Member State.

It should be noted that the term

1/. John Briggs is a barrister practising from South Square, Gray's Inn, London WC1R 5HP (johnbriggs@southsquare.com) and a Deputy Registrar in Bankruptcy and Companies in the High Court in London. Giorgio Corno is an avvocato practising from Studio Corno Avvocati, Milan (Giorgio.corno@studiocorno.it) and qualified as a solicitor (England and Wales. Both are members of the British Italian Law Association and of Insol Europe. An Italian version of this article is available largely translated by Orietta Bergamo a graduate in law of the University of Trento and an administrator at South Square.

2/. England covers England and Wales and effectively Northern Ireland but not Scotland or the semi-independent Channel Islands or the Isle of Man.

3/. Adopted on 29 May 2000 and came into effect throughout the European Union, except Denmark, on 31 May 2002.

THE UK SUPREME COURT IS LOCATED IN PARLIAMENT SQUARE, LONDON.

"debtor" will be used to apply to legal or natural persons. The term "liquidator" will be used for the insolvency officeholder whether of a debtor who is a natural person (in England called "trustee in bankruptcy") or of a legal person (in England called "liquidator" or "administrator" depending on the type of insolvency process).

"Legal acts detrimental to all the creditors" – general discussion

English and Italian law both have measures designed to avoid, recover, adjust or render unenforceable transactions which have or have had the effect of prejudicing the general body of creditors of the debtor. To use an analogy, insolvency law is all about cutting up the body so everyone entitled gets a fair but limited share and if necessary adjusting rights to ensure fairness.

In a sophisticated financial world with complex transactions the rules on transaction avoidance and adjustment must necessarily be detailed and comprehensive so as to be effective in the event of insolvency.

The expression "legal acts detrimental to all the creditors" is taken from Arts 4.2(m) and 13 of the Insolvency Regulation and it is an autonomous expression not defined in the Insolvency Regulation.

It will be seen however from the wording of Art 13 reproduced and discussed later in this article, and from paras 135 to 138 of the explanatory guide in the Virgos-Schmit Report[4], that the scope of the expression "legal acts detrimental to all the creditors" is restricted to acts carried out prior to the opening of the insolvency proceedings and affected by either the retroactive nature of the insolvency proceedings or actions to set aside previous acts of the debtor.

So, unauthorised disposals or transactions by the bankrupt after the commencement of the insolvency proceedings which are not the subject of the "saving provisions" of Art 13 and their treatment in the insolvency regimes in Italy and England will not be discussed in this article.

4/. Report on the Convention on Insolvency Proceedings by Prof Miguel Virgos and Etienne Schmit.

In other words, the "detrimental act" in question took place before the formal insolvency order or decree, and at a time when the debtor was either insolvent (unable to pay his debts[5]) or could see himself becoming insolvent in the future, or when the law presumes him to be insolvent (irrebuttably or otherwise[6]) or simply because it is thought fair to undo the transaction because it occurred so close to the opening of the insolvency proceedings.

There are two main strands to avoidance or adjustment of pre-bankruptcy transactions:

1/. reversing the effect of the debtor giving away assets or entering into disadvantageous financial arrangements which deliberately or otherwise prejudice creditors as a whole, or rendering such a transaction ineffective, and

2/. reversing the effect of the debtor paying or doing some other act in favour of one or some creditors to the disadvantage of creditors generally.

The general concept behind the legislation in this area is to prevent abuse and achieve a fair distribution of property among creditors.

Both English and Italian insolvency laws have traditionally been particularly hostile to the position of the spouse and relatives of the debtor[7]. In one English case in 1965[8] the Judge, Mr Justice Stamp, said of the avoidance of settlement of property provisions in S 42 of the Bankruptcy Act 1914 (now revoked and replaced by the Insolvency Act 1986) that the legislation was "clearly framed to prevent properties from being put into the hands of relatives to the disadvantage of creditors".

Moreover, English law, and to an extent Italian law[9], develop this theme more widely with regard to transactions with parties who can be regarded as "connected" to the debtor and therefore to whom he is to be regarded as well-disposed, such as directors or others in control in the company insolvency context or relatives in the personal insolvency context.

By Art 3.1 of the Insolvency Regulation the courts of the Member State within the territory of which the debtor's COMI is situated shall have jurisdiction to open insolvency proceedings and by Art 4.1, save as otherwise provided in the Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. This law includes the conduct and the closure of the insolvency proceedings and by Art 4.2(m):

"the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors."

Accordingly, before outlining the major features of pre-bankruptcy transaction avoidance legislation in the two jurisdictions, it is necessary to consider the jurisdictional basis under the Insolvency Regulation for determining which State's transaction avoidance legislation will apply, as a matter of principle, under Art 4.2(m).

This necessitates examining under the next heading the Member State within which the debtor's COMI is situated at the time the insolvency proceedings are opened. This has given rise to problems for the English courts in determining the COMI of natural persons and in view of the phenomenon of "insolvency tourism" discussed in the next section.

Determining international jurisdiction under the Insolvency Regulation - COMI

As explained above, the Insolvency Regulation applies only to insolvency proceedings where the centre of the debtor's main interests (COMI) is located in the EU (save for Denmark) (see Recital (14)).

COMI is not defined in the Insolvency Regulation[10] but Recital (13) states: "The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

There is however a presumption in Art 3 that "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Paras 74 and 75 of the Virgos-Schmit Report give further guidance. The Report says that where companies and legal persons are concerned COMI normally corresponds to the debtor's head office. This is not difficult for Italian lawyers to understand since domestic jurisdiction between courts is based

5/. In English law generally defined as "unable to pay his debts as they fall due" or "the value of his assets is less than the amount of his liabilities taking into account his contingent and prospective liabilities" (eg S 341(3) of the Insolvency Act 1986). In Italian law by Art 5 of the Legge Fallimentare (LF) insolvency occurs with the failure to fulfil obligations or by other external factors that demonstrate the debtor's inability to regularly satisfy his obligations).

6/. In English law e.g. under S 341(2) of the Insolvency Act 1986 in relation to a transaction with an "associate" of the debtor.

7/. In Italian law see Art 69 of the LF. Note also that in both regimes the voting rights of "associates" are discounted in formal insolvency arrangements with creditors (voluntary arrangements with creditors under English law and concordato preventivo or concordato fallimentare under Italian law).

8/. In re a Debtor ex parte the Official Receiver v Morrison [1965] 1WLR 1498.

9/. Art 69 – acts between spouses.

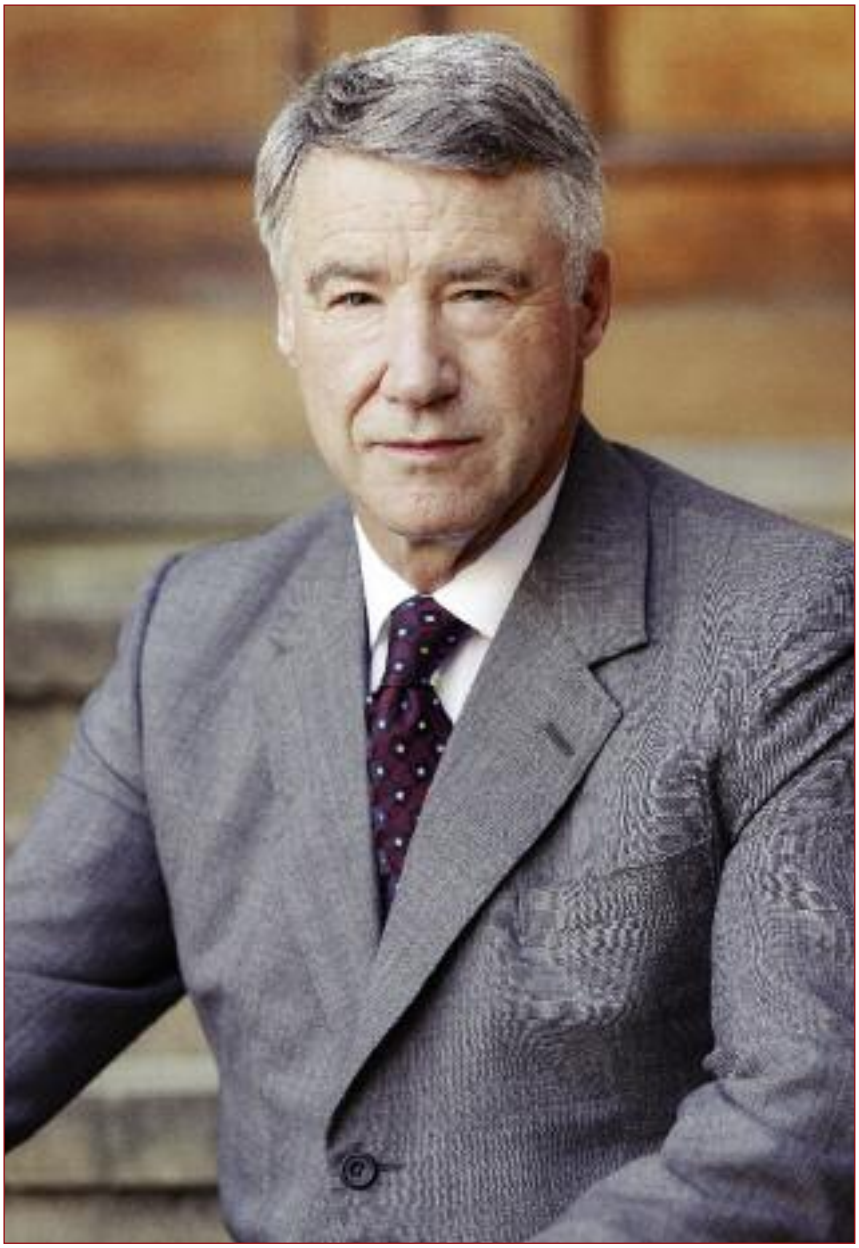
10/. Compare the Recast Insolvency Regulation 2015/848 of 20 May 2015 which came into force on the twentieth day following its publication in the OJ and which applies from 26 June 2017 with the exception of certain provisions.

on the "sede principale".[11] In England the courts have frequently applied the head office test[12] although it is not always easy to ascertain COMI, particularly as the ECJ has confirmed that "COMI shifting" before the date of the lodging of the request for the opening of the insolvency proceedings is permissible[13]. A change of COMI requires an element of permanence and the COMI must be ascertainable by third parties[14] (Recital (13) of the Insolvency Regulation).

The Virgos–Schmit Report explains that by using the term "interests" the intention was to encompass not only commercial, industrial or professional activities but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

The Virgos-Schmit Report goes on: "In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence."

Ascertaining the centre of main interests of an individual should not, therefore, as a matter of general practice pose problems. However, the ability to shift COMI from one country to another before the opening of insolvency proceedings taken together with the fact that in England a debtor can present his own petition for bankruptcy (the instigation of bankruptcy proceedings is not restricted to creditors) has led to "bankruptcy tourism"[15].


JOHN BRIGGS

"Bankruptcy tourism" is the phenomenon whereby residents of one country move to another jurisdiction in order to declare personal bankruptcy there, before returning to their original country of origin. In other words, the establishment of COMI in the new jurisdiction is not genuine because the intention is that

11/. Art 9 of the LF.
12/. See for instance Re Lennox Holdings PLC [2009] BCC 155. The ECJ has seemingly approved this test in Interedil Srl v Fallimento Srl Case C-396/09 reported in England in [2011] BPIR 1639.
13/. The cases of Re Staubitz-Schreiber (C-1/04) [2006] ECR 1-701 (in England [2006] BPIR 510) and Interedil Srl (In liquidation) v Fallimento Interedil Srl (C-396/09) [2011] ECR 1-9915 (in England [2011] BPIR 1639)
14/. As to recognition of these factors see the decision of the Court of Appeal in England in Shierson v Vlieland-Boddy [2005] EWCA Civ 974; [2005] 1 WLR 3966
15/. While a debtor can similarly in Italy present his own bankruptcy petition there is no real evidence that Italy is a favoured destination for "bankruptcy tourism". Note also that in Italian domestic law the movement of the debtor's "sede principale" during the year preceding the filing of a bankruptcy petition has no effect on the jurisdiction of the tribunal (Art 9 of the LF).

German and Irish insolvency tourists have been abusing COMI

residence in the new country will be only temporary.

This COMI move is done in order to facilitate bankruptcy in a new jurisdiction where the insolvency laws are deemed more favourable to the debtor. It is most prevalent in the EU where EU law allows the free movement of residents from one country to another.

This issue has gained notoriety in the UK where German and Irish individuals have sought to make themselves bankrupt here. Whereas release from debts occurs after one year through automatic discharge if the bankrupt co-operates with the liquidator appointed, in Germany release from debts takes six years. In addition, the affordable income contribution rules in England are more generous to the bankrupt and his family than in Germany and last only three years compared with seven years in Germany.

The position was similar with Ireland until the insolvency legislation was recently modernised and amended introducing a release from debts and discharge from bankruptcy period of one year[16].

The English courts have introduced various measures to try and reduce the incidence of bankruptcy forum shopping by, for instance, requiring the foreign debtor who is presenting his own debtor's petition to make a witness statement exhibiting documents which show a real connection with England such as a tenancy agreement, bank accounts or employment contract, and by notifying major foreign creditors in advance of the hearing of the petition and giving them the opportunity to make representations objecting to the making of a bankruptcy order[17].

There is no real evidence, anecdotal or otherwise, to suggest that Italians are using the system in a similar way, but given that the Italian insolvency regime is stricter and that until 2012 there was no form of bankruptcy regime for non-trader individuals[18] (consumer and credit card debtors and professionals) this type of abuse by Italians is a possibility.

It is of course to be emphasised that the issue of which persons or entities may be subject to insolvency proceedings is determined by national law. Where the international jurisdiction rule mentions the debtor[19], this means the natural persons or legal entity (whether a legal person or not) concerned[20].

This phenomenon of bankruptcy tourism has a direct relationship with "acts detrimental to all the creditors" which is the major topic of this article. There are two reasons for this.

The first is that if a foreign debtor has not only all or a major number of its creditors abroad but has also carried out all or the majority of its transactions abroad, then it will prove difficult for the liquidator to investigate transactions due to the different language and legal regime.

Secondly, the liquidator will have to engage local lawyers to advise him on whether the local insolvency laws will provide protection for a transaction governed by that local law even if the transaction would not be protected by the insolvency law of the Member State of the opening of the insolvency proceedings which otherwise governs their effects, conduct and closure. This is the Art 13 defence.

Thus, the insolvency proceedings will likely be less effective than would otherwise be the case and insolvency proceedings in a jurisdiction which has little historic connection with the debtor's affairs will be prejudicial to the administration of the insolvent estate and detrimental to creditors generally.

Legal acts detrimental to all the creditors – English law

There are three major avoidance provisions all contained in the Insolvency Act 1986 ("IA 1986") as follows:-

1/. recovering gifts by the debtor and the benefit of transactions at significant undervalue between the debtor and another party within a specific time-frame before the commencement of the insolvency proceedings without the need for the liquidator to prove an intention by the debtor to prejudice creditors ("transaction at undervalue");

2/. recovering payments or the benefit of other acts on the part of the

16/. Reduced from 3 years to 1 year as from 29 January 2016 by dint of S 10 of the Bankruptcy (Amendment) Act 2015.

17/. In English law the debtor's petition must be accompanied by a statement of the debtor's affairs identifying creditors and debts. Note that as from 6 April 2016 the process of a debtor applying for bankruptcy has become administrative, by application to an adjudicator (S 71 of the Enterprise and Regulatory Reform Act 2013). The online application must contain such particulars of the debtor's creditors, debts and other liabilities and assets as may be prescribed (new S 263J of the IA 1986). The courts have retained a general review and annulment function once a bankruptcy order has been made by an adjudicator.

18/. There is now an agreement with creditors procedure or liquidation of assets but no release from debts and the procedure is dependent on the good conduct of the debtor. It is understood that this new legislation is little used.

19/. i.e. in the Insolvency Regulation.

20/. The test of this paragraph is reproduced from para 74 of the Virgos-Schmit Report.

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debtor within a specified time-frame before the commencement of the insolvency proceedings which have the effect of putting the creditor in a better position than he would have been in in the insolvency proceedings ("preferences");

3/. recovering gifts by the debtor and the benefit of transactions at significant undervalue between the debtor and another party at any time before the commencement of the insolvency proceedings if the Court is satisfied (on proof by the liquidator or creditor(s) victim(s)) that it was entered into with the intention by the debtor to prejudice creditors ("transaction defrauding creditors").

There are other special remedies available to a liquidator such as in the case of the insolvency of an individual (natural person) recovering or adjusting an "extortionate credit transaction"[21] but the three avoidance provisions referred to above are the major special remedies. Not to be overlooked are proceedings against directors of companies for breach of trust or misfeasance but these form part of the general law[22].

Considering now these major remedies in turn and giving a simplified outline only of each, followed by some general common points and applicable limitation periods:

Transaction at undervalue

The rules permit the liquidator to recover or seek other redress[23] from the party with whom the debtor gave a gift or entered into a transaction at a significant undervalue made in the two years before the opening of the insolvency proceedings[24] (corporate debtors)[25], or in the five years before the opening of the insolvency proceedings (individual debtors) provided the debtor was insolvent at the time[26] but the debtor is presumed insolvent at the time in the case of a gift to or transaction with an "associate"[27]; however in the case of a gift by or transaction at significant undervalue with an individual debtor

21/. S 343 of the Insolvency Act 1986.
22/. S 170 and following sections of the Companies Act 2006.
23/. S 238 & 242 for companies and 339 & 342 for individuals.
24/. Defined in the case of an individual debtor as the presentation of the bankruptcy petition (S 341(1) and in the case of a corporate debtor the "onset of insolvency" being either the commencement of the winding up or the date of an administration order or the appointment of an administrator if the company goes into administration or the administration is converted into the company going into liquidation (S 240(3)).
25/. S 238 & 240(1)(a) and (2) and (3).
26/. S 339 & 341(1)(a) and (2).

the gift or transaction is avoided irrespective of whether the individual debtor was insolvent or not at the time[28].

A few additional points need to be made with regard to this particular legislative remedy.

The legislation provides no definition of "significant undervalue". This is a matter of judgment for the court.

The longer recovery period in the case of debtors who are individuals (natural persons) reflects the previous legislation and the fact that preferences are more common in the insolvency of individuals than of companies.

In the case of a debtor which is a company there is a saving provision if the company entered into the transaction in good faith and did so for the purpose of carrying on in business and at the time there were reasonable grounds for believing that the transaction would benefit the company[29].

Preferences

The rules permit the liquidator to recover or seek other redress[30] from the creditor in favour of whom the debtor has, in the two years prior to the opening of the insolvency proceedings[31] in the case of an "associate" of the individual debtor[32] or six months otherwise[33] done anything or suffered anything which has put that person in a better position in the insolvency proceedings than he would have been in if that thing had not been done and the debtor was influenced by the desire to produce a preference for that person[34]; however in the case of an "associate" of the individual debtor or person connected with the corporate debtor there is a presumption that the debtor was influenced by a desire to give the preference[35].

The commonest form of creditor preference is payment; however a creditor could be preferred otherwise for instance through the giving of security over the debtor's property or through submitting to judgment and enforcement of judgment (hence "suffering anything to be done" which puts the creditor in a better position).

The longer recovery back provisions for insolvency proceedings concerning debtors who are individuals reflects the same considerations as apply to "transactions at an undervalue" outlined above.

Transaction defrauding creditors

The rules permit the liquidator or a victim of the transaction to recover or seek other redress[36] on behalf of all victims of the transaction[37] from the party with whom the debtor gave a gift or entered into a transaction at a significant undervalue[38] and for the purpose of putting assets beyond the reach of a person who is making or may at some time make a claim against the debtor or of otherwise prejudicing the interests of such a person[39].

It is to be noted that this remedy is unrestricted in time and is not dependent on there being insolvency proceedings or even establishing insolvency at the time of the gift or transaction at undervalue. The victim may be an existing creditor or future or contingent creditor and not even the creditor intended to be defrauded[40]. The remedy is designed to recover dispositions made in anticipation of possible future financial difficulties. For instance, the start of some new and risky business venture, or the giving of a guarantee.

Even if the proceedings are instituted by a victim, the remedy is on behalf of all victims of the transaction[41].

General points common to one or more of the above remedies

The term "transaction" for the purpose of transaction at undervalue and transactions defrauding creditors is widely defined to include an "arrangement"[42]. So, the transaction need not be a transfer of money or property but could be an arrangement whereby the debtor provides services of monetary value.

The expressions "associate" of an individual debtor and "connected person" in respect of a corporate debtor[43] are intended to embrace persons to whom a debtor in financial difficulties would be well-disposed. For instance, spouse, children and

27/. S 341(2).
28/. S 341(2).
29/. S 238(5).
30/. S 240 & 241 for companies and sections 340 & 342 for individuals.
31/. Same definitions as apply to transactions at an undervalue.
32/. S 341(1)(b).
33/. S 240(1)(b) & 341(1)(c).
34/. S 239(4) & (5) and 340(3) & (4).
35/. S 240(2) and 341(2).
36/. S 423 & 425.
37/. S 424.
38/. S 423(1).
39/. S 423(3).
40/. Hill v Spread Trustee Co Ltd [2006] EWCA Civ 542; [2006] BPIR 789.
41/. S 424(2).
42/. S 436.
43/. S 249.

relatives of a debtor who is an individual and directors and relatives of directors or persons having control of the company in relation to a debtor which is a corporation[44].

It is important to appreciate that in these provisions of English law the state of knowledge of the recipient of the gift from the debtor who is later to be the subject of insolvency proceedings, or the person with whom the said debtor transacts at an undervalue or the creditor who receives the preference is irrelevant. Neither knowledge of the debtor's state of mind (that his intention was to prejudice creditors), nor that he was insolvent at the time if this is a necessary element for the insolvency officeholder to prove, or the "associate" to disprove as the case may be, nor that the debtor was influenced in giving a preference by the desire to do so, is relevant.

However, no remedy lies against a "sub-transferee"[45] (i.e. a person who deals with the person receiving the benefit or preference from the debtor and who was not a party to the transaction with the debtor) if the latter acquired his interest in property or benefit from the transaction in "good faith" and "for value"[46]. There are complex provisions dealing with the issue of establishing "good faith" but these principles accord with normal English principles of equity that persons acting innocently and giving proper monetary value should not be made victims of the wrongful conduct of others.

Limitation periods

In general terms a cause of action deriving from statute is classed as a claim upon a specialty under the Limitation Act 1980, for which a limitation period of 12 years applies[47]. However, if in essence the action is to recover a sum of money under an enactment (as is usually the case) then the limitation period is only six years.

The English courts consider that time begins to run from the date of the opening of the insolvency proceedings in the case of proceedings brought by the liquidator or the latter's appointment. By contrast, in the case of proceedings instigated by a victim of a transaction defrauding creditors the limitation period would run from the date of the transaction itself[48].

The defence of 'good faith' operates more under Italian law than English law

Legal acts detrimental to all the creditors – Italian law

Major avoidance provisions

As explained in the Introduction, Italian law makes no distinction between detrimental acts which are in the nature of transactions at an undervalue, preferences and transactions defrauding creditors, but it does contain rules which are similar in effect. Consequently, the concepts and expression adopted in English law will be used to make things easier for most English-speaking readers.

Italian insolvency law is governed by the Legge Fallimentare ("LF") of 1942 (RD 267/1942) subjected to reforms in particular in relation to detrimental acts by legislation in 2005 and 2006. Under Italian insolvency law, the competent insolvency court may declare detrimental acts automatically ineffective for the benefit of the creditors admitted to the bankruptcy, or ineffective after a claim for annulment based on the *azione revocatoria*, where the burden of proof is placed on the third party recipient (inverted in favour of the insolvency officeholder) (*azione revocatoria fallimentare*)[49]. Payments of liquidated and accrued debts within six months of the bankruptcy decree are also void so long as the liquidator proves that the other party knew that the debtor was insolvent[50].The claim of a creditor for amounts repaid as a result of the avoidance judgment is admitted in the bankruptcy list of liabilities for a corresponding amount[51].

Transaction at an undervalue

The relevant rules permit the liquidator ("*curatore*") to a) recover or seek other redress from the party to whom the debtor gave a gift in the two years preceding the date of bankruptcy without proof of insolvency or knowledge of insolvency on the part of the recipient[52] or b) recover or seek other redress from the party with whom the debtor entered into a transaction at a significant undervalue, which occurs where the consideration given in the year preceding the bankruptcy decree in which the services rendered or the obligations assumed by the bankrupt are more than one quarter of what was

44/. See generally S 435 as to the meaning of "associate".
45/. Or person further down the chain.
46/. S 241(2) and 342(2).
47/. S 8(1).
48/. See Hill v Spread Trustee Co Ltd, above.
49/. Specifically, articles 64 (Gifts), 65 (Payments), 67 first para (heads 1) to 4)) of the LF.
50/. Art 67 second para of the LF.
51/. Art 70 of the LF.
52/. Art 64 of the LF.

promised to the debtor in return[53]. However, in the case of this remedy b) the onus is on the recipient to show that it had no knowledge of the debtor's insolvency.

It is to be noted that this "saving provision" applies only to transactions entered at a significant undervalue, not to gifts. In the case of gifts there is a saving provision in respect of small gifts and actions executed in performance of a moral obligation or a public necessity (provided that they are proportional to the value of debtor's estate)[54].

With regard to insolvency proceedings opened after 27 June 2015, registration of the insolvency decree in the public registers (relating to the debtor's immovable or movable property) makes the assets the subject of gift part of the estate of the insolvent debtor[55]. Therefore, following the said registration, the liquidator may sell the assets in question without the need to obtain judgment in respect of his claim to the gift. Any interested party may, however, file an opposition based on a breach of law against the said registration within eight days from the day he became aware of the registration.

Preferences

Rules permit the liquidator to recover or seek other redress from the creditor in favour of whom the debtor has done the acts described below, which put that person in a better position in the insolvency proceedings than he would have been in if that thing had not been done.

Payment of debts accruing on or after the day the bankruptcy is declared are automatically ineffective as against creditors if performed in the two years preceding the declaration of bankruptcy[56]. There is here no "saving provision".

The following detrimental acts are void, unless the defendant party executing the act proves to have been ignorant of the insolvent status of the debtor: (i) payment of accrued monetary debts, performed by the debtor with means of payment other than money or other usual means of payment within the year preceding the bankruptcy order[57]; (ii) the voluntary granting by the debtor of security such as pledges, anticresi[58] and voluntary mortgages for pre-existing debt that was not due at the date of the bankruptcy decree, if executed during the year preceding the bankruptcy decree[59]; (iii) the granting of security (voluntary or otherwise) such as pledges, anticresi, mortgages or judicial mortgages obtained by creditors for debts already due during the six months preceding the bankruptcy order[60].

The liquidator is also entitled to recover or seek other redress from the third party in favour of whom the debtor has carried out the following acts during the six months preceding the bankruptcy decree, if the liquidator proves that the third party was aware of the insolvency of the debtor: (i) voluntary or forced payments made by the debtor against liquid and payable claims; (ii) onerous acts ("*atti a titolo oneroso*") performed by the debtor; (iii) granting of securities by the debtor, including for debts undertaken by third parties, simultaneously with the creation of the debt[61].

Specific rules are laid down by Art. 68 of the LF regarding payment of bills of exchange or promissory notes made in the six months preceding the bankruptcy order whereby the liquidator can make recovery from the last purchaser of the promissory note whom he can prove knew the debtor was insolvent when he purchased the note.

Preferences: Exceptions

Some acts are exempt from avoidance claims under specific circumstances, as follows:

By Art 67.3 of the LF the liquidator shall not be entitled to recover or seek other redress from the creditor in whose favour the debtor has done the following acts: (i) payments for goods and services made in the normal course of business; (ii) transactions on a bank account so long as they did not significantly reduce the debtor's exposure towards the bank; (iii) sales and pre-sales agreements concluded for a fair price and involving a residential property destined to be the principal residence of the buyer or the buyer's family, or principal place of business of the buyer himself (under certain conditions); (iv) acts, payments or guarantees made to perform a certified rescue plan ("*piano attestato*"), a rescue agreement ("*accordo di ristrutturazione dei debiti*"), a preventive composition with creditors ("*concordato preventivo*") or following an application for it; (v) payments made for services carried

53/. Art 67(1)b) of the LF.
54/. Art 64 of the LF.
55/. Art 64.2 of the LF.
56/. Art 65 of the LF.
57/. Art 67.2 of the LF.
58/. Anticresi is a rare contract providing for the delivery of real property of the debtor (or a third party) to the creditor to set off the debt with the transferor of the property until full satisfaction of the credit, for capital and interest, up to a maximum of 10 years. Management and preservation of the property is transferred to the creditor. The prohibition of patto commissorio is applicable to anticresi as well.
59/. Art 67.3 of the LF.
60/. Art 67.4 of the LF.
61/. Art 67.4 of the LF.

out by employees and other associates of the bankrupt; and (vi) payments made in respect of liquidated debts and executed and paid at maturity to obtain the performance of services necessary to access insolvency procedures.

Whenever the claim commenced by the liquidator refers to detrimental acts relating to the use of a bank account or continuing commercial relations, in the event that the liquidator's claim is accepted by the court, the defendant shall return a sum equal to the balance between the maximum of its claim in the period for which it is proven that the defendant knew that the debtor was insolvent, and the residue of the debt at the date on which the insolvency proceedings were opened[62].

Any third party who returns to the liquidator any payment received is entitled to lodge a claim for the corresponding amount in the insolvency proceedings.

Transaction defrauding creditors

By Art 2901 of the Civil Code, which provides general rules on ordinary avoidance claims ("*azione revocatoria ordinaria*"), if the debtor disposes of its assets in favor of a third party and thus jeopardizes the right of a creditor, any creditor may commence an action for avoidance of the act of disposal, provided that the following conditions are satisfied: (i) there is some evidence that the debtor was aware of the prejudice to the creditor caused by his action; or, if the act was performed before the claim arose, the claimant acted deliberately, causing the debtor to hinder the fulfillment of his obligations; (ii) if the act was made in exchange for some consideration, the claimant proves that the third party was aware of the prejudice to creditors or, if it was performed before the claim arose, he intentionally took part in the fraud. The burden of proof to satisfy these conditions lies with the creditor making the claim. Such a claim must be commenced within five years of the challenged act[63].

Remedies under English law extend further back in time than those under Italian law.

Following the bankruptcy of the debtor, the liquidator is entitled to commence or take over the *azione revocatoria ordinaria*[64].

Further claims and exceptions

Detrimental acts subject to Art 67 of the LF and those acts which took place more than two years before the bankruptcy decree for no consideration and which were executed by the debtor with his spouse at a time when the debtor carried on his commercial enterprise are void unless the spouse proves to have been ignorant of the insolvency of the bankrupt spouse[65].

The provisions of Art 67 of the LF do not apply to debts based on pledges and mortgages provided by financial institutions who deal professionally with these operations[66]. Nor do they apply to certain other specified laws and regulations.

Any act that impacts assets dedicated to a specific destination ("*patrimonio destinato*") as provided in Art 2447*bis*, first paragraph, letter a, of the Italian Civil Code may be set aside if the act prejudices the company's assets and if the beneficiary knew that the company was insolvent.

General points common to one or more of the above remedies

The impact of claims brought by the liquidator in relation to detrimental acts within insolvency proceedings have been significantly reduced following the 2005 reforms, with specific regard to those under Art 67.2 of the LF, which are described above under the sub-heading Preferences. The reforms have made recourse to such claims less frequent within insolvency proceedings compared to the recourse which took place before when such claims were frequently resorted to by liquidators in order to obtain monies from third parties and, especially, financial institutions.

Avoidance and limitation periods

Detrimental acts performed by a debtor may be subject to avoidance claims either outside or within the insolvency proceedings if they took place during a certain period of time before the date of the filing of the avoidance claim, or before the opening of the insolvency proceedings. This period of time is five years for an ordinary avoidance claim; or a shorter period, within two years and six

62/. Art 70 of the LF. The limitation of the remedy here seems to bear similarities to treatment of post commencement of insolvency payments to banks in English law. See Re Gray's Inn Construction Co Ltd [1980] 1 WLR 711 and s 127 of the IA 1986.
63/. If the claim of the creditor is directed to setting aside a transfer of rights on real property or other registered property for consideration, the judgment does not prejudice the rights of a buyer in good faith if the writ is registered in the applicable property registry following registration of the act.
64/. Art 66 of the LF.
65/. Art 69 of the LF.
66/. As an example, payments and mortgages registered at least 10 days before the bankruptcy cannot be set aside if performed in accordance with a bank loan on real property granted under Art 39 of Legislative Decree No. 385 of September 1, 1993 (credito fondiario).

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months before the opening of the bankruptcy proceedings, based on the type of detrimental act performed, for a claim brought within the insolvency proceedings. Note that specific rules apply to detrimental acts between spouses.

Claims in respect of detrimental acts governed by Italian insolvency law cannot be commenced more than three years after the bankruptcy order and in any case five years after the date of the detrimental act concerned[67].

Where the bankruptcy decree follows an agreement with creditors, the time limits set out in certain arts[68] of Italian bankruptcy law start from the date the request for an agreement with creditors is filed in the business registry.

A comparison of English and Italian law relating to avoidance of detrimental acts - brief comments

It is apparent that unlike English law there are not two separate regimes in Italian law for detrimental acts by debtors who are companies and debtors who are individuals. The single regime of Italian law is consistent with the fact that only entities and individuals engaged in commercial activity are amenable to insolvency proceedings under the LF.

In England, on the other hand, it has been open to individuals who are not engaged in trade to be made or to make themselves bankrupt since 1869[69] and the two insolvency regimes are largely separate though similar as regards detrimental acts[70].

Italian insolvency law has specific but restricted "suspect periods" for gifts (two years, save for acts between debtor and spouse) and payment of non-accrued debts (one year) for which there is no defence. In these specific cases, the solvency or insolvency of the debtor at the time and the recipient's knowledge of the debtor's circumstances are irrelevant.

Otherwise, apart from different "relation back" periods, the most significant difference between English and Italian law is that the latter places importance on the knowledge of the recipient of the debtor's asset or recipient of payment of the debtor's status of insolvency, whereas the current English law from 1986 (IA 1986[71]) places importance either on the fact of the debtor's insolvency at the time of the carrying out of the detrimental act or on the debtor's intentions at the time in relation to the transaction. For instance, either the debtor must be insolvent for there to be a transaction at undervalue or the debtor must be influenced by a desire to give the creditor a preference.

It is submitted that it is generally easier for a liquidator to show the debtor's status of insolvency at a particular time or that he desired to give a preference than it is for him to show that the other party knew of the debtor's insolvency. Even across the breakfast table husbands rarely tell their wives the true extent of their financial problems! Debtors are even less likely to tell creditors that they are in financial difficulties. In this respect English law is perhaps more "user-friendly" for liquidators than Italian law.

However, under Italian law there are certain presumptions relating to the third party's knowledge of the debtor's financial affairs. For instance,

67/. Art 69 bis of the LF.
68/. According to Art 69bis 2 of the LF, relevant terms are those mentioned in art 64, 65, 67.1 and 67.2; 69 of the LF.
69/. The Bankruptcy Act 1869.
70/. Note in particular that the transaction in fraud of creditor provisions of s 423 apply generally.
71/. Note that the repealed section 172 of the Law of Property Act 1925 protected the transferee acting in good faith and for value.

if the debtor has had to be subject to enforcement proceedings to obtain payment of a debt the creditor is presumed to know he is insolvent; as also if the bill of exchange issued by the debtor has been subject to a notice of "*protesto*" before the detrimental act was performed.

So, in some cases not having to prove a debtor was influenced by a desire to prefer a creditor the "*curatore's*" task to recover the preference would be easier under Italian law.

Interestingly, and seemingly helpfully, following the 2005 reforms Italian law defines undervalue at ¼ or more. In English law assessing "undervalue" which is only defined in terms of "*consideration... which is significantly less than the value in money or money's worth of the consideration provided by the individual (i.e. the debtor)*" has caused the English courts real problems[72].

In addition, Italian law permits the liquidator or creditors to start enforcement proceedings against registered assets subject to prior gift or other detrimental acts without the need for a favourable judgment, in certain circumstances.

Both regimes have, in principle, an automatic avoidance of gifts within two years of the insolvency[73]. Other avoidance periods under insolvency laws are not the same but broadly similar and do not extend back more than two years, save in English law where a transaction at undervalue with an "associate" of an individual can reach back five years. Italian law has numerous exceptions to recovery based on need or public policy[74].

The other substantial differences relate to limitation periods. The

Does Art 13 give rise to potential for abuse...?

remedies in the LF are subject to a three year limitation period from the bankruptcy decree and in any case five years from the act in question[75]. Under English law the limitation period for insolvency law remedies under the IA 1986 is longer namely six years (from the date of the insolvency proceedings or the liquidator's appointment) and arguably twelve years if recovery is an asset other than money[76].

In the case of a transfer in fraud of creditors it is to be noted that under English law the remedy is unlimited in time in the sense that it matters not when the transaction took place so long as the liquidator commences proceedings within the six or twelve year period from the commencement of the insolvency proceedings (as indicated above).

In the commercial world where risks and eventualities may not manifest themselves for many years (e.g. guarantees may not be called on until long after they have been executed) this unrestricted limitation period in English law is an effective tool against fraud. The same does not exist under Italian law where the limitation period is five years from the date the transaction was performed.

The final possible difference to note is that in the case of transactions in fraud of creditors under English law the remedy is on behalf of all creditor victims whether the action is brought by the liquidator or a creditor[77]; under Italian law the action is on behalf of all creditors when taken by the liquidator[78] but otherwise the position is debatable.

What one can say with regard to both regimes is that the substantive and procedural laws are very technical and complex. Local legal advice is a paramount necessity for a foreign liquidator.

Observations on the "saving provision" of Art 13 of the Insolvency Regulation

Art 13 provides:

"Art 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- 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."

As explained in the Virgos-Schmit Report[79] this provision must be read in conjunction with Art 4(2)(m). In principle it is the law of the State of the opening of the insolvency proceedings which governs any possible voidness [etc] of acts detrimental to all the creditors' interests and it is that same law which determines the conditions to be met, the manner in which the voidability [etc] functions (by among other things allocating retrospective effects to the proceedings) and the legal consequences of voidability.

Again to quote Virgos-Schmit, Art 13 represents a defence against the

72/. See for example the difficulties over the valuation of an insurance policy in Ramlort v Reid [2003] EWHC 1999 Ch.
73/. In English law the onset of insolvency (usually presentation of petition for insolvency order) and Italian law the bankruptcy decree.
74/. Set out in Art 67 a) to g) of the LF.
75/. Art 69bis of the LF.
76/. S 8 and 9 of the Limitation Act 1980.
77/. S 424(2) of the Insolvency Act 1986.
78/. Art 66 of the LF.
79/. Para 135.

It is naive to think that Art 13 does not represent a problem for officeholders...

application of the law of the State of the opening which must be pursued by the interested party, who must claim it [the defence]. It acts as a "veto" against the invalidity of the law of the State of the opening[80].

The justification for this derogation is said to be in order to uphold the legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law against interference from a different "*lex concursus*" and is justified with regard to acts carried out prior to the opening of the insolvency proceedings[81]. In this regard, Art 13 reflects Recital 24 to the Insolvency Regulation.

It could be said that Art 13 is an extension of the protection given to secured creditors by Art 5 ("Third parties rights *in rem*") which excludes from the effects of the insolvency proceedings rights *in rem* of third parties and creditors in respect of assets belonging to the debtor which, at the time of the opening of proceedings are situated within the territory of another Contracting State. These rights *in rem* are governed by the "*lex rei sitae*". Similarly, Art 5 only applies to rights *in rem* created before the opening of the proceedings.

In the External Evaluation of the Insolvency Regulation of 9 January 2013 presented by Professor Hess and others of the Universities of Heidelberg and Vienna ("the External Evaluation") the General Reporter recommended no changes with regard to Art 13[82] and emphasised the protection of legitimate expectations, also based on the legitimacy according to Art 3 of Regulation 593/2008 ("Rome I Regulation").

Indeed, the need for an extension of Art 13 so that it could positively justify an avoidance and thereby make Art 4(2) (m) irrelevant was canvassed but rejected.[83]

However, it could be argued that this "legitimate expectation" must be questionable, it is difficult to justify and is both an affront to the policy of the State of the opening and could have a serious adverse impact on the proper functioning and effectiveness of insolvency proceedings. Art 13 has been criticized in academic circles[84] and by some National Reports as indicated by the External Evaluation[85] and debated in some texts[86].

A creditor or party doing business or entering into some transaction with another party abroad would surely appreciate that in the event of that party becoming insolvent the validity of some legal act entered into before a decree of insolvency would be subject to the law of the debtor's "*sede principale*", to take the Italian expression.

Neither English law nor Italian law differentiates between legal acts governed by their domestic law and those governed by a foreign law in their provisions dealing with avoidance of pre-bankruptcy transactions. The legal provisions apply irrespective of what law governs the transaction and whether the contra-party is within or outside the jurisdiction, or a national or non-national. Any such restriction would seriously diminish the effectiveness of the legislation. In England it has been held by the Court of Appeal that these provisions have extra-territorial effect[87].

Moreover, it is illogical that a transaction governed by the law of another Member State should have protection, but a transaction governed by the law of a non-Member State have no such protection.

The "protection" could give rise to "law shopping" as an alternative to "forum shopping" which has given rise to the phenomenon of "bankruptcy tourism" in England.

It is understood that the Art 13 protection was brought in to benefit banks and credit institutions which wanted to ensure that the validity of their transactions would be governed by a single legal system. However, it is not difficult to see how this protection could be abused. To take a simple domestic circumstance, a husband in a business which gets into financial difficulties and who owns a house abroad could transfer it into his wife's name making the transfer subject to the law of the country in which the property is situate if this law gives greater protection to pre-bankruptcy transactions than the law of the husband's professional domicile. Distortions of the market could occur in other ways, for instance altering the contractual terms of payment and governing law when making payments

80/. Para 136.
81/. Para 138 of the Report.
82/. Para 6.10.3 at page 314.
83/. Para 6.10.3 at page 313.
84/. For instance, in a paper presented by Prof Irit Mevorach at a conference in Erice Sicily in October 2015 on "Security rights under the European Insolvency Regulation" organised by Prof Renato Mangano of the University of Palermo.
85/. E.g. the UK report – on the grounds of complexity.
86/. For an excellent treatment of this topic see the discussion of "detrimental acts" (Art 16 of the new EU Regulation 2015/848) in European Cross-Border Insolvency Law (OUP 2016) by Professors Reinhard Bork and Renato Mangano at paras 4.102 to 4.109.
87/. Specifically S 238 of the IA 1986; In re Paramount Airways Ltd (in administration) [1993] Ch 223.

to creditors in other jurisdictions.

Art 86 of the Recast Insolvency Regulation 2015/848 currently in force but which exceptionally applies from 26 June 2016, and not one year later like almost all the other provisions, requires Member States to provide a short description of their national legislation and procedures relating to insolvency and the Commission is to make this information available to the public.

It is not difficult to perceive that those determined to avoid the consequences of insolvency will use this information and whatever means are at their disposal to their advantage[88].

It would no doubt be argued that because Art 13 puts the onus of proving the protective effect of the foreign law on the party which benefited from the detrimental act[89] that this represents a real balance between the liquidator and the party benefiting. And that the scope of protection of Art 13 must be interpreted strictly to include proof that no provision of the *lex causae* exists to enable the transaction to be challenged whether in insolvency law or the general law. Otherwise, Art 13 would facilitate excessive reliance on that provision[90].

However, those experienced in the field of transaction avoidance will know that this represents yet another obstacle to overcome for the liquidator because he will not want to embark on litigation without being satisfied that he is likely to win. The view expressed in the External Evaluation that *"the administrator only has to state the requirements for avoidance based on the lex concursus and may wait and see whether any debtor of a claw-back will raise objections based on Art 13 EIR"*[91] is, with respect, naïve.

THE DECISION IN THE "NIKE CASE" PROVIDED THAT IT IS THE DEFENDANT THAT WILL HAVE THE TASK OF DEMONSTRATING THAT ART 13 IS ENGAGED SO AS TO SUCCESSFULLY GET OFF THE HOOK.

So, Art 13 will necessitate time, trouble and expense in the form of local legal advice for the liquidator. The effectiveness of pre-bankruptcy avoidance legislation is a core element in insolvency to which creditors and other interested parties look for trust and confidence in the system. Without it, the law is liable to fall into disrepute.

The extent of the trap for a liquidator that Art 13 represents is highlighted by *Lutz v Bauerle* (C-557/13)[92] where the German liquidator got caught out by the short limitation period under the Austrian law governing the transaction even though the German and Austrian avoidance provisions were substantively very similar.

Another as yet unresolved problem with Art 13 is that it seems to presume that the remedy of the insolvency law of the State of the opening will be restricted to the party benefiting from the detrimental act. This is not so with either English or Italian law which gives remedies against sub-transferees. How is the provision to work, in such a case? Assuming a sub-transferee cannot get the "party benefiting" to provide the necessary proof of the protection afforded by the foreign law, can the sub-transferee be said to be the "party benefiting"?

This point awaits decision. Moreover, the debate about the propriety of Art 13 will no doubt continue.

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88/. Such "fraudulent manipulation" although mentioned in the External Report is regarded as hardly realistic (para 6.10.2.3 at page 312).
89/. This aspect is emphasised in the ECJ decision in Nike European Operations Netherlands BV v Sportland Oy Case C-310/14 of 15 October 2015 (the "Nike case") but the national rules in question must not make it procedurally impossible or excessively difficult to prove the negative and thereby shifting the burden of proof laid down in Art 13 (para 29 of the judgment).
90/. Again, emphasised by the ECJ in the Nike case above (paras 39 and 40 of the judgment).
91/. Para 6.10.3 at page 313.
92/. Reported in England at [2015] BCC 413.

Case Digests

EDITED BY HILARY STONEFROST

BANKING & FINANCE

Digested by **TOBY BROWN**

TOBY BROWN

Financial Conduct Authority v Asset LI Inc [2016] UKSC 17 (Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath, Lord Hodge JJSC, 20 April 2016)

Collective investment scheme – land banking - regulated activities

This is the first time the House of Lords or the Supreme Court has considered the regulation of collective investment schemes. Two of the defendants had acquired agricultural land on sites which they divided into plots and sold onto individual investors, on the basis that the companies would seek to progress planning with a view to the land being re-zoned for housing, enabling the investors to make a return once the companies had procured the sale of the land to a developer (a "land banking" scheme). The FSA (subsequently the FCA) brought proceedings against the defendants alleging contraventions of the "general prohibition" contained in s. 19 FSMA 2000 that no person may carry on a regulated activity unless he is an authorised person or an exempt person. Certain defendants settled with the FSA. At first instance, upheld in the Court of Appeal, it was held that the remaining corporate defendants had operated a collective investment scheme within the meaning of s. 235 FSMA 2000 and that the individual defendants had been knowingly concerned in the breach of the general prohibition. The issue for the Supreme Court was whether the corporate defendants had established and operated a collective investment scheme within the meaning of s. 235. The Supreme Court agreed with the lower courts' decisions and dismissed the appeal. Lord Carnwath (with whom the other Justices agreed) stated, first, there was no error of law in the Judge's conclusion that the arrangements within s. 235 were made when plots were marketed and investors paid their deposits. The object of the arrangements were that the company should achieve a sale of the site after seeking to enhance its value by improving the prospects for housing development, the price to be shared between the owners. That conclusion was amply supported by the evidence.

Second, the property for the purposes of s. 235 was each of the company's sites taken as a whole, not the individual plots. That was the property whose sale was to lead to the profits which were the scope of the exercise, and which brought the scheme within the scope of s. 235. Management control of the property under s. 235 may be achieved in different ways, and the mechanisms may not be the same in each case and they need not be legal mechanisms. That followed from the acceptance that the term "arrangements" is not limited to agreements binding in law, and by the same token "control" is not confined to legal control. To "have…control" is not a technical term. For the purposes of applying s. 235, the Judge was entitled to take the arrangements as he found them at face value. The issue was not whether the arrangements were good or bad or even dishonest, but whether they fell within the statutory words.

Lord Sumption (with whom the other Justices agreed save for Lord Carnwath), whilst agreeing with Lord Carnwath that the appeal should be dismissed, gave a separate judgment expressing similar reasons. In particular, he stated that the question of whether the defendants were operating a collective investment scheme "must be firmly founded on the language and purpose of section 235, without making arbitrary teleological assumptions". Further that the use of "arrangements" in s. 235 is a broad and untechnical word, comprising not only contractual or other legally binding arrangements, but any understanding between the parties to the transaction about how the scheme would operate, whether binding or not. It also includes the consequences which necessarily follow from that understanding, or from the commercial context in which it was made.

Edgeworth Capital (Luxembourg) SARL (2) Aabar Block SARL v Ramblas Investments BV [2016] EWCA Civ 412 (Moore-Bick, King, Sales LJJ, 28 April 2016)


ANTONY ZACAROLI QC

Financing "upside fee agreement" - interpretation - penalties

A borrower appealed against a decision that it was liable to pay €105 million pursuant to an upside fee agreement ("UFA") entered into with RBS. The fee agreement was one element of a suite of financing agreements supporting the purchase by a subsidiary of the borrower of a group of buildings in Madrid. The UFA provided for payment of certain fees to RBS as consideration for providing funds essential for the completion of the financing. RBS subsequently assigned its interests to the respondents.

The first question was whether a payment event had occurred within the meaning of the UFA, because the borrower argued no fee was payable unless there had been repayment of the whole or part of the junior loan. The Court of Appeal upheld the decision that a payment event had occurred. It may well be the parties hoped the property would increase in value and that RBS stipulated a share in that increase, but the commercial background and the recitals to the UFA supported the conclusion that RBS was able to and did demand a substantial fee for agreeing to provide the essential missing elements of the financing arrangements. Fees became payable in different amounts at different rates depending on subsequent events, but the UFA provided for a fee whether the value of the property rose or fell. The borrower's suggested construction did not reflect the natural meaning of the words used and there was nothing in the commercial background to support its construction.

The second question was whether the provision for payment of a fee was unenforceable as a penalty, which the borrower argued on the basis it far exceeded any loss that RBS could suffer as a result of a breach of contract in failing to repay the junior loan. This was also rejected by the Court of Appeal. The UFA made clear that the fee was remuneration payable to RBS for providing part of the financing necessary to complete the property purchase. It became payable on a specified date when the repayment of the junior loan fell due. As Hamblen J had said, the fee had nothing to do with damages for breach of contract; it was payable on the happening of a specified breach. Accordingly, it did not fall foul of the rule against penalties (*Makdessi v Cavendish Holdings BV* [2015] UKSC 67 followed). The appeal was, however, allowed to a limited extent to vary the amount of interest ordered under the terms of the UFA.

[Antony Zacaroli QC; William Willson]

Playboy Club London Ltd v Banca Nazionale del Lavoro Spa [2016] EWCA Civ 457 (Laws, Longmore and David Richards LJJ, 18 May 2016)

Bankers' references – duty of care – undisclosed principal

The Playboy Club London Ltd ("the Club") operates a casino in Mayfair and used a company ("Burlington") as its agent to seek banking references in order to preserve the confidentiality of its gambling customers. An apparent "High Roller" requested a cheque cashing facility from the Club, under which a customer can present a cheque and immediately receive gambling chips before the cheque has cleared. The Club, however, required a bankers' reference. Burlington, via the Club's own bank Natwest, made a reference request to the defendant bank ("the Bank"). The Bank provided a favourable reference with respect to the High Roller, who it said was trustworthy up to £1.6m per week. Once received Natwest passed the reference into the Club. The High Roller played roulette at the Club over four days using chips obtained on two cheques totalling €1.4m. However, the cheques were returned unpaid and turned out to be

counterfeits, and it also transpired that the High Roller's account with the Bank never contained any funds. The Club was out of pocket for c. £800,000 and brought a negligence claim against the Bank, which succeeded at first instance, subject to a deduction of 15 per cent for contributory negligence.

The Court of Appeal allowed the appeal and entered judgment in favour of the Bank. Longmore LJ (with whom David Richards and Laws LJJ agreed) distinguished the facts from those in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 on the basis that the requesting bank identified the customer as Burlington (rather than the Club) and the true purpose of the reference (i.e. for gambling) was not revealed. In such circumstances, there could not be an assumption of responsibility by the Bank to the Club, rather than to Burlington, or indeed a responsibility for its use by the Club in trusting the High Roller in his gambling activities. Moreover, it was difficult if not impossible to describe the Bank and the Club as having "a special relationship" when the Bank did not know of the existence of the Club and only knew the reference was requested by Burlington (with whom the special relationship could only have been). On the facts of the case, Longmore LJ held that the Bank assumed no responsibility to the Club. In addition, that it was not fair, just and reasonable to impose liability on the Bank because the Club concealed its own interest.

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD AND ROBERT AMEY

ALEXANDER RIDDIFORD

Sarpd Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120, 3 March 2016, Court of Appeal

Security for costs – non-resident companies – financial information

D, a Swiss company, appealed against a Judge's refusal to order C, a BVI company, to provide security for costs under CPR 25.13(2)(c). C had sought damages alleging that gas oil it had purchased from D fell short of contractual specifications. D denied that the gas oil fell short of contractual specifications but contended that, if it did, then that was the fault of X (the company from which D had bought the gas oil). Accordingly, D commenced Part 20 damages proceedings against the supplier.

D, seeking security for costs against C, relied on CPR 25.13(2)(c). C did not reveal its financial position and there was no publicly available financial information relating to C. The Judge below refused to grant the order, holding that there was no reason to believe that C would be unable to pay D's costs if ordered to do so and that it had been reluctant to reveal its financial position for settlement reasons. The Judge noted that, if it had become the Commercial Court's practice to order security for costs where a claimant had not filed publicly available accounts or had no discernible assets and declined to reveal its financial position, then he would not follow it.

The most interesting issue on appeal was whether the Judge had been justified in not following the Commercial Court practice. The Court of Appeal held that, to order security for costs, the Court had to believe that a claimant would not be able to pay them if ordered to do so; that, this test should not be elevated to a test on the balance of probabilities (*Jirehouse Capital v Beller* [2008] EWCA Civ 908 applied); that the Court should only interfere if the Judge applied some wrong principle, failed to take a relevant matter into account, took an irrelevant matter into account or was plainly wrong (*Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642 applied). The Court of Appeal further held that, in the present case, the Judge had been plainly wrong, on the basis that, if a company was given every opportunity to show that it could pay a defendant's costs and deliberately refused, there was every reason to believe that, if and when it was required to pay a defendant's costs, it would be unable to do so. If the Commercial Court's practice was to order security for costs in a case like the present, then the practice was a sound one which should be upheld.

Eurasian Natural Resources Corp Ltd v Dechert LLP [2016] EWCA Civ 375, 19 April 2016, Court of Appeal

Legal professional privilege – private hearings – waiver

The appellant law firm appealed the Judge's decision that an application by the respondent former client for detailed assessment under s.70 Solicitors Act 1974 should be held in private. The client had sought an order for the taxation of the firm's bills, which were in the sum of over £16.3m, in respect of investigations that the firm had been instructed to conduct into possible fraud. The firm's evidence contained confidential information which it held as a result of its instruction. The Serious Fraud Office was pursuing a criminal inquiry into the client's affairs and, if the s.70 application were heard in public, the SFO would attend that hearing. It was common ground that at least some of the material in the firm's evidence could, if it became public, significantly prejudice the client's interests in the criminal inquiry.

At first instance, the Judge held that the protection of the client's right to legal professional privilege required the matter to be heard in private under CPR r.39.2(3) and that, while there had been an implied waiver of that privilege, it was limited to enabling the solicitors to contest the challenge to their bills and did not constitute a general waiver.

The Court of Appeal dismissed the appeal, holding that the conclusion that putting the material into the public domain, whether subject to legal professional privilege or not, would prejudice the client as against the criminal investigation was clearly correct and that a hearing in private was therefore "*necessary in the interests of justice*" to preserve the client's entitlement to rely on the presumption of innocence. A client's implied waiver of legal professional privilege did not mean that a client should be deprived of all protection in respect of its previous confidential dealings with its solicitor.

Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2016] EWCA Civ 411, 28 April 2016, Court of Appeal

Case management – issue estoppel – privity – jurisdiction clauses – stay of proceedings

The second appellant (VIP) was a shareholder in the first appellant (IPT). IPT had borrowed from the respondent banks under a facility agreement, and VIP had entered into a shareholder support deed. The facility agreement and shareholder support deed contained a jurisdiction clause which stated that they were governed by English law, and that courts in England and Malaysia had jurisdiction to deal with any disputes. The clause expressly accepted the possibility of concurrent proceedings in different jurisdictions and contained a waiver of objection to the laying of proceedings in any court referred to in the clause. IPT defaulted on the agreement and winding up proceedings were commenced by VIP. The appellants issued proceedings in Tanzania and in New York against the respondents' parent company. The respondents issued proceedings in England to recover the sums due under the facility agreement. The judge refused the appellants' application to stay those proceedings.

The Court of Appeal dismissed the appeal, holding that the judge was justified in concluding that, although considerable sums of money had been spent in Tanzania, they had been spent essentially on interlocutory battles, that in both England and Tanzania proceedings were still in their preliminary stages and that the case was nowhere near ready for trial in any jurisdiction. There was no estoppel arising from the New York proceedings, because those proceedings were against the respondents' parent company, which was not a privy of the respondents, and the issues raised in New York were not the same as those raised in England.

Webb Resolutions Ltd v Countrywide Surveyors Ltd, unreported, 4 May 2016, Deputy Master Nurse (Chancery Division)

Pre-action costs – claim issued but not served

The claimant was the owner of a loan which was secured on a property that had been valued in August 2007 by the defendant surveyors. The borrowers defaulted and the claimant repossessed and sold the property, realising considerably less than the valuation provided by the defendants. In May 2011, the claimant sent a letter before claim. Two years of settlement discussions followed, during which considerable costs were incurred. In August 2013, with the expiry of the limitation period looming, the claimant issued a claim form but did not serve it. The claimant notified the defendant that it had issued a claim form, made one last (unsuccessful) attempt at settlement, and then allowed the claim form to lapse.
The defendant applied to recover from the claimant the costs which it had incurred during the two year pre-action period and in the period after the claim form was issued. The Deputy Master noted that, if a claim form is not issued, a defendant cannot seek an order for its pre-action costs. However, when a claim form is issued, the court has discretion to award to a defendant its costs "of and incidental to" the litigation (which will ordinarily include pre-action costs) if that claim is subsequently abandoned. This is the case whether a claimant formally discontinues the claim or, as in the present case, simply allows the issued claim form to lapse. The fact that a claim form has not been served is only a factor to be taken into account when the court's discretion is exercised. On the facts of the present case, the Deputy Master held that the defendant was entitled to its costs, including all the expense that followed as a direct consequence of the letter before claim.

Coyne v Morgan, unreported, 24 May 2016, Judge David Grant (TCC)

Resignation of expert witness – permission to adduce evidence from second expert – disclosure of first expert's draft report

The claimant employed the defendants to carry out building works. The claimant alleged that the works were defective and commenced proceedings in the TCC. The defendants' expert visited the claimant's property for a site visit, during which he engaged in unauthorised discussions with the claimant. The content of the expert's draft report had allegedly been influenced by those unauthorised discussions. Following discussions between the expert and the defendant's solicitor, the expert indicated that he was unable to continue to act.
The defendant sought permission to adduce evidence from a second expert. The issue arose whether, as a condition of the defendants being given permission to adduce a report from a second expert, they should be required to disclose the draft report and any other material produced by the first expert.
The court emphasised its wide discretion whether to impose terms when granting permission to adduce expert opinion evidence under CPR r.35.4(1) and the wide nature of its case management powers under r.3.1(2)(m). In exercising that discretion, it could give permission for a party to rely on a replacement expert, but that was usually exercised on condition that the first expert's report was disclosed. Once the parties had engaged in a relevant pre-action protocol process and an expert had prepared a report, the expert owed a duty to the court irrespective of his instruction by a party, and accordingly there was no justification for not disclosing that report. The court's power to use its discretion arose irrespective of the occurrence of any expert shopping. However, strong evidence of expert shopping was required before imposing a term that a party had to disclose documents other than the original expert's report, such as a solicitor's attendance note of discussions with the original expert.
In the present case, the first expert had already produced a draft report in the context of the proceedings, and he had discussed the expert issues in the case and attended a joint inspection with the claimant's expert.
Accordingly, the first draft report should be disclosed. However, the instant case was not a strong case of expert shopping, and the defendants were therefore not required to disclose attendance notes or other documents recording the substance of any conversation between E1 and their solicitors.

McTear v Engelhard [2016] EWCA Civ 487, 24 May 2016, Court of Appeal

Disclosure – relief from sanctions – witness statements

The appellants appealed against the Court's refusal of their applications for extensions of time, or relief from sanctions, in relation to disclosure and the service of witness statements. The respondents were the former administrators of a company who had brought proceedings against the appellants seeking the repayment of loans made by the company before it went into administration and alleging, inter alia, that the appellants were in breach of fiduciary duty. The appellants defended the claim and the Court timetabled standard disclosure by list and the exchange of witness statements. Disclosure was ordered to take place on 7 February 2014, with witness statements to be served by 4pm on 21 February. The appellants served their witness statements 50 minutes late. One of the statements exhibited 700 pages of documents, some of which had only been found on 15 February and had not been disclosed. The appellants applied for retrospective extensions of time or relief from sanctions in relation to the service of the witness statements and in relation to disclosure. The judge refused the applications and debarred the appellants' witnesses from giving evidence at trial. The Judge held that, although the 50-minute delay was trivial, the witness statement application had to be considered together with the disclosure application and, in this regard, he inferred that the appellants were trying to subvert the litigation process by burying the new documents in the exhibits to the witness statement. On appeal the issues were whether the Court below had been justified in considering the two matters together and drawing the inference; and, if so, whether the witnesses should have been debarred from giving evidence. The Court of Appeal allowed the appeal, holding that, if the Judge had properly considered the application in respect of the witness statements he could only have concluded that granting relief from sanctions was appropriate, and that he had erred in considering that application together with the disclosure application. It was relevant to the Court of Appeal's decision that the late-disclosed documents were of limited relevance to the pleaded issues, none were of particular importance, and some were available to the former administrators in any event, and that, even if the documents in question were sufficiently relevant to require disclosure, it was hard to see any justification for the inference that the appellants were deliberately seeking to subvert the litigation process. Moreover, the connection between the witness statement application and the disclosure application should have been limited to the third stage of consideration, at which all the circumstances were taken into account; and, once the judge had accepted that the 50-minute delay in serving the statements was trivial, he should have considered the reason for the delay, namely the inappropriate decision to exhibit hundreds of pages of documents and the uncooperative email correspondence. In any event, the judge appeared to have ignored the most important factor at the third stage of the analysis, namely whether it was proportionate and just to exclude the appellants from giving evidence, and this was an important oversight given that it was plainly not proportionate and just to do so.

COMMERCIAL CASES

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

AS Latvijas Krajbanka (in liquidation) v Antonov [2016] EWHC 1262 (Comm) – Leggatt J – 27 May 2016

Fiduciary duty – Breach of duty – Dishonesty

The Claimant, a Latvian retail bank in liquidation, brought proceedings against a Russian national, the majority shareholder of a Lithuanian bank which owned the majority of shares in the Claimant. The Claimant contended that the Defendant had acted dishonestly and in breach of duty by causing it to enter into transactions which were not in the company's interests, but for his own benefit, the claims being governed by Latvian law. The trial took place in the Defendant's absence. He had left the jurisdiction, and was held in contempt of court. The evidence established that the Defendant had caused the Claimant to advance money to a closely connected borrower, which money had not been repaid. It was held that in doing so he had acted dishonestly and in breach of duty. He was therefore held to be liable for the Claimant's losses of over €60m and US$30m.

Sino Channel Asia Ltd v Dana Shipping and Trading Pte Singapore [2016] EWHC 1118 (Comm) – Eder J – 20 May 2016

Arbitration – Service – Implied actual authority

The Claimant charterer brought proceedings seeking a declaration that an arbitration award, made in favour of the Defendant ship owner, was made without jurisdiction. The Claimant, who had not taken part in the arbitration, argued that service of the notice of arbitration by email on another company (A) was invalid as A had no authority to accept service on its behalf.

The Defendant's position was that A had implied actual, or ostensible, authority to accept service; alternatively, that the Claimant had retrospectively ratified the award, either by not challenging it for four months or by agreeing with A that A should pay the award.

The court granted the declaration sought by the Defendant. It was held that, even where an employee or agent had wide general authority to act on behalf of an employer or principal, such authority did not generally extend to authority to accept service of a notice of arbitration, and that A did not have implied actual authority to accept the notice, nor did A have ostensible authority.

Moreover, where an award was made without jurisdiction, a party which had not participated could not ratify and award just by silence.

Ratification required an unequivocal act and on the facts there was no such act; an agreement that A should pay was not inconsistent with the Claimant maintaining the invalidity of the award insofar as it is concerned.

Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd [2016] EWHC 1103 (Comm) – Knowles J – 16 May 2016

Shipping – Breach of contract – Bribery

The Claimant shipping company brought a claim for damages for repudiatory breach of contract. The Claimant and a subsidiary of the Defendant had chartered a ship, with the Defendant providing a guarantee. When the Defendant's subsidiary breached its obligations under the charterparty, the Claimant accepted the repudiation. The Defendant refused to pay up under the guarantee. The Defendant contended that the charterparty was unenforceable on the basis that it had been procured by bribery. It was alleged that, at instigation of the Claimant's general manager, an employee of the Claimant had paid a friend, whose father was employed by the Defendant group, to induce the father to approve the charterparty. The general manager, employee and friend had all confessed to, and were convicted of, bribery, but they later said that the allegations were untrue, that they had been tortured and confessed in light of promises of more lenient sentences. The court found there to be insufficient evidence that a charterparty had been procured by bribe; the reason given for the bribe was not convincing in circumstances where the chartering market could be described as an 'owner's market' and the charterparty had been approved by directors other than the father. Torture would further reduce the confidence that could be placed in the confessions, but, as the court was in any event satisfied that there had been no bribe, it was not necessary to determine whether the alleged torture had taken place. The Defendant was therefore held to be liable under its guarantee.

Barclays Trust Co (Jersey) Ltd v Ernst & Young LLP [2016] EWHC 869 (Comm) – Phillips J – 20 April 2016

Professional negligence – Due diligence

The Claimants sought damages for professional negligence from the Defendant in respect of the due diligence services it provided in relation to the acquisition of a health and fitness company. The Defendant's due diligence report in respect of the acquisition included its view as to the alterations that should be made as to the company's management forecasts so as to reflect the most likely outcome. The Claimants alleged that the Defendant should have reduced the estimate of the company's earnings in light of the company's membership data, and that, had the Defendant done so, they would not

have completed the transaction without a significant reduction in the price.
The Claimants' claim was dismissed. The shortfall in membership was immaterial and the company's performance supported the Defendant's views as to revenue forecasts. The Defendant had not acted negligently. Further, the evidence did not support the contention that the Claimants would have approached the seller to renegotiate the purchase price so, in any event, there was no loss.

COMPANY CASES

Digested by MATTHEW ABRAHAM

Re Metinvest BV Chancery Division, Companies Court (Newey J, 8 June 2016)


STEPHEN ROBINS

Certain notes issued by the company were repayable at the end of January 2016, but the company was unable to make repayment, giving rise to defaults on those notes and cross-defaults on other notes issued by it. In those circumstances, the company proposed a scheme of arrangement (the First Moratorium Scheme) to prevent noteholders from taking enforcement action. Mrs Justice Proudman made an order convening a meeting of scheme creditors to consider and if thought fit approve the First Moratorium Scheme: see Re Metinvest BV [2016] EWHC 79 (Ch); [2016] I L Pr 19 (as reported in the March 2016 edition of the South Square Digest). The scheme creditors approved the First Moratorium Scheme by the requisite majorities and it was sanctioned by Mrs Justice Asplin: see Re Metinvest BV [2016] EWHC 372 (Ch). During the moratorium the company negotiated heads of terms for a substantive restructuring, which were agreed with an ad hoc committee of creditors. The moratorium pursuant to the First Moratorium Scheme was expiring, but the company required further time to agree the documentation for, and implement, the substantive restructuring, as set out in the heads of terms. In those circumstances, the company proposed a further scheme of arrangement (the Second Moratorium Scheme) to provide a further moratorium period in which noteholders would be prohibited from taking enforcement action. The company applied for an order convening a meeting of scheme creditors to consider and if thought fit approve the Second Moratorium Scheme. At the convening hearing, Mr Justice Newey held that it was appropriate for the scheme creditors to vote as a single class (holding that there was no relevant distinction between the First Moratorium Scheme, in respect of which Mrs Justice Proudman had held a single meeting to be appropriate, and the Second Moratorium Scheme). He also concluded that there was no jurisdictional point which rendered it inappropriate for the meeting of scheme creditors to be convened. As regards the putative applicability of the Brussels Regulation Recast, Mr Justice Newey noted that, whilst the scheme company was aware at the time of the convening hearing of only 10 noteholders in the UK holding only US$6 million of notes, Article 8 of the Brussels Regulation Recast required there to be only a single defendant in the UK, provided that it was expedient for the claim to be brought before the English court; and that the test of expediency would be satisfied given that the notes were governed by English law. Mr Justice Newey approved the proposed arrangements for the holding of the meeting and made the convening order in the terms requested by the company.

[David Allison QC; Stephen Robins]

Secretary of State for Business, Innovation and Skills v Atkar 10 June 2016 (unreported) Nugee J

Directors Disqualification Proceedings - stays of execution

The respondent in this case had been a director of a company that had traded to the detriment of the Crown by not paying PAYE and National Insurance. At a hearing before a Registrar the respondent was found to have been complicit in that trading and was therefore unfit under the Company Directors Disqualification Act 1986 s.6(1)(b). The respondent was disqualified for 4 years. A stay of execution on the order was granted pending the respondent's permission to appeal. The stay was granted on the basis that the respondent was a director of several companies and had a long and previously unblemished career of directorships which would be prejudiced if the order was known. The secretary of state sought to set aside the stay of execution. In response

to this the respondent adduced evidence to show irremediable harm that would be suffered if the stay were lifted. In particular: (1) that he was the director of a company that operated a care home with a bank facility that contained termination events, which could be triggered by his disqualification; (2) that he was the director of a company that ran a hotel under licence, which could be jeopardised by his disqualification; and (3) that he belonged to a charitable organisation which could remove a member whose conduct was a violation of its rules.

The Court granted the application to set aside made by the secretary of state. In this regard the Court noted that while the court retained jurisdiction to grant a stay, the usual practice was not to do so (*Secretary of State for Trade and Industry v Bannister* [1996] 1 W.L.R. 118 and *Department for the Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257). The Court found that the respondent could make an application for relief under s.17 of the Company Directors Disqualification Act 1986 which would be adequate to protect him against the risk of irremediable harm. The Court also found that the alleged harm was unfounded and that in any event a finding had been made by the Court below which the respondent could explain to third parties as being subject to an appeal. The Court stated that it should not do anything to supress the findings that have been made against the Respondent.

CORPORATE INSOLVENCY

Digested by **RYAN PERKINS**

ABN Amro Fund Services (Isle of Man) Nominees Ltd & UBS AG v The Joint Liquidators of Fairfield Sigma Limited & Ors (Leon J sitting in the High Court of the BVI, 11 March 2016)


GABRIEL MOSS QC


RYAN PERKINS

Liquidators' powers and duties

The applicants sought an order under section 273 of the BVI Insolvency Act 2003 directing the respondent liquidators to withdraw proceedings brought in the US Bankruptcy Court. Section 273 is derived from section 168(5) of the IA86, and provides as follows: "A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder." The applications were refused. Leon J held that: (i) section 273 is a limited remedy, and the applicant must prove that he has *locus standi* and a legitimate interest in obtaining relief; (ii) the applicants could not demonstrate that they had any such *locus standi* or legitimate interest; (iii) even if the applicants had *locus standi* and a legitimate interest, the Court would not interfere with the liquidators' conduct; (iv) the critical test was whether the liquidators' conduct was "so utterly unreasonable and absurd that no reasonable man would have done it", and this test could not be satisfied in the present case. **[Gabriel Moss QC]**

Pennyfeathers v Fieldfisher (Nugee J, 8 March 2016)

Administration – arbitration agreements

A firm of solicitors applied for an administration order against a former client, relying on fees claimed to be due under a CFA. The CFA contained an arbitration clause. Following a line of recent cases including *Salford Estates (No. 2)*, Nugee J held that it would be contrary to the policy underlying the Arbitration Act 1996 if the parties to an arbitration agreement could circumvent the need for arbitration by applying for an administration order. Permission to appeal was granted. Subsequently, an application to rescind the order dismissing the application for an administration order and for an administration order was successful as it came to light that the company had an undisputed debt. **[Hilary Stonefrost]**

CFI 005/2016 (1) Mr Rafed Abdel Mohsen Bader Al Khorafi (2) Mrs Amrah Ali Abdel Latif Al Hamad (3) Mrs Alia Mohamed Sulaiman Al Rifai v Bank Sarasin-Alpen (ME) Limited, DIFC Court of First Instance, H.E. Justice Omar Al Muhairi, 2 May 2016


DAVID ALLISON QC

Winding Up – Outstanding Appeal – No stay of Execution

The DIFC Court considered a winding-up petition against the Bank based on a judgment debt of US$35m ("the Judgment Debt").

The DIFC Court of Appeal had given the Bank permission to appeal

against the Judgment Debt on the grounds that the appeal had a real prospect of success and the appeal was listed to be heard later in 2016. The Bank had failed to obtain a stay of execution pending the hearing of the appeal. The Bank contended that there was a genuine and substantial dispute in respect of the Judgment Debt which should be resolved by the DIFC Court of Appeal and that the winding-up petition should be dismissed or adjourned pending the determination of the appeal.

The Bank further contended that this would not cause any prejudice to third parties as the Bank had ceased trading in the DIFC and surrendered its licence to carry on financial services in the DIFC.

The Bank also contended that the winding-up petition was brought for the purpose of stifling the appeal against the Judgment Debt and represented an abuse of process. H.E. Justice Omar Al Muhairi rejected the arguments of the Bank and made a winding-up order, placing heavy reliance on the failure of the Bank to obtain a stay of execution of the Judgment Debt pending the hearing of the appeal.

[David Allison QC]

Re Lemma Europe Insurance Co Ltd [2016] EWCA Civ 484 (Patten, Kitchin and Floyd LJJ, 24 May 2016)

Cross-border insolvency – stay of proceedings

The company was in liquidation in Gibraltar. The liquidation was recognised in England pursuant to the Cross-Border Insolvency Regulations 2006 ("CBIR"), resulting in an automatic stay of proceedings against the company under Article 20(1) of the CBIR (of the same scope as the liquidation stay under section 130(2) of the IA86). The appellant, a solicitor, sought to lift the stay in order to seek an indemnity under a professional negligence insurance policy.

The appeal was denied. In order to succeed, the appellant needed to establish a genuinely arguable case that a "claim" had been made against him within the terms of the policy. A "claim" was defined in the policy as "a demand for or an assertion of a right to civil compensation or civil damages or an intimation of an intention to seek such compensation or damages". A letter had been written to the appellant which mentioned the possibility of future proceedings against him for professional negligence. But the Court of Appeal rejected held that the letter did not constitute a "claim". Further (and in any event), the Judge acted within his discretion in refusing to lift the stay. The Court of Appeal stated: "In the absence of any challenge to the competence of the courts of that jurisdiction to determine the dispute in the liquidation, the need to preserve the estate for the benefit of creditors outweighs the contractual right of the insured in this case to have his claim determined in England." **[Charlotte Cooke]**

Hosking v Slaughter & May [2016] EWCA Civ 474 (Arden, Jackson and Kitchin LJJ, 24 May 2016)

Administration – fees

The company's former administrators agreed and paid the fees of the respondent solicitors (who had been instructed during the administration). The company entered into liquidation, and new liquidators were appointed. Held, that the liquidators had no power to seek a detailed assessment of the solicitors' bills pursuant to rule 7.34 of the IR86. On its true construction, rule 7.34 precluded a request for detailed assessment of fees which had already been agreed and paid, and the Court had no inherent jurisdiction to order such an assessment.

[Hilary Stonefrost]

CFI 013/2016 Oger Dubai LLC v Daman Real Estate Capital Partners Limited, DIFC Court of First Instance, Justice Sir Richard Field, 23 June 2016

Winding Up – Jurisdictional Challenge

The DIFC Court considered a winding-up petition against Daman flowing from an arbitration award of US$263m ("the Award") made, in July 2015, by a Dubai International Tribunal Arbitration Centre ("DIAC") Tribunal. Daman had contested the jurisdiction of the DIAC Tribunal and applied to the Dubai Court for the annulment of the Award. In December 2015, the DIFC Court considered an application by Oger for recognition and enforcement of the Award. Justice Steel found that Daman's jurisdiction challenge in the Dubai Courts just

passed the threshold of a realistic prospect of success and ordered that the enforcement application be adjourned for four months to allow for the hearing of the jurisdiction challenge in the Dubai Courts if Daman posted security in the amount of the Award in the DIFC Court. Daman failed to post the security and, as a result, the Award was recognised pursuant to Article 43 of the Arbitration Law and became liable to enforcement as if it were a judgment of the DIFC Court ("the Enforcement Order"). In January 2016, the Dubai Court of First Instance dismissed Daman's challenge to the jurisdiction of the DIAC Tribunal on the ground that it did not have jurisdiction to entertain it. Daman then sought to appeal this decision to the Dubai Court of Appeal. In March 2016, Oger issued a winding-up petition based on the Enforcement Order. In April, Justice Steel granted Daman an injunction restraining Oger from advertising the winding-up petition until the effective hearing of the petition. The effective hearing of the petition took place before Justice Field on 16 May 2016 and judgment was reserved. On 8 June 2016, the Dubai Court of Appeal dismissed Daman's appeal against the decision of the Dubai Court of First Instance on the jurisdiction challenge. Justice Field took a different approach to the approach of H.E. Justice Omar Al Muhairi in CFI 005/2016 on the test to be applied to a petition by a judgment creditor. He found that the effect of the Enforcement Order is not that the petitioner has a right to a winding-up order on the basis of a final and indisputable judgment debt. Instead, the effect of that order is to allow the petitioner to have recourse to such means of execution as are available to enforce its judgment debt and the petitioner must take those means of execution as it finds them. Justice Field went on to find that Articles 50 and 51 of the DIFC Insolvency Law were closely based on sections 122 and 123 of the Insolvency Act 1986 and that the practice and procedure of the English courts on winding-up petitions should be broadly applied by the DIFC Courts. Justice Field found that the central question was whether Daman's challenge to the DIAC Tribunal's jurisdiction in the Dubai Courts has a realistic prospect of success and that the need to answer this question is not ousted in circumstances where the petition is based on a judgment debt. He found that the decision of the Dubai Court of Appeal reached after the hearing of the petition which upheld the Dubai Court of First Instance's decision that it lacked jurisdiction was a "game changer". The decision of the Dubai Court of Appeal meant that the position had moved on from the state of affairs which Justice Steel had found gave the jurisdictional challenge a realistic prospect of success and led to the conclusion that the jurisdiction challenge could no longer be regarded as having a realistic prospect of success. Justice Field therefore made a winding-up order in respect of Daman.

[David Allison QC]

CFI 013/2016 Oger Dubai LLC v Daman Real Estate Capital Partners Limited, DIFC Court of First Instance, Justice Sir Richard Field, 30 June 2016

Winding Up – Jurisdictional Challenge – Stay

The winding-up petition was restored for further consideration following the referral of the jurisdiction challenge to the Judicial Tribunal established pursuant to Decree No.19 of 2016. Decree No.19 of 2006 operates to establish a new Judicial Tribunal from members of the DIFC Courts and the Dubai Courts which is given the power to resolve disputes over conflicts of jurisdiction between the DIFC Courts and the Dubai Courts. The effect of the Decree is that the underlying proceedings in the DIFC Court and the Dubai Courts are stayed until the Judicial Tribunal rules on the referral. Accordingly, the DIFC Court ordered that the winding-up order in respect of Daman is stayed until the Judicial Tribunal determines which is the competent court to examine the jurisdiction of the DIAC Tribunal.

[David Allison QC]

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM

MATTHEW ABRAHAM

Aabar Block Sarl v Maud [2016] EWHC 1016 (Ch), Registrar Briggs

Adjournment of bankruptcy petition where there is an alleged ulterior motive

This case addressed the issue of whether the Court is entitled to adjourn the a bankruptcy hearing where the debt was undisputed but there was an allegation that the petition was presented for an ulterior motive and it was not in the interest of the creditors to make an immediate order. The case arises out

of the bankruptcy proceedings against Mr Glenn Maud which has been on going.The petition first came before the court in July 2015 when it was adjourned on the ground that there was a reasonable prospect of payment in full by September 2015. The petition came back to court on 1 December 2015 where it was adjourned principally for the same reason but in addition it was forcefully argued that the Petitioners were not acting in the interests of the creditors as a whole and that the Petitioners were also pursuing the petition for a collateral purpose.

The parties and Court concluded that there was no English authority that dealt with the issue of whether an adjournment could be granted where there was an ulterior object and it was not in the interests of the creditors as a class to make an immediate order (the "Conjunction").

The Registrar noted that if the court were to find that there was an ulterior object and also find (on a challenge) that it was in the interests of the class as a whole to make an order, there could be no ground for an adjournment.

The Registrar held that the Court in fact had a discretion to adjourn or stay proceedings if there was evidence of the Conjunction. The Court helpfully set out the shifting in the burden of proof in such cases. In particular, it noted that where there was an undisputed debt, there was a presumption in favour of the petitioner that an order for bankruptcy would be made. However, if a debtor was able to demonstrate the Conjunction the presumption that an order would be made was negated. In such a situation the burden then rested on the petitioner to show that an immediate order was for the benefit of the class of creditors as a whole.

Applying the principles set out above the Registrar concluded that there was insufficient evidence to support the claim for an ulterior object and so the debtor had failed to discharge its burden as to why a bankruptcy order should not be made.

[Antony Zacaroli QC and William Wilson]

Robert v Woodall [2016] EWHC 528 (Ch) (Registrar Jones, 15 March 2016)

Bankruptcy – Matrimonial Causes Act 1973

Under sections 23 and 24 of the Matrimonial Causes Act 1973, a spouse can apply for relief for the purpose of "adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation". Held, that the right to claim relief under sections 23 and 24 is personal to the bankrupt, and does not vest in the trustee.

Glenn Maud v (1) Aabar Block SARL (2) Edgeworth Capital (Luxembourg) S.A.R.L (2016) (unreported) Snowden J


WILLIAM WILLSON

Stay of Bankruptcy Order

Following the making of a bankruptcy order the debtor sought a stay of the order pending an appeal. When the order was made the Registrar refused permission to appeal or to stay the order.

The debtor argued that the bankruptcy order should be stayed because if he was made bankrupt he would suffer irremediable prejudice. It was stated that the prejudice would be that the order would prevent the payment of the petition debt and other value accruing to his estate. It was further argued by the debtor that the petitioning creditors would suffer no prejudice from a short stay in the context of a petition which had been outstanding for a year.

The Court applied the principles applicable to a stay pending appear as set out in *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 755 (Comm). (1) Ordinarily an appeal did not operate as a stay. (2) The starting point was that a successful claimant was not to be prevented from enforcing his judgment even though an appeal was pending (*Winchester Cigarette Machinery Ltd v Payne* Times, December 15, 1993). (3) A stay was the exception rather than the rule; solid grounds had to be put forward by the party seeking a stay, and, if such grounds were established, then the court would undertake a balancing exercise weighing the risks of injustice to each side if a stay was or was not granted (*Department for the Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257). (4) When undertaking the balancing exercise the decision in *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 should be considered. (5) While the normal rule was for no stay to be granted where the justice of that approach was in doubt, the answer

might depend on the perceived strength of the appeal (*Leicester Circuits Ltd v Coates Brothers Plc (Application to Lift Stay)* [2002] EWCA Civ 474).
The Court also considered the usual position in appeals against bankruptcy orders that a stay would not be ordered because of the need to secure the assets of the estate, to identify creditors and to obtain information. The Court noted that it might however be appropriate to modify the full effect of a bankruptcy order in circumstances where there appeared to be substantial grounds for an appeal and where a bankruptcy order would cause irreparable damage to the debtor. The Court found that there appeared to be irreparable prejudice to the debtor and his creditors if a stay was not granted and that there was no prejudice or risk of injustice to the petitioning creditors from a few weeks' delay.
[William Wilson]

Re Chinn [2016] BPIR 346 (Registrar Barber)


JOHN BRIGGS

Guidance on applications for directions by trustee in bankruptcy

A proof of debt was submitted by the liquidators of a company in relation to a series of claims arising out of the bankrupt's directorship of the company in liquidation. The bankrupt did not agree with the liquidators claims. At a later date the liquidators sought that the trustee convene a creditor's meeting for the purposes of removing the trustee and appointing two other insolvency practitioners in his place.
In this regard the trustee applied for directions under s 303 of the Insolvency Act 1986 as to: (1) whether the proof of debt should be admitted, for voting purposes only, in whole or in part, in the bankruptcy; and (2) whether a meeting of creditors should be convened by him or by the court at the liquidators' request.
It was the trustee's case that any admission of the proof wholly or in part or rejection would inevitably give rise to an appeal, whether by the bankrupt (to the extent that the proof was admitted) or the liquidators (to the extent that the proof was rejected) and so an application was necessary. The liquidators asserted that the application was misconceived, as it was a fundamental aspect of an office holder's role to adjudicate on creditors' claims for voting purposes when called upon to do so. The liquidators also challenged the trustee's assertion that an appeal was inevitable, on the grounds that a creditor whose proof was rejected in whole or in part had a choice as to whether and if so to what extent to challenge the decision reached. They argued that the trustee sought to extinguish that choice and to convert the possibility of an appeal into a certainty. The Registrar made it clear that the general power of the court to give directions should not ordinarily be invoked to create a procedure for which there were specific rules which had not been applied (*Re McHale (James) Automobiles Ltd* [1997] 1 BCLC 273). The court should decline to give directions where some alternative, more appropriate, course was available (*Re Stetzel Thomson and Co Ltd* [1988] 4 BCC 74). The Registrar noted that there are circumstances where an office holder might properly seek guidance from the courts before adjudicating on a creditor's claim for voting purposes however these would be in exceptional circumstances or where a definitive ruling is required. However, it is not acceptable for an office holder to "*invite the court, outside of the established appeal process which is clearly set out in the Insolvency Rules 1986, to supplant the office holder's role entirely*". The Registrar found that the trustee's stated desire to avoid criticism from the debtor and from the liquidators was not a sufficient justification for bringing the application and displacing the usual process.
[John Briggs]

Shlosberg v Avonwick Holdings Ltd [2016] EWHC 416 (Ch) (Arnold J, 7 March 2016)


HENRY PHILLIPS


TOM SMITH QC

Bankruptcy – privilege – conflict of interest

This was an application by a bankrupt for an order directing a firm of solicitors to cease to act both for his trustees in bankruptcy and his major creditor. The bankrupt asserted that the solicitors held a large quantity of documents which were subject to legal professional privilege and confidential. It was not disputed that many of the documents were privileged and confidential. However, the

respondents contended that the benefit of the privilege had passed to the trustees, and that there was no real risk that the solicitors would misuse any confidential information. Arnold J rejected this argument and granted the injunction sought by the bankrupt. He held, *inter alia*, that the bankrupt's right to legal professional privilege had not passed to his trustees in bankruptcy, and could not be waived by them. It was irrelevant that the trustees had acquired title to the pieces of paper on which the information was recorded. Further, Arnold J held that privilege itself is neither property within section 486(1) of the IA86, nor a power in respect of property within the same section.

[Tom Smith QC; Henry Phillips]

Narandas-Girdhar v Bradstock [2016] EWCA Civ 88

Material Irregularity and IVAs

CHRISTOPHER BROUGHAM QC

In this case a debtor sought to set aside a modified proposal in his IVA as invalid because it had not been validly approved by the majority of his creditors at a creditors' meeting held over 10 years earlier. The appeal was from the Order of a Deputy Judge of the Chancery Division in relation to orders dismissing attempts by the debtor to set aside an IVA. On appeal the debtor pursued two of the grounds put before the Deputy Judge, namely: (1) the modified proposal that he was said to have accepted was conditional upon the acceptance of a simultaneous IVA proposal for his wife which was in the event rejected by her creditors; and (2) the approval of his modified proposal depended upon the vote in support of his main creditors HMRC that voted by their proxy at the meeting contrary to the terms of HMRC's authority which did not permit their vote to be case in support of some of the modifications which formed part of the modified proposal.

The judge found that: as to (1) above, the modified proposal was not conditional upon the debtor's wife's IVA being approved by her creditors; and as to (2) above, that although HMRC's proxy had not indeed been authorised to cast HMRC's vote in favour of the modified proposal, HMRC had subsequently ratified that vote and in any event such a challenge based upon want of authority was, at most, a material irregularity at or in relation to the creditors' meeting which was time-barred by s.262(3) of the Insolvency Act 1986 and otherwise prohibited by s.262(8).

In determining issue (1) the Court of Appeal found that the conditionality of the IVA was not agreed and as a result the IVA could not be set aside on this ground. In arriving at this conclusion the Court applied the case law in relation to the relevance of deleted words in an agreement when construing a final document. In particular, the case of *Mopani Copper Mines plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm) was considered. As to the issues around the proxy vote as set out in (2) the Court first found that the judge's conclusion that this was a case of a conscious and deliberate decision not to object, rather mere passivity, brought the facts squarely within a recognised category of ratification and so the debtor's issues with authority were dismissed. Despite this the Court went on to deal with the issue of material irregularity.

In reviewing s.262 of the Insolvency Act the Court provided helpful guidance as to the scope of s.262(8). The Court noted that two rival interpretations had emerged from the mainly first instance decisions in relation to s.262(8). The first, narrower interpretation was that nothing in s.262 applies to anything short of an IVA which has actually (i.e. validly) been approved at a creditors' meeting summoned under s.257. Thus the phrase "material irregularity" in subsections (1)(b) and (8) means some irregularity which does not of itself render the approval of the IVA a nullity. The second broader interpretation was that s.262 applies to regulate the validity or otherwise of an IVA wherever the allegedly invalidating event (or non-event) occurs at, or in connection with, a creditors' meeting summoned under s.257. Having reviewed the authorities in this area the Court held that the broader interpretation was to be favoured. The Court also noted that s.262 is however still limited by the qualifying requirements *"that the irregularity should be material (which I suppose means more than de minimis or irrelevant) and that it should have occurred at or in connection with a creditors meeting summoned under s.258."* The Court also noted that an appeal under r.5.17 in relation to challenging decisions by the chairman at a creditors' meeting about entitlement to vote was separate to s.262 but would not in substance differ from an application under s.262.

[Christopher Brougham QC]

PROPERTY & TRUSTS

Digested by ANDREW SHAW


ANDREW SHAW

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

Breach of fiduciary duty –Limitation periods – Summary judgment

The claimant company was a holding company with a number of trading subsidiaries. The defendants, Mr and Mrs Fielding, were directors of the claimant, which had three other executive directors. Mrs and Mrs Fielding were also the controlling shareholders of the claimant. The claim concerned a number of transactions which were effected pursuant to a planned sale of 30% of the shares in Vital Energi Utilities Ltd ("Vital") to Scottish & Southern Energy plc ("SSE"). These transactions were as follows:

● On 4 October 2007, the claimant's shareholders exchanged their shares for shares in a new holding company ("BHUH"); their shareholdings in BHUH precisely replicated their shareholdings in the claimant. BHUH thus became the claimant's sole shareholder.

1.

● On 12 October 2007, a distribution in specie of the claimant's shareholding in Vital was approved by unanimous resolution of the claimant's directors and by a written resolution of BHUH. This distribution was effected on the same day.

● On 15 October 2007, BHUH was placed in members' voluntary liquidation. On the same day, the liquidator of BHUH transferred its shares in Vital and BHUH to new holding companies ("VHL" and "BGHL" respectively). VHL and BGHL in turn issued shares to the former shareholders of BHUH, again in precise replication of their original shareholdings in BHUH and in the claimant.

● On 19 October 2007, Mrs Fielding sold a 30% shareholding in VHL to SSE for £6 million, of which £3 million was lent to the claimant and the balance allegedly retained by the Fieldings.

Subsequently the claimant and two of its other subsidiaries entered administration and the claimant later went into liquidation.

On 15 October 2013, the claimant issued proceedings against Mr and Mrs Fielding for various breaches of fiduciary duties and/or statutory duties owed under the Companies Act 2006. A key element of the claimant's case was that the distribution in specie of its shareholding in Vital had been unlawful.

The defendants' applied for summary judgment against the claimant on the basis that the action was time-barred. At first instance, HHJ Hodge QC gave summary judgment for the defendants and the claimant appealed.

The claimant contended that its cause of action had accrued on the defendants' receipt of the share on Vital which it said was 15 October 2007, which was the date on which BHUH's share in Vital was transferred to VHL. David Richards LJ observed that the defendants themselves had never directly received or held the share in Vital though, because it was transferred to BHUH and then to VHL. Since BHUH was a company controlled by the defendants, he held that to the extent that Mr and Mrs Fielding received that share in Vital at all, they did so on 12 October 2007, which was when the share was distributed to BHUH. The subsequent transfer to VHL was simply a re-arrangement of the defendants' existing indirect ownership of the share in Vital.

Section 21 of the Limitation Act 1980 (the "Act") governs actions in respect of trust property and so was applicable to the claim. This provision provides for a primary limitation period of 6 years, save where the actions of the trustee have been fraudulent or where he has misappropriated trust property. Unfortunately for the claimant, a close reading of the particulars of claim disclosed no allegation of a fraudulent breach of duty: such a claim must be distinctly alleged and properly particularised and the claimant's particulars of claim were deficient in both respects.

David Richards LJ then considered whether the share in Vital fell within the section 21(1)(b) of the Act, namely whether the share was, "*in the possession of the trustee, or previously received by the trustee and converted to his use*." He considered that a literal reading of the provision supported the defendants' contention that they had never actually received the share in Vital themselves but considered that this would enable recalcitrant trustees easily to avoid section 21(1)(b) by holding trust property through companies. He concluded that where a fiduciary either used a beneficiary's monies to confer a benefit on a company controlled by him, or caused his beneficiary to incur a liability to a company controlled by the fiduciary, then this amounted to a conversion of the beneficiary's property to the trustee's use. Accordingly section 21(1)(b) of the Act did apply, there was no limitation period and the appeal succeeded.

SPORT

Digested by ROBERT AMEY


ROBERT AMEY

International Tennis Federation v Maria Sharapova (ITF Independent Tribunal, 6 June 2016)

Unintentional doping – subsequent concealment by athlete – estoppel – proportionality – appropriate sanction

On 26 January 2016, Maria Sharapova played against Serena Williams in the quarter-final of the Australian Open. Following that match a sample was taken from Ms Sharapova under the rules of the Tennis Anti-Doping Programme 2016 ("TADP"). That sample tested positive for Meldonium, a substance which had been added to the Prohibited List with effect from 1 January 2016. On 2 March 2016, Ms Sharapova received a letter from the International Tennis Federation ("ITF") giving notice of a disciplinary charge that she had committed a contravention of the TADP. By letter to the ITF sent on 4 March 2016 Ms Sharapova promptly admitted the anti-doping rule violation ("ADRV"). She also admitted that an out of competition test taken on 2 February 2016 in Moscow found Meldonium to be present in her sample, although under the rules these test results were to be treated as one single ADRV.

Ms Sharapova asserted that she did not know that the active ingredient of Mildronate, a medication which she had regularly been using for over 10 years (and which is not licensed for human consumption in the USA or the EU, although it is in Russia), had been added to the Prohibited List from 1 January 2016, and she did not intentionally contravene the anti-doping rules by using Mildronate at the Australian Open. Accordingly, she said, the maximum period of ineligibility would be 2 years rather than the 4 years to be imposed for intentional doping. Further, she argued that she had no significant fault or negligence, such that the period of ineligibility should be reduced to 1 year. She also asserted that the ITF was estopped from alleging any fault on her part, since it knew or ought to have known that she had repeatedly tested positive for Meldonium in 2015 (before it was banned) and failed to warn her that it had been banned from 2016 onwards. She further argued that the principle of proportionality operated to avoid the sanctions which would otherwise follow from the rules.

The ITF accepted that Ms Sharapova did not know that Mildronate contained a Prohibited Substance but argued that in taking the medication she knowingly and manifestly disregarded the risk of contravening the anti-doping rules, and thus committed an intentional ADRV.

The tribunal sat for two days and heard evidence from a number of factual and expert witnesses. The tribunal was heavily critical of the evidence adduced on behalf of Ms Sharapova, describing various parts of it as "untenable", "remarkable", "wholly incredible" and "unbelievable". Ultimately, the tribunal held that Ms Sharapova had made a "deliberate" decision to conceal her use of the drug from anti-doping authorities, and that she took Mildronate "for the purpose of enhancing her performance".

The next question for the tribunal was whether Ms Sharapova's ADRV was intentional. Interestingly, the ITF conceded that Ms Sharapova had not known that she was committing an ADRV, because she knew that she would be tested at the Australian Open and would not have taken the drug had she known it was prohibited. Nonetheless, the ITF submitted that Ms Sharapova knew that there was a significant risk that her conduct might result in an ADRV and manifestly disregarded that risk. The tribunal rejected this submission, holding that the player's conduct must be judged on her actual knowledge, not what she ought to have known. Since the ITF had accepted that Ms Sharapova believed that Mildronate was not a Prohibited Substance, she could not have known that she was running the risk of committing an ADRV.

Unsurprisingly, however, the tribunal did not accept Ms Sharapova's submission that she bore no significant fault or negligence in relation to the ADRV, and accordingly imposed a period of 2 years ineligibility. The tribunal also rejected a submission that the ITF was stopped from proceeding against her by reason of its knowledge that she had previously taken Meldonium before it was banned: on the facts, the ITF had not had access to the names of players who had tested positive for Meldonium, only the numbers who had tested positive. Accordingly, no inference could be drawn against the ITF from the ITF's failure to warn Ms Sharapova personally that Meldonium had been added to the Prohibited List.

Finally the tribunal held that there were no extreme or unique circumstances which would justify departing from the normal sanction on proportionality grounds. Ms Sharapova was, however, entitled to have the commencement of her period of ineligibility backdated to commence on the date of the ADRV (26 January 2016), because she had immediately admitted the charge against her.

Spotlight on... The Bahamas

Brian Simms QC and Sophia Rolle-Kapousouzoglou of Lennox Paton review three significant cases to come out of the Bahamas

No cross-border assistance in the Baha Mar case

The Supreme Court of The Bahamas dismissed an application seeking various orders in aid of bankruptcy proceedings commenced in the District of Delaware, United States, concerning various Bahamian companies placed into Chapter 11.

Facts

On June 29 2015, the first applicant, US company North Shore Mainland Services Inc, and 14 Bahamian companies (the Baha Mar companies) filed for Chapter 11 Bankruptcy. The Baha Mar companies were responsible for the development of a resort in Nassau, Bahamas. The resort was approximately 97 percent complete and funded by the Export Import Bank of China (CEXIM), which lent $2.5 billion towards the development of the project and is a secured creditor.

North Shore was authorised to act as foreign representative and, along with the Baha Mar companies, applied to The Bahamian Supreme Court seeking recognition of and assistance in the Chapter 11 proceedings by extending and giving effect to the bankruptcy court order in The Bahamas, or by making ancillary orders staying all legal proceedings in The Bahamas against the debtors and seeking various directions to aid the foreign bankruptcy proceedings. CEXIM, among others, opposed the application for recognition on the grounds that:

(1) the foreign representative's application was misconceived in seeking to ask the court to recognize the foreign insolvency proceedings as opposed to the authority of the foreign representative appointed in the foreign proceedings;

(2) the application was procedurally flawed as to the manner in which the proceedings seeking recognition were commenced in non-compliance with the Foreign Proceedings (International Cooperation) Liquidation Rules 2012;

(3) the common law inherent jurisdiction to grant recognition which may have existed in The Bahamas was abrogated by virtue of the passing of the Companies Winding Up Amendment Act 2011;

(4) if the common law powers of recognition and the provision of judicial assistance survived at all, the relief sought could not be granted; and

(5) the alternative relief sought for recognition under the statute could not succeed, as Part VII A – which provides for international cooperation – could not apply to the proceedings.

Supreme Court decision

The Supreme Court held that the applicants could not seek a stay of proceedings in The Bahamas emanating from Section 362 of the US Bankruptcy Code. The section in The Bahamian statute which provides for international cooperation also stipulates that an ancillary order shall not affect the rights of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest. To this extent, the CEXIM attorneys argued that to grant a stay would be contrary to public policy and to the statute, as the court can act only within the limits of its own inherent powers. Even if the court recognised the US insolvency proceedings, it could not grant assistance in the terms sought because it had no inherent power to order assistance in the nature of what was being sought by the applicants, which would be tantamount to an injunction and amount to interference with the lenders proprietary rights.

The Bahamas had not (at the time of the hearing) designated a list of relevant foreign countries to which the statutory enactment to grant aid to foreign representatives as defined would extend; thus, the issue arose as to whether the relevant statutory enactment could be relied on for assistance by the foreign representative. (As explained further below in respect of the Caledonian Bank case, foreign countries have now been designated for statutory assistance under the Companies Winding Up Amendment Act 2011.)

The court had an opportunity to consider the Privy Council decision in *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36 and the principle of modified universalism, but concluded that co-existence of both the common law and statute would undermine the statutory framework and render the entire application otiose. In circumstances where the

BAHA MAR COMPANIES WERE RESPONSIBLE FOR THE DEVELOPMENT OF THE BAHA MAR RESORT, WHICH WAS APPROXIMATELY 97 PERCENT COMPLETE AND FUNDED BY THE EXPORT IMPORT BANK OF CHINA (CEXIM) WHEN IT FILED FOR CHAPTER 11 BANKRUPTCY.

legislature has circumscribed the court's powers of recognition and assistance to relevant countries, the court has no residual power to grant recognition or assistance to non-relevant countries.

The court held that the only insolvency proceedings which could give true effect to the principle of modified universality would be unitary insolvency proceedings in The Bahamas; and it cannot be that the mere submission to a jurisdiction, no matter how inappropriate, would suffice to afford recognition where it offered an attractive restructuring regime.

It was further determined that there is no equivalent to Chapter 11 under Bahamian law by which breathing space can be created or new capital can be injected on terms acceptable to any reasonable lender. The court held that "the Applicants admitted to forum shopping and though they probably could not be faulted

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for doing that, despite the attractiveness of the laws of our neighbours it is not for the Court to advance matters which are the exclusive purview of the legislature."

After the date of the judgment, the US court has dismissed the Chapter 11 proceedings in relation to The Bahamian companies on the basis, among other things, that the creditors would have expected The Bahamian courts to have jurisdiction over the insolvency proceedings.

Baha Mar initially sought to appeal the first-instance decision refusing recognition but later withdrew its appeal.

Further problems with recognition and assistance: the Caledonian Bank case

The Supreme Court of The Bahamas refused the Liquidators of Caledonian Bank ('In Official Liquidation under the Supervision of the Grand Court of The Cayman Islands') ("Caledonian Bank") recognition in The Bahamas where assets in the region of $16million were held. As explained below, this resulted in the need to commence 'ancillary' winding-up proceedings in The Bahamas.

Keiran Hutchison and Claire Loebell, the Liquidators of Caledonian Bank appointed in the Cayman Islands, petitioned The Bahamian court for recognition as foreign representatives seeking declarations that they be recognized to act in The Bahamas on behalf of Caledonian Bank and that the Cayman proceedings be recognized as foreign proceedings within the meaning of Section 253 of The Bahamian Companies Winding Up Amendment Act 2011 ('CWUA') with the purpose to facilitate actions by the Cayman Liquidators in The Bahamas to collect monies and/or to take possession of property belonging to the Company as part of the liquidation process taking place in the Cayman Islands.

The Cayman proceedings had already been recognized in various forms by the courts in England, Australia, the United States of American and Ireland.

Under the winding-up order given by the Cayman court, the Cayman Liquidators had, inter alia, the power to (i) take such steps as they considered appropriate in respect of legal proceedings either in their own name for and behalf of the Company, or in the name of the Company, (ii) commence winding up bankruptcy and/or recognition proceedings in the United Kingdom, Australia, Switzerland and any other jurisdiction where the Company had assets as the Cayman Liquidators may consider necessary and appropriate.

The Cayman court appointed Liquidators, petitioned The Bahamian court for recognition and sought relief by way of statutory assistance pursuant to Part VIIA of the CWUA in addition to recognition at common law in the alternative.

The Bahamian court held that neither the Cayman Proceedings nor the Cayman Liquidators fell within the statutory definition of 'foreign proceedings' and 'foreign representatives' as defined within Section 253 of the CWUA since the Cayman Islands were not designated as a 'relevant foreign country' for the purpose of the definition under the Statute. In fact, no countries at all had yet been designated (although this has since changed, as set out below).

The court held the statutory regime to grant assistance was not available to the Petitioners

since they were not appointed liquidators of Caledonian Bank for the purpose of a judicial or administrative proceeding in a country designated by the Liquidation Rules Committee as a relevant foreign country and on the same reasoning the Cayman proceedings were held not to be a 'foreign proceeding' since no list of designated countries had yet been created.

The Petitioners also applied for recognition at common law appealing to the inherent jurisdiction of the Court which had been exercised for over 100 years.

It was submitted that recognition should still be available to the Liquidators on the basis of the court's inherent jurisdiction to assist a liquidator in foreign liquidation proceedings, even if the liquidator is not a 'foreign representative' within the meaning of the statute in accordance with the principle of modified universalism.

The court considered the cases of *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, *Rubin v Eurofinance* [2013] 1 AC 326, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, and *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* [2009] EWHC 2099 (Ch) amongst others in relation to the court's common law power to assist foreign winding up proceedings so far as it properly can. The court accepted that under the common law principle the power to recognize a foreign office-holder and grant assistance is not restricted by reference to the country, territory or jurisdiction in which he/she was appointed, and held that, '[in] this regard it is an open gate subject only to local law and local public policy.'

The court also accepted 'without hesitation that the principle of modified universalism is a recognized and established principle of the common law', and further held that, 'the statutory powers of liquidators in the Cayman Islands are generally equivalent in The Bahamas.' However, Moree QC (Actg) J. considered the critical question to be whether the common law power to grant recognition and assistance to foreign-officeholders (whether or not they are foreign representatives as defined in the Statute) in insolvencies with an international element survived the enactment of the statutory scheme.

Despite hearing arguments in support of the proposition that in England common law principles co-exist alongside the statutory procedure under Section 426 of the Insolvency Act 1986, the EC Insolvency Regulations and the Model Law, the court determined that since there are no provisions within The Bahamian Statute comparable to Article 7 of the UNCITRAL Model Law (which the court held supplemented and did not supersede the common law) such a provision is distinct from the framework in The Bahamas under Part VIIA of the CWUA.

Moree QC (Actg) J held that because Part VIIA limits its application to a designated class of persons defined as foreign representatives, the statute would be undermined if persons who did not fall into the class known as 'foreign representatives' could nonetheless apply to the court for the very same relief which the statute was intended to restrict.

In doing so, the court rejected the view that the common law power could co-exist alongside statutory recognition. It was held that the

THE SUPREME COURT OF THE BAHAMAS REFUSED TO RECOGNISE THE CAYMAN ISLAND-APPOINTED LIQUIDATORS IN THE CALEDONIAN BANK CASE.

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common law power would render the statutory power virtually otiose. Further, in taking this view the court determined that it is the ability to recognize and grant ancillary relief at common law to those outside of the statutory class of foreign representatives which is 'repealed' or 'abolished' and common law assistance cannot be granted to any country which is not on the list.

The court did not agree that it was capable of usurping the function of the Liquidation Rules Committee to make designations under Section 253 by granting such assistance through the exercise of its common law power as if Part VIIA of the Statute, which was intended to provide for international cooperation in insolvency proceedings had not been enacted.

Despite a plea being made that an alternative construction has arguably been placed on the scope of common law assistance in circumstances where it appeared to be an equivalent statutory power between jurisdictions, which could seemingly facilitate assistance on the basis of reciprocity, this view was declined.

Subsequently, following the refusal of recognition, Caledonian Bank petitioned for an ancillary winding up on the basis that it was a foreign company with assets in The Bahamas and which carried on business there. The application was acceded to in April and the court made a winding-up order. The assets in The Bahamas have been collected and realized and the liquidators appointed in The Bahamas have obtained an order for the remittal of assets to the Cayman Islands in June.

In addition, it should be noted that the problem of 'non-designation' of relevant countries (which arose both in the Baha Mar case and in the Caledonian Bank case) has now been resolved by the publication by the Liquidation Rules Committee of a list of relevant foreign countries for the purposes of Section 253 of the CWUA. The Cayman Islands have been designated as a relevant foreign country for these purposes.

Legal difficulties with the Bankruptcy Statute of 1869

On 20 November 2015, The Bahamian Supreme court declined to register a composition with creditors sought to be entered into by Irish billionaire Sir Anthony O'Reilly. The court took the alternative route of adjudicating him bankrupt instead.

The Court declined to register what is said to be the first composition with creditors sought to be entered into under Bahamian Law on the basis that there were legal difficulties with the proposed composition under Section 97 of The Bahamian Bankruptcy Act of 1869 which is the equivalent to section 126 of the former English Bankruptcy Act of 1869.

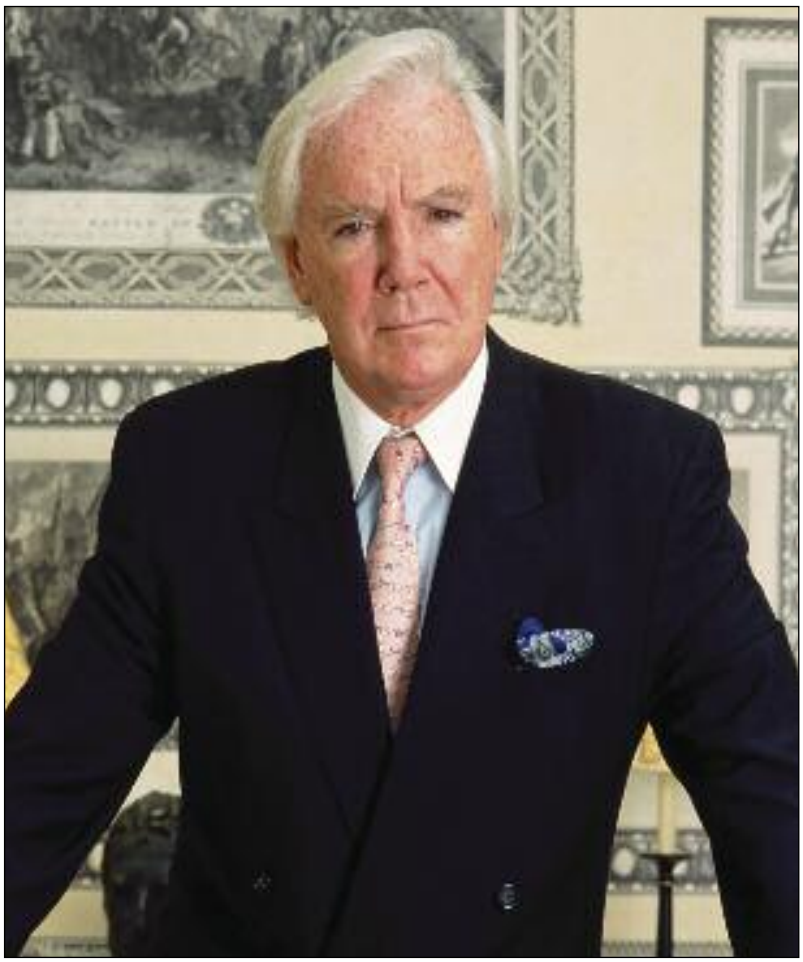
It was argued by counsel for Allied Irish Bank ('AIB'), a dissenting creditor, that the court did not have jurisdiction to register resolutions resulting from a procedure adopted in non-compliance with the relevant Bankruptcy Statutes and passed in non-conformity with Section 97 of the Bankruptcy Act and the First and Second Schedule to the English Bankruptcy Act 1914 which is adopted into Bahamian Law. The majority of O'Reilly's creditors had voted in favour of the composition following a creditors' meeting held in London, England earlier last year, prior to invoking the jurisdiction of The Bahamian court in which the resolutions

passed were to be registered. The Bahamian court also questioned whether the General Rules made in pursuance of the Bankruptcy Act of 1870, which were said to govern the general procedure of bankruptcy proceedings, were of application.

After hearing full arguments contesting the jurisdiction of the proceedings, The Bahamian Supreme Court held that section 97 gave rise to significant legal difficulties of interpretation when one seeks to apply it into the rules which are available, and instead determined to give effect to a subsection which provides, "if it appears to the court, on satisfactory evidence, that a composition under the section cannot in consequence of legal difficulties or for any sufficient cause, proceed without injustice or undue delay to the creditors of the debtor, the court may adjudge the debtor a bankrupt and proceedings may be had accordingly".

The debtor therefore sought alternative relief that he be adjudicated bankrupt. The Bahamian court was faced with seeking to interpret legislation which has since 1869 evolved significantly in other jurisdictions towards Individual Voluntary Arrangements ('IVA's) and in relation to which express provision is often made that such arrangements are to have extraterritorial effect. By way of comparison, The Bahamian Bankruptcy Statute arguably does not have extraterritorial effect to permit the collection of the debtor's assets by a trustee in bankruptcy, wherever the assets are situate, as this would not have been within the contemplation of the statute in 1869.

While a bankruptcy filing would in theory allow all creditors to be paid *pari passu*, AIB in its submissions challenged whether a trustee in bankruptcy appointed in The Bahamas would be recognised by foreign courts in places where a debtor's assets are situate since the bankruptcy legislation which is almost 150 years old does not contain any provisions on extraterritorial effect. The bankruptcy petition sought relief pursuant to section 122 of the English Bankruptcy Act 1914 and/or the inherent jurisdiction of the court for assistance from foreign courts. It was submitted that the statute was not intended to have such extensive scope and the ability to rely upon the English statue was not permissible since it was beyond the relief available under The Bahamian bankruptcy statute. The application of section 122 of the English Bankruptcy Act 1914 in Commonwealth countries was considered by the Privy Council in the case of *Al Sabah v Grupo Toras* [2005] 1 All ER 871; however, no determination was made by The Bahamian Court on this argument at the time when O'Reilly was adjudicated bankrupt.



REFORM IS NEEDED, AS THE CASE AGAINST TONY O'REILLY HAS SHOWN.

The bankruptcy legislation in The Bahamas is undoubtedly in need of reform to accommodate the changing landscape of insolvency proceedings in the 21st Century. However, declaring O'Reilly bankrupt as an alternative to the composition, as requested by his counsel, has provided O'Reilly with protection against creditors seeking to attach his unencumbered assets in satisfaction of provable debts.

Bankers selling swaps: salesmen, advisors, or something in between?

Antony Zacaroli QC looks at where the balance lies between providing redress where banks fail in their responsibilities and preventing opening the floodgates to unmeritorious claims.

A small businessman walks into a bank and asks for a variable rate ten year loan. Three weeks later he walks out again with a variable rate five year loan, renewable thereafter at the option of the bank, a discount on the variable rate in years one and two of 0.45%, and an interest rate swap under which he was obliged to pay a fixed rate of 5.45% for eight years beginning at the end of year two. As punchlines go, this may fairly be said to be far from a classic. Indeed, for the small businessman concerned it was no joke at all. At the outset, he had two problems. The first was that this deal was entered into in 2007 when an interest rate of 5.45% was close to the market variable rates, but – as everyone knows – rates plummeted to close to zero in early 2009 and have stayed there ever since. His second problem was that when the man with the words "Corporate Risk Advisor" on his business card started explaining things to him, his mind soon wandered, and he found himself worrying what could possibly be wrong with his cap, or his collar, and which of them had ended up on the floor. These led to his really big problem. Five years later, when the bank refused to renew the loan, he was stuck with 'break costs' under the swap running into hundreds of thousands of pounds.

These facts are not untypical, indeed they are an approximation to some of the underlying facts in *Crestsign v Royal Bank of Scotland* [2014] EWHC 3043 (Ch) and *Thornbridge Ltd v Barclays Bank PLC* [2015] EWHC 3430 (QB), both cases in which the claimant sought redress for the 'loss' it suffered as a consequence of the entry into the swap, on a variety of legal bases. Was that loss caused by any actionable breach of duty on the part of the bank? Or was the loss merely the consequence of the collapse in interest rates following the financial crisis of 2008, an event which was neither the fault of the bank nor anticipated by the parties[1]? The essence of an interest rate swap is, after all, to exchange an obligation to pay interest at a floating rate for an obligation to pay at a fixed rate and, in the words of Tomlinson LJ in *Green and Rowley v Royal Bank of Scotland* [2014] Bus LR 168, at para 12, "*it is necessary to bear in mind that "doing well" and "doing badly" in this context merely reflects the answer to the question whether the market movements, from whose effect the claimants were, so far as concerns the loan, now insulated, had been up or down. Through thick and thin the swap achieved its purpose of, in effect, fixing the interest rate payable under the loan.*"

1/. In fact, the claimant in the Crestsign case positively wanted a variable rate loan because he was of the view that interest rates were likely to fall in the future.

The fact that interest rate movements were uniformly one-way after 2008 has led to a great number of bank customers suffering enormous losses and looking either for a way out of their contract or for compensation from the bank. This article explores where, in light of recent cases bearing on this question, the common law has struck a balance lies between, on the one hand, providing proper redress to customers where banks have failed in their responsibilities and, on the other hand, preventing opening the floodgates to unmeritorious claims by customers who simply made (as it turned out) a bad bargain.

Regulation

In addition to the common law principles discussed in this article, it is important to keep in mind the parallel regulatory requirements, and the redress available to bank customers under the Financial Services and Markets Act 2000 ("FSMA") and the FCA's Conduct of Business Rules ("COBs"). The latter provides, by COBS 2.1.3: "*When a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading*" and, by COBS 5.4.3: "*A firm must not make a personal recommendation of a transaction … or arrange (bring about) or execute a deal in a warrant or derivative … with, to or for a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved.*" Breach by a bank of these requirements can lead to regulatory consequences: sanctions such as fines or censure, restitution orders in favour of the FCA or compensation orders in favour of customers. In addition, the FCA encouraged major banks to engage in a voluntary resolution process, agreeing to third party scrutiny of thousands of claims and to be bound by the outcome. In practice, a number of customers have, notwithstanding the regulatory alternatives, sought to pursue claims at common law. This is for a variety of reasons, including the perception that the regulatory route did not provide sufficient compensation and the customer could do better via a damages claim.

Additionally, breach of COBs will, in certain circumstances, give rise to a statutory cause of action against the bank. S.150(1) of FSMA provides that "*A contravention by an authorised person of a rule is actionable at the suit of a*

CRESTSIGN V ROYAL BANK OF SCOTLAND WAS ONE CASE IN WHICH THE CLAIMANT SOUGHT REDRESS FOR THE 'LOSS' IT SUFFERED AS A CONSEQUENCE OF ENTRY INTO A SWAP

Courts have been extremely reluctant to find that a banker owes an advisory duty to its customer...

private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty." Such a cause of action is limited to a "private person", defined by the FSMA 2000 (Right of Action) Regulations 2001, Reg 3(1) as *"(a) any individual, unless he suffers the loss in question in the course of carrying on any regulated activity, or (b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind."*

The Courts have, however, interpreted the exception in paragraph (b) of this definition narrowly, such that a person who carries on business, and enters into a swap in relation to that business, will be excluded from the definition of 'private person', irrespective of whether the entry into transactions of that nature was an integral, or incidental, part of its business: *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm). Accordingly, it is likely to be difficult for the small businessman, operating through an incorporated company, to claim the benefit of the statutory cause of action.

Content of banks' duties at common law

Away from the regulatory context, the basic common law duty assumed by an entity in the position of a bank selling a derivative contract to its customer is the duty to take reasonable care as to the truth of any statements made, as in *Hedley Byrne v Heller* [1964] AC 465. A negligent (or fraudulent) statement, whether that statement was express or implied, can lead to a claim in damages. Additionally, a claim for rescission might lie in the case of a misrepresentation which induced the customer to enter into the swap agreement.

When, if ever, does a bank owe more? In particular when, at common law, does it owe a duty to its customer to give advice in relation to the derivative products it is selling to the customer? This is impossible to answer in the abstract, since the question whether an advisory duty arises as between two parties is a highly fact specific enquiry. Over the past 35 years three tests have been developed for determining whether a claimant may sue for pure economic loss: (1) the assumption of responsibility test, coupled with reliance; (2) the 'three-fold-test' of reasonable foreseeability, sufficient proximity and whether it would be just and reasonable to impose a duty; and (3) the incremental test. However, as noted by the House of Lords in *Commissioners of Customs & Excise v Barclays Bank* [2007] 1 AC 181, there is no single common denominator and all of the tests operate at a high level of generality. Lord Bingham, while recognising the need for a coherent test for the tort of liability in negligence, noted that it was necessary to "*concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.*"

In practice, however, the courts have been extremely reluctant to find that a banker owes an advisory duty to its customer, in the absence of an express contract creating such a relationship. In the absence of such a contract, it is necessary to find something in the conduct of the bank from which it can be inferred that it had assumed a responsibility to advise the customer. What matters is the objective interpretation of the bank's conduct, not its subjective intentions, so what is required are "*exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff*" (per Lord Steyn in *Williams v Natural Life Health Foods* [1998] 1 WLR 830, 835F. Two factors in particular work against the customer. First, it is likely to be a rare, and soon to be let go, banker who makes any express statement to the effect that he is giving advice, on which the customer can rely, when discussing the derivative products on offer. Second, it has consistently been held that

the mere fact that the bank does in fact give advice is not enough to impose responsibility for that advice. The genesis of this conclusion is the law's approach to the general commercial relationship between a salesman and a customer. In *Springwell Navigation Corporation v JP Morgan Chase Bank* [2008] EWHC 1186 (Comm) (affirmed on appeal, [2010] EWCA Civ 1221), Gloster J concluded on the evidence that the bank, in giving personal recommendations to the customer about the merits of various products, or as to whether the customer should buy, sell or hold any particular investment, was indeed giving advice. But such advice had to be viewed "*...as no more than the recommendations of a trader to a buyer as to what was available, on what terms, and perhaps also as to the respective merits of the products on offer, given the requirements of the particular client. It may well be that, theoretically, in such circumstances, a low level of duty of care would arise on the part of the salesman not to make any negligent misstatements, or even to use reasonable care not to recommend a highly risky investment without pointing out that it was such, but a low level duty along those lines is worlds away from the wide duty of care that was pleaded or relied upon as having arisen...*" Echoing the words of Lord Steyn quoted above, Gloster J, at para 374, said "*...this factual conclusion as to what the evidence showed that [the banker] was doing, namely giving advice, in the sense that I have described above, tells us nothing about what, if any, obligations were in fact owed by [...the bank...]. Still less does it inform us as to the extent of any such duties of care as were owed. In order to decide whether the advice given gave rise to obligations that went beyond the normal recommendations or "advice", given in the daily interactions between an institution's sales force and a purchaser of its products, so as to import obligations of the type owed by a fully-fledged investment advisor, one needs to look to all aspects of the objective evidence of the relationship between the parties.*"

A similar approach was taken by the court in *Thornbridge v Barclays Bank* (above), in which a customer sued the bank for damages for, among other things, negligent failure to advise as to the suitability of entering into an interest rate swap. HHJ Moulder concluded that even if the bank's representative, a Mr Burgess, gave advice to the customer, the bank had nevertheless not assumed an advisory duty: "*Mr Burgess did express views as to the direction of interest rates, he did give explanations as to*

ANTONY ZACAROLI QC

It has been consistantly held that the mere fact that a bank does in fact give advice is not enough to impose responsibility for that advice

IN THORNBRIDGE, THE SWAP WAS ALLEGED BY THORNBRIDGE TO HAVE BEEN MIS-SOLD WHEN IT TURNED OUT TO HAVE BEEN DISASTROUS FOR THORNBRIDGE FOLLOWING THE COLLAPSE OF INTEREST RATES IN THE BANKING CRISIS

how an interest rate swap would fix payments for the claimant and he appeared to endorse the suggestion of an interest rate swap. However even if this amounted to "advice" in my view it did not go beyond what Gloster J describes as the "daily interactions between an institution's salesforce and a purchaser of its products"." (above, at paragraph 96). This was so, even though Mr Burgess' title was "Corporate Risk Adviser", a description that appeared on his emails. A factor which weighed heavily with the judge was the fact that no fee was received by the bank in relation to any advisory service, whereas it was common practice for bankers doing mergers and acquisitions to charge a fee for their involvement.

Bankers' duty informed by the content of COB rules?

Where a bank does undertake an advisory duty, the content of that duty is in part informed by the content of the COB rules, on the basis that the skill and care to be expected of a financial advisor would ordinarily include compliance with the rules of the relevant regulator: *Loosemore v Financial Concepts* [2001] Lloyds PNLR 235, 241, per HHJ Raymond Jack QC, and *Shore v Sedgwick Financial Services Limited* [2007] EWHC 2509, per Beatson J. An attempt to persuade the Court of Appeal to find that the mere existence of the COB rules gives rise to a co-extensive duty of care at common law failed in *Green and Rowley v Royal Bank of Scotland* (above), at para 22, per Tomlinson LJ: absent the bank having "*…crossed the line which separates, on the one hand, the activity of giving information about and selling a product and, on the other hand, the activity of giving advice … there is neither justification nor need for the imposition of a common law duty independent of but co-extensive with the remedy provided by statute*." In the same case, Tomlinson LJ rejected (at para 17) a suggestion that the separate common law duty (which it was accepted the bank owed) to take reasonable care as to the accuracy of statements made by it was not itself extended by reference to the fact that the bank was subject to the COB rules. Thus, insofar as COB rule 2.1.3 refers to a duty to take reasonable steps not to mislead, that is comprised within the common law duty, but insofar as it refers to a duty to take reasonable steps to communicate clearly or fairly, "*this introduces notions going beyond the accuracy of what is said which is the touchstone of the Hedley Byrne duty*". While the duty not to mislead may involve a duty to make disclosure of further information, that is limited to circumstances where the failure to disclose further information renders that which has already been said untrue or a "half-truth".

Notwithstanding this, in the *Crestsign* case (above), the Court did conclude that in a case where a bank in fact undertakes to explain the nature of a transaction to the customer, its duty extends to taking reasonable care to do so as fully and properly as the circumstances demand. Such a duty (the "Intermediary Duty") would fall somewhere between, on the one hand, the duty as to accuracy of statements made and, on the other hand, a full advisory duty. The deputy judge relied on the following statement of Mance J in *Bankers Trust International plc v PT Dharmala* [1996] CLC 518, at 533: "*a bank negotiating a contract with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice,*

then it owes a duty to give that explanation or tender that advice fully, accurately and properly." (It is perhaps pertinent to note that the deputy Judge had already concluded that, subject only to the exclusion of such duty in the contractual documents, the circumstances of the case were such that the bank would have in any event owed an advisory duty.)

Doubts were expressed about the existence of an Intermediary Duty in the subsequent first instance decision of *Thornbridge* (above), where HHJ Moulder noted (at paras 118-122) that Mance J's obiter comment was in the context of a conclusion that focussed on the role of Bankers Trust as advisor rather than on any Intermediate Duty, and that he had rejected any such Intermediate Duty on the facts. She concluded that the only principle to be derived from the case was that "*a positive duty would exist only in the context of an advisory relationship or (absent any undertaking to inform) if it rendered inaccurate or unreasonable the information provided*." So far as the conclusion in *Crestsign* that there was such an "intermediate duty" is concerned, the Judge in *Thornbridge* thought that while each case must depend on its facts, if the deputy Judge in *Crestsign* was making a point of more general application, then he "*would in effect have elevated the duty of a salesman to that of an adviser*". In short, the earlier decision should be consigned to that class of case with no precedential value beyond its own peculiar facts. Permission to appeal against the conclusions in the *Crestsign* case was given by the Court of Appeal ([2015] EWCA Civ 986), but the case was recently settled so it provides no opportunity for clarification from the Court of Appeal.

In principle, on the basis of the existing state of English law, the approach of the judge in *Thornbridge* is to be preferred. The concept of an Intermediate Duty, which arises whenever a bank undertakes to explain a transaction, ignores the necessary foundation for liability in tort as explained above, namely that the assumption of a duty is justified by reference to the "*detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole*".

The concept of Intermediate Duty ignores the necessary foundation for liability in tort

Whether an Intermediate Duty, or even a broader advisory duty, *ought* to arise as a matter of principle, ignoring precedent for the moment, in the context of the sale of a swap by a bank to its customer is a different question. The conclusion that because the bank is *selling* a product to its customer it should be judged by the standards of any other salesman is not without its problems. There are important differences between the position of a bank as seller, and the seller of a car, a house or a television. First, and most obviously, the complexity of the product being sold by the bank is out of all proportion to a car, house or television. That is not to say that the average buyer has any greater prospect of understanding the inner workings of a car or television, but an understanding of those inner workings is not relevant to the buyer's decision whether or not to buy. In contrast, in purchasing a complex product like a derivative

UNLIKE A PRODUCT SOLD BY A BANK, UNDERSTANDING THE INNER WORKINGS OF A CAR IS NOT RELEVANT TO A BUYER'S DECISION WHETHER OR NOT TO BUY.

In an interest rate swap, the bank's interests are at all times conflicting with those of its customer

transaction from the bank, an understanding of its complexities is fundamental to an appreciation of the potential impact of that transaction on the buyer. Second, although described as a 'product', an interest rate swap is in reality a long term transaction with the bank, under which the bank acquires long term rights against (and assumes long term obligations to) its customer. Moreover, the bank stands itself to profit (or lose) from the transaction with its customer, at the expense of (or to the benefit of) that customer. In other words, the bank's interests under the transaction are at all times conflicting with those of its customer. Third, in many cases (*Crestsign* being a stark example) the customer approached the bank with a request for something completely different – a loan – and finds itself required by the bank to enter into an interest rate swap as a condition of acquiring the loan. There may be a variety of reasons for that: the bank is not in a position – for regulatory capital purposes – to enter into a variable rate loan without a swap; or the bank needs to cover its own fixed rate funding costs; or the bank wishes to ensure, from a credit risk perspective, that the customer is insulated against adverse interest rate movements. Whatever the reason, the fact that the customer is in effect forced into buying the derivative product as a condition of acquiring the thing that it actually wants further distinguishes the bank/customer relationship from the normal relationship of seller/buyer.

Ultimately, there is a policy question at play here, whether a bank should be judged by the same standards as any other salesman, or whether because of the different features of the 'products' identified above, and the inherent imbalance in the level of understanding those products as between the bank and its customer, bankers should be subject to greater duties than

IN SPRINGWELL NAVIGATION CORPORATION V JP MORGAN CHASE BANK GLOSTER J CONCLUDED JP MORGAN WAS GIVING ADVICE. BUT SUCH ADVICE HAD TO BE VIEWED "...AS TO THE RESPECTIVE MERITS OF THE PRODUCTS ON OFFER

other salesmen. While there is much to be said for the latter view, the answer probably best lies, not in making adjustments to the common law so as to allow for the imposition of a tortious duty, but in regulation. In the first place, an adjustment to the common law duty might lead to the imposition of a tortious duty irrespective of the identity and nature of the counterparty. Where the customer is itself highly sophisticated and has the same, or even greater, ability to understand the transactions it is entering into with a bank, then the grounds which might justify imposing an Intermediate Duty, or higher advisory duty, on the bank are mostly lacking. Second, regulation has already imposed itself firmly in this area. The COB rules impose much more stringent requirements on banks when selling derivative products than on any other salesman and, as noted above, in addition to the regulatory responses available in cases of breach of the COB rules, FSMA s.150 provides a statutory cause of action to private persons who suffer damage as a result of such breach. Third, the fact that s.150 is not available to all, but only to 'private persons' is a recognition of the fact that sophisticated parties may be left to determine with which party the various risks inherent in a complex transaction should lie. Fourth, dealing with the issue via regulation avoids the problem that arises where (as is often the case) the bank seeks to exclude any advisory relationship, or any responsibility for statements. It is now well established that the consequence of such clauses is to create a contractual estoppel, which is at least capable of avoiding any requirement of reasonableness under the Unfair Contract Terms Act 1977 or the Misrepresentation Act 1967: see, e.g., *Peekay v ANZ Banking Group* [2006] 2 Lloyds Rep 11; *Cassa di Risparmio v Barclays Bank* [2011] 1 CLC 701. An examination of this topic is beyond the scope of this article, but the issue for present purposes is the fact that, if effective, these provisions preclude liability arising irrespective of the level of understanding or sophistication of the customer.

The root of the problem, therefore, is that the definition of 'private person' is so narrowly drawn in *Titan Steel Wheels* (above) for the purposes of s.150 of FSMA. Whereas a sole trader can take advantage of the statutory cause of action, unless he suffered the loss in the course of a regulated activity, a husband and wife team that choose to run a business through the medium of an incorporated company will rarely be able to do so. This distinction holds good even though the sole trader is highly sophisticated and frequently enters into complex derivative transactions in connection with his business, whereas the husband and wife team have no understanding of the complexities of the transaction they are required to enter into. It is strongly arguable that the line, as a matter of policy, between those that ought, and ought not, to have the greater protection of the statutory cause of action has not been adequately drawn. A reversal of the narrow approach taken in *Titan Steel Wheels* would have provided the claimant in *Crestsign* with redress without the need to invent any Intermediate Duty.

THE FCA'S CODE OF BUSINESS RULES IMPOSE MUCH MORE STRINGENT REQUIREMENTS ON BANKS WHEN SELLING DERIVATIVE PRODUCTS THAN ON ANY OTHER SALESMAN.

Unfair trials - the perils of late evidence and insufficient reasons

Two recent cases in the Chancery Division provide reminders of fundamental procedural principles says **Jeremy Goldring QC**

Introduction

On the night before trial, the other side serves reams of new evidence, both witness statements and documents, defying the timetable and throwing careful preparation into disarray. The natural and immediate reaction, after vehement swearing at the computer screen, is to do everything possible to keep it out, so that the long planned strategy for trial can be implemented. One might call it the temptation of the short cut. The next morning, armed with the CPR, the judge is persuaded not to permit the other side to use its late evidence and the trial proceeds, culminating in victory. But *Barons Bridging Finance 1 Limited v. Barons Finance Limited* [2016] EWCA Civ 550, a recent decision Court of Appeal decision demonstrates that the natural reaction may well not be the right one.[1] Often it will be better to deal with the substance of the new material on its merits, if possible within the existing timetable for trial, or (if that is impractical) following an adjournment. The danger is that a victory at first instance decision may turn out to be pyrrhic as the Court of Appeal sets aside the judgment on the basis that the trial was not fair.

In *Barons Bridging Finance*, the liquidator of a company in business as an unlicensed moneylender brought a claim in the Chancery Division seeking to set aside a deed of assignment of a portfolio of debts under s 127, s 238 and s 423 of the Insolvency Act 1986. The deed purportedly bore a date prior to the commencement of the liquidation. The third defendant (Dharam Gopee) was an experienced litigant in person, who conducted the defence of all three defendants. The liquidators made two main allegations. The first was that, contrary to the date it bore, the deed was in fact executed after presentation of the winding up petition, so that s 127 was engaged. i.e. the document had been fraudulently backdated. The second was that the portfolio of assigned debts was worth more than was paid for it, so that in any event s 238 and s 423 applied. The defendants denied both the backdating and the allegation of undervalue. In particular the value of the debts was undermined because the majority was unenforceable due to lack of compliance with the Consumer Credit Act 1974.

The trial

On the first day of the trial, the defendants produced an application for disclosure by the liquidator of documents said to be relevant to the low value of the debts generally, because of their unenforceability. On the second day, Mr Gopee sought to rely on a four-page witness statement, with an exhibit of 104 pages, giving an explanation as to why a particular assigned debt (on which the liquidator specifically relied) was valueless. The deputy judge rejected both of the defendants' applications. As to the second he "*concluded that no good reason had been given for the delay, nor for the failure to seek an extension, that it would be unfair to the liquidator to have to deal with this evidence today*

1/. The judgment was handed down on 14 July 2016.

and that an adjournment would be costly for the liquidator and unfair to other litigants." While Mr Gopee presented the defendants' case, he did not give evidence in chief, nor was he cross-examined.

As to the merits, the deputy judge accepted the liquidator's case. The deed was entered into after the commencement of the winding up. In any event, it was a transaction at an undervalue and one defrauding the Company's creditors. In reaching those conclusions, the judge relied, amongst other things, on adverse inferences based on a lack of evidence and explanation provided by the defendants. Referring to *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324[2], he said:

"*The burden is on [counsel for the liquidator] to prove her case, but if she provides prima facie evidence, then it may be proper to draw an adverse inference from Mr Gopee's failure to put in a witness statement to the contrary.*"

Later in the judgment, the deputy judge returned to the theme:

"*The liquidator has produced a schedule of debts owned by the Company. Mr Gopee was asked to verify this and failed to do so. I am satisfied that I should apply the principle in the old case of Armory v. Delamirie (1722) 1 Strange 505, i.e. that I should resolve any evidential doubts against Mr Gopee. The liquidator says, and I accept, that the schedule shows outstanding debts of some £373,000, which includes £40,000 which was the original sum lent to Mr Kelly. Mr Gopee says that some of these debts are contracts which are void or unenforceable under the Consumer Credit Act. He has produced no evidence to substantiate this. On the contrary, the evidence is that he has pursued the hapless debtors for payment. It does not lie in his mouth to assert that these debts are worthless. Once again, I apply Armory v. Delamirie.*"

THE COURT OF APPEAL HAS RECENTLY GIVEN A PAIR OF JUDGMENTS ON THE FAIRNESS OF TRIALS.

The appeal to the Court of Appeal

Matters looked very different from the Court of Appeal's perspective. Gloster LJ (with whom Kitchin LJ agreed) concluded that the defendants had not received a fair trial. The Court of Appeal therefore set aside the judgment, and remitted it to the Chancery Division for a rehearing. Gloster LJ set out a number of ways in which the proceedings, which after all alleged fraud, had gone wrong.

Mr Gopee should have been permitted to give evidence during the trial as a witness giving his evidence, not as a litigant advocate presenting submission under stress:

"*In circumstances where the defence (supported by Mr Gopee's statement of truth) and his witness statements in support of his applications for disclosure, denied both the backdating and the transfer at an undervalue, and Mr Gopee, albeit an experienced litigant, was acting as a litigant in person, it was in my judgment wrong for the judge not to have allowed him to have given evidence. The judge should have allowed Mr Gopee to go into the witness box and give evidence in chief in order to support his defence and be subjected to cross-examination; alternatively the judge should have accepted his additional witness*

2/. In that case, at 340, Brooke LJ said: "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

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statements as evidence and allowed him to be cross-examined on them."

Mr Gopee should also have been permitted to rely on his late evidence:

"There was nothing in the exhibits to the further witness statements … which the liquidators should not have been in a position to deal with either immediately or overnight. If a lengthier adjournment had been required, no doubt an appropriate order could have been made in relation to the costs of any such adjournment."

In any event, the liquidator should have disclosed additional information about the value of the Company's loan book, which undermined his allegation of a transfer at an undervalue.

As a result of these various failings, the trial before the deputy judge was unfair. As Gloster LJ put it:

"Accordingly, the judge's failure to permit Mr Gopee to give evidence, and further the former's decision to draw serious adverse inferences from the fact that Mr Gopee had not done so … , were in my view wrong in principle because they resulted in the appellants having an unfair trial. Not only did the appellants not have a proper opportunity to present their case but they also suffered the disadvantage of that failure being used evidentially against them. In my judgment, whatever view the judge took of Mr Gopee's experience as a litigant, the judge nevertheless should, in all the circumstances of the case, have given him, as a litigant in person, a proper opportunity to give evidence. He should also have given serious consideration as to whether there was any documentation within the possession of the liquidator which might have borne on the recoverability of the loans and accordingly the value of the loan book as at the date of the assignment."

In short, the Court of Appeal's careful and detailed analysis of the proceedings at first instance led it to the conclusion that the deputy judge had been too easily persuaded of the defendants' fraud (at [46], with emphasis added):

"In my view because, as the reported judgments against him and his companies make clear (some of which I have been involved in refusing permission to appeal to Mr Gopee and his companies), Mr Gopee has had, to put it mildly, somewhat of a chequered career in the courts in relation to his conduct of the Company and his other associated money lending companies, the judge mistakenly found it all too easy to infer fraud against Mr Gopee and the other appellants. That is exemplified by the judge's statement, at paragraph 12 of the judgment, that "Given that this is a case of fraud for the benefit of the various companies controlled by Mr Gopee, it would be difficult to imagine a less meritorious case." In my judgment, that comment demonstrates the lack of objective impartiality which the judge failed to bring to his analysis of this case. That assertion is no more than conclusory."

Harb v. Abdul Aziz Bin Fahd

Another recent example of an appeal succeeding in the Chancery Division on the grounds that the trial was unfair, on the basis that the

defendants' case was not properly dealt with, is *Harb v. Abdul Aziz bin Fahd* [2016] EWCA Civ 556, a case which has achieved some notoriety.[3] That case was an appeal against an order in favour of a bankrupt, against Prince Abdul Aziz bin Fahd, a member of the Saudi royal family and son of the late King Fahd, on the bankrupt's claim (assigned by her trustee) to enforce the performance of a contract to pay her the sum of £12 million and to procure the transfer to her of the title to two properties in Cheyne Walk.

The judgment was held to be unfair by the Court of Appeal because of a lack of reasons in the judgment, the judge being criticised because, "*in effect, he took a short cut*" in his evaluation of the factual evidence (at [38]). The Master of the Rolls said (at [39], emphasis added):

"Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."

The temptation of the short cut is a dangerous one whether for advocate or judge

In the same judgment, the Court rejected a further ground of appeal to the effect that the judge displayed apparent bias: see [73] to [77]. Having set out the legal test from *Porter v. Magill* [2002] 2 AC 357, at [103] (whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased), the Court, in rejecting the challenge notwithstanding strong criticism of the judge's conduct, emphasised two important points.

At [69] to [71], the Court dealt made its first point:

"First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant. The "real possibility" test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias: see Helow v Secretary of State for the Home Department [2008] UKHL 62, [2008] 1 WLR 2416 at para 2 per Lord Hope. As Lord Hope also said in Porter v Magill at para 103, the "real possibility of bias" test "is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias" … the litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded."

At [72], the Court made its second point:

"Secondly, the informed and fair-minded observer is to be treated as knowing all the relevant circumstances and it is for the court to make an assessment of these: see Competition Commission v BAA Ltd and Ryanair Ltd [2010] EWCA Civ 1097 per Maurice Kay LJ at paras 11 to 13 and the authorities cited there. … It was held in Virdi v Law Society [2010] EWCA Civ 100 that the hypothetical fair-minded observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available. Stanley Burnton LJ gave a number of reasons for this conclusion at paras 43 to 48 of his judgment. This reasoning is binding on this court. In any event, we are satisfied that it is correct."

Conclusion

Neither *Barons Bridging Finance* nor Harb says anything new or surprising, but both illustrate that the temptation of the short cut is a dangerous one, whether for advocate or judge. What may appear to be a straightforward and practical procedural approach at first instance may look different with hindsight. The risks to the losing party's basic right to a fair trial, especially where the losing party is accused of fraud or is a litigant in person, may be more obvious from the Court of Appeal's perspective than during the rough-and-tumble of trial.

3/. The judgment of the Court, which consisted of Moore-Bick and Mcfarlane LJJ, in addition to the Master of the Rolls, was handed down on 16 June 2016.

Is evidence outside the four-corners of a registered document exluded from the matrix of facts?

In the light of the decision in *Re Powa (UK) Limited*, **Adam Al-Attar** suggests that the rule in *Cherry Tree Investments* requires a re-think

Introduction

In *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305, the majority of the Court of Appeal held that, in construing a registered charge, the court should give little weight to relevant, admissible but extrinsic evidence. In particular, it held that the court should give little weight to the terms of the facility agreement between the contracting parties under which the debt secured was owed.

In that case, the registered charge did not refer to the facility agreement in any way. Lewison LJ (with whom Longmore LJ agreed) held that the protection of the reasonable expectations of third parties who had enquired or might enquire of the register required that little weight be given to the facility agreement which, although admissible, would undermine those expectations. The expectation in question was that the power of sale under the charge was the power implied in law (as if a term of the deed) by section 101 of the Law of Property Act 1925 and not the extended power of sale, which the parties had agreed to, in the facility agreement.

The principal purpose of this article is, first, to suggest that the rule in *Cherry Tree* is overly exclusive of relevant evidence and requires a re-think and, secondly, to suggest an alternative in which extrinsic evidence is not excluded when the question of construction is one the answer to which a third party can have no reasonable expectation of reliance.

The ancillary purpose of this article is to explore how the rule in *Cherry Tree* should operate in a case in which the registered document refers to other documents which are not registered. Is there a defensible mid-point between the four-corners of a registered document and the ordinary rules of construction by which all parts of the matrix of fact might be considered? If so, what is it?

The article has been prompted by the decision in *Re Powa (UK) Limited (in administration)*; an unreported decision of Murray Rosen QC (sitting as a Deputy Judge of the High Court) which was for a time embargoed for reasons of commercially sensitivity. *Powa* concerned a USD60m convertible note issue by the company's listed parent direct to noteholders (i.e. without a note trustee) secured by fixed and floating charges given by the parent and by the company as guarantor. The dispute as to construction arose because the charge given by the company was registered, but did not define the secured liabilities. It instead, via a series of cross-references outwith the registered four-corners of the charge, referred to the definition supplied by the deed constituting the notes. That deed had, by apparent error, omitted to mention the company's guarantee as a designated finance document. The case, accordingly, considered, but without ultimately deciding the point, the question of whether (and if so how) the rule in *Cherry Tree* should operate in a case in which the registered document refers to other documents which are not registered.

Admissibility and weight

The phrasing of the rule in *Cherry Tree* is odd. It is expressed by the majority of the Court of Appeal as a rule about the weight of extrinsic evidence, rather than as to its admissibility (see, in particular, [123] [127]-[128]). It is however difficult to see a relevant difference between a finding of inadmissibility and a finding of zero-weight, or, indeed,

ARDEN LJ DISSENTED IN CHERRY TREE, CONSIDERING THE MAJORITY'S DECISION OVER-EXCLUSIONARY.

why one should think in terms of evidential weight in the context of a question of construction.

The above criticism is not nit-picking about labelling. The exclusion of evidence occurs for a myriad of policy reasons. It can, for instance, in exceptional cases extend to evidence illegally obtained, although instances in which the court will close its eyes to the truth because of some other wrong done are rare.

Legal-policy reasons for excluding evidence are commonly encountered, even in civil cases. The parol evidence rule which excludes oral evidence from a dispute as to the meaning of a written contract is one such rule. So too is the exclusion of pre-contractual negotiations, even if written. Each such exclusionary rule is reflective of and supports the achievement of an objective construction. Neither, however, can be said to flow directly from the objective principle and is instead explained in terms of achieving a distinct legal policy aim. For a fuller discussion of this point, see the speech of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

The rule in *Cherry Tree* is an exclusionary rule of this kind. That much is clear from its operation – to exclude evidence in all but name – and its rationale, specifically, the justification for excluding extrinsic evidence from consideration in construing a registered document is to protect the reasonable expectations of third parties who have or might rely on the registered document. It has nothing to do with an objective meaning as between the parties, which is the essence of the objective principle as traditionally explained. In this respect, Lewison LJ however approved of the following passage in the judgment of Campbell JA in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64:

"However, the way those principles come to be applied to a particular contract can be affected by aspects of the contract such as whether it is assignable, whether it will endure for a longer time rather than a shorter time, and whether the provision that is in question is one to which indefeasibility attaches by virtue of the contract being embodied in an instrument that is registered on a Torrens title register. All these are matters that would be taken into account by the reasonable person seeking to understand what the words of the document conveyed.

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That is because the reasonable person seeking to understand what the words convey would understand that the meaning of the words of the document does not change with time or with the identity of the person who happens to be seeking to understand the document. That reasonable person would therefore understand that the sort of background knowledge that is able to be used as an aid to construction, has to be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document."

By this passage, Campbell JA treated the exclusionary rule as part of the objective principle. He elides the distinction between a reasonable interpretation as between the parties and a reasonable third party who – looking in on the parties' dealings as if through a window – reviews a document to which he knows he is not a party and necessarily without full information.

It is essential to emphasise the correct rationale of the rule is the protection of third party expectations because the rule in *Cherry Tree* is a judge-made one. Unlike a legislative rule, the interpretation of which may involve a tension between the legislature's words and the legislative purpose, a judge-made rule, or rather a given formational by a judge, is vulnerable where it over-steps its rationale. This is because a judge-made rule has no definite expression in language. What matters is the concept behind it.

So analysed, it is a mistake to conceive of the rule in *Cherry Tree* as part of the objective principle of contract law. It is a rule to protect third parties. It operates to restrict the corpus of material ordinarily available to find an objective meaning applicable to the parties. It should not, therefore, apply to exclude extrinsic evidence where there can be no reasonable third party expectation worthy of protection. This observation has particular significance to cases in which the question of a registered charge is what debt is secured.

Secured debt and registration

A debt is an obligation to pay a sum of money that can be enforced (as distinct from a breach sounding only in damages). It is why an action in debt has sometimes been referred to as common law specific performance. A secured debt is debt for which security is given. This may be personal security in the form of a guarantee, or a proprietary security such as a charge which entitles the secured creditor to exercise rights in relation to the secured assets by way of enforcement. The rights of enforcement are various: to sell, to appoint a receiver to collect income, to appropriate, and so on.

Such security rights are significant to third parties. This is because the secured asset is frequently itself a property right and the charge or mortgage which creates the security is always a property right. The distinguishing feature of a property

right is that it binds third parties without their consent.

For this reason, the perfection of many proprietary security rights is now dependent upon registration in a public register. Registration gives notice to the world of the right and so, at least, allows the right-holder to say against the third party that he at least had notice because he could (and should) have checked the register[1].

Other systems of registration, such as the Torrens system of land registration in Australia (and latterly our own move towards a complete registration of land) utilise registration to facilitate transactions. A purchaser of registered land enjoys a registration defence which is subject to very limited exceptions such as overriding interests. Indeed, this is the primary purpose of land registration to which the register of charges on the title is ancillary, although it too fulfils an important purpose in its own right. Hence, it has been said that the system of land registration is now one of "title by registration", implying that it is registration that is constitutive of the right, whether freehold or leasehold or other title. This aim is further reflected in the narrow and statutorily defined grounds upon which the register of title can be rectified under the Land Registration Act 2002.

Neither the aim of giving notice of a property right to an unwary third party nor of creating a system of title by registration is however undermined by the admission of extrinsic evidence in order to ascertain what debt is secured by a charge.

On what basis can a third party examining a registered charge which secures a debt defined in an un-registered agreement assert a reasonable expectation about the debt secured?

A third party can never have any reasonable expectation as to what the debt is. This is best illustrated by two examples: a registered charge which itself states the debt secured; and a registered charge which does not itself state the debt owed but instead secures an unregistered facility agreement. As against all-the-world, the facility agreement is a private document between banker and customer. For present purposes, it does not matter whether the registered charge references the facility agreement.

In the first example, all that can be gleaned from the register is that a given debt was owed on registration. Even this assumes an advance occurred. Since that date, the principal amount may have been paid in full. Equally, it might be outstanding in whole or in part with interest accruing on, on this assumption, an unknowable principal amount.

In the second example, the position is essentially the same, but one does not even know the initial parameters as to principal or interest. There may be fees and other contingencies the effect of which may have been to extend the debt far beyond the amount of the original facility limit. There may, moreover, have been amendments and revisions including of the facility limit[2].

Given the above, on what basis can a third party examining a registered charge which secures a debt defined in an un-registered agreement assert a reasonable expectation about the debt secured? Even in a case in which the registered document states an amount for the debt, the debt owed at any given time may be more or less than that amount.

If, as would appear to be the case, the third party must accept that he can have no expectation as to the amount of the debt, he must look to another document, indeed, the current state of account between the parties, to know the amount of the debt.

It follows that the third party can have no reasonable expectation as to the scope of the debt in terms of the debt obligations secured. The enquiries which a third party must make undermine any basis for a reasonable expectation as to the scope of the debt.

It is no answer to say that the parties might, at least, register the abstract scope of the debt obligation. It is the state of the account that matters in commerce. Further, the mere existence of a debt, even of £1

1/. For this reason a definite public register is essential and is not to be confused with notoriety of a fact or practice. The court may accept as a fact a matter of which it is deemed to have judicial notice and similarly it may accept that participants in a market have knowledge of facts or practices notorious in that market. Notice of a matter by participants in a market of fact is very different from constructive notice to the world-at-large by virtue of a public register. Such a register is created for that purpose, officiated (by the state) to that end and can usually only be altered by special procedure upon narrow grounds.

2/. Indeed, in modern commerce that it would be realistic to assume the possibility of an amendment and extension because it is favoured over a cancellation and fresh loan because it does not trigger the need for a security review or re-engage hardening and look-back periods under the Insolvency Act 1986.

and even if contingent, renders the security effective, bringing into play the full restrictive force of the proprietary security[3] and any associated restrictive covenants. Neither the amount owed nor the abstract scope of the debt obligation has a bearing on these matters.

So assessed, the rule in *Cherry Tree* should not apply where the question of a registered charge is what is the debt secured.

In this respect, it is to be recalled that *Cherry Tree* concerned an attempt to rely on a power of sale in a facility agreement to override the power implied by law into the registered charge (as if part of the deed) by section 101 of the Law of Property Act 1925. The power of sale is an aspect of the proprietary security, which is capable of affecting third parties, as described above. It is clear that the policy of the law should exclude extrinsic evidence which would undermine the expectations of those who have or might rely on the registered charge to ascertain what it permits in terms of enforcement action.

It is not however clear why that policy should apply where the question is as to the debt secured. This should be a question as between debtor and creditor for which there is access to the full matrix of fact.

The above approach, therefore, differs from the approach favoured by the dissenting judgment of Arden LJ, who, in her conclusion on this point at [54], favoured a rule which would admit extrinsic evidence depending upon whether there are third parties who would be prejudicially affected by its admission. The difficultly with this approach is that the meaning of the contract would change depending upon a subsequent event and, moreover, one which is uncertain. In particular, Arden LJ acknowledged, at [57], that her preferred approach might require the court to mitigate any potential prejudice by making a declaration as to the meaning of a registered document conditional upon the consent of potentially prejudiced persons.

It is however difficult to see why an adjudication of rights as between parties should depend upon the consent of non-parties. The notion that a declaration of contractual rights should be granted or withheld by reason of the grant or refusal by a non-party of its consent appears to have no basis in law.

Incorporation by reference

Had the preferred approach above been available in *Powa*, the decision should have been simpler. The Deputy Judge would have had unrestricted access to the subscription agreement which preceded the note issue and to the deed constituting the notes, each of which provided clear(er) indications that the secured liabilities included the company's guarantee of the notes issued by the parent (the noteholder's case) as opposed to merely the contingent obligations for damages for breach of negative covenants and warranties (the unsecured creditor's case put by the administrators).

The parties however approached the matter on the footing that the judge was bound by *Cherry Tree* and not in a position to re-interpret it. The court was, therefore, required to consider the dispute on two alternative footings, first, that *Cherry Tree* was a special decision concern with "self-contained" registered documents and, secondly, that *Cherry Tree* applied and required the court to look only to the registered charge and its incomplete definition of secured liabilities.

The judge decided the case in favour of the respondent noteholders on the second basis. He accepted that, in contrast to *Cherry Tree* in which the creditor had sought to use the facility agreement to introduce a power into the registered charge in place of those implied by statute, the dispute in *Powa* arose only when the incomplete definition of secured liabilities in the registered charge was read with the definition of finance documents in the deed. Without putting the two together, which a third party reading only the registered charge could never do, the ambiguity that gave rise to the unsecured creditor's argument did not arise.

For this reason, what the judge had to say as to the scope of *Cherry Tree* is dicta, but it is that part of his judgment which is of wider interest. He did not accept that Asplin J in *ICM Computer Group Limited v Stribley & Ors* [2013] EWHC 2995 (Ch) had confined *Cherry Tree* to "self-contained" registered documents, by which she appears to have meant those which made no express reference to other documents by their terms. He did however accept that *Cherry Tree* was concerned with such a document. This point, therefore, remains open.

Of potentially greater significance to future cases, he considered the extent to which reference could be made to a document referred to by a registered document in construing the registered document. As noted above, the unsecured creditors had to reach outside the registered charge to identify the ambiguity which gave rise to the construction in their favour. They did this by reliance upon the doctrine of incorporation by reference, treating it as a special rule which entitled (indeed, required) *only* the relevant definition in the deed

3/. This refers to essential aspects of fixed and floating charges: respectively, the restriction on the debtor's power of disposal without consent of the creditors, and the restriction on the debtor's power of disposal save in the ordinary course of business.

referred to by the charge to be read into the charge. In concrete terms, only the definition of finance documents was to be incorporated into the charge, and not any *other* terms of the deed.

The judge rejected this submission, saying that, had he to decide the point, he would have concluded that the cross-reference in the charge to the definitions of the deed allowed him to look to all terms of the deed and thereby to resolve any ambiguity otherwise created by importing only the seemingly erroneous definition of finance documents alone.

The conclusion that reference can be made to the four-corners of a document referred to by a registered document but not any other document referred to in that document is difficult to sustain. It occupies an unstable middle ground in which there is no logical place to stop once the four-corners of the registered document are exceeded

The difficultly is neatly illustrated by the facts of *Powa*. The registered charge referred to the unregistered deed for its definition of finance documents. Listed amongst the finance documents were the deed itself and the subscription agreement. It is difficult to see any difference in principle between a cross-reference to a definition and the defining document itself (both permitted, on the judge's view) and other terms and documents referred to in *that* definition or document (not permitted, on the judge's view). To admit the former on the basis that it is consistent with *Cherry Tree*, but not the latter is to draw a distinction without a relevant difference. The reasonable expectations of a third party as to what the registered document may mean are defeated by the first cross-reference. The known unknown of other terms essential to the comprehension of the registered document denies any ground for a legitimate expectation based solely upon the registered charge.

ASPLIN J SUGGESTED THAT CHERRY TREE SHOULD BE UNDERSTOOD AS SPECIFICALLY AN EXCLUSIONAL RULE CONFINED TO 'SELF-CONTAINED' REGISTERED DOCUMENTS.

Assessed in this light, there would appear to be a good argument that *Cherry Tree* should be understood as Asplin J suggested in *ICM Computers*, specifically an exclusionary rule confined to "self-contained" registered documents.

A consequence of this argument, if accepted, is that the court has to say what a "self-contained" document is. This may well be more difficult than first impression would suggest. The clearest definition is a document which does not refer to any other expressly. But what of documents referred to as part of a group rather than by name? What of implied reference, as where a document clearly contemplates or presupposes other documents?

Priority?

The potential difficulties in these respects suggest that the error in Cherry Tree was to conceive of the matter as a search for an appropriate exclusionary rule. An alternative rule would be to cede priority to the meaning of the registered documents in the event of conflict with the unregistered document. This would have allowed the power of sale under section 101 of the Law of Property Act 1925 to prevail over the parties' contract. In other words, a priority rule would have reached exactly the same result as an exclusionary one.

This is not however the sort of rule a judge can readily make, if at all. It involves a departure from the parties' agreed legal rights. There is no indication in the Law of Property Act 1925, the Land Registration Act 2002 or the Companies Act 2006 that a registered document is to have a distinct legal meaning and, if in conflict with other contractual documents, is to have priority as to that meaning.

The protection of third parties who have or might rely upon the meaning of a registered document is, as such, dependent upon some form of exclusionary rule. As matter stand however, the rule in *Cherry Tree* is uncertain in scope and potentially unjust when applied to questions which can have no impact on the reasonable expectations of third parties.

Adam Al-Attar acted for the noteholders in Powa

Insolvency Lawyers' Association conference in Oxford

Felicity Toube QC reviews the ILA's 2016 Annual Conference

The ILA Conference was back in Oxford this year and, as usual, was well attended by South Square, both as speakers and as delegates. Chaired with his usual good humour and aplomb by Mr Justice Snowden, the conference was lively and enjoyable.

The opening speaker was David Ereira OBE, now relieved of his long-term Lehman's hat and attending in his capacity as Chair of the Insolvency Service's Board. David spoke about the role of the IS and the increasing involvement of the Official Receiver in insolvencies such as that of the Redcar steelworks and Kids' Club. David bemoaned the limited use of the pre-pack pool. The overall message was one in favour of a continued history of involvement and co-operation between the IS and the insolvency profession.

OXFORD WAS ONCE AGAIN THE LOCATION FOR THE ILA ANNUAL CONFERENCE.

The next panel consisted of Linden Ife and James Pickering. The former spoke on declaring dividends, a rather technical romp through the question of which accounts are the right accounts. James Pickering spoke about *Re Eliachoff (a Bankrupt)* and the inevitable tensions between family law and insolvency law. Some of the findings in this case are interesting and are likely to be revisited in the future.

Following on was a "message from our sponsors", a talk by Manolete Partners plc which focussed on the funding process and case studies where funding could be used creatively and effectively.

The final session before lunch featured Mark Phillips QC, who revisited the perennial favourite: whether giving effect to a foreign insolvency under the Insolvency Regulation or the CBIR can discharge an English law contract. Praying in aid the (rather suspect) statement in *Pan Ocean* about the distinction between procedural and substantive rights, Mark's thesis was that there was an open question about whether the CBIR or the Insolvency Regulation could overrule *Gibbs*. Some of us might beg to differ on this one! The session led to lively discussion over lunch.

Following lunch, Snowden J moderated (in an entertaining interventionist mode) the afternoon's panel session which pitted Philip Hertz (Clifford Chance) and Peter Arden QC (Erskine Chambers) against Ben Larkin (Jones Day) and Felicity Toube QC. With the title "Schemes: fair game or extreme sport?", the panel was asked to debate whether the English courts' approach to schemes amount to beneficial jurisdictional innovation or legal imperialism. On the pro-scheme side, it was contended that the flexibility inherent in schemes has enabled judges to respond to changes in the economic climate and debt structures, and to achieve solutions in difficult circumstances. On the other side (that of common sense), caution was urged against "extreme forum shopping" and straying beyond the bounds of comity. There was inevitably much discussion about *Indah Kiat*, although there were obvious constraints imposed by the fact that the convening hearing was then pending before Snowden J with Felicity leading the team (with Ryan Perkins) one side, and the other side (William Trower QC and Adam Goodison) in the audience! 6 key questions were debated by the panel: Discharge of third party liabilities; the "sufficient connection" test; the Brussels Regulation issue; practical difficulties; the classes test, and the correctness (or otherwise) of the Chapter 15 cases on recognition. Snowden J put them to the vote and (unsurprisingly) most of the votes came out on the "fair game" side.

FELICITY TOUBE QC

The last two sessions were Lehman focussed. In one Daniel Bayfield QC and Euan Clarke (Linklaters LLP) did a speedy run through of all the major law made by the administration. They pointed out the positive developments made, in particular, as a result of the troublesome questions of client monies and client assets which have led to new legislative instruments (namely the Investment Bank Special Administration Regulations) and new practical approaches (such as the MF Global distribution plan).

In the final session of the day, Russell Downes of PWC reflected on the practical effect of the Lehman administration and the future challenges it was likely to face.

Although brains were full, stomachs were empty, and those who didn't have to rush back to London went happily on to the Gala Dinner.

INSOL comes to Jersey

William Willson reports from the Channel Islands

It's been another very busy year in the INSOL calendar, with recent conferences in Bermuda, the Caribbean and, most recently, Dubai. In early June we reconvened, this time in sunny Jersey, for the INSOL International One Day Seminar.

For the South Square contingent, the conference started informally on the Wednesday evening at the Oyster Box restaurant in St Brelade bay, where we were generously hosted by Bedell Cristin's Rob Gardner and Alasdair Davidson to delicious seafood and a plentiful supply of Chablis. I have never seen a table of dinner guests less disappointed to hear that the taxis were going to be an hour late. Many thanks.

WILLIAM WILLSON

After welcomes/introductions from Anthony Dessain, Richard Heis and Tim Le Cornu, the conference proper kicked off with a thought-provoking session on a critically important topic for the Channel Islands' many non-executive directors: "Offshore Directors' Liabilities Offshore". The panel (Heather Bestwick, Raquel Agnello QC, Jeremy Garrood, Grant Lyon and Anthony Williams) explored the potential pitfalls for off-shore NEDs arising out of arbitration clauses and foreign winding up proceedings. The message: "know your jurisdiction", "be selective" and "know your business".

This was followed by the conference's piece de resistance: a role-played session based on a series of applications to Mr Justice Snowden (recently arrived from Japan, but fully on top of the papers) roughly following the facts of the well-known Ablyazov litigation. With KPMG's David Standish standing in as a very capable litigant in person, assisted by Jersey counsel (Bedell Cristin's Ed Drummond and Ogier's Matt Newman), the English High Court (sitting for the first time in the Raddison Blu Hotel) determined applications to freeze assets and appoint receivers in the Channel Islands, considering issues such as non-cause of action defendants, mirror injunctions, recognition of foreign office-holders and the application of the principles in Prest v Petrodel. The session highlighted the challenges of seeking to enforce judgments against offshore nominee companies, but the growing willingness of the respective onshore and offshore courts to co-operate and assist where possible.

The morning seminar finished with an informative session on the fast-changing and ever-important subject of litigation funding, with contributions from Susan Dunn (Harbour

JERSEY'S RADISSON BLU WATERFRONT HOTEL VENUE WAS THE VENUE FOR THIS INSOL INTERNATIONAL ONE DAY SEMINAR.

Litigation Funding), Derek Hyslop (EYUK), Marius Nasta (Redress Solutions), Marcus Pallot (Carey Olsen) and Jeremy Wessels (Mourant Ozannes).

We adjourned for lunch, courtesy of Mourant Ozannes, before returning for the keynote address, "Team Leadership & Cooperation on Challenging International Assignments", from former soldier Colonel Tim Collins. Speaking from his military experiences, particularly Iraq after the fall of Saddam Hussein, the list of rules is a welcome reminder for the commercial litigator: know your objectives; pick the right team; understand your responsibilities as a leader; make sure everyone has a role.

Later in the afternoon South Square's Glen Davis QC was joined by Barry Faudemer (Jersey Financial Services Commission) and others to demystify the difficult topic of "The Role of the Regulator", unpicking the realities of licensing and enforcement in offshore jurisdictions. Finally, there were case updates from Jersey and Guernsey: in particular, the effect of the Privy Council decision in Brazil v Durant International, and a slick analysis by Baker Mackenzie's Hugh Lyons of the "*unhappy outcome*" left by the diverging judgments on the extraterritorial effect of Section 236 of IA86 in the *Re MF Global* and *Re Omni Trustees* decisions.

After a full and challenging seminar programme the delegates were hosted to a fine dinner at The Boathouse in St Aubin – with many thanks to Carey Olsen and KPMG – which offered a relaxed atmosphere to catch up with the INSOL community from the UK, the Channel Islands, the Cayman Islands, the BVI and Bermuda (and to drink the loyal toast to the Duke of Normandy).

Many thanks as usual to Penny Robertson for all her hard work.

All in all it was another very successful conference, and our eyes now turn to Sydney next spring.

EU/EEA LAW UPDATE


GABRIEL MOSS QC


ROBERT AMEY

Gabriel Moss QC and Robert Amey look at European conference season and recent case of Profit Investment v Ossi

European conference season

Back in the bad old days before the "rescue culture", insolvency proceedings were once described as "feeding off the rotting corpse of capitalism". Where better therefore to hold an insolvency conference than Trier, the birthplace of Karl Marx.

ERA, the German initials for the EU-supported Academy of European Law, whose conference centre is in Trier, organised a one and a half day conference on cross-border insolvency and rights *in rem*, i.e. proprietary rights, such as security rights.

The assembled experts included Professor Bariatti of the University of Milan, Dr Dammann, a German practising as a notable French lawyer with Clifford Chance in Paris, Professor Garcimartin of the Autonomous University of Madrid (of Virgos and Garcimartin fame), Dr Gardella of the European Banking Authority, Professor Haentjens, a professor at Leiden University, Jens Haubold, a German lawyer from Stuttgart, Gabriel Moss QC of South Square, Dr Norkus, the President of


TRIER IN GERMANY, FAMOUS FOR ITS ROMAN RUINS AS WELL AS MARX'S BIRTHPLACE, WAS VENUE FOR THE ERA CONFERENCE.

the Lithuanian Supreme Court and Dr Rodriguez from the Swiss Department of Justice.

After a brief welcome and introduction by the organisers, Professor Garcimartin dealt with recent case law on jurisdiction under the Insolvency Regulation. He and later speakers dealt with both the provisions of the existing Regulation and also the Recast Regulation, which will apply to insolvency proceedings opened on or after 26th June 2017.

Professor Bariatti spoke on applicable law and its exceptions.

In the afternoon of the first day, there were workshops where the participants were broken into smaller groups who had to discuss and come up with the answers to practical problems set by Jens Haubold and Gabriel Moss QC. Gabriel had the challenging task of setting a problem based on the operation of floating charges in relation to the Regulation and explaining to a roomful of civil lawyers with little or no knowledge of common law, the difference between fixed and floating charges. Having heard the introductory explanation, the participants then had to solve a problem on fixed and floating charges, validity and priorities.

After a hard day's work, the participants had the onerous task of inspecting the vineyard on the hill opposite the conference centre. The Romans had first brought wine to Trier when they made it the capital of the Western Roman Empire around the fourth century. Having gone to the top of a very steep vineyard, the participants made the equally steep descent down to the winery where they were rewarded with wine tasting, involving wine made from the locally-grown Riesling grape varieties, ranging from fairly sweet and fruity to very dry. Those who had actually drunk all the wine were taken back to their hotels by taxi, whereas those who were still standing walked back to the hotels via an eco-path next to a local stream.

Refreshed, the participants woke the next morning to a further workshop with a problem set by Professor Garcimartin relating to the *situs* of shares, financial instruments and claims for the purposes of the Regulation.

After the morning coffee break, Professor Bariatti moderated, first a talk on the Bank Recovery and Resolution Directive ("BRRD" or sometimes just "BRD") by Anna Gardella and then a roundtable discussion on the BRRD by Professor Haentjens, Gabriel Moss QC and Anna Gardella. After a question and answer/discussion session involving the participants, the conference was rounded up by Professor Bariatti in time for lunch.

The scene now shifts from the banks of the Moselle to the banks of the Danube. R3 held their annual conference in Budapest 18-22 May 2016. South Square were represented by Gabriel Moss QC, Mark Phillips QC, Hilary Stonefrost and Richard Fisher. Gabriel and Richard had speaking roles.

On the afternoon of the first day Gabriel and Richard presented the topic of "Cross-Border: current and future trends". Gabriel spoke of the key changes to be effected by the Recast Regulation and Richard analysed recent non-EU cross-border cases. Following Gabriel's brief remarks on what might happen if the UK were to vote for an exit from the EU, Jamie Leader of Eversheds LLP gave an entire talk on the implications for the UK restructuring and insolvency market of a potential Brexit.

The next stop on the conference circuit was Milan, for the International Bar Association Conference on Insolvency 23-26 May 2016.

The second day of this conference saw a talk entitled "Cross-Border

MARK PHILIPS QC

HILARY STONEFROST

RICHARD FISHER

Enforcement to Insolvency Judgments: the EU and Beyond", a two-hour discussion involving experts from different parts of the world. The session was chaired by Patrick Rona of Duane Morris New York, with Professor Han from Korea, Professor Mazzoni of Milan, Professor Mohan from Singapore, Gabriel Moss QC of South Square and Rodrigo Rodriguez from Switzerland.

The discussion centred around difficulties of cross-border enforcement of judgments and in particular the unfortunate precedent set by the *Rubin* case, involving a comparison as to how that type of situation was dealt with in different countries and under the EU Regulation.

After a coffee break, Patrick Rona continued to chair, this time leading a meeting of the Insolvency Section Task Force of the IBA on a proposal for UN Insolvency Convention which would in effect seek to reverse the *Rubin* decision. The discussion centred around the feasibility of persuading a sufficient number of States to join such a Convention. Professor Mohan and Gabriel Moss QC were guest speakers at this session and put forward their ideas on the subject of this proposal. The question of whether it acquires traction remains to be seen.

EU CASES

C-366/13 Profit Investment SIM SpA (in liquidation) v Ossi (in liquidation)

This important judgment of the European Court of Justice concerns the circumstances in which a party purchasing a bond on the secondary market will be bound by a jurisdiction clause contained in the prospectus. In May 2004, Commerzbank, whose registered office is in Germany, launched a programme for the issue of credit linked notes (CLNs). The general rules governing the programme and the conditions of issue were set out in the issuing prospectus, which was made available on the website of the Irish Stock Exchange. Paragraph 16 of the 'Terms and Conditions of the Notes' contained an exclusive jurisdiction clause in favour of the courts of England and Wales. As part of that programme, Commerzbank placed on the market CLNs, with a total value of EUR 2 300 000, linked to the reference entity E3, whose registered office is in Luxembourg. In October 2004, acting through an intermediary based and regulated in the UK, Profit and Profit's holding company, both of which had their registered office in Italy, purchased all of the issued CLNs. In spring 2006, E3 defaulted, and Commerzbank cancelled the CLNs by issuing to Profit the corresponding number of shares in E3, which had become insolvent. As a result, Profit entered compulsory administrative liquidation, after which it commenced proceedings before the Tribunale di Milano (Italy) against its holding company, Commerzbank, the UK intermediary and E3, as well as against two directors of Profit, and Mr Fiore, a member of E3, all three of whom are domiciled in Italy. Profit brought claims seeking a declaration as to the nullity of the agreements which led it to purchase the CLNs, on the ground of their unfairness, and consequential damages and restitution. Commerzbank then sought to join two third parties, domiciled in the UK, for the purpose of seeking a contribution from them. The defendants contested the jurisdiction of the Italian court, and Profit asked the Italian Court of Cassation to give a preliminary ruling on the question of jurisdiction. The relevant article of the old Judgments Regulation (44/2001) is Article 23(1), now superseded by Article 25(1) of Regulation 1215/2012 which is in identical terms:

Article 23(1):

'1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned…'

The Italian court referred a series of questions concerning the interpretation of these provisions to the ECJ, the most important of which concerned the circumstances in which the jurisdiction clause in the prospectus would bind a purchaser on the secondary market.

The ECJ held that where a jurisdiction clause is included in a

ALTHOUGH THE COMMERZBANK PROSPECTUS CONTAINED AN EXCLUSIVE JURISDICTION CLAUSE IN FAVOUR OF ENGLAND & WALES, THE RULING BY THE ECJ THROWS THE EFFICACY OF SUCH CLAUSES INTO QUESTION.

prospectus, that clause is "*in writing or evidenced in writing*" only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus. Furthermore, a jurisdiction clause contained in a prospectus may be relied on against a third party who acquired those bonds from a financial intermediary if it is established that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause. Finally, the insertion of a jurisdiction clause into a prospectus may be regarded as a form which accords with a usage in international trade or commerce, for the purpose of Article 23(1)(c), allowing the consent of the person against whom it is relied upon to be presumed, provided that it is established (i) that such conduct is generally and regularly followed by the operators in the particular trade or commerce concerned when contracts of that type are concluded and (ii) either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that the conduct in question is sufficiently well known to be considered an established practice.

The ruling introduces considerable uncertainty where an issuer has inserted a jurisdiction clause into the prospectus without including the same in the underlying bond documents. Issuers who have previously considered themselves safe from the 'Italian torpedo' by including an exclusive jurisdiction clause in the prospectus may now find themselves litigating in Italy against a purchaser on the secondary market with whom they had no direct relationship. It is unfortunate that the ECJ did not take the opportunity to express a view on whether the insertion of a jurisdiction clause in a prospectus "accords with a usage of which the parties are or ought to have been aware", which would have the effect of bringing the clause within Article 23(1).

South Square at Spencer House

The South Square Spring Reception was this year held at Spencer House on Wednesday 25 May. Members and staff welcomed Chambers' clients and friends to one of London's finest surviving eighteenth-century town houses. In addition to the impressive State Rooms, guests were able to admire the surrounding views of Green Park from the terrace. Here is a selection of photographs from the evening which was very much enjoyed by all.

SPENCER HOUSE. BUILT C1760 FOR THE FIRST EARL SPENCER, ANCESTOR OF DIANA, PRINCESS OF WALES, SPENCER HOUSE BOASTS AN IMPRESSIVE NEO-CLASSICAL INTERIOR DESIGNED BY JOHN VARDY AND JAMES 'ATHENIAN' STUART

PROF JEFFREY GOLDEN - PRIME AND JOHN VERRILL - CHADBOURNE & PARKE

HANNAH THORNLEY AND CHARLOTTE COOKE - SOUTH SQUARE.

ROSEMARY FINN AND DECLAN FINN - DAC BEACHCROFT.

ADRIAN COHEN - CLIFFORD CHANCE AND JOE BANNISTER - HOGAN LOVELLS.

JEREMY SCOTT - LIPMAN KARAS, WILLIAM TROWER QC - SOUTH SQUARE AND WILLIAM BALLMANN - GATELEY.

KARL CLOWRY - PAUL HASTINGS, RICHARD FISHER - SOUTH SQUARE AND JAMES DOUGLAS - ROPES & GRAY.

JO LIVERMORE - STEPHENSON HARWOOD, SERENA EDDY - IRWIN MITCHELL AND CHARLOTTE WELSH - STEPHENSON HARWOOD.

TESSA BLANK - DENTONS, STEPHEN ROBINS - SOUTH SQUARE AND EUAN CLARKE - LINKLATERS.

KELLY SHERBURN - DAVID RUBIN & PARTNERS AND LUCINDA ORR - ENYO LAW.

ANTONY ZACAROLI QC - SOUTH SQUARE, SUSAN MOORE - STEPHENSON HARWOOD AND RICHARD CLARK - BURGES SALMON.

TOM WITHYMAN - PINSENT MASONS, SHANE CROOKS - BDO AND RICHARD WILLIAMS - PINSENT MASONS.

JULIE KILLIP AND MARIE VAN DER ZYL - GORDON DADDS AND ADAM GOODISON - SOUTH SQUARE.

Photography by Serena Bolton

Paul Cooklin joins Manolete Partners Plc

Paul Cooklin was Senior Practice Manager at South Square and has recently joined Manolete Partners. Along with Mena Halton, Head of Legal at Manolete, Steven Cooklin, the Chairman and CEO of Manolete, Paul Cooklin details certain issues relating to the assignment of Office Holder claims.

Many of you will remember that for more than 10 years (January 2000 to February 2010) Paul Cooklin was Senior Practice Manager at South Square. Paul started out as a junior clerk at the bar as long ago as April 1984. He then joined 3 Verulam Buildings in September 1985 where he rose to Practice Manager by the time he left to join South Square in 2000. From South Square Paul went on to be Director of Clerking at Keating Chambers, had another spell at 3 Verulam Buildings as Senior Practice Manager and then was Director of Clerking at Littleton Chambers until February 2016. After more than 32 years working for the Commercial Bar in London, Paul has now changed career. He has joined Manolete Partners Plc as head of operations responsible for delivering first class execution across all Manolete cases. Manolete describes itself on its website as "the UK's Number 1 insolvency litigation financing company and the largest litigation financier in the Northern Hemisphere by volume of cases."

To mark Paul's arrival with Manolete, the Digest asked him to highlight something of recent interest that he and Manolete believed to be important. The result was the following article, put together by Mena Halton, Head of Legal at Manolete, Steven Cooklin, the Chairman and CEO of Manolete and Paul.

The Assignment of Office Holder Claims and the Optimisation of Creditor Returns

Administrators and liquidators are unique in having the power to assign rights of action without difficulties relating to champerty and maintenance in the civil sense. It is appropriate and in the public interest that administrators and liquidators enjoy this special position as the proceeds of such assignments are for the benefit of creditors, whether the public purse in the case of HMRC or a trade creditor who has supplied goods or services in good faith and not received payment.

Assignment of a right of action pursuant to the powers set out in the Insolvency Act 1986 ("the Act") is not "trafficking" within the concept of champerty and maintenance.

An administrator or liquidator has the power (under Schedule 1 (2) and Schedule 4 (6) of the Act respectively) to sell any of the Company's property. Such property will include a right of action vested in the company at the time of administration or liquidation.

In contrast, prior to the amendments to the Act introduced by section 118 of the Small Business Enterprise and Employment Act 2015, office holder claims were not capable of assignment, not being the property of the company prior to administration or liquidation.

In most insolvencies there are insufficient monies in the estate to fund claims, whether company claims or office holder claims; a state of affairs often brought about by the actions of the miscreant former directors who are the most common target of claims. Office holders have overcome the obstacle of lack of funds by entering into CFAs with their solicitors and counsel or by entering into funding agreements with litigation funders such as Manolete.

Manolete specialises in the finance of insolvency litigation and has entered into 142 funding and purchase agreements with office holders since 2008 returning a net total of approximately £10m to insolvent estates. Where Manolete purchases the office holder claim, the case proceeds with Manolete as Claimant or Applicant – insulating the Office Holder from all risk on costs and adverse costs. When funding the office holder to pursue a claim, Manolete is responsible for all legal costs and provides a full indemnity to the office holder for adverse costs.

However, the Government considered that more office holder claims could and should be brought. In response to the consultation paper (Transparency and Trust, enhancing the transparency of UK company ownership and increasing trust in UK business, Department for Business, Innovation and Skills discussion paper July 2013. Government response April 2014) the

MANOLETE'S STEVEN COOKLIN, MENA HALTON AND PAUL COOKLIN.

Government stated:

"270. We remain of the view, widely held by respondents, that the causes of action which currently exist to protect creditors and secure financial redress are not well used. We intend to act to remove a barrier to their use, by making it possible for actions to be assigned to a creditor or other third party, so they are more likely to be pursued. Responding to the views we have heard, we intend to broaden the proposal in the discussion paper, and include not just fraudulent trading and wrongful trading actions but also actions that can only be brought by a liquidator or administrator under sections 238 (transactions at an undervalue), 239 (preferences) and 244 (extortionate credit transactions) of the Insolvency Act 1986.

271. Following the Government's recent response to last year's Insolvency Red Tape Challenge consultation we will also broaden the proposals to allow administrators the same right as liquidators to bring fraudulent trading and wrongful trading actions on an insolvent administration and also give them the right to assign such actions. Currently, an administrator wishing to pursue this type of claim would first have to put the company into insolvent liquidation, which represents an unnecessary cost.

272. We understand the concerns we heard about the risk of unwarranted claims being brought against directors. However, we expect insolvency professionals to have regard to existing professional and ethical standards in judging when to assign causes of action and there are remedies within insolvency legislation that parties may be able to use to deal with instances of abuse".

In summarising the way forward, the Government's position was clear:

"When Parliamentary time allows we will allow causes of action that arise on an insolvency and which may only be pursued by an insolvency office-holder to be sold or assigned to another party to pursue, to increase the chances of action being taken against miscreant directors for the benefit of creditors."

The result has been the insertion of section 246ZD to the Act, which provides that an office holder (both administrator and liquidator) can assign a right of action relating to fraudulent trading, wrongful trading, transactions at undervalue, preference and extortionate credit transactions. This is in addition to the existing powers of assignment under Schedule 1(2) and Schedule 4 (6) of the Act.

A concern raised by the Chancery Bar Association in response to the consultation paper was that a third party might struggle to bring a claim without access to the liquidator's detailed investigation powers. This is fully recognised by Manolete, which will, in appropriate cases, meet the office holders costs in this respect, whether the claim is being funded or purchased. Where an office holder claim has been assigned, the office holder's powers of investigation remain with the office holder. If, for example, on a purchased office holder claim it were necessary to make application under section 366 of the Act, Manolete will meet the legal costs of such application, and the office holder costs of the same.

Section 246ZD of the Act applies where the company entered into administration or liquidation on or after 1 October 2015. Accordingly, it is likely to be some time before assigned office holder claims come to be considered by the Courts and the judicial approach to the same remains to be seen. The remedies available are for the most part of a discretionary nature and some (for example, as provided by section 241(a)) possibly not applicable to an assignee.

The addition of the powers conferred by section 246ZD of the Act is to be welcomed as it expands the options open to Insolvency Practitioners to achieve the maximum return for creditors at no risk to the office holder and to the estate. On entering into a purchase or funding agreement with Manolete, the responsibility for all legal costs, including adverse costs, is transferred completely to Manolete, whose agreed share of the net realisation is paid only after all costs and expenses have been deducted.

As investigations are carried out into the affairs and antecedent transactions of companies entering into administration or liquidation on and after 1 October 2015, Insolvency Practitioners will be considering how best to achieve realisations on office holder claims. The ability to assign the same on commercial terms will bring benefits to creditors, both in terms of the number of claims brought and the realisations achieved.

If you wish to discuss anything in this article please contact: steven@manolete-partners.com, mena@manolete-partners.com or paul@manolete-partners.com.

NEWS in brief

Football League new insolvency rules

The Football League has announced the toughening up of its insolvency rules. Football League clubs will face stricter sanctions and be forced to repay the majority of their debts to unsecured creditors under new rules agreed at the competition's annual conference.

Clubs entering administration will be slapped with an increased 12-point deduction, which could rise to 15 if they are found to have flouted new rules around repaying funds to creditors. The Football Creditors' Rule, which guarantees 100 percent repayment of debts to clubs and players for transfers and wages, will be retained but unsecured creditors will now receive a minimum of 25p in the pound, which must be paid upon takeover of the clubs' assets, or the sum rises to a minimum of 35p in the pound over three years. Failure to comply will result in a further 15 point deduction at the start of the season.

On appointment, administrators will also be required to market the club for at least 21 days during which time they will be required to meet with the club's supporters' trust and provide it with the opportunity to bid for the club. The League has also removed the requirement for a Company Voluntary Arrangement (CVA) meaning that it will transfer the club's share in The Football League to the administrator's preferred bidder subject to their compliance with the league's other requirements.

United Overseas suspends loans for London properties

Singapore's third-largest bank by assets, United Overseas Bank, suspended loan applications for London properties following the UK's vote to leave the EU.

The lender has said it is monitoring the market environment closely and will review it regularly to determine when it will reinstate its London property loans in the wake of Brexit. "As the aftermath of the UK referendum is still unfolding and given the uncertainties, we need to ensure our customers are cautious with their London property investments," a UOB spokesperson said in an email to the Singapore Business Times.

DBS Group Holdings, Singapore's biggest lender, said it will continue to offer financing for property purchases in London but warned its customers to be both cautious and aware that even if the value of property purchased during a market slump rises, any gains could be eroded if sterling depreciates further against the Singapore dollar. The Singapore dollar gained about 10 per cent against the British pound in the aftermath of the referendum result.

But it is not all bad news on the property front. Some estate agents have said they have been swamped with calls from Chinese, Middle Eastern, Italian and Spanish buyers looking for a bargain after the pound tumbled to more than 30-year lows, making the exchange rate very favourable for foreign buyers.

Events round up

The last quarter has been a busy time for events with members of Chambers attending and speaking at various conferences in the UK and overseas. Over the last few months Gabriel Moss QC has been invited to speak at the R3 & INSOL Europe International Restructuring Conference in London; the ERA Conference on Cross-Border Insolvency Proceedings in Germany; the Annual IBA Global Insolvency & Restructuring Conference in Italy; and Gabriel co-presented with Richard Fisher on cross-border insolvency issues at the R3 Annual Conference in Hungary. More recently Glen Davis QC joined fellow panellists discussing the role of the Regulator at the INSOL International Channel Islands One-Day Seminar in Jersey.

Save the dates!

Litigation Forum 2016

The Litigation Forum 2016 hosted by South Square and Mourant Ozannes will this year be held on Wednesday 28 September in London. David Alexander QC and Mourant Ozannes' Christopher Harlowe will co-chair the event with keynote speaker Gregory Coleman, the former FBI special agent who led the investigation of Jordan Belfort, the "Wolf of Wall Street". A range of other guest panellists will be joining South Square and Mourant Ozannes speakers to address developments in fraud and schemes of arrangements among other topics.

RISA Conference 2016

South Square is delighted to be once again collaborating with The Restructuring and Insolvency Specialists Association (RISA) in Cayman on the RISA Conference 2016. This year's half-day event covering key R&I issues will be held on Tuesday 22 November at the Ritz-Carlton, Grand Cayman.

More details about both events will be available shortly. If you would like more information, contact events@southsquare.com.

South Square barristers appointed advisers in BHS inquiry

In May 2016, Gabriel Moss QC, Hannah Thornley and Ryan Perkins were appointed as specialist legal advisers to the Work and Pensions and Business Innovation and Skills House of Commons Select Committees in relation to the BHS inquiry.

The high profile BHS inquiry follows the collapse of the 88-year old high street chain founded in Brixton, south London. BHS is the biggest retail collapse in Britain since Woolworths in 2008 resulting in 163 store closures and the loss of 11,000 jobs after administrators and management failed to find a buyer. It has been reported that £100million would have been required to finance the business.

Previous owner Sir Philip Green, Chairman of the Arcadia Group, has faced criticism over the extraction of more than £500million in dividends, rental income from BHS and interest on loans over the 15 years he owned the business. He sold BHS in March 2015 for £1 to Retail Acquisitions, a group of City investors led by Dominic Chappell, the former racing driver and bankrupt.

BHS: SOLD FOR A POUND

Female solicitors to outnumber males by next year

Female solicitors are set to outnumber men within two years if the current rate of women entering the profession in the UK continues.

According to the Law Society's Annual Statistics Report 2015, which uses data collated by the SRA, the gender imbalance is due to a disproportionate number of male solicitors aged over 40. However, of practising solicitors under 35, who make up two-thirds of the total, 15,596 are male while 25,399 are women.

Over the last five years, the Law Society Research Unit has found the number of female practising solicitors has increased at a rate of 3.8 per cent per year, compared to just 1.3 per cent for men. If this trend continues, women will outnumber men by 2017.

Other findings in the report include:

- The 50 biggest firms in the UK (defined as those comprising 81+ partners) now employ almost 30 per cent of the UK's solicitors.
- 40 per cent of all practising solicitors are located in London, half of whom are based in the City.
- 42 per cent of male solicitors in private practice are partners versus 19 per cent of women, while the gap has narrowed by just 3.3 per cent in the last five years.
- More solicitors than ever before are in-house, and the number of non-private practice organisations employing PC holders has increased.
- The SRA registered 5,457 trainees in 2015, 384 more than last year but 275 fewer than the hiring heights of 2004/5.

London Legal Walk

South Square once again participated in the annual London Legal Walk which took place on 16 May.

The South Square team – which this year included Antony Zacaroli QC, Mark Arnold QC, Lloyd Tamlyn and Henry Phillips - joined 600+ teams on the 10km circuit around London.

The Legal Walk is an annual fundraiser organised by the London Legal Support Trust who work to support law centres and legal advice agencies in London and the South East.

The South Square walkers are very grateful to everyone who sponsored them with their generous donations.

50 Cent to pay $7.4m to begin bankruptcy plan

A federal bankruptcy court judge in Connecticut has approved a plan for 50 Cent to reorganise his finances and pay back creditors.

The rapper, whose real name is Curtis James Jackson III, burst on to the music scene in 2003 with his debut album, Get Rich or Die Tryin. He filed for bankruptcy a year ago, citing debts of $36m and assets of less than $20m.

He will make a $7.4m payment to begin the bankruptcy plan, which was approved on 6 July, the Hartford Courant reports. Under the plan approved by the judge, creditors holding unsecured claims will receive 74 percent to 92 percent of the money they are owed, depending on how quickly 50 Cent makes the payments.

Judge Ann Nevins noted that 50 Cent "has a significant ability to generate income".

Jackson, 41, is an admitted former crack dealer who has built an empire beyond entertainment. He invested early in Vitamin Water and has expanded his business interests into clothing and audio equipment.

He has gone on to become an actor whose credits include the Starz network action series Power. He also was named by Forbes last year as one of hip-hop's five wealthiest artists for 2015.

He bought his 17-acre home in Connecticut from boxer Mike Tyson in 2003 for $4.1m.

Man seeks restraining order against God

A man in Israel who believes God has been particularly unkind to him has sought legal recourse by applying for a restraining order at his local court.

David Shoshan appeared in court in Haifa in May demanding that God stop interfering in his life, according to NRG, an Israeli news website.

Shoshan told the court that over the last three years, God had been very negative towards him but no further details were recorded in the court documents. Shoshan admitted he had made previous attempts to obtain the restraining order through the police which only resulted in 10 police visits over the three-year period. For this reason he had decided to try the court this time in the hope he would succeed.

The presiding judge, Ahsan Canaan, threw out Shoshan's application calling it "absurd".

Canaan recommended Shoshan seek help from a source other than local law enforcement, according to NRG.

It was recorded in the court documents that God failed to attend the hearing.

GOD: NO SHOW

UK's oldest hand-written document found

Over 400 Roman tablets were recently discovered during an excavation in London, including the oldest hand-written document ever found in Britain. The Museum of London Archaeology (MOLA) said it had deciphered a document, from 8 January AD 57, found at the excavation at Bloomberg's new European headquarters.

The first ever reference to London, financial documents and evidence of schooling have also been translated.

All the tablets would originally have been covered in beeswax which has not survived but the words were etched into the wood using styluses. According to MOLA, the tablets reveal the first years of the capital "in the words of the people who lived, worked, traded with and administered the new city".

The oldest tablet is thought to have been from the Romans' first decade of rule and the translation reads "...because they are boasting through the whole market that you have lent them money. Therefore I ask you in your own interest not to appear shabby... you will not thus favour your own affairs...."

The excavation area is around the buried Walbrook River and objects were trapped in soaking mud which helped to preserve the wood. Some documents, however, were concentrated in a small room – possibly the oldest law office in Britain.

Dr Roger Tomlin, who translated the documents said it had been "a privilege to eavesdrop" on the people of Roman London.

The London Mithraeum exhibition of the artefacts found will open at the site in Autumn 2017.

5-star hotel goes into liquidation

Her Majesty's Revenue and Customs (HMRC) filed for a winding up order against The Scotsman Hotel, on North Bridge, Edinburgh in May.

Edinburgh Sheriff Court then appointed liquidator, French Duncan.

However, the owners, JJW Hotels, said last minute negotiations meant the hotel would continue to trade and there were no plans for 150 staff to lose their jobs.

French Duncan are working with the hotel's senior management team to ensure that trading continues, 'and to find a long term sustainable solution.'

THE SCOTSMAN: STILL OPEN - FOR NOW

Bars and pubs face serious challenges

Bars and pubs face "serious challenges" that could result in more business closures or failures, according to a new report. The report suggests that "significant pressure" has been put on the trade by the introduction of the National Living Wage, unseasonable weather, England's early exit from the Euros and the result of the EU referendum. However, the Olympics in August and the possibility of a late hot summer could provide a "much-needed boost".

According to Begbies Traynor's Red Flag Alert research, the number of bars and pubs which were dissolved in April to June this year increased by 53 per cent to 831 compared to 531 in the second quarter of 2015. Its research suggests that there will be no respite for the sector as one in five bars and pubs (21 per cent or 2,754 companies out of 13,211 trading businesses) faced "significant financial distress" at the end of the second quarter of this year compared to 17 per cent a year earlier.

Sir Terence Etherton appointed next Master of the Rolls

Sir Terence Etherton has been appointed as the next Master of the Rolls, the second most senior judge in England and Wales.

Etherton will take up his new appointment in October when Lord Dyson MR retires. He has been a judge since 2001. In 2008 Etherton was appointed to the Court of Appeal and in 2013 was named as Chancellor of the High Court, head of the Chancery Division. Before joining the bench he was in practice at the Bar at Wilberforce Chambers.

Dyson MR has been Master of the Rolls since 2012 following two years as a Supreme Court judge.

The new appointment was made by the Queen on the advice of the Prime Minister, David Cameron, and the Lord Chancellor, Michael Gove, following the recommendation of an independent selection panel chaired by Lord Chief Justice Lord Thomas.

US lawyer threatens law suit over soup

A Texas lawyer accused his local restaurant of breach of contract after it failed to provide the bowl of soup advertised as part of a weekend meal deal.

Dwain Downing claims that staff at 'Our Place' in Mansfield, Texas, refused to offer a substitute or discount when the soup ran out. Unwilling to back down, Downing followed up with a legal letter to the restaurant's owner Benji Arslanovski. In the letter Downing set out how the lack of soup constitutes a breach of contract - the restaurant's menu is an "offer" and by purchasing the meal deal the offer was "accepted".

Claiming $2.25 (£1.54) in damages and $250 (£171) in legal fees, Downing informed Arslanovski that if he did hear from him within 10 days he would commence legal proceedings. Arslanovski responded to the "ridiculous" letter by explaining that the soup was complimentary with meals and was only available "while supplies last" as stated on the menu.

Downing apparently does not regret sending the letter - which has since gone viral on the web - but does admit he is contemplating his next legal move very carefully.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the July 2016 edition. All you have to do is name the eight judges in the pictures and then say what the connection is between them.
Please send answers by email to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by 5 September 2016 please. To the winner, if necessary drawn from the wig tin, will go a Magnum of Champagne and an ever so useful South Square umbrella. Good luck.

David Alexander QC

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FEBRUARY CHALLENGE

The correct answers to the February 2016 South Square Challenge were (1) Tools of trade (2) Bedding (3) Clothing (4) Furniture (5) Personal correspondence (6) Pension (7) Vehicle (8) Passport. The connection is that none of these vest in a trustee in bankruptcy. There were a number of close entries, but the winner is Paula Richmond of AlixPartners to whom goes our congratulations, a magnum of champagne and an unbelievably useful (particularly this summer) South Square umbrella.

Diary Dates

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

INSOL International Jakarta One Day Seminar
14 September 2016 – Fairmont Hotel, Jakarta

Law Society of Singapore 3rd Regional Insolvency Conference
15-16 September 2016 - Singapore

INSOL Europe Annual Congress
22-25 September 2016 – Cascais Miragem Hotel, Lisbon

Litigation Forum 2016 (co-hosted by South Square and Mourant Ozannes)
28 September 2016 – 200 Aldersgate, London

Africa Round Table hosted by INSOL International and the World Bank Group
6-7 October 2016 – Labadi Beach Hotel, Accra, Ghana

INSOL International British Virgin Islands One Day Seminar
17 November 2016 – Peter Island Resort, BVI

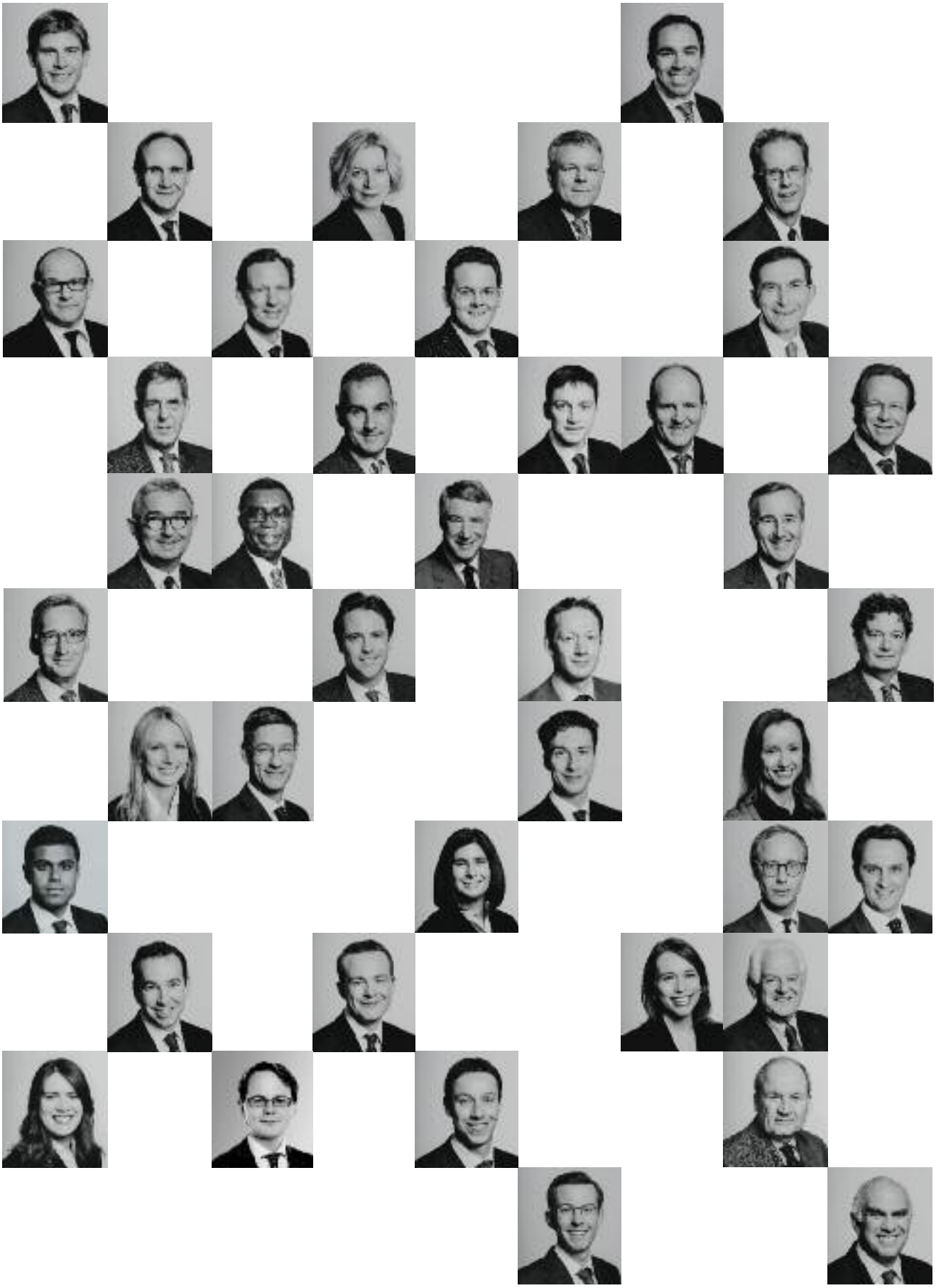
TMA UK Annual Conference
17 November 2016 – The British Library, London

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

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

R3 Annual Conference 2017
26-28 April 2017 – Dublin

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



SOUTH SQUARE

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

Chambers & Partners 2016

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

Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
David Allison QC
Tom Smith QC
Daniel Bayfield QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Richard Fisher
Stephen Robins

Joanna Perkins
Marcus Haywood
Hannah Thornley
William Willson
Georgina Peters
Adam Al-Attar
Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown
Robert Amey
Andrew Shaw
Ryan Perkins

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