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MARCH 2016

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MARCH 2016

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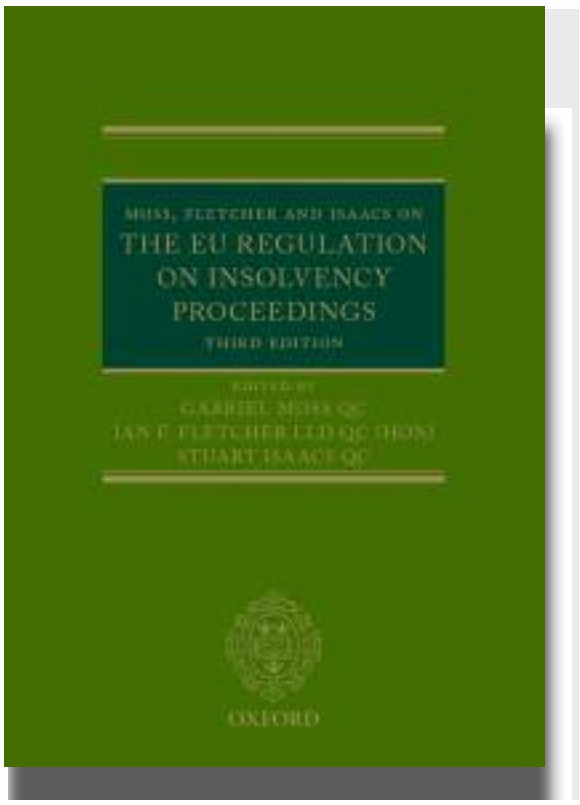

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FROM THE EDITOR

DAVID ALEXANDER QC

Project fear takes hold

Welcome to the March 2016 edition of the Digest.

Well the elephant that has been lumbering over the horizon for the last few years – the EU Referendum – is now clearly visible. David Cameron has been off to Brussels (for many nights) to secure his renegotiation. Ever since the terms of that were announced the UK home news has been dominated by the Referendum and a possible Brexit (and, oh no, we still have four more months of this to endure). Cameron and George Osborne are in favour of remaining. Boris Johnson and Michael Gove are in favour of leaving. And all four of them are in the same Cabinet and taking up much time on the airwaves and in the newspapers. Statement and counter-statement have followed about the consequences of leaving or staying. But so far the most noticeable thing is what has become dubbed "Project Fear". Statements which appear to be designed to terrify the British people to vote to remain on account of the fact that no one knows what it will be like were the UK to leave the EU. Ultimately the decision will be made by the people who can doubtless be trusted to make the right choice. However what everyone really needs to make their decision is concrete facts rather than broad brush statements from politicians.

DAVID CAMERON (ABOVE) AND HILARY CLINTON (BELOW) COURT THE PEOPLE ON THE EU REFERENDUM AND THE US ELECTIONS

It is unusual to have two big political stories running at the same time. However a different kind of project fear is taking place across the Atlantic. This time it is the rise and rise of Donald Trump. To begin with no one really gave him a chance. But as the weeks go by his chances of becoming the Republican nominee look stronger and stronger. Who will he have to fight? Probably Hillary Clinton. Will he win that fight? Not according to the polls. But then the polls never gave him a chance of getting as far as he has. Nothing can be discounted in this world. The time for getting very scared indeed may be approaching.

So what else is happening? Well the two other big stories for me in the last few months have been oil and migrants.

The oil price has recently hit record lows at levels where many countries cannot produce oil profitably (we have all seen the benefits of that in the pump price and I am sure they have seen it in industry too). But just as what goes up must come down, so in the case of oil what comes down must go up. When is uncertain. But when it does, that seems to be likely to have a pretty detrimental effect on us all. For by then we will all have got used to rather cheaper prices.

Finally, the migrant story. It does not stop. They said that the flow would lessen with winter. It does not appear to have done, and with spring approaching presumably the levels will rise even further. Europe seems to be powerless (or unwilling) to deal with a migration problem that is at its biggest since the Second World War in any meaningful way. But it is a serious crisis that someone in Europe has to tackle with ever-increasing urgency. It is already a terrible humanitarian crisis.

So moving on to what there is in this Digest, there is an article by Simon Mortimore QC on the lessons to be learnt from the Supreme Court decision in the Eclairs case and how directors can ensure that they comply with their duty only to exercise their powers for the purposes for which they were conferred. There is an article by David Allison QC and Ryan Perkins on *Codere Finance (UK) Limited* [2015] EWHC 3778 in which they consider the latest episode in the developing jurisprudence on cross-border schemes of arrangement and another by Richard Fisher in which he identifies further guidance of the scheme practice arising from Mr Justice Snowden's decision in *Indah Kiat International Financing Company B.V.*[2016] EWHC 246 (Ch).

Next, in something of a BVI focus, there are articles by Mark Arnold QC (on the different approaches adopted in England, Wales and the BVI to the effect of arbitration clauses on winding-up petitions) and Oliver Clifton and Jennifer Fox of Walkers in the BVI who discuss a recent case in the BVI in which the court has clarified the scope of the so-called Black Swan injunction.

Finally, turning to matters in Cayman, we have an article by Barnaby Gowrie and Brett Basdeo of Walkers on the recognition of foreign compromises and facilitating their effectiveness and one by Guy Manning and Mark Goodman of Campbells reviewing recent developments in insolvency law and practice in Cayman.

THE OIL PRICE HIT HISTORIC LOWS IN EARLY 2016

But articles are, of course, not all we have in this issue. There are the usual case digests edited by Lloyd Tamlyn (actually there are quite a lot of them this time) and a Glen Davis QC review of a new book on the law of financial collateral by Yeowart and Parsons (and you even have a chance of winning a free copy). There are also reports from the South Square and Mourant Ozannes Litigation Forum 2015, on the recent INSOL Conference in Dubai and on the RISA Conference 2015 in association with South Square. There is also a piece on Daniel Bayfield QC who took silk on 22 February 2016 as well as the usual Gabriel Moss QC led EU/EEA Law update, news in brief, diary dates and the latest South Square Challenge.

As ever all at South Square hope that you enjoy this latest version of the Digest. If you would like to be added to the circulation list or your details have changed please do let us know to *kirstendent@southsquare.com* and we will endeavour to ensure that you receive the next issue.

The Proper Purpose Rule:

Under the spotlight in the Supreme Court

Simon Mortimore QC considers the lessons to be learnt from the Eclairs case and how directors can ensure that they comply with their duty only to exercise their powers for the purposes for which they are conferred

In *Eclairs Group Ltd v JKX Oil & Gas plc*[1] the proper purpose rule came before the UK's highest court for the first time in a company law context. The outcome provides a salutary lesson for directors who exercise their powers, thinking it is sufficient that they are acting in good faith in the best interests of the company, but without considering the propriety of the purpose for which they are exercising them. In this case the court found that the directors had exercised their power under JKX's articles to impose restrictions on certain shares for the improper purpose of preventing them from being voted at general meetings. The directors were therefore in breach of their fiduciary duty under section 171(b) of the Companies Act 2006 only to exercise powers for the purposes for which they are conferred and the restrictions were invalid. The outcome of the case cost some of the directors of JKX their jobs. Shortly after the Supreme Court judgments were published, a shareholder requisitioned an extraordinary general meeting to change the board. At the subsequent general meeting, shareholders voted to remove five of the remaining seven directors (two others having resigned just before the meeting) and to appoint five new directors.

This article seeks to explain how this came about, what the Supreme Court decided, what remains unresolved, how boards can avoid falling foul of the proper purpose rule and what are the implications for corporate transparency.

What happened in the JKX case

JKX is an English public company listed on the London Stock Exchange, which is the parent of a group of companies engaged in the development and exploitation of oil and gas reserves, primarily in Russia and the Ukraine.

Since it is a public company, Part 22 of the Companies Act (information about interests in a company's shares) applies to it. This Part includes section 793 under which a public company can issue a disclosure notice, seeking information about interests in its shares and about agreements and arrangements relating to the exercise of rights conferred by the holding of the shares. If the requested information is not given, the company may apply under section 794 for a restriction order, which has the effect, among other things, of preventing the shares from

1/. [2015] UKSC 71, [2015] Bus LR 1395.

OIL COMPANY JXX BECAME SUBJECT TO A RAID BY SHAREHOLDERS, ECLAIRS GROUP AND GLENGARRY OVERSEAS

being transferred or voted unless the restrictions are relaxed or removed pursuant to an application under sections 799 or 800.

As is now quite common, article 42 of JKX's articles supplements those statutory provisions by giving the directors power to issue a restriction notice, having similar effect to a restriction order, where they have reasonable cause to believe that the information provided pursuant to a disclosure notice is false or materially incorrect. Thus the board may issue a restriction notice in circumstances where JKX might not be able to satisfy the court that a restriction order should be made.

In about March 2013 the board became concerned that JKX was about to become subject to a "corporate raid" under which the persons behind two minority blocks of its shares would seek to obtain management or voting control. One block, amounting to 27.55 percent of JKX's issued share capital, was beneficially owned by Eclairs Group Ltd, a BVI company controlled by trusts associated with Mr Kolomoisky, a Ukrainian business man and politician, and Mr Bogolyubov, his business associate. They had reputations as corporate raiders. The other block, amounting to 11.45 percent of JKX's issued share capital, was held by Glengarry Overseas Ltd, a BVI company controlled by Mr Zhukov, a Russian businessman, and in which his right-hand man, Mr Ratskevych, had a small holding. The directors believed that Mr Zhukov had had business dealings with Mr Kolomoisky in the past.

In late March 2013 the directors exercised their power to cause the company to send out a first batch of disclosure notices under section 793 to elicit information about interests in, and agreements and arrangements relating to, the Eclairs and Glengarry shares.

After the responses to the first batch of disclosure notices had been received, on 23 April 2013 the directors convened the AGM,

SIMON MORTIMORE QC

to be held on 5 June 2013, at which a number of resolutions would be proposed, including ordinary resolutions to approve the directors' remuneration report, to re-elect three directors who retired by rotation and to authorise the directors to allot share capital up to a certain amount and two special resolutions to authorise the company to make market purchases and disapply statutory pre-emption rights on the allotment of shares. The special resolutions were designed to help protect JKX and its shareholders from the "raid". The directors appreciated that the special resolutions would not be passed if the Eclairs shares were voted against them and that the ordinary resolutions could well fail if Eclairs and Glengarry voted their combined 39% holdings against them.

On 13 May 2013 the directors exercised their power to cause JKX to send out a second batch of disclosure notices relating to the Eclairs and Glengarry shares and requesting that information about the number of shares held, their beneficial ownership and agreements and arrangements between the various persons interested in them be provided by 5 pm on 28 May 2013. This deadline was complied with. All respondents said they were not party to any agreement or arrangement.

On 30 May 2013 the board met to consider the responses. It decided that it had reasonable cause to believe that the information provided in the responses to the disclosure notices was materially incorrect and decided to exercise its power under the articles to issue restriction notices in respect of the Eclairs and Glengarry shares. The minutes record that the directors considered that the issue of restriction notices would promote the success of JKX for the benefit of the members as a whole, having regard to the factors set out in section 173 of the Companies Act. There was no mention of the duty under section 171(b).

Eclairs and Glengarry immediately applied for interim relief, challenging the validity of the restriction notices. This led to an interim order under which Eclairs and Glengarry could vote their shares at the AGM, but the effectiveness of their votes would be determined by the outcome of the proceedings. Directions were given for a speedy trial.

At the AGM the ordinary resolutions were passed regardless of the opposition of Eclairs and Glengarry but their votes, if valid, would cause the special resolutions to fail.

The trial before Mann J

The trial came on before Mann J at the end of July 2013. Among their challenges to the validity of the restriction notices, Eclairs and Glengarry relied on improper purpose. This was denied by JKX, but the directors' witness statements did not touch on this point. It was left for their purpose to emerge in cross-examination. In what Lord Sumption described as "a meticulous judgment", Mann J rejected all the grounds for challenging the validity of the restriction notices, except for

improper purpose.[2] He found that the majority of the directors regarded the restriction notices as a means of disenfranchising Eclairs and Glengarry, so that all the resolutions could be passed at the AGM in order to protect JKX from "raiders", and that this purpose was not linked to the extraction of information.[3] Therefore the substantial, if not principal, purpose of the directors was improper and the restriction notices had to be set aside.[4]

Mann J did not find this a particularly satisfactory outcome because he thought it virtually certain that the directors would have issued restriction notices even if they had excluded the improper purpose from their consideration and that if they had done so the restriction notices might have been saved.[5] Because this point did not emerge until Mann J raised it after cross-examination had been completed, he refused to allow JKX to rely on it.[6]

The appeals

The Court of Appeal upheld Mann J's judgment, except on the proper purpose issue.[7] As to that the court was split. The majority, Longmore LJ and Sir Robin Jacob, upheld the validity of the restriction notices, mainly on the grounds that the proper purpose doctrine had a very limited role to play in relation to a restriction notice, since its issue depended on the conduct of the respondent to the disclosure notice and was the very thing the articles empowered the directors to do if information is not provided. In what Lord Sumption called "a formidable dissent" Briggs LJ agreed with Mann J, largely for the same reasons.

The Court of Appeal gave permission to appeal to the Supreme Court on the proper purpose issue. The Supreme Court allowed the appeal and restored the decision of Mann J. The leading judgment is given by Lord Sumption with which Lord Hodge agreed, as did Lords Clarke, Mance and Neuberger in relevant part. There is a section of Lord Sumption's judgment, concerning multiple purposes, as to which Lords Clarke, Mance and Neuberger preferred not to express firm and concluded views. This was because the case had been argued before the Supreme Court on the basis that if the proper purpose rule applied, the restriction notices fell to be set aside, since Mann J had found that the notices had been issued for the principle purpose of improving the prospects of passing the ordinary and special resolutions at the AGM.[8]

The proper purpose rule is a principle by which equity controls the exercise of a fiduciary power

What the Supreme Court did decide

Lord Sumption began by rejecting JKX's argument that where the purpose of a power is not expressed by the instrument creating it, there is no limitation on its exercise save such as could be implied on the principles which would justify the implication of a term (i.e. business efficacy or obviousness). This was wrong because the proper purpose rule is a principle by which equity controls the exercise of a fiduciary power.[9] This confirms what Lord Wilberforce had said in *Howard Smith Ltd v Ampol Ltd*.[10]

Lord Sumption went on to identify the purpose of the power in the articles to issue restriction notices. He found that this power was "wholly ancillary to the statutory power to call for information under section 793".[11] As such the power had three closely related purposes: (i) to induce the shareholder to comply with the disclosure notice, (ii) to

2/. [2013] EWHC 2631 (Ch), [2014] 1 BCLC 202.
3/. Para 189.
4/. Para 227.
5/. Paras 228, 229, 235-243.
6/. Paras 230-234.
7/. [2014] EWCA Civ 164, [2014] 2 BCLC 164.
8/. Para 49.
9/. Para 30.
10/. [1974] AC 821, 834, PC.
11/. Para 31.

Directors are required to recognise the distinction between the purpose of a decision and its incidental consequence

protect the company and its shareholders against having to make decisions about their respective interests in ignorance of relevant information, and (iii) to provide a sanction for failure or refusal to provide the information so long as it persists.[12] This is a wider description of the scope of the proper purpose of the power than Mann J and Briggs LJ had given, but it does not extend to using the power to issue a restriction notice to influence the outcome of a general meeting independently of getting the required information. If a restriction notice is issued for a proper purpose, it may have the consequence that the outcome of votes at a general meeting is affected. Such a bi-product of the proper exercise of the power is to be distinguished from using the power to issue a restriction notice to manipulate the outcome of a general meeting.[13] Lord Wilberforce made much the same point in *Howard Smith*.[14]

Lord Sumption then said that directors considering the imposition of restrictions under a company's articles should proceed carefully and possibly with legal advice, since they would be exercising a draconian power which not only interferes with a shareholder's property rights, but may affect the proper operation of the market and therefore the public interest.[15] Also directors are required to recognise the distinction Lord Sumption had made between the purpose of a decision and its incidental consequence.[16] Accordingly directors should not elevate their desire to achieve the consequence, if outside the scope of the power, so that it becomes the main purpose for the exercise of the power.

Lord Sumption then moved on to expose the flaws in the reasoning of the majority in the Court of Appeal. The writer must confess to having been attracted by that reasoning.[17] After all, restrictions could only be imposed if there had been a default in responding to a disclosure notice and, if there had been such a default, what else was the board supposed to do but impose restrictions? It could hardly ignore the default. But "two wrongs do not make a right" and the power to issue a restriction notice must still be issued for one or more of the proper purposes that Lord Sumption had identified. He went on to point out that a restriction notice affects other shareholders and that, since the notice could be issued where the directors reasonably believed that a defective answer had been given, it could be issued in highly debatable circumstances.[18]

Once those principles were applied to the facts of the JKX case, the outcome was clear since, when considering whether to issue restriction notices, the majority of the board was only interested in the impact the notices would have on the forthcoming AGM. JKX, through its directors, erroneously believed that was a proper purpose and did not attempt to support the decision to issue the notices on a narrower and proper basis.[19]

The area of debate: multiple purposes

Lord Sumption also considered how the court approaches a case where a power is exercised for "multiple purposes, all influential in different degrees but some proper and others not".[20] He referred[21] (para 18) to the seminal judgment of Dixon J in *Mills v Mills*[22] who said that the court looks for "the substantial object the accomplishment of which formed the real

12/. Para 32.
13/. Paras 33 and 37.
14/. At page 837.
15/. Para 36.
16/. Paras 36 and 37.
17/. See article in South Square Digest, November 2014: The Eclairs case and the "proper purpose" duty head to the Supreme Court.
18/. Para 39.
20/. Para 17.
21/. Para 18.
22/. (1938) 60 CLR 150, 185-186.

LORD SUMPTION: THE PROPER PURPOSE RULE IS A PRINCIPLE BY WHICH EQUITY CONTROLS THE EXERCISE OF A FIDUCIARY POWER

ground for the board's decision. If this is within the scope of the power, then the power has been validly exercised." He then referred[23] to the later decision of the High Court of Australia,[24] where Mason, Deane and Dawson JJ said that an exercise of a fiduciary power will be invalidated "if the impermissible purpose was causative in the sense that, but for its presence, "the power would not have been exercised"". Lord Sumption agreed with this test and concluded that Lord Wilberforce's speech in *Howard Smith*[25] was to the same effect.[26]

Lord Mance was of the view that determining the test to be applied where multiple purposes are in play required further debate.[27] He was not convinced that a "but for" test should replace one based on identifying the principal primary or substantial purpose. He noted that, relying on *Howard Smith*, *Buckley on the Companies Act*[28] suggested that section 171(b) should be construed as meaning that "a director must exercise his powers primarily (or substantially) only for the purposes for which they are conferred" and that Dixon J had adopted the "substantial object" test because the court is not as exacting in scrutinising a director's purposes as it is with a trustee. If a "but for" test is adopted, Lord Mance wondered what standard should be applied if directors assert that they would have made the same decision even if they had not had the illegitimate purpose in mind.

23/. At para 22.
24/. (1987) 162 CLR 285, 294.
25/. At pages 832 and 834.
26/. Paras 23-24.
27/. Paras 51-55.
28/. At para 3[869].

Directors considering the exercise of the power to issue a restriction notice should proceed with care and legal advice

Is probability enough or is inevitability required?

In this connection it is interesting to see how the court has approached the question of purpose under section 423 of the Insolvency Act 1986 (transactions defrauding creditors). In the leading case *IRC v Hashmi*[29] Arden LJ concluded that purpose of defeating creditors did not have to be the sole or dominant purpose; it was sufficient that it was "a real substantial purpose" and not merely a bi-product or consequence of the transaction. This test echoes the test applied by Dixon J and Lord Wilberforce. Laws LJ agreed and said that the claimant must show that "the donor, vendor or settlor was substantially motivated by one or other of the aims set out in ss 423(3)(a) and (b) in entering into the transaction in question".[30] Simon Brown LJ also explored the approach to be taken to the "substantial purpose" test.[31] He rejected the notion that the transaction could stand if it would have been entered into anyway, because that would defeat the purpose of the section in a case where a substantial factor in the donor's thinking had been putting property out of the reach of creditors. That point, which was directed to identifying an interpretation of section 423 which supports the purpose of the section, may not apply, or not apply with the same force, to a case about the scope of the duty under section 171(b), where a "but for" test may be appropriate.

Avoiding the proper purpose trap

The main lesson to be learnt from the *Eclairs* case is that directors considering the exercise of the power to issue a restriction notice or to take any other step that might affect decision-making by shareholders should proceed with care and legal advice, recognising that (i) the duty under section 171(b) is distinct from that under section 173 and that all general duties must be complied with, (ii) the purpose for which a thing is done is distinct from its consequences or bi-products, and (iii) when making their decision, they should put out of their minds all improper purposes.

In the same way that directors frequently record in the minutes why they considered that a particular step is in the best interests of the company, in any case where the proper purpose duty is or may be engaged, the directors should expressly record the purposes that led them to make their decision, making it clear that they were not influenced by improper purposes. If they have not left such a record and the propriety of their purpose is challenged, they should consider passing a confirmatory resolution under which the impugned decision is justified only by proper purposes. In the *Eclairs* case the board left it too late to take such a step.

The directors may quite properly issue a restriction notice as a sanction for failure to provide the information required in the disclosure notice, provided that obtaining the information is of at least some importance to them.[32] It is likely to be prudent to keep separate the decision to issue the restriction notice and the decision to take other steps that may be open to the company while the restriction is in force. The problem for the directors of JKX was that they had already convened the AGM at which shareholders would be asked to approve ordinary and special resolutions before they had issued the disclosure and restriction notices. Imposing restrictions was an essential step if the directors were to obtain the approval of shareholders to all the resolutions.

29/. [2002] 2 BCLC 489, CA, at paras 19, 23 and 25.
30/. Para 33.
31/. Paras 37-40.
32/. Lord Sumption at para 33.

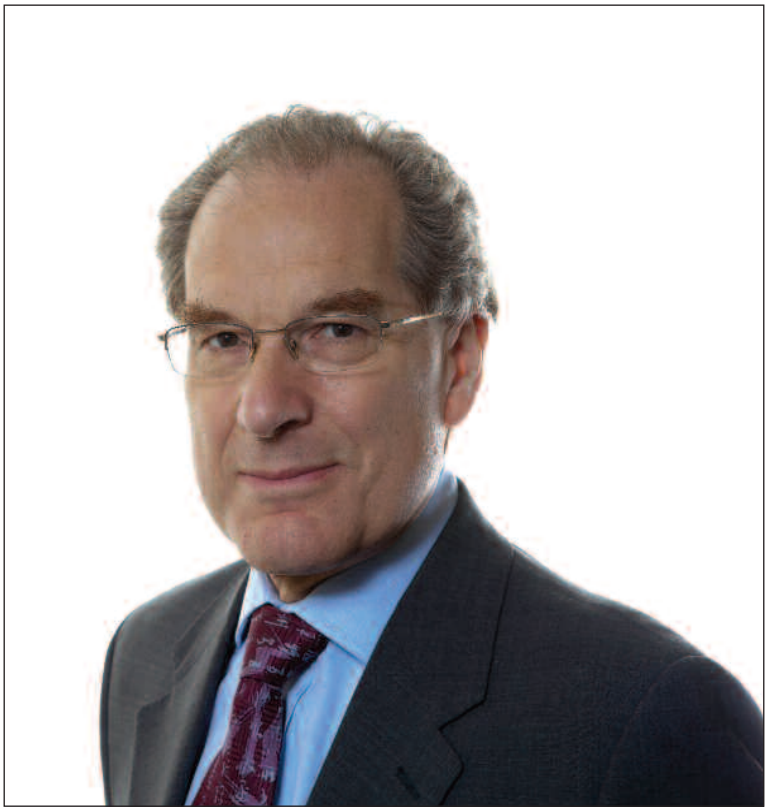
Implications for transparency

The implications of the *Eclairs* case for transparency are likely to be very limited. A company's ability to apply for a restriction order under section 794 of the Companies Act is unaffected. Although there were many reported cases on the predecessor provisions to section 794 in the 1980s, there have been none since then. In part this may be because companies rely on their own bespoke articles giving directors the power to issue restriction notices. It may also be due to the fact that the court would not make or continue a restriction order where there has been an apparently full, even if implausible, answer.[33]

A bespoke article, giving the directors power to issue a restriction notice where it knows or has reasonable cause to believe that the information provided in response to a disclosure notice is false or materially incorrect is therefore much more satisfactory. It is possible that the *Eclairs* case may encourage respondents to disclosure notices to challenge restriction notices on the ground that the company does not really need or want the information. In relation to interests in shares, that is likely to be a difficult argument, because a company has an unqualified right to know who is the real owner of its shares. The reasons why it wants the information are irrelevant.[34] On the other the argument the argument may find more fertile ground in relation to voting arrangements. If two shareholders tell the company they will vote against a resolution, it may not matter to the company that they have agreed between each other that that is what they would do.

Final thoughts

For the future, boards who act with the benefit of legal advice should not find themselves tied up in the way the board in JKX was: knowing that they would have imposed restrictions anyway, but being unable to deploy that argument in court. They will record that they only acted for a proper purpose, so making it very difficult for anyone to challenge their decision. If nevertheless a challenge is maintained, the court may have to resolve the issue left undecided in the *Eclairs* case and decide what test to apply in a multiple purpose case. The likelihood is that the court will follow Lord Sumption and adopt a "but for" test, so that the directors will be regarded as complying with their duty only to exercise their powers for proper purposes unless the court is satisfied that, but for the presence in their minds of an improper purpose, the power would not have been exercised. Where a disclosure notice has not been complied with, it will be very difficult to persuade the court that the board would not have issued a restriction notice anyway, regardless of what it planned to do while the restrictions were in force.



LORD MANCE: WAS OF THE VIEW THAT DETERMINING THE TEST TO BE APPLIED WHERE MULTIPLE PURPOSES ARE IN PLAY REQUIRED FURTHER DEBATE

This article first appeared in the March 2016 edition of the Butterworths Journal of International Banking & Financial Law.

33/. Re Ricardo Group plc (No 2) [1989 BCLC 766.
34/. Re TR Technology Investment plc [1988] BCLC 256, 275, 276, per Hoffmann J.

Codere: a development in the cross-border scheme jurisdiction

David Allison QC and **Ryan Perkins** consider the latest episode in the developing jurisprudence on cross-border schemes of arrangement

In December 2015, Newey J sanctioned a scheme of arrangement promulgated by *Codere Finance (UK) Limited*: [2015] EWHC 3778 (Ch). The scheme formed part of a wider restructuring of the Codere group, and had significant cross-border features. In particular: the group carried on business in Latin America, Italy and Spain (but not in England); the scheme liabilities were governed by New York law; and the scheme company became a co-obligor of the scheme liabilities for the sole purpose of promulgating the scheme and engaging the jurisdiction of the English court. These factors did not dissuade Newey J from sanctioning the scheme. In his judgment, Newey J described the scheme as an example of "good forum shopping".

This article explains the main features of the *Codere* scheme, and considers the impact of Newey J's judgment on future cross-border schemes of arrangement. This article also considers the reasons why the court was satisfied that it was appropriate to convene a single meeting of the scheme creditors, notwithstanding that certain creditors received significant fees for back-stopping the new money to be raised pursuant to the scheme and additional director nomination rights under the scheme.

Background

The Codere group carried on business by way of gaming and similar activities in Latin America, Italy and Spain. Codere SA, a company incorporated in Spain, was the ultimate holding company of the Codere group. The group's main sources of finance consisted of a senior facilities agreement and, more importantly for present purposes, two series of notes. The issuer of the notes was Codere Finance (Luxembourg) SA ("Codere Lux"), a subsidiary of Codere SA. Codere SA and several of the key operating subsidiaries of the group acted as guarantors of Codere Lux's obligations under the notes. The notes were governed by New York law, but were subject to an intercreditor agreement governed by English law. By the time of the scheme, over EUR 1.46bn was due in respect of the notes.

Following a payment default on the notes in 2013, the group entered into restructuring negotiations with its noteholders. The parties gave extensive consideration to the restructuring mechanisms available in the jurisdictions where the group carried on business. It was concluded, however, that the available options would all involve formal insolvency proceedings in respect of one or more group companies. This created a significant problem. The group held gaming licences in a number of jurisdictions, which were liable to be terminated upon the commencement of formal insolvency proceedings. The termination of the gaming licences would have been fatal to the group's business.

Schemes of arrangement are not normally regarded as formal insolvency proceedings: there is no statutory stay on enforcement action against the scheme company, there is no requirement for the scheme company to be insolvent (or on the verge of insolvency), and the scheme jurisdiction arises under company legislation rather than insolvency legislation. As a result, it was believed that the implementation of a scheme would not threaten the continued existence of the Codere group's gaming licences.

It was for this reason that the group decided, in close consultation with its creditors, to formulate a scheme of arrangement. The object of the scheme (within the wider context of the restructuring of which the scheme formed a part) was to replace the existing notes with new notes and to effect a partial debt-for-equity swap.

When the restructuring negotiations began in 2013, none of the companies in the Codere group were incorporated in England. In

THE UK COURT-APPROVED DEBT RESTRUCTURING OF SPANISH-BASED CODERE SA, CEMENTS LONDON'S ROLE AS A LEGAL HUB FOR TROUBLED COMPANIES WORLDWIDE

itself, this did not create a problem of jurisdiction: the court has jurisdiction to sanction a scheme in respect of "any company liable to be wound up under the Insolvency Act 1986" (section 895(2) CA 2006), which includes foreign companies. However, where a scheme is proposed by a foreign company, the court will not exercise its discretion to sanction the scheme unless there is a sufficient connection with England: see *Re Drax Holdings Ltd* [2004] 1 WLR (Lawrence Collins J) and *Re Magyar BV [2014] BCC 448* at [14] (David Richards J). Given that: (i) none of the existing group companies were incorporated in England; (ii) no group companies had their COMI in England or carried on business in England; and (iii) none of the notes were governed by English law, there was believed to be a risk that a sufficient connection to England could not be established.

To deal with this problem, a number of strategies were explored. Ultimately, it was decided that Codere SA would acquire an English SPV known as Codere Finance (UK) Limited ("Codere UK"). Codere SA caused Codere UK to accede to the notes as a "co-issuer" thereof, pursuant to the terms of the indentures governing the notes. By virtue of this accession, Codere UK assumed primary, joint and several liability for all of Codere Lux's obligations in respect of the notes. The sole purpose of acquiring Codere UK, and of causing Codere UK to accede to the notes as a co-issuer, was to engage the scheme jurisdiction of the English court. It was Codere UK, rather than any of the other group companies, which formally proposed the scheme. The use of an English company was designed to forestall any argument that the scheme company lacked a sufficient connection to the jurisdiction.

The scheme provided for the release of all group companies (including Codere UK, Codere Lux, Codere SA and the operating subsidiary guarantors) from their obligations in respect of the existing notes. It is well-established that a scheme of arrangement can release third party liabilities where this is necessary to give effect to the scheme: see *Re Lehman Brothers International (Europe) (No. 2)* [2010] Bus LR 489 at [65] (Patten LJ); *Re La Seda de Barcelona* [2010] EWHC 1364 (Ch) at [20]-[22] (Proudman J); and *Re Magyar Telecom BV* [2014] BCC 448 at [33] (David Richards J). In return for the cancellation of the existing notes, scheme creditors received a complex basket of scheme consideration, consisting of new notes and equity in the group.

The commercial terms of the scheme were complex, and are largely irrelevant for present purposes. It is

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significant, however, that the terms and structure of the scheme were approved by over 97% of the scheme creditors, who entered into lock-up agreements with the scheme company. The remaining creditors were not "hold-outs", but were simply beneficial holders of the notes who could not be identified, or who had not responded to communications from Codere UK through the clearing systems. It is also significant that about 22% of the scheme creditors by value were domiciled in England.

Codere UK filed expert evidence that the scheme (including the third party releases) would be recognised under New York law, pursuant to Chapter 15 of the US Bankruptcy Code. Given that the notes were governed by New York law, expert evidence of this nature was essential to establish that the scheme would achieve its purpose: see *Re Magyar Telecom BV* [2014] BCC 448 at [16] (David Richards J). Unlike in *Magyar*, recognition under Chapter 15 was stipulated as a non-waivable condition precedent to the effectiveness of the scheme. Codere UK also filed expert evidence that the scheme would be recognised in Luxembourg (where Codere Lux was incorporated) and all of the jurisdictions where the guarantors carried on business.

Finally, Codere UK filed evidence that the only real alternative to the scheme was a formal insolvency process, which would result in a projected return of nil for the scheme creditors (compared to a minimum projected return of 47% under the scheme).

The convening hearing

At the convening hearing (before Nugee J), Codere UK argued that the scheme creditors formed a single class, such that a single scheme meeting of the scheme creditors should be convened. Nugee J accepted this submission: see [2015] EWHC 3206.

Under the terms of the scheme, there were various differences between the treatment of certain scheme creditors. However, Nugee J accepted that the differences were not so great as to fracture the cohort of scheme creditors into different classes. The most interesting class issues concerned director nomination rights and backstopping fees.

(i) Director nomination rights

The scheme consideration included an allotment of equity in the ultimate holding company of the Codere group. If a scheme creditor received a sufficient allotment of equity, that creditor would be entitled (pursuant to the terms of shareholders' agreement to be entered into under the scheme) to nominate certain directors to the board of the group's ultimate holding company (in proportion to their holdings of notes). Based on information available to Codere UK, it was possible to identify the expected recipients of director nomination rights.

Codere UK accepted that the director nomination rights could be regarded as a difference in the rights conferred on scheme creditors under the scheme. However, Codere UK contended that this difference was not so great as to make it "impossible for [the scheme creditors] to consult

together with a view to their common interest": per *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 at 583 (Bowen LJ). Codere UK relied on *Re Co-Operative Bank plc* [2013] EWHC 4072 (Ch) at [27]-[28] (Hildyard J) and *Re Telewest Communications plc* [2004] EWHC 924 (Ch) (David Richards J), in which the court held that one-off director nomination rights did not create a separate class of those who were able to exercise such rights.

The Judge was also referred to *Re Stemcor Trade Finance Ltd* [2015] EWHC 2662 (Ch) at [21]-[22], in which Snowden J suggested (without deciding the point) that a scheme which conferred the right to appoint executive directors on certain scheme creditors could give rise to a class division. However, Snowden J also said that the right to appoint a non-executive director would be unlikely to give rise to a class division:

"It seems to me that, although this might be said to constitute a difference in rights available to those lenders under the scheme, those rights of participation in management are limited. They are also not accompanied by any prospect of financial reward. Having regard to the issues to be considered in relation to the scheme overall, in my judgment such rights are not sufficiently different so as to require the putative holders of those rights to be placed into a different class from other lenders who will not ultimately enjoy those rights. I was also told that only two of the Scheme Creditors are likely to qualify to exercise such rights, and I would have had substantial reservations as to whether it was appropriate to constitute such a small class with potential veto rights: see Hawk Insurance [2001] 2 BCLC 480 at [32]-[33]."

Codere UK submitted that the rights conferred by its scheme were more analogous to the second set of more limited rights in *Stemcor* than the rights which caused Snowden J

Although Nugee J accepted Codere UK's submissions on class composition, he was concerned by the cross-border aspects of the scheme

concern. Nugee J accepted this argument, and convened a single scheme meeting. However, he stated that the point was not an easy one: see the convening judgment at [2].

On the facts of *Codere*, it is suggested that Nugee J reached the correct decision. The starting point is that classes should not be proliferated beyond necessity, "lest by ordering separate meetings the court gives a veto to a minority group" (per Chadwick LJ in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [33]). The director nomination rights did not make it impossible for all of the scheme creditors to consult together with a view to their common interest. Indeed, this is apparent (with the benefit of hindsight) from the fact that the scheme was ultimately approved by all of the scheme creditors who voted at the meeting: see below. In future cases, however, the impact of awarding director nomination rights to a limited class of creditors remains somewhat uncertain. *Codere*, *Co-Op* and *Telewest* illustrate that such rights will not necessarily give rise to a class division, but *Stemcor* illustrates that the matter may be highly fact-specific.

(ii) Backstopping fees

Under the wider restructuring of which the scheme formed a part, Codere UK sought new monies from its creditors (in return for various new securities). In order to be certain that the necessary amount of new monies would be provided, it is normal market practice for one or more persons to underwrite (or "backstop") the subscription of the new securities. The underwriters (or "backstop providers") will invariably receive a fee for providing this service.

In *Codere*, certain of the scheme creditors agreed to act as backstop providers. In return, they received consideration by way of a cash premium ranging from 2% to 5% of the relevant backstopped securities, as well as up to 10% of the equity in the ultimate holding company of the group. Codere UK adduced evidence to demonstrate that the fees should be regarded as a fair market rate.

Codere UK contended, and Nugee J accepted, that these backstopping arrangements did not give rise to a class issue which fractured the single class of scheme creditors. Nugee J observed that the backstopping fees were *de minimis* in comparison to the total scheme liabilities: see the convening judgment at [3].

It is suggested that Nugee J's analysis on this point is correct. The court has consistently held that underwriting fees at a fair market rate do not create class issues: see e.g. *Re Co-Operative Bank plc* [2013] EWHC 4072 (Ch) at [23]-[26] (Hildyard J). It is very common for restructurings to involve the raising of new money, and it would be undesirable if this practice gave rise to class issues in schemes of arrangement. *Codere* illustrates that the sensible approach in *Co-Op* is likely to be followed in future cases.

(iii) Jurisdiction

Although Nugee J accepted Codere UK's submissions on class composition, he was concerned by the cross-border aspects of the scheme. Nugee J said ([at [7]-[9] of the convening judgment):

"I will just very briefly, for the

The scheme was unanimously approved by all of the noteholders who voted at the scheme meeting

benefit of whoever hears the sanction hearing, say that what strikes me as, on the face of it, slightly novel, so far as I am aware, is that this is a group of companies with a Spanish holding company and operating companies trading in Europe and Latin America with no apparent connection with the UK before the restructuring took place, apart from a fact which I regard as of not great significance in this context, which is that an intercreditor agreement was governed by English law. The notes which are sought to be restructured are obligations of a Luxembourg company. They are obligations governed by New York law, and it is clear from the evidence that the connection with the UK has been brought about deliberately by the acquisition of the scheme company as a UK company, the UK company then accepting liability as a co-obligor under the New York governed notes, and then the UK company seeking a restructuring, which will have the effect, it is suggested, of not only restructuring the UK company's liabilities, but also the Luxembourg company's liabilities and the guarantee liabilities of other companies within the group.

That seems to me, at first blush, to be quite an extreme form of forum shopping, in which the restructuring is brought in the UK purely by incorporating a company to take on very large liabilities. I did raise the question of how the directors of the UK company could regard it as in the interests of their company to take on such large liabilities, to which Mr. Allison gave the answer that, since the company was not insolvent, its interests were to be aligned with those of its principal shareholder, which was the holding company.

I regard all these matters as giving rise to quite serious issues which should be looked at at the sanction hearing, without any encouragement from the fact that I have made a convening order, to be taken as to whether I regard this as an appropriate case for a scheme to be sanctioned or not."

Nugee J did not suggest that Codere UK lacked a sufficient connection to England. Given that Codere UK was incorporated in England, the question of sufficient connection did not strictly arise. However, Nugee J was concerned that the scheme involved an "extreme form of forum shopping", which could lead the court to refuse to sanction the scheme in the exercise of its general discretion.

The sanction hearing

The scheme was unanimously approved by all of the noteholders who voted at the scheme meeting (representing, in aggregate, more than 97% of the scheme creditors by value). Nearly all of the scheme creditors wrote letters to the English court voluntarily submitting to its jurisdiction. In the absence of any opposition to the fairness of the scheme, the only live issue at the sanction hearing (before Newey J) was whether the court itself was willing to exercise its discretion to sanction the scheme.

Codere UK contended that the concerns expressed by Nugee J at the convening hearing should not deter the court from sanctioning the scheme. Codere UK was supported by an ad hoc committee of scheme creditors, who appeared by counsel at the sanction hearing. Newey J accepted Codere UK's argument, and duly sanctioned the scheme: see [2015] EWHC 3778 (Ch).

In the sanction judgment at [16], Newey J noted that the Codere group had a number of connections with England:

"I have referred already to the intercreditor agreement dating back to 2005 which, as I have said, is governed by English law. I have mentioned, too, the fact that a significant percentage of the noteholders are domiciled in England, and it is noteworthy too that some 97 percent of the noteholders by value have now submitted to the jurisdiction of the English court. On top of those features, it can be said that the note trustee and security trustee have, since the notes were issued, performed their functions from offices in London and that other relevant documents, including for example the lock-up agreements which have been entered into, are also governed by English law. In the circumstances, the fact that the company is incorporated in England is not the only connection with this jurisdiction."

Further (and in any event), Newey J noted that "the authorities show that over recent years the English courts have become comfortable with exercising the scheme jurisdiction in relation to companies which have not had longstanding connections with this jurisdiction": see the sanction judgment at [17]. The Judge referred to a number of authorities, some of which are set out below, and concluded:

"In a sense, of course ... what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping

can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.

In the particular circumstances of this case, I cannot see that the fact that the company has been acquired only recently, and with a view to invoking the scheme jurisdiction, should cause me, in the exercise of my discretion, to decline to sanction the scheme. For reasons I have already touched on, the scheme appears to be very much in the interests of the group's creditors. I bear in mind in that context the fact that it was devised following close consultation with creditors; the overwhelming level of support that it has enjoyed from creditors; the fact that no creditor has opposed the scheme; the lack of alternatives available to the group in other jurisdictions; and the fact that, on the evidence, my declining to sanction the scheme could cause the group and its creditors a loss of value of around EUR 600 million, by any standards a large sum."

This passage is significant because it recognises, perhaps more clearly than any of the other cases on cross-border schemes of arrangement, that there is nothing wrong with "forum shopping" which is done "with a view to achieving the best possible outcome for creditors". In such cases, "if it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping".

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It is suggested that Newey J was correct to sanction the scheme, and that he was right to distinguish between good forum shopping and bad forum shopping. There is a world of difference between a case where a German dentist attempts to make himself bankrupt under English law following a bogus COMI-shift in order to escape his lawful debts, and a case where a company elects to pursue a restructuring in a jurisdiction with suitable laws, in consultation with its creditors and for their exclusive benefit.

The distinction between good forum shopping and bad forum shopping is well-established in the case law of the CJEU: see the Opinion of AG Colomer in Case C-1/04, *Staubitz Schreiber* [2006] ECR I-701 at [70]-[73], and the Opinion of AG Colomer in Case C-339/07, *Seagon v Deko Marty Belgium NV* [2009] ECR I-1767 at footnote 49. In the context of schemes of arrangement, the weight of academic opinion also supports the view that forum shopping is generally to be encouraged rather than discouraged: see Payne, "Cross-Border Schemes of Arrangement and Forum Shopping" (2013) 4 European Business Organization Law Review 563 at 586-

Newey J held that the concerns expressed by Nugee J should not deter him from sanctioning the scheme

588. Outside the context of insolvency and restructuring, the distinction between good forum shopping and bad forum shopping is well-established. As Lord Simon of Glaisdale said in *The Atlantic Star* [1974] AC 436 at 471:

"Forum-shopping is a dirty word; but is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor indignation."

Or as Lord Denning memorably said in the Court of Appeal (*The Atlantic Star* [1973] 1 QB 364 at 381-2):

"No one who comes to these courts asking for justice should come in vain **...** This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping' if you please, but if the forum is England, it is good place to shop in, both for the quality of the goods and the speed of service."

The court has sanctioned numerous schemes of arrangement in respect of liabilities governed by foreign law. Examples include *Re PT Garuda Indonesia* [2001] EWCA 1696 (approving the decision of Lloyd J at first instance); *Re Telewest Communications plc* [2004] BCC 342 (David Richards J); *Re Gallery Capital SA* (unreported judgment dated 21 April 2010) (Norris J); *Re Magyar Telecom BV* [2014] BCC 448 (David Richards J); *Re Zlomrex International Finance SA* [2015] 1 BCLC 369 (Mann J); and *Re New World Resources NV* [2015] BCC 47 (Norris J). In each of the more recent cases, the foreign-governed liabilities were owed by a foreign-incorporated entity which had shifted its COMI to England for the sole purpose of utilising the scheme jurisdiction. (In *PT Garuda*, the scheme company was based in Indonesia and had not even shifted its COMI to England.)

Further, it is not necessarily abusive or unjustifiable for a company to assume liabilities for the sole purpose of using restructuring or insolvency proceedings available under English law. Numerous cases can be cited in support of this proposition. Perhaps the most significant authority, to which Newey J referred in the sanction judgment at [17], is the decision of Norris J in *Re AI Scheme Ltd*, reported at [2015] EWHC 1233 (Ch) (convening judgment) and [2015] EWHC 2038 (Ch) (sanction judgment). In that case, a scheme was proposed in order to provide compensation to customers of the Affinion Group, a supplier of consumer credit products. One of the group companies, known as Affinion International Limited, was the main entity liable for the mis-selling claims, but did not wish to propose the scheme itself (which would have triggered an event of default under its financing documents). Instead, the scheme was proposed by an "orphan vehicle" incorporated in England for the sole purpose of promulgating the scheme. The scheme company executed a deed poll, whereby it unilaterally covenanted to become a co-obligor in respect of mis-selling liabilities owing by Affinion International Limited and its "business partners". The scheme provided for a compromise of those liabilities, both as against the scheme company and as against third parties (including Affinion International Limited and its business partners).

Norris J recognised that the scheme company had been deliberately incorporated for the sole purpose of assuming liabilities as a co-obligor, which would then be compromised under the scheme. This did not, however, create a jurisdictional difficulty. In the convening judgment at [26], Norris J said:

"The scheme company is, as I have said, a 'company' proposing an 'arrangement' with its creditors within section 895, and there is no reason to read into that section some limitation to exclude entities such as the scheme company. The structure has not been created as a matter of mere artifice; it has a solid grounding in commercial necessity. I therefore hold that the proposed scheme is one within the section, in relation to which I can order convening meetings."

Nor did the structure create difficulties of discretion: the scheme was later sanctioned by the same Judge. There is clearly a close parallel between *AI Scheme Ltd* and *Codere*, as Newey J recognised in the *Codere* sanction judgment at [17]. There are several other cases in which a company has deliberately assumed liabilities for the purpose of using restructuring or insolvency proceedings under English law, including *Re Privatbank* [2015] EWHC 3186 (Ch) (Asplin J) and [2015] EWHC 3299 (Ch) (David Richards J); *Re Christophorus 3 Ltd* [2014] EWHC 1162 (Ch) (Henderson J); and *Sompo Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch) (David Richards J).

During the sanction hearing in *Codere*, Newey J was referred to numerous other schemes involving various forms of "forum shopping" which were sanctioned by the court. Perhaps the leading case of this type

is *Re Apcoa Parking Holdings GmbH* [2015] BCC 142. The *Apcoa* scheme involved the compromise of liabilities under a facility agreement which had, at all material times prior to the launch of the scheme, been governed by German law and subject to the jurisdiction of the German courts. The governing law of the scheme liabilities was changed to English law and the jurisdiction clause was changed to the English courts for the sole purpose of creating a sufficient connection to England. The opposing scheme creditor argued that the change of governing law amounted to little more than abusive forum-shopping (see the judgment at [223] and [236]). The court rejected these arguments and sanctioned the scheme. Hildyard J held that it was not abusive to change the governing law of the scheme liabilities to English law for the sole purpose of establishing a sufficient connection with the jurisdiction, especially where there is no viable alternative procedure to a scheme in England which would avoid insolvency proceedings in respect of the group: see the judgment at [244]. *Apcoa* was applied and approved by Rose J in *Re DTEK Finance BV* [2015] EWHC 1164 (Ch).

Each of the COMI-shifting cases cited above also involved "forum shopping", yet this did not create any difficulties. Forum shopping via COMI-shifting is also a common phenomenon in the context of administration: see *Re Hellas Telecommunications (Luxembourg) II SCA* [2010] BC 295 and *Re European Directories (DH6) BV* [2012] BCC 46.

In *Re PT Garuda Indonesia* (unreported judgment dated 4 October 2001; affirmed on appeal, [2001] EWCA Civ 1696), Lloyd J sanctioned a scheme of arrangement proposed by a state-owned Indonesian company to compromise claims including liabilities governed by Indonesian law. On any view, the scheme company's connections with England were minimal: it had not even shifted its COMI from Indonesia to England. Lloyd J nevertheless said:

"As regards the choice of proceeding in England and Singapore and not in Indonesia, that too is a rational commercial decision, justifiable by reference to objective factors described in the Explanatory Statement. Of course one would normally expect a corporate entity to look first to the law of the place of its incorporation **...** but if that law, for whatever reason, does not provide a procedure that seems likely to meet the needs of the Company according to the board's best judgment, the Company cannot be criticised for having recourse to another jurisdiction and law available to it if that offers the possibility of achieving the desired result in a sensible way."

Ultimately, there is no fundamental distinction between the forum shopping in *Codere* and the forum shopping in numerous other schemes which the court has sanctioned in recent years. Newey J's analysis was therefore correct.

Conclusion

Codere is an important step in the fast-developing jurisprudence relating to cross-border schemes of arrangement. It should be emphasised, however, that a similar strategy may not be effective in all cases. It cannot be assumed that a group with no connection to England can promulgate a scheme of arrangement simply by incorporating a new company, causing the new company to execute a deed poll (or similar) such that it becomes a co-obligor in respect of the relevant liabilities, and causing the new company to propose a scheme which provides for the release of the relevant liabilities as against the entire group.

This strategy was successful in *Codere* because: (i) the scheme was designed in close consultation with creditors; (ii) the scheme was unanimously approved by all of the scheme creditors who voted at the meeting (representing more than 97% of the noteholders by value), most of whom voluntarily wrote letters submitting to the jurisdiction of the court; (iii) it was clear, on the basis of expert evidence, that the scheme would be recognised in all relevant jurisdictions, and recognition in New York was a non-waivable condition precedent to the implementation of the scheme; (iv) it was clear, on the basis of expert evidence, that there was no alternative to the scheme under the law of any jurisdiction which would benefit the creditors as a whole; and (v) there were a number of pre-existing connections to England, including a large number of creditors domiciled in England and an English intercreditor deed.

Without the above ingredients, it is uncertain whether the *Codere* strategy would have succeeded. If it were always possible for a group with no connection to England to promulgate a scheme of arrangement simply by incorporating a new company, causing the new company to execute a deed poll (or similar) such that it becomes a co-obligor in respect of the relevant liabilities, and causing the new company to propose a scheme which provides for the release of the relevant liabilities as against the entire group, then it is arguable that the "sufficient connection" test would be deprived of any meaningful application. Accordingly, care should be taken in structuring future schemes in this manner.

David Allison QC, Richard Fisher and Ryan Perkins appeared for Codere UK; Antony Zacaroli QC and Charlotte Cooke appeared for the Ad Hoc Committee

Case Digests

LLOYD TAMLYN

The Privy Council, in *Vizcaya Partners Limited v Picard*, has rejected an attempt by Mr Irving Picard, the Trustee in the New York liquidation of the BLMIS (i.e. Madoff) estate, to enforce, under Common Law in Gibraltar, judgments in default against a former customer of BLMIS entered by the New York Court under anti-avoidance provisions of the US Bankruptcy Code. The customer had received substantial payments from BLMIS prior to its collapse in December 2008, when the Madoff Ponzi scheme was exposed. The trading agreements between the customer and BLMIS were subject to New York Law, and contained no express submission to the New York jurisdiction.

Lord Collins, delivering the Advice, concluded that a person might implicitly consent in advance to submit to the jurisdiction of the foreign court: but that whether, in a contractual context, he had given that consent depended on the implication of a term either as a matter of law or of fact, both issues being governed by the law which governs the contract. There being no relevant expert evidence of any such implication under New York law, the Trustee could not enforce the default judgments. The Privy Council found a further formidable difficulty in the way of allowing enforcement: even if consent had been implied, that consent would *prima facie* not include submission to the foreign insolvency proceedings, and thus submission to judgments entered under the anti-avoidance insolvency provisions of the US Bankruptcy Code.

Elsewhere, the Court has reiterated the obligation on a foreign representative seeking recognition of a foreign insolvency proceeding under the Model Law to make full and frank disclosure (*Nordic Trustee ASA v OGX Petroleo*). The foreign representative had applied for recognition, and thus the benefit of the statutory stay, solely to take the benefit of a stay of arbitration proceedings brought by a creditor whose claim was not subject to the foreign insolvency process at all: an abuse of process, the Judge held. In *Re Ralls Builders Ltd*., the Court has reaffirmed that before it will make any order against directors for contributions in respect of wrongful trading, it must be satisfied that the wrongful trading has caused loss to the relevant company (rather than to any class of its creditors), so that the contribution will, almost invariably, be equal to the amount, if any, by which the wrongful trading has caused the net deficiency in the company's assets to increase. *Stevensdrake Ltd v Stephen Hunt* illustrates some of the pitfalls and expense which can arise where solicitors agree to act for insolvency practitioners on a CFA. Despite the terms of the CFA providing for payment to the solicitors irrespective of whether any actual recovery was made, the terms were held to be subject to a prior understanding that payment would only be made out of recoveries. In a post-script, the Judge commented that an elephant had been lurking in, or at least peering through the glass panelled doors into, the courtroom, namely whether the arrangements insisted on by the insolvency practitioner offended the indemnity principle (an issue he did not need to decide). Another extended metaphor was born in *Aabar Block SARL v Maud*, a case which elaborated a fine distinction between bankruptcy petitions presented for a collateral purpose and those for an ulterior object.

After quoting Thomas H. Jackson's explanation of the logic of bankruptcy law in terms of fish in a lake, the Registrar held that the petitioners were not seeking a bankruptcy order for the benefit of all those with fishing rights in the bankruptcy lake, and since all those fishing at the water's edge would not benefit in the same way, the petition would be adjourned to allow the debtor time to pay.

Lloyd Tamlyn

BANKING AND FINANCE

Digested by TOBY BROWN


TOBY BROWN

LBG Capital No. 1 Plc v BNY Mellon Corporate Trustee Services Limited [2015]

EWCA Civ 1257 (Gloster LJ, Sales LJ, Briggs LG, 10 December 2015)

Enhanced capital notes – redemption – interpretation

This was an expedited appeal against a decision of the Chancellor reported in the August 2015 edition of the Digest. In issue was whether the Issuers were entitled to redeem, in advance of the maturity dates, certain contingent convertible securities known as Enhanced Capital Notes ("ECN") which were issued in 2009 by the Lloyds Banking Group ("LBG"). Such a redemption could take place if a Capital Disqualification Event ("CDE"), as defined in Condition 19 of the terms of the ECNs had occurred and was continuing.

At first instance, BNY Mellon, Trustee of the ECNs sought a declaration that the Issuers could not redeem the ECNs in advance of the contractual maturity dates. The Issuers, which were special purpose companies in LBG, argued that the ECNs could be redeemed because a CDE had occurred given that the ECNs were not taken into account in the stress test on LBG carried out by the PRA in December 2014. Condition 19 of the ECN trust deeds provided that a CDE would be deemed to occur *"if as a result of any changes to the Regulatory Capital Requirements or any change in the interpretation or application thereof by the FSA, the ECNs shall cease to be taken into account in whole or in part (save where this is only as a result of any applicable limitation on the amount that may be so taken into account) for the purposes of any "stress test" applied by the FSA in respect of the Consolidated Core Tier 1 ["CT1"] Ratio."*

The Chancellor decided that a CDE had not occurred, but gave permission to appeal because the case raised matters of general importance. In the Court of Appeal Gloster LJ gave the main judgment, with whom Sales LJ agreed and Briggs LJ agreed, substantially for the reasons given by Gloster LJ.

Of the various issues on appeal, the "main construction issue" was whether the Chancellor was correct in his construction of the ECNs that a CDE only occurred in circumstances where there was a "disallowance in principle" of the use of the ECNs in connection with the stress test. The Issuer argued that a CDE could occur where as a result of changes in regulatory capital requirements, the ECNs no longer served to assist LBG to remain above the minimum ratio requirements in the stress test. It was suggested that when the ECNs were issued, the contractual trigger point for conversion of 5% CT1 capital ratio was above the stress test hurdle of 4%, which was "an absolutely key part of the contractual structure for the notes". The Issuer argued that the ECNs ceased to assist for the purposes of the stress test when regulatory changes increased the stress test hurdle, above the contractual trigger point for conversion.

The Trustee, however, argued that the Chancellor's interpretation was correct in particular because it was important to construe the ECN conditions in the context of the factual background, which was primarily contained in the ECNs' Exchange Offer Memorandum. The Trustee suggested that none of the Issuer's construction arguments were reflected anywhere in this document, such that a reader could not reasonably have appreciated that if the regulators sought to increase the stress test hurdle, the Issuers would be entitled to redeem the ECNs.

Gloster LJ accepted the Issuer's argument that, as a result of changes in the regulatory capital requirements, the ECNs have ceased for the foreseeable future, as a matter of language and purpose of the redemption provisions, to be taken into account for the purposes of any stress test applied by the regulator in respect of the relevant ratio. IN her view this was because the ECNs ceased to be able to assist LBG in passing the threshold capital ratio in the stress testing environment. In reaching this conclusion Gloster LJ relied on the statements published by the FSA in 2008 and 2009, which she said meant that a reasonable person in the position of the holders of the ECNs and the Issuers must have appreciated the critical importance to a bank of clearing the stress test in order to satisfy its regulators.

Gloster LJ stated this interpretation was reinforced by the context in which the Exchange Offer Memorandum was circulated, namely that LBG failed the March 2009 stress test because it failed to clear the CT1 ratio throughout the stress test period and was therefore compelled to take action to satisfy the regulators. As a result, she accepted the Issuer's argument that in the circumstances the reference to the CT1 ratio in Condition 19 in the

context of the known stress testing environment would indicate to the reasonable reader that the relationship between the contractual 5% and the well-published 4% figure used by the regulator as a stress test hurdle was deliberate and important. The Court of Appeal therefore allowed the appeal and granted a declaration that a CDE had occurred, thereby entitling the Issuers to redeem the ECNs in accordance with their terms. Permission to appeal has been granted by the Supreme Court. The appeal has been expedited and the final appeal will be heard by the Supreme Court on 21 March 2016.
[Robin Dicker QC; Stephen Robins]

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp [2015] EWCA Civ 1145, 10 November 2015, Court of Appeal

Arbitration awards – Security

In this decision the Court of Appeal reconsidered its own decision (and jurisdiction) whereby it had required a Nigerian state-owned company (A) to provide security to another Nigerian company (B) for the whole of an arbitration award following the adjournment of a Nigerian company's application to enforce the award.
In its earlier decision (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2015] EWCA Civ 1144), the Court of Appeal had required A to provide security for the full amount of an arbitration award following adjournment of an application by B to enforce the award. The court had:
(a) Adjourned the application pending determination by the Commercial Court, under the Arbitration Act 1996 s.103(3), as to whether enforcement would be inconsistent with English public policy; and
(b) Ordered that, if an outstanding fraud challenge in Nigeria to the award failed, there should be immediate enforcement of the full amount of the award plus interest, notwithstanding other non-fraud challenges to the award before the Nigerian court.
A contended that:
(a) The proposed order was made without jurisdiction since, on the basis of s.103(5), security could be ordered only on the application of the enforcing party and no such application had been made by B; and
(b) It would be wrong in principle (or at least require special justification) to make an order requiring an award debtor to bring assets into the jurisdiction as a condition of further adjournment.
The Court of Appeal held that it was artificial to say that there was no extant application by B for security if enforcement was not ordered, since (in particular) it was implicit in the series of previous applications made by B that security was sought. In any event a court which was asked to adjourn enforcement was entitled, under CPR r.3.1(3)(a), to impose conditions on the exercise of its discretion and could do so under its own initiative, under CPR r.3.3.
Section 103(5) could not be treated as precluding the exercise of the right.

Wilsons Solicitors LLP v Bentine [2015] EWCA Civ 1168, 19 November 2015, Court of Appeal

Bills of costs – Detailed assessment – Retainers

In short, the Court of Appeal decided that, in detailed assessment proceedings, costs deducted for want of retainer were to be included in a judge's calculations when applying the "one-fifth" rule in the Solicitors Act 1974 s.70(9).
In this case, the court was required to consider the proper interpretation of the one-fifth rule in s.70(9) of the Solicitors Act 1974 (the "1974 Act") s.70(9) and the application of the "special circumstances" provision in s.70(10). The provisions of section 70 of the 1974 Act govern the position where a detailed assessment is carried out after a dispute between a client and his solicitor in respect of a legal services bill. Section 70(9) provides the default rule that costs should follow the event, with the "event" being defined by reference to whether a reduction in the amount of the bill of one-fifth had been achieved by the client in the assessment. Section 70(10) allowed the court to modify the default position (provided by s.70(9)) where there were "special circumstances relating to the bill or the assessment of the bill".
The Court of Appeal held that:
(a) As a matter of statutory interpretation, there was no good reason to divide up different elements within the bill for the

purposes of applying the one-fifth rule. Costs disallowed for want of retainer should be included in the overall bill when determining whether there had been a one-fifth reduction. Further, the decision in *Re Taxation of Costs*, concerning the "one-sixth" rule in the Solicitors Act 1932 s.66(5), had been decided per incuriam, because it had overlooked the judgment in *Re Clark* [2015] 6 Costs L.R. 917.

(b) The test of whether "special circumstances" existed for the purpose of s.70(10), was the same as for the same phrase in s.70(3), namely whether something so outside a run of the mill case had occurred as to justify departing from the prima facie result given by the default one-fifth rule in s.70(9). It was better not to gloss the language used in s.70(1), for example as referring to "exceptional" circumstances, albeit it had to be borne in mind, when applying that provision, that one was looking for something significant and out of the ordinary course which justified departing from the prima facie one-fifth rule set by Parliament.

Abdulle v Commissioner of Police of the Metropolis [2015] EWCA Civ 1260, 8 December 2015, Court of Appeal

Case management orders – Court fees – Non-compliance

The Court of Appeal held that, in a case management decision where the balance was a fine one, an appeal Court should respect the balance struck by the first instance Judge.

The appellant commissioner appealed against a decision ([2014] EWHC 4052 (QB)) not to strike out a claim brought by the respondents (X).

The background to the appeal was as follows:

- X alleged that police officers had unlawfully detained and used excessive force against them.
- X delayed considerably in progressing the claim. Much of the delay was attributable to X or their solicitors.
- A trial window was fixed.
- However, X failed to file a pre-trial checklist and to pay the listing fee.
- X also failed to communicate with the commissioner regarding preparations for trial, including the preparation of a bundle.
- However, the claim was not automatically struck out under CPR r.3.7(4) because no notice of default had been served on X.
- The trial date was vacated.
- Further, X failed to comply with a costs order made against them.

Against this backdrop the commissioner had applied for X's claim to be struck out under CPR r.3.4(2)(c), in particular because of the failures to file the checklist, to pay the fee and to prepare a bundle.

At first instance the judge found that the behaviour of X's solicitors was worthy of real criticism, but noted that the claim was all but ready for trial and was a substantial claim.

On appeal the commissioner argued that the loss of the trial date was particularly serious; as that had been caused by X's own default without good reason, that outweighed the reasons the judge had considered tipped the balance into allowing the claim to proceed.

The Court of Appeal noted that, had the instant Judges been deciding the case at first instance (rather than hearing the appeal from that decision), then they would have accepted the commissioner's submissions, and in particular they would have given more weight to the history of delay in progressing the case, etc. However, that was not the question for an appeal court. In particular, the commissioner had not suggested that the judge had overlooked any relevant factor, or taken into account irrelevant factors, nor had he suggested that the judge misdirected himself in law.

Accordingly, the Court of Appeal dismissed the commissioner's appeal.

P v D [2016] EWCA Civ 87, 12 February 2016, Court of Appeal

Private hearings – Confidential information – injunctions

P, the employee of D, appealed against a decision enforcing certain restrictive covenants in his contract of employment with D.

At first instance (D v P [2015] EWHC 3152 (Ch)), the Judge had given reasons for handing down in private the judgment which was the subject of the appeal. Important aspects of the judgment below included the following:

(a) The finding that, if the full judgment and the resulting order were made public, it would destroy or damage confidential information;

(b) An injunction should be granted preventing P from acting in breach of the restrictive covenants;

(c) The Judge was satisfied hat P had acted in good faith and honestly, but considered that injunction relief was nonetheless appropriate;

(d) The judge had exercised his discretion as to whether to grant an

injunction on the basis of guidance in *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13, [2014] AC 822.
The Court of Appeal was satisfied that D's commercial reasons for maintaining secrecy should be respected. The appeal was also therefore heard in private.
The appeal was dismissed by the Court of Appeal. The Court of Appeal had doubts as to whether the guidance in *Lawrence* (a case that concerned the approach to be adopted to the commission of a tort, in that case nuisance, when considering whether to award damages in lieu of an injunction) was directly applicable to the exercise of discretion in the present case; but considered that the judge's adoption of that guidance had not resulted in an incorrect approach to the exercise.

COMMERCIAL CASES

Digested by CHARLOTTE COOKE

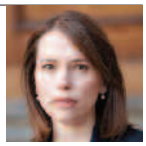
GSO Credit v Barclays Bank Plc [2016] EWHC 146 (Comm) – Knowles J – 29 January 2016


CHARLOTTE COOKE

Contract – Interpretation – Surety bonds

HCC International Insurance Company Plc ("**HCC**") had provided surety bonds to various public authorities in Spain on behalf of Codere SA ("**Codere**"), a Spanish gaming company, under a surety bonds facility. The GSO funds agreed to acquire HCC's position under the surety bonds facility at a rate of 76 cents/€1 facility through back-to back-trades carried out via an intermediary, Barclays Bank. The dispute between the parties concerned the settlement amount payable in relation to these trades. The trades were subject to the Loan Market Association Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank/Debt Claims) ("**the LMA Standard Terms**"). HCC argued that the definition of "Purchased Assets" in the LMA Standard terms excluded its obligation to pay the beneficiaries under the issued surety bonds and consisted solely of its rights in relation to Codere and that the position sold to the GSO funds was therefore "funded" for the purposes of calculating the settlement amount under the LMA Standard Terms because HCC had issued surety bonds under the surety bonds facility.
The GSO funds argued that the definition of "Purchased Assets" was broad enough to include any obligations under the issued surety bonds, and that the traded position had included these obligations. The traded position was "unfunded" for the purposes of the LMA Standard Terms because no calls had been made on the issued surety bonds. This would result in a settlement amount payable to the GSO funds, to reflect the fact that they were assuming the obligations of HCC to pay the beneficiaries of the issued surety bonds.
Knowles J held that HCC was wrong to contend that the definition of "Purchased Assets" excluded obligations and that the surety bonds facility was "unfunded" because no monies had been paid by HCC to the beneficiaries of the issued surety bonds. Recognising the wider significance of the judgment for trades conducted under the LMA Standard Terms he identified two key conclusions relevant for trades in respect of surety bonds facilities under those terms: (1) The trade will generally include the economic burden of the seller's obligations under the issued surety bonds; and (2) The "Purchased Assets" are generally "funded" to the extent that monies have been paid buy by the seller under the issued surety bonds.
[Tom Smith QC; Andrew Shaw]

Canary Wharf Finance II Plc v Deutsche Trustee Co Ltd [2016] EWHC 146 (Comm) – Phillips J – 28 January 2016


GEORGINA PETERS

Contract – Mortgage-backed debentures – Redemption

The Claimant, a company within the Canary Wharf group, issued the mortgage-backed debentures to another group company under an inter-company loan agreement, which company then on-lent the sums to other group companies. The borrower's liabilities under the loan agreement were secured by charges over the group's properties. The group sold one of the properties and the borrower paid a proportion of the sale price to the claimant by way of prepayment. The claimant used the money to redeem some of the debentures early.
The issue was whether the redemption had been effected under condition 5(b)(iv), which applied where the proceeds were a "mandatory repayment" arising

from the release of mortgaged property, or under condition 5(c), which applied in relation to optional redemption. This mattered because condition 5(b)(iv) involved payment of accrued interest, whereas condition 5(c) provided for the payment what was described as a "premium" or "spens payment". The Judge held that the relevant clause (clause 17.20(a)(ii)) did not impose an obligation on the borrower to prepay; unlike provisions which were intended to be mandatory, the wording of the clause was not imperative. A premium under condition 5(b)(iv) was therefore payable, it being said that otherwise the structure would be undermined; it was not surprising that a premium became payable in the event of a voluntary redemption.

[Georgina Peters]

Trafigura Pte Ltd v Taci Oil international Trading and Supply Co Sh.a [2015] EWHC 3739 (Comm) – Popplewell J – 16 December 2015

Contract –Deferred payments

The Claimant was a commodities trader who sought payment of the deferred balance in respect of the purchase price of gas oil supplied to the Defendant distributor. The Defendant's position was that the amounts and due dates remained subject to discussion and that there was a degree of flexibility. He averred that the Claimant had declined to engage in good faith discussions to this end.

The Judge held that the terms agreed for deferred payments had been clear and precise as to the amounts to be paid and the dates by which payment was to be made. There was therefore no reason for implying a degree of flexibility as contended for by the Defendant. Judgment was entered in favour of the Claimant in respect of the outstanding balance. In any event, the Judge considered that the Claimant, who had engaged in lengthy correspondence with the Defendant, would not have been in breach.

Edgeworth Capital Luxembourg SARL; Aabar Block SARL v Glenn Maud [2015] EWHC 3464 (Comm), QBD (Comm), Knowles J, 30 November 2015


MARK PHILLIPS QC

Guarantees – Spanish law – Construction

The claimant companies ("C") claimed €40,000,000 from a UK guarantor ("D") under a third party guarantee of a loan to an insolvent Dutch company ("R"). R had entered into a junior loan agreement with a bank for €200 million and had drawn down the full amount. That loan was guaranteed by D with a cap of €40 million. The guarantee was governed by English law and the English courts had exclusive jurisdiction. Under a transfer and assignment, C acquired all past and future rights of the bank. R failed to pay and C issued proceedings in the UK, in which R was ordered to pay the claimants €216 million. R had its COMI in Spain and entered into Spanish insolvency proceedings. C's debt claims against R were classified as subordinated. C challenged that classification in Spain but no ruling had as yet been issued. R made no payment and C sought payment from the guarantor. D contended that under Article 97.2 the Spanish Insolvency Act the guarantee, and in consequence the debt owing to C under it, had been extinguished. C argued that although Article 97.2 could extinguish a guarantee granted by an insolvent debtor who was the subject of Spanish insolvency proceedings, it did not extinguish a third party guarantee. It was held that the analysis of the framework of the Spanish legislation gave no clue as to why Article 97.2 should be supposed to address third party guarantees. Although the experts on Spanish law agreed that the literal wording of Article 97.2 could extend to include a third party guarantee, D was wrong to claim that the final sentence of Article 97.2 supported the extension of the article to third party guarantees. There was no credible reason why it should extend to third party guarantees.

[Mark Phillips QC; William Willson; Ryan Perkins]

Global Asset Capital, Inc, Glenn Maud v Aabar Block S.A.R.L., Aabar Investments PJS, Robert Tchenguiz [2016] EWHC 298 (Comm), Walker J, 18 February 2016

Summary judgment – relevance of post-contractual conduct

C1 and C2 alleged they had contracted to acquire a security interest for €250m from D1 and D2 ("the Aabar Defendants") in a telephone conversation between C2 and D2's CEO. The Aabar Defendants denied having made an agreement and sought summary judgment in respect of the alleged contract. D3 sought summary judgment of the Cs' claims that he committed the torts of procuring breach of contract and intimidation by threatening litigation against the Aabar Defendants if they sold the security interest. The Aabar Defendants contended that no enforceable contract (1) could have or (2) did come into force in the telephone conversation, and that (3) conditions accepted by the Cs to be part of the contract had not been satisfied. The judge applied the test for summary judgment (as most recently summarised in *Tesco Stores Ltd v Mastercard Incorporated* [2015] EWHC 1145 (Ch)).

The Aabar Defendants' first contention rested on the fact that a letter supposedly containing the agreed terms was expressed to be "subject to contract". However, this did not undermine Cs' case that, despite this wording, it had been accepted as an offer. That the contracting parties were insufficiently identified and key terms left to be agreed later did not mean it was impossible agreement was reached. A contract is insufficiently certain only where incapable of enforcement, not simply where seemingly important terms are absent. As to their second and third contentions, the Aabar Defendants relied on post-contractual conduct and correspondence. However, Cs' proposition that post-contractual conduct should be excluded when considering whether and, if so, what agreement was reached had a realistic prospect of success. The Aabar Defendants further argued that as the party to benefit from the conditions, they were entitled to judge whether these had been satisfied. However, the authority adduced for this point did not provide a basis for summary judgment, since in it the benefitting party's judgment had been assessed at trial. The Aabar Defendants' application was dismissed.

As D3's application also relied on evidence of post-contractual conduct, summary judgment was not available on the procurement of breach of contract claim. As to the tort of intimidation, the Cs had failed to plead that D3 threatened litigation he knew he had no right to bring. Since the illegality of the threatened behaviour was an essential ingredient, the claim would have been struck out if it were not amended. The claim had been "*poorly drafted*" by Cs' Counsel. Nonetheless, at the end of the hearing the Cs applied to amend, and since the amended claim had a realistic prospect of success, it would have been contrary to the overriding objective not to allow amendment, and so summary judgment was not awarded.

[Mark Phillips QC; William Willson]

COMPANY LAW

Digested by HENRY PHILLIPS


HENRYPHILLIPS

Re Metinvest BV [2016] EWHC 79 (Ch) (Proudman J, 13 January 2016)

Schemes of arrangement – class composition – jurisdiction

The company, which was incorporated and domiciled in the Netherlands, applied for an order convening a single meeting of its scheme creditors to consider and, if thought fit, approve a scheme of arrangement under Part 26 of the Companies Act 2006. The company was a member of an international group which carried on business in the mining and steel markets. The company had issued three series of notes (maturing in 2016, 2017 and 2018 respectively) under three trust deeds governed by English law. The trust deeds also included a provision whereby the obligors irrevocably submitted to the jurisdiction of the English court. Most of the group's assets were located in Eastern Ukraine, and were affected by the political instability there. The company was unable to repay the 2016 notes, which would trigger a cross-default on the other notes. The company also had committed a series of payment defaults on substantial pre-export finance facilities with four syndicates of international commercial banks.

The purpose of the scheme was to impose a moratorium against enforcement action by the noteholders, so as to provide a "breathing space" to negotiate a restructuring of the company's debts. In return, the company agreed (*inter alia*) to make an immediate payment of part of the interest due on the notes. Certain holders of the 2016 notes, representing less than 1% of the scheme creditors by value, objected to the scheme. The opposing creditors wrote a letter to the court one day before the hearing, which contained a number of arguments. Most importantly, the opposing creditors argued that the 2016 notes should be placed into a different class from the other series of notes for the purposes of voting at the scheme meeting. The Judge rejected this argument. She began by citing the standard authorities on class composition (such as *T&N (No. 4)*, *UDL* and *Hawk*), and observed that the legal rights of creditors (rather than their commercial or other interests) determine whether they form a single class. The Judge emphasised that it is important to take a broad approach to class composition so that veto rights are not conferred on a small minority of creditors.

The only significant difference between the three series of notes related to their maturities: the first series matured in 2016, the second series matured in 2017, and the third series matured in 2018. However, by virtue of the cross-default clauses in the documentation, all of the notes were liable to be accelerated following an event of default on any of them. Accordingly, the differences between the maturities of the notes were not so great as to render it impossible for the noteholders to consult together with a view to their common interest. The noteholders were all treated in materially the same way under the scheme, because the moratorium and the interest payments applied equally to all of them.

The Judge also held that the rights of the noteholders would be materially the same in a formal insolvency (which was held to be the relevant comparator for present purposes), and rejected the argument that the evidence filed by the company was inadequate.

The opposing creditors also asserted that the court lacked jurisdiction to make a convening order. The Judge rejected this argument. The Judge noted that the company had a branch in England, and constituted a "company" within section 895(2) of the Act. She observed that it has not been conclusively determined whether the Brussels Regulation (Recast) applies to schemes of arrangement. However, applying a line of recent authorities culminating in *Re Van Gansewinkel Group BV* [2015] EWHC 3686 (Ch), the Judge held that the court would have jurisdiction to make a convening order under Article 8 of the Brussels Regulation (Recast) if at least one scheme creditor was domiciled in England. This condition was satisfied in the present case. Further, it was expedient for the restructuring to take place in England, as the Notes were governed by English law and therefore England was the natural forum. Further, the company had adduced expert evidence that a restructuring of the company's obligations could not be achieved in the Netherlands in the absence of formal insolvency proceedings, whereas a scheme sanctioned by the English court would be recognised in the Netherlands and the Ukraine. The Judge therefore made a convening order. (Subsequently, at the meeting of scheme creditors, the scheme was approved by the requisite majorities; and thereafter the scheme was sanctioned by the Court.)

[David Allison QC, Stephen Robins]

Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch) (Newey J, 12 February 2016)

Schemes of arrangement – forum shopping – class composition – sufficient connection


DAVID ALLISON QC

This was the sanction hearing of a scheme of arrangement promulgated by Codere Finance (UK) Limited ("Codere UK"). Codere UK was a subsidiary of a Spanish company known as Codere SA, which was the ultimate holding company of the Codere group. The Codere group carried on business by way of gaming and similar activities in Latin America, Italy and Spain. The group was financed by, among other things, two series of notes. The issuer of the notes was Codere Finance (Luxembourg) SA ("Codere Lux"), a subsidiary of Codere SA. Codere SA and several other group companies acted as guarantors of Codere Lux's obligations under the notes. The notes were governed by New York law, but were subject to an intercreditor agreement governed by English law. By 2015, over EUR 1.46bn was due and outstanding in respect of the notes. Following a payment default on the notes in 2013, the group entered into restructuring negotiations with its noteholders. The parties gave extensive consideration to the restructuring mechanisms available in the jurisdictions where the group carried on business. It was concluded, however, that the available options would all involve formal insolvency proceedings in respect of one or more group

companies. This created a significant problem. The group held gaming licences in a number of jurisdictions, which were liable to be terminated upon the commencement of formal insolvency proceedings. The termination of the gaming licences would have been fatal to the group's business.

It was for this reason that the group decided, in consultation with its creditors, to formulate a scheme of arrangement under Part 26 of the Companies Act 2006 (the "Act"). The object of the scheme (within the wider context of the restructuring of which the scheme formed a part) was to replace the existing notes with new notes and to effect a partial debt-for-equity swap. It was believed that the implementation of a scheme would not threaten the continued existence of the Codere group's gaming licences.

Where a scheme is proposed by a foreign company, the court will not exercise its discretion to sanction the scheme unless a sufficient connection to England can be demonstrated: see *Re Drax Holdings Ltd* [2004] 1 WLR (Lawrence Collins J). None of the original companies in the Codere group were incorporated in England, had their COMI in England or carried on business in England, and none of the notes were governed by English law. For these reasons, there was believed to be a risk that a sufficient connection to England would be difficult to establish.

To deal with this problem, Codere SA decided to acquire an English SPV (namely Codere UK). Codere SA caused Codere UK to accede to the notes as a "co-issuer" thereof, pursuant to the terms of the indentures governing the notes. By virtue of this accession, Codere UK assumed primary, joint and several liability for all of Codere Lux's obligations in respect of the notes. The sole purpose of acquiring Codere UK, and of causing Codere UK to accede to the notes as a co-issuer, was to engage the scheme jurisdiction of the English court. It was Codere UK, rather than any of the other group companies, which formally proposed the scheme. The use of an English company was designed to forestall any argument that the scheme company lacked a sufficient connection to the jurisdiction.

The scheme provided for the release of all group companies (including Codere UK, Codere Lux, Codere SA and the other guarantors) from their obligations in respect of the existing notes. The terms and structure of the scheme were approved by over 97% of the scheme creditors, who entered into lock-up agreements with the scheme company. The remaining creditors were not "hold-outs", but were simply beneficial holders of the notes who could not be identified, or who had not responded to communications from Codere UK through the clearing systems. About 22% of the scheme creditors by value were domiciled in England.

Codere UK filed expert evidence that the scheme (including its effects on guarantors of the notes) would be recognised under New York law, pursuant to Chapter 15 of the US Bankruptcy Code. Given that the notes were governed by New York law, expert evidence of this nature was essential to satisfy the court that the scheme would achieve its purpose. Codere UK also filed expert evidence that the scheme would be recognised in all of the major jurisdictions where the group operated. Finally, Codere UK filed evidence that the only real alternative to the scheme was a formal insolvency process, which would result in a projected return of nil for the scheme creditors (compared to a minimum projected return of 47% under the scheme).

At the convening hearing (before Nugee J), Codere UK argued that the scheme creditors formed a single class, and that a single meeting of the scheme creditors should be convened. Under the terms of the scheme, the scheme creditors would not all be treated in precisely the same manner. However, Codere UK argued that the differences in treatment were not so great as to justify fracturing the scheme creditors into different classes. Nugee J accepted this submission: see the convening judgment at [2015] EWHC 3206. Among other things, Nugee J accepted that the director nomination rights conferred on certain creditors, and the significant backstopping fees awarded to certain creditors, did not fracture the class. See *Codere: a development in the cross-border scheme jurisdiction*, in this issue of the Digest. However, Nugee J was concerned that the scheme involved an "extreme form of forum shopping". He directed for this matter to be resolved at the sanction hearing. The sanction hearing was listed before a different judge (Newey J).

Following the convening hearing, the scheme was unanimously approved by all of the noteholders who voted at the scheme meeting. Nearly all of the scheme creditors wrote letters to the English court voluntarily submitting to its jurisdiction. In the absence of any opposition to the fairness of the scheme, the only live issue at the sanction hearing before Newey J was whether the court itself was willing to exercise its discretion to sanction the scheme.

Newey J noted that the Codere group had a number of connections with England. First, the notes were subject to an intercreditor agreement governed by English law. Second, a significant percentage of the noteholders are domiciled in England. Third, the note trustee and security trustee performed their functions from offices in London. Fourth, a number of other relevant documents, including the lock-up

agreements, were governed by English law.
Further (and in any event), Newey J noted that the English courts had become comfortable in recent years with exercising the scheme jurisdiction in relation to companies which have not had longstanding connections with England. It was not abusive for the scheme company to be incorporated for the sole purpose of assuming liabilities to engage the scheme jurisdiction, *Re AI Scheme Ltd* [2015] EWHC 1233 (Ch) applied. The present case was an example of "good forum shopping" rather than "bad forum shopping". In these circumstances, Newey J made an order sanctioning the scheme.
[David Allison QC, Richard Fisher, Ryan Perkins]

Hamilton v Brown [2016] EWHC 191 (Ch) (Mr Registrar Jones, 8 February 2016)

Directors – Locus Standi

B was the director and 50% shareholder of company C. B was made bankrupt and his property, including his shares in C (the "**Shares**"), vested in the trustees in bankruptcy.
The trustees in bankruptcy subsequently presented a petition claiming relief under section 994 of the Companies Act 2006 (the "**Petition**"). The trustees (as petitioners) alleged that B's wife (D) had conducted the affairs of C in a manner unfairly prejudicial to their interests as members. In the alternative, they sought a winding up order on just and equitable grounds pursuant to section 122(1)(g) of the Insolvency Act 1986 ("IA").
D sought to defend the Petition by arguing (among other things) that the trustees had no standing to present a petition to wind up the company. This was because the Shares had not been held and registered in the trustees' names for the a period of 6 out of the last 18 months starting with the day the petition was presented. In this regard, section 124(2)(b) IA provides that "*a contributory is not entitled to present a winding up petition unless… the shares in respect of which he is a contributory, or some of them…have been held by him, and registered in his name, for at least 6 months during the 18 months before the commencement of the winding up, or have devolved to him through the death of a former holder*".
By the time of the hearing, the trustees could satisfy the conditions of section 124(2)(b) IA and could have adopted a pragmatic approach by presenting a new petition forthwith. However, that would have impacted on the look-back periods applicable to the transaction avoidance provisions under the IA.
The trustees argued that the beneficial interests in the Shares and the choses in action relied upon in the Petition vested in them upon their appointment (section 306(2) IA)) and that as legal title could not be transferred by operation of law (since registration is required to achieve membership of a Company) (section 283(1)(a)IA), B held the Shares and the choses in action on trust for the trustees until their registration. Since under section 284(4)IA references to "*property*" includes "*any power exercisable by [the bankrupt] in respect of property*" and since such power deemed to "*vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person*", the trustees argued that they can rely on the fact that B had been a member for at least 6 months during the above-mentioned period of 18 months when exercising the power to present the petition.
The court held that it would have acceded to the trustees' argument but did not need to, since section 250 IA also provided an answer in favour of the trustees.
Section 250 provides that "*a person who is not a member of a company but to whom shares in the company have been transferred, or transmitted by operation of law, is to be regarded as a member of the company, and references to a member or members are to be read accordingly*". The trustees fell within the provision and were therefore to be "*regarded as a member*". Since a "member" has to have their name registered in the register of members (section 112(2) CA 2006), the trustees were to be "*regarded as*" having had their names entered in the register from the date of their appointment. As a consequence, the requirements of section 124(2)(b)IA had been satisfied.

CORPORATE INSOLVENCY

Digested by RYAN PERKINS


RYAN PERKINS

Vizcaya Partners Limited v Picard and another (Gibraltar) [2016] UKPC 5 (Privy Council: Lords Neuberger, Mance, Clarke, Sumption and Collins)

Enforcement of foreign default judgments – consent to the jurisdiction of the foreign court

For the purposes of Dicey's Fourth Case (i.e. whereby a judgment in default entered by a foreign court is enforceable at Common Law against a person who has agreed before the commencement of the relevant proceedings to submit to the jurisdiction of the foreign court), a person might implicitly consent in advance to the foreign court's jurisdiction: and a contracting party's agreement might be implied as a matter of fact or law, those issues being subject to the law applicable to the contract. *Prima facie*, where a person has implicitly consented to the jurisdiction of the foreign court, that consent does not apply to insolvency proceedings in that foreign court (implicitly approving *AWB (Geneva) SA v North America Steamships* [2007] 2 Lloyd's Rep 315 (CA)): paras 73-74. The Court did not therefore need to consider whether, had there been an implied agreement to submit to the jurisdiction of the foreign insolvency court, the judgment would nonetheless have been unenforceable as obtained in breach of an arbitration clause in the relevant contract: para 75.

In the course of its reasoning, the Privy Council categorised the implied obligation of confidentiality arising in banker/customer contracts (i.e. as decided in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA)) as a term implied by law: para 57.


DAVID ALEXANDER QC


MATTHEW ABRAHAM

Coilcolor Ltd v Camtrex Ltd [2015] EWHC 3202 (Ch) (Hildyard J, 6 November 2015)

Winding-up petitions – disputed debts

This was an application to restrain the presentation of a winding-up petition by the respondent. The respondent had traded with the applicant company for a decade, and the debt represented the unpaid price for goods supplied to the company. The company contended that the goods were not fit for purpose, and cross-claimed for more than the sum claimed by the respondent. The respondent asserted that the cross-claim had been contrived with a view to avoiding or delaying payment. Granting the application, the judge restated the well-known principles relating to the use of winding-up petitions to enforce disputed debts. The judge emphasised that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will not automatically suffice to prevent the presentation or prosecution of the petition: the court must be satisfied that there is substance in the dispute and in the company's refusal to pay. The judge also reviewed the authorities on the potential relevance of evidence that the company is solvent. Although solvency is not a defence to a petition based on an undisputed debt, evidence that the company is solvent may indicate that the petition is being used abusively, to exert inappropriate pressure on the company.

In the circumstances, it was clear that the respondent did not truly seek a winding-up of the company, especially since the company appeared to be solvent. Rather, the respondent sought leverage to pressurise the company into "paying now and arguing later", which was an improper basis for presenting a winding-up petition. The company's cross-claim was sufficiently arguable, and the relevant factual issues could not be determined in the Companies Court.

[David Alexander QC, Matthew Abraham]

Top Brands Ltd v Sharma [2015] EWCA Civ 1140 (Sir Terence Etherton C, Christopher Clarke LJ, Lloyd Jones LJ, 10 November 2015)

Liquidators' powers and duties – misfeasance – fraudulent trading – ex turpi causa

This case related to a company in liquidation, which had previously carried on business as the vehicle for a VAT fraud through the sale and purchase of toiletry products. The company's main asset was a bank account with a credit balance of £548,000. These monies were paid to the company by a third party (SERT),

which had taken delivery of various goods from the company. The company had purchased the goods from two suppliers (TB and LS), neither of which had not been paid. As a result of a fraud practised on the former liquidator of the company, she wrongfully disbursed the entire sum of £548,000 to a variety of recipients. TB and LS, in their capacity as creditors, commenced proceedings against the former liquidator for misfeasance under section 212 of the Insolvency Act 1986, seeking an order requiring the liquidator to contribute £548,000 to the company's assets. At first instance, the judge held that the liquidator had acted negligently and in breach of duty, and ordered her to pay £548,000 to the company. The liquidator appealed, contending that the misfeasance proceedings were barred by the rule ex turpi causa non oritur actio.

The appeal was dismissed. Sir Terence Etherton C, giving the judgment of the court, confirmed that section 212 is a purely procedural provision, which gives specified persons (including creditors) locus standi to prosecute a cause of action vested in the company. However, the application of the ex turpi causa rule in the context of misfeasance proceedings was unclear. The rule might depend on whether the applicants had to rely on the company's illegal conduct in order to establish the claim (per *Tinsley v Milligan* [1994] 1 AC 340). Alternatively, the rule might depend on whether there was an inextricable connection between the relevant illegality and the claim (per *Hounga v Allen* [2014] 1 WLR 2889). Until the law of illegality was comprehensively reviewed by the Supreme Court, it was impossible to resolve this issue in a satisfactory manner. In any event, it was clear that the ex turpi causa rule did not apply in the present case: TB and LS did not need to rely on any allegations of illegal conduct to make good the misfeasance claim against the liquidator, and there was no close connection between the VAT fraud which the company had committed and the liquidator's misfeasance. If the monies paid by SERT to the company represented criminal property within section 340 of the Proceeds of Crime Act 2002, this was irrelevant to the liquidator's liability for wrongfully disbursing the monies.

Stevensdrake Ltd. (t/a Stevensdrake Solicitor) v Hunt [2016] EWHC 342 (Ch) (His Honour Judge Simon Barker QC)

Contingency Fee Agreement – Insolvency – professional negligence – breach of fiduciary duty

The express entitlement of a firm of solicitors to payment of their fees by their insolvency practitioner client irrespective of whether recoveries were made in the litigation was subject to a prior understanding that no fees would be paid unless actual recoveries were made. Further, the solicitors had in the circumstances fallen below the standard of reasonable care to be expected of a solicitor in not adequately advising the client of the effect of the CFA; and also breached their fiduciary duty in not disclosing that effect.

Centaur Litigation SPC v Terrill [2015] EWHC 3420 (Ch) (Norris J, 10 November 2015)


FELICITY TOUBE QC

Section 426 – fraud – freezing injunctions

This case involved three companies incorporated in the Cayman Islands, which had carried on business as mutual funds ostensibly engaged in the funding of litigation. The companies raised about £80m from 1,300 investors, most of whom were individual retail investors. Each of the companies had a sole corporate director, and the respondent (T) was the sole director and shareholder of that corporate director. Following an internal investigation (which revealed that T may have been responsible for misappropriating significant quantities of company funds), the companies were placed into provisional liquidation in the Cayman Islands. The provisional liquidation was subsequently converted into an official liquidation. The liquidators attempted, without success, to contact T in order to discuss the potential claims against him. In August 2015, T was arrested in England in connection with an unrelated crime. Upon discovering T's whereabouts, the liquidators took steps to issue the present applications.

By the first application, the liquidators sought an order recognising their authority to act on behalf of the companies in England (in accordance with a letter of request from the Grand Court of the Cayman Islands), pursuant to section 426 of the Insolvency Act 1986. By the second application, the liquidators sought an ex parte worldwide freezing injunction against T.

Both applications were granted. As to the first application, the judge held

that it was clearly appropriate to grant relief under section 426. The fact that the Grand Court had written a letter of request to the English court was itself a significant factor, though not a determinative one.

As to the second application, it was also appropriate to grant a worldwide freezing injunction in the present case. There was a good arguable case that T had acted as a de facto director of the companies, and had acted in breach of duty in his capacity as such. There is no general rule that if a company (X) has a corporate director (Y), each director of Y is a de facto director of X. However, there was ample evidence that T had held himself out as a director of the relevant companies in the present case, which was sufficient (in conjunction with evidence that T had misappropriated company funds) to create a good arguable case against him. Although T was imprisoned in England, there was sufficient reason to believe that he might take steps to dissipate his assets. There was evidence that T had assets in several jurisdictions, which meant that a purely domestic freezing injunction would be insufficient.

[Felicity Toube QC, Ryan Perkins]

Re Angel Group Ltd [2015] EWHC 3624 (Ch) (Rose J, 3 December 2015)

Moving from administration to liquidation – appointment of conflict liquidators – discharge


SIMON MORTIMORE QC


STEPHEN ROBINS

This case related to eight companies within the Angel Group, which were owned and controlled by Ms Julie Davey. The companies carried on business as landlords of various residential and commercial properties in the UK. The Royal Bank of Scotland (the bank) was the sole secured creditor of the companies, and financed the acquisition of the properties. Administrators from KPMG were appointed over the companies in 2012 and 2013. Most of the properties were subsequently sold, but £20m remained owing to the bank. The KPMG administrators and the bank argued that the companies had substantial claims against Ms Davey, who was said to be liable for misappropriating the companies' assets. For her part, Ms Davey argued that the companies had claims against the bank and the KPMG administrators for breach of contract, negligence, misrepresentation, conspiracy and/or misfeasance. Ms Davey asserted that the bank and the KPMG administrators had conspired to artificially distress the companies' finances, so as to force them into a formal insolvency process. She asserted that the KPMG administrators had a conflict of interest, which prevented them from properly investigating these claims.

Following a series of contested hearings, all of the interested parties (namely the bank, Ms Davey and the KPMG administrators) consented to the following three-stage proposal: (i) the companies would move from administration to liquidation; (ii) the KPMG liquidators would resign; and (iii) four new liquidators would be appointed. Two of the proposed liquidators (the bank nominees) were selected and funded by the bank. Their role would be to complete the disposal of the companies' assets and to pursue any claims the companies had against Ms Davey. The other two proposed liquidators (the Davey nominees) were selected and funded by Ms Davey. Their role would be to pursue any claims the companies had against the bank and KPMG. In effect, the Davey nominees were "conflict liquidators", whose appointment was designed to deal with the bank nominees' alleged conflict of interest. However, this proposal faced a potential problem. If a company moves from administration into liquidation, the new liquidator will normally be the former administrator, or alternatively the Official Receiver (who can be replaced by the usual methods): see sections 136, 139 and 140 of the Insolvency Act 1986. There is no specific provision in the Act which enables the immediate appointment of a new insolvency practitioner as liquidator, so as to bypass the Official Receiver.

To deal with this problem, a complex set of interlocking applications were issued. First, the KPMG administrators applied to appoint the bank nominees and the Davey nominees as additional administrators, pursuant to section 103 of Schedule B1. The bank nominees and the Davey nominees would have very limited functions in their capacity as additional administrators, and their appointment would only last for a scintilla temporis. Second, the KPMG administrators caused the companies to present winding-up petitions against themselves, so that the administrations would be converted into liquidations. Each petition sought an order, pursuant to section 140(1) of the Act, appointing the bank nominees and the Davey nominees (but not the KPMG administrators) as joint liquidators of the companies. Third, the bank nominees and the Davey nominees applied for an order directing them, upon their appointment as joint liquidators, to enter into a memorandum of understanding in an agreed form (the

MOU). The MOU was a carefully negotiated document, which demarcated the powers and responsibilities of the bank nominees and the Davey nominees inter se. The petitions and applications were expressed to be interlocking, and stood or fell together.

The judge granted the relief sought. Although the procedural mechanism for implementing the agreed plan was complex, it was not abusive. It would not serve any useful purpose for the Official Receiver to be appointed as the initial liquidator of the companies. In order to appoint the bank nominees and the Davey nominees as additional administrators for a scintilla temporis prior to winding up the companies, numerous provisions of the Insolvency Rules 1986 (including rules 2.127, 2.128, 4.7(10) and 2.116) had to be waived. This was appropriate in the unique circumstances of the present case. The judge held that the court had jurisdiction to direct the bank nominees and the Davey nominees to enter into the MOU. Three sources of jurisdiction were explored: section 168(3) of the Act (which empowers the court to give directions in a liquidation); section 231 of the Act (which empowers the court to demarcate the powers of joint office-holders); and the inherent jurisdiction of the court to control the activities of its own officers. The judge held that section 168(3) was the critical provision. The judge noted that "conflict liquidators" had been appointed in a number of cases (such as *Re Arrows Ltd* [1992] BCC 121 and *SISU Capital Fund Ltd v Tucker* [2005] EWHC 2170 (Ch)). The court would deal with conflicts of interest in a pragmatic manner, as and when they arose.

Finally, Ms Davey argued that the KPMG administrators' discharge should be postponed for a period of three years. This argument was rejected. The judge reviewed the authorities on postponing discharge, and held that the long period of postponement sought by Ms Davey was unusual and unjustified. The facts on which Ms Davey relied were insufficient to justify such a substantial departure from the normal position. Rather, the KPMG administrators would be discharged with effect from 21 days after they complied with rule 2.116 of the Insolvency Rules 1986, save in relation to claims brought by any relevant company acting through its liquidator within 6 months of the commencement of that company's liquidation.

[Simon Mortimore QC, Richard Fisher, Stephen Robins, Ryan Perkins]

Re Premier Motor Auctions Ltd [2015] EWHC 3568 (Ch) (Judge Behrens, 11 December 2015)

Litigation expenses – hearings in private

The liquidators of the company issued proceedings against Lloyds, PwC and other defendants for fraudulent misrepresentation and conspiracy. Lloyds was a substantial secured creditor of the company, and asserted that the claim was entirely without merit. In November 2015, the liquidators issued an application pursuant to rule 4.218E(2)(a) of the Insolvency Rules 1986 for an order approving the proposed litigation expenses in respect of the claim. This would ensure that the liquidators' litigation expenses had priority over the claims of Lloyds under its floating charge, pursuant to section 176ZA of the Insolvency Act 1986. The liquidators also sought numerous heads of ancillary relief, including an order that the application be heard in private, that Lloyds not be served with the application, that Lloyds be prohibited from making submissions at the hearing and that the order not be served on Lloyds until after the final determination of the claim against it.

The judge refused to grant the relief sought, and criticised the liquidators for attempting to conceal the application from Lloyds. Excluding Lloyds from the hearing would contravene fundamental principles of English procedural law. There were important questions as to the construction of rule 4.218 which could not properly be resolved without notifying Lloyds. The matters on which the liquidators relied "did not come within a measurable distance of justifying excluding Lloyds from participating in this application".

Re Allanfield Property Services Ltd [2015] EWHC 3721 (Ch) (Judge Keyser QC, 17 December 2015)

Administration – client money – insurance intermediaries

This application was brought by the administrators of two insurance brokers, under paragraph 63 of Schedule B1 to the Insolvency Act 1986 and/or the inherent jurisdiction of the court. The brokers held several hundred thousand pounds in client bank accounts. These sums represented (inter alia) insurance premiums paid by policyholders, which the brokers had not yet remitted to the relevant insurers at the time when they went into administration. The monies held in the client accounts were subject to a statutory trust, pursuant to Chapter 5 of the Client Assets Sourcebook (CASS 5) promulgated by the FCA. In broad terms, CASS 5 requires client money held by insurance intermediaries to be treated as pooled upon the occurrence of specified events (including the appointment of administrators over the relevant intermediary), and thereafter to be distributed to the relevant persons in accordance with a specified formula. The brokers had failed to keep adequate accounting records in respect of their client money, and there was significant intermingling between the companies' client accounts. Because the brokers' books and records were so inadequate, it was likely to be impossible to calculate client money entitlements in the manner prescribed by CASS 5 with any certainty. The administrators therefore proposed a distribution plan in respect of the client accounts, and sought directions from the court to distribute the funds in accordance with the terms of the plan.

The judge granted the directions sought. He cited *Re MF Global UK Ltd (No. 3)* [2013] EWHC 1655 (Ch) as authority for the proposition that the court has jurisdiction to give directions as to the distribution of trust property, including property held under statutory trusts pursuant to the CASS regime. The judge considered a number of detailed individual questions relating to the construction of specific provisions of CASS 5, which are not described herein. Among other things, the judge confirmed that the client money pool of one company can trace into the client money pool of another company where monies from the first pool have been wrongfully transferred into the second pool, in accordance with the normal equitable rules of tracing. Finally, the judge was concerned by the high level of costs incurred by the administrators in connection with the application, having regard to the relatively small amount of client money at stake. In principle, the administrators could recover appropriate remuneration from the client money pool (either under the terms of CASS 5, or at common law under the rule in *Re Berkeley Applegate (Investment Consultants) Ltd (No. 1)* [1989] Ch 32). However, if it becomes clear that significant preliminary work by administrators or liquidators will be necessary to identify the beneficiaries of a client money pool (or any other trust), it would be prudent for those administrators or liquidators to make an application to the court for prospective sanction of their remuneration. The quantification of the administrators' remuneration was adjourned to a future date.

TOC Investments Corporation v Beppler & Jacobson Ltd [2016] EWHC 20 (Ch) (Hildyard J, 8 January 2016)


DANIEL BAYFIELD QC

Liquidators – funding agreement – construction

The seventh respondent presented a petition to wind up the first respondent (BJUK) in May 2012, and provisional liquidators (PLs) were appointed. By a consent order of Newey J in July 2012, the parties agreed that the remuneration and expenses of the PLs would be borne by BJUK if the petition was dismissed. This order was intended to reflect rule 4.30(3) of the Insolvency Rules 1986, which has the same effect. Shortly after Newey J's order, the applicant company (TOC) entered into a funding agreement with the PLs, whereby TOC agreed to "advance" money to the PLs "on account of fees already incurred or to be incurred". BJUK was also a party to the funding agreement. There were no express terms in the funding agreement identifying the circumstances, if any, in which BJUK would be liable to reimburse TOC for advances under the funding agreement.

In December 2014, the winding-up petition was dismissed by an order of Rose J. By that time, TOC had advanced a total of £2.685m in respect of the PLs' remuneration and expenses. TOC contended that the monies had been advanced by way of

a loan to BJUK, and applied an order requiring BJUK to reimburse TOC for the entire amount of £2.685m.

The application was granted. It was clear that a gift was not intended. Given that the word "advance" connotes a loan with a right of recourse, the parties plainly intended for TOC to have recourse against BJUK in respect of the advances. The funding agreement, the contemporaneous court orders and the relevant provisions of the Insolvency Rules had to be read together and interpreted in conformity. There was no basis for suggesting that the terms of the funding agreement were intended to supersede the terms of Newey J's order (or the provisions of rule 4.30(3)). The intention of the parties, and of the court, had been that the costs and expenses of the PLs should ultimately be borne by BJUK or out of its available assets in its liquidation. The funding arrangements were intended to cover the PLs' ongoing costs and expenses, but subject to the funder's right of recourse to the assets of BJUK to reimburse its outlay (at the time stipulated in Newey J's order).

Further or alternatively, TOC was entitled to be subrogated to the PLs' right to receive payment of their remuneration and expenses from the assets of BJUK. The object of subrogation is to prevent unjust enrichment (applying *Bank of Cyprus UK Ltd v Menelaou* [2015] 3 WLR 1334). BJUK would be unjustly enriched if TOC was not reimbursed. For that reason, subrogation was an appropriate remedy in the present case. **[Daniel Bayfield]**

Re OGX Petroleo E Gas SA [2016] EWHC 25 (Ch) (Snowden J, 12 January 2016)


MARTIN PASCOE QC


RICHARD FISHER

UNCITRAL Model Law on Cross-Border Insolvency – full and frank disclosure

The company (OGX), which was incorporated in Brazil, chartered a vessel from an entity known as Leasing. OGX fell into financial difficulties, and sought to renegotiate the charterparty. In June 2014, a judicial reorganisation plan under Brazilian bankruptcy law was approved by OGX's creditors and the Brazilian court. When the reorganisation plan was submitted to the Brazilian court, the charterparty renegotiations were ongoing. It was therefore envisaged that the new charterparty would not be subject to the judicial reorganisation, and Leasing was not included on the list of creditors set out in the plan. In

ONCE BRAZIL'S SECOND-LARGEST OIL COMPANY BY MARKET VALUE, OGX FILED FOR BANKRUPTCY IN 2013

September 2014, the renegotiation between Leasing and OGX concluded and a new charterparty was executed. Shortly thereafter, Leasing assigned its rights under the charterparty to a third party (Nordic). The new charterparty provided for any disputes to be determined by arbitration in London. Payments due from OGX under the new charterparty fell into arrears, and Nordic submitted a request for arbitration in June 2015.

In July 2015, OGX made an ex parte application to the English court for recognition of the Brazilian judicial reorganisation as a foreign main proceeding under the UNCITRAL Model Law on Cross-Border Insolvency, as incorporated into English law by Schedule 1 of the Cross-Border Insolvency Regulations 2006. The proposed recognition order included a paragraph stating that, pursuant to Article 20(1) of the Model Law, the arbitration between Nordic and OGX would be stayed. Upon hearing the recognition application, the judge (Mann J) made an order in the terms sought by OGX. After learning of the order, Nordic and Leasing applied for the order to be set aside or varied so as to permit the arbitration to proceed. Nordic contended that Mann J had been misled by non-disclosure of a material fact, namely that the reorganisation plan for which recognition had been sought did not apply to the new charterparty.

Nordic's application was heard by Snowden J.

The parties placed a draft consent order before Snowden J, which provided for the automatic stay to be lifted so that the arbitration could continue. Snowden J was satisfied that the consent order should be approved. However, he made a number of remarks about the importance of full and frank disclosure in ex parte applications under the Model Law.

First, Snowden J held that the stay imposed by Article 20(1) of the Model Law was not intended to prevent persons whose claims are not subject to the relevant foreign proceeding from being able to pursue their claims against the company. Such persons stood outside the relevant collective process, and it would not be appropriate to utilise the Model Law to prevent them from pursuing their ordinary remedies against the company.

Second, Snowden J held that a foreign representative who seeks recognition without notice ought to place before the court any material of which he is aware which is relevant to the exercise of the court's discretion. If the foreign representative knows that recognition and the automatic stay thereunder will affect existing or threatened proceedings, or the enforcement of security by a third party, he should inform the court of that fact and of any matters that would be relevant as to whether the automatic stay should apply or not. The court can then exercise its discretion whether to modify the automatic stay immediately (pursuant to Article 20(6) of the Model Law) or simply to grant recognition and to place the burden upon the third party to make a subsequent application to the court for modification of the stay. In many cases – for example, where there are pre-existing court proceedings against the company – it may well be appropriate for the court simply to grant recognition and to leave it to the other litigant to apply for the automatic stay to be lifted. In other cases – for example, where there are arbitration proceedings already in existence or threatened – the decision might be more finely balanced. In the present case, it was clear that the stay should have been modified from the outset, so that Nordic would be free to continue the arbitration without making its own application to the court. Had OGX complied with its duty of full and frank disclosure, there is no doubt that Mann J would have modified the stay in this manner.

Third, Snowden J considered it to be strongly arguable that the court has a residual discretion to refuse recognition if it is satisfied that the applicant is abusing the recognition process for an illegitimate purpose (notwithstanding the narrow ambit of the public policy exception in Article 6 of the Model Law). On the exceptional facts of the present case, Mann J might well have been justified in rejecting the application for recognition altogether.

Although Snowden J was troubled by the extent of the non-disclosure in the present case, he determined that it would not be proportionate to investigate matters further in circumstances where Nordic would be compensated for its wasted costs.

[Martin Pascoe QC, Richard Fisher]

Re Ralls Builders Ltd [2016] EWHC 243 (Ch)

Wrongful trading

The liquidators of a construction company applied for a declaration, pursuant to section 214 of the Insolvency Act 1986 (wrongful trading), that the directors had engaged in wrongful trading and were liable to make a contribution to the company's assets. The liquidators' primary case was that the directors knew or ought to have concluded by 31 July 2010 that there was no reasonable prospect that the company would avoid going into insolvent liquidation. In the alternative, the liquidators argued

that the directors should have reached this conclusion by 31 August 2010.

The application was dismissed. It was obvious that the company was insolvent by 31 July 2010, and that the directors were well aware of this fact. By 31 August 2010, the directors ought to have realised there was no reasonable prospect that the company would avoid going into insolvent liquidation. However, the company only traded for a short period of time thereafter, and went into administration on 13 October 2010. The judge was not satisfied that the directors had caused any, or any material, reduction in the net asset value of the company, or any other loss to the company or its creditors, between 31 August and 13 October. In these circumstances, the judge refused (in the exercise of his discretion under section 214) to make an order requiring the directors to contribute to the company's assets.

PERSONAL INSOLVENCY

Digested by WILLIAM WILLSON


WILLIAM WILLSON

Aabar Block SARL; Edgeworth Capital (Luxembourg) SARL v Glenn Maud [2015] EWHC 3681 (Ch) Ch D (Bankruptcy), Registrar Briggs, 18 December 2015

Bankruptcy petition – collateral purpose

The respondent debtor ("**R**") sought an adjournment of the hearing of the bankruptcy petition which had been presented against him by the two petitioning creditors ("**P**").

The respondent had operated as a property entrepreneur through shareholdings in three companies with another individual ("**Q**"). R and Q had acquired an office complex in Madrid which R claimed had a current market value of between €3 and €3.5 billion. The petition debt was £51 million. The companies had entered into liquidation in Spain in February 2015. The Spanish court had recently approved a liquidation plan providing for the sale of the companies. R was part of a consortium which had put forward an offer to buy the companies which, he claimed, would result in the discharge of all of his debts. He sought an adjournment to allow the sale to proceed. He also claimed that P were pursuing a collateral purpose in seeking to make him bankrupt: by a deed entered into with Q, they had obtained effective control over Q's shares in R; his bankruptcy would trigger Q's rights of pre-emption over his shares in R; that would enable P to gain control of R and therefore of the office complex as well. It was held that, it was necessary to decide whether P had an ulterior object in pursuing the petition. If they did, the burden would shift to them to show that an immediate bankruptcy order would benefit the class of creditors as a whole (*Re Bula Ltd* [1990] 1 I.R. 440 applied). The facts of the case overwhelmingly led to the inference that the petitioning creditors did have an ulterior object in pursuing the petition. Among other things, they had admitted that they wished to acquire the office complex. Further, they would obtain it by reason of a bankruptcy order, not as a class right in the bankruptcy, but in their capacity as a contractual party to the deed entered into with Q. The burden having shifted to the petitioning creditors to show that an immediate bankruptcy order would benefit the creditors as a whole, they had not discharged that burden. The judge had previously rejected his submission that the collateral purpose relied on would render the presentation of a bankruptcy petition an abuse of process. However, the inquiry as to purpose could continue at the hearing of the bankruptcy petition even where an abuse of process was not found to exist at the statutory demand stage. There might be more evidence before the court at that hearing.

[Mark Phillips QC; William Willson]

PROPERTY & TRUSTS

Digested by ANDREW SHAW


ANDREW SHAW

Urban Ventures Ltd v Thomas (Black Ant Co Ltd (In Administration), Re) [2016] EWCA Civ 30 (Beatson LJ, Lindblom LJ, David Richards LJ, 29 January 2016)

Land Registration Act 2002, section 49 – "further advances"

"Tacking" describes the means by which a creditor, with a charge securing an original advance, is able to use that charge to secure a further advance and so obtain priority for the further advance over sums secured by any second or subsequent charge. Given the prejudice to subsequent charge holders, tacking has been severely restricted by equity and statute. Section 49 of the Land Registration Act 2002 (Tacking and further advances) provides that tacking in relation to a charge over registered land is only possible with

the agreement of a subsequent chargee, except under the circumstances specified in the section. It was common ground that none of these circumstances applied in the present case, and so the only issue was whether any further advances were actually made by the holder of the first charge. There was, however, no direct relevant authority on the meaning of "further advances".

The first charge holder was the second respondent Dunbar Assets plc, which in 2006 made available to the Black Ant Company Limited ("TBAC") a loan facility of £2.47 million. The facility letter was headed "Loan Facility – No. 13 Account". The security for the loan included a first legal charge over a property, and the charge was registered with the Registrar of Companies and the Land Registry. The claimant Urban Ventures Ltd ("Urban") also lent monies to TBAC, secured by a second charge on the same property. Through a series of letters during 2007 and 2008 (headed "Loan Facility – No. 13 Account") the loan facility provided by Dunbar was extended, with the terms and conditions of the facility amended by each letter. Further facilities letters were provided during 2009 (also headed "Loan Facility – No. 13 Account") which specified increased amounts for the facility, with the purpose being stated as "to fund your existing borrowings". Where such increased facility amounts were specified, the amount of increase reflected the current balance including unpaid interest. A key difference from the 2008 letters was that the 2009 letters stated "This offer is in substitution of and not in addition to all our previous Facility letters to you which shall be deemed cancelled." Urban argued that the effect of the facility letters in 2009 was that Dunbar made new or further advances to TBAC in place of the previous advance, and therefore Dunbar was not entitled under the statutory provisions to tack such further advances to its first legal charge and so gain priority over Urban's subsequent charges. It was submitted that the terms of the 2009 letters meant that the previous loans were cancelled and replaced by new loans, and applying *Morris v Baron & Co* [1918] AC 1 these letters created a new contractual relationship in place of that which existed before. Urban's arguments, however, were rejected at first instance by Nicholas Strauss QC, sitting as a Deputy Judge of the High Court.

David Richards LJ (with whom Lindblom LJ and Beatson LJ agreed) stated that the answer to the question of whether the 2009 facility letters made new or further advances was not determined by whether these letters took effect as a variation of the earlier facility letter or as a replacement for it. It was true that if it were only a variation, it would follow that there was no further advance, but the contrary proposition did not follow. Accordingly, a new contract would not mean there was a new advance, as it could take effect as a new contract relating to the existing advance. David Richards LJ stated that "[s]o far as relevant for present purposes, an advance is a payment of money on terms that it will be repaid, in other words a loan". However, no monies were repaid by TBAC to Dunbar, and no monies were paid by Dunbar to TBAC pursuant to the 2009 letters. Nor did the parties agree that TBAC should be treated as repaying the existing loan, with that amount immediately re-lent to it. The Court of Appeal held that "[c]ontinuing or leaving outstanding an existing loan is not the making of a new or further advance", and therefore the Judge was right to conclude that no new advance was made by the 2009 letters. David Richards LJ did not find that the rule in *Clayton's Case* (1815–15) 1 Mer 572 was of assistance in the present case, since there was no running account and the pre-requisite of payments into the account was absent, save for some payments regarding interest. Finally, even if the 2009 letters were to replace rather than vary the previous letters, the purpose was to set out the terms to the existing advance, and these subsequent letters simply restated with minor variations the original facility letter. Accordingly, the Court of Appeal held that tacking did not arise, and so Dunbar retained its priority as first charge holder.

Erlam v Rahman [2016] EWHC 111 (Ch) (Chief Master Marsh, 29 January 2016)

Charging Orders – Beneficial Interests – Sham Transactions

This case concerned a final charging order obtained by the Claimants against a property registered in the sole name of the Defendant, Lutfur Rahman, pursuant to a judgment of the Election Commissioner against Mr Rahman. The Second Defendant, Mrs Farid, was Mr Rahman's wife. Mrs Farid claimed that she was the beneficial owner of 74% of the property subject to the charging order ("the Property").

Mr Rahman had purchased the property in 2005. On his application for a mortgage he had described himself as separated and had certified that the Property was to be used for residential letting only and he would

not occupy the Property, nor would any related person. Subsequently, in 2006 Mr Rahman and Mrs Farid executed a declaration of trust, which stated that Mr Rahman held the Property on trust for himself and Mrs Farid, in the shares of 26% and 74% respectively ("the Declaration of Trust"). The Declaration of Trust also stated that Mrs Farid had contributed 74% of the Property's purchase price.
Chief Master Marsh considered whether the Declaration of Trust was intended to be definitive as to the beneficial ownership of the Property or whether it was simply one factor to take into account. He held that the Declaration of Trust was not definitive but was intended to evidence a trust which had come into effect by virtue of Mrs Farid's contribution to the purchase price of the Property. It followed that it was necessary to examine what this contribution had been and to what beneficial interest it had given rise. In considering the latter point, Chief Master Marsh applied Laskar v Laskar [2008] 1 WLR 2695, in which Neuberger LJ held that in considering the beneficial ownership of a property that had been acquired for business purposes, the beneficial ownership was determined by considering the principles applicable to resulting trusts, rather than by applying the common intention constructive trust analysis described in Stack v Dowden [2007] 2 AC 432, which had no application to a property bought by a married couple for investment, rather than as a home.
Chief Master Marsh found Mrs Farid "a thoroughly unreliable and unsatisfactory witness." He held that she was willing to alter her case when challenged and was curiously unable to locate bank statements for critical periods. He also drew an adverse inference from the fact that she had failed to call Mr Rahman to give evidence without adequate explanation for this omission. He concluded that, on the balance of probabilities, Mrs Farid was unable to show that she had made any contribution to the purchase price of the property and it followed that she could not establish a resulting trust.
Since the Declaration of Trust was predicated on the fact that Mrs Farid had contributed 74% of the purchase price it did not reflect the reality and was a fiction. On its proper construction, the Declaration of Trust did not amount to a gift of 74% of the beneficial interest in the Property to Mrs Farid.
Chief Master Marsh went on to deal with the Claimants' alternative case that the Declaration of Trust was a sham. The burden of proving this was on the Claimants, who would have to show that by executing the Declaration of Trust, Mrs Farid and Mr Rahman had a common intention of giving third parties the appearance of creating legal rights and obligations that differed from the legal rights or obligations (if any) that they actually intended to create.
He held that if the Declaration of Trust could have been construed as gifting Mrs Farid a beneficial interest in the Property or if she had actually shown she did contribute 74% of the purchase price, the Declaration of Trust would nonetheless have been a sham for the following reasons:
(1) Mr Rahman and Mrs Farid concealed the existence of the Declaration of Trust from third parties, including the mortgagor.
(2) Mr Rahman and Mrs Farid did not act between themselves as if Mrs Farid was the beneficial owner of the majority of the Property; neither declared the rental income to HMRC and there was no accounting between them of the rental income. At all times, they acted between themselves as if Mr Rahman were the sole owner of the Property.
(3) The Declaration of Trust was not registered with the Land Registry, despite Mrs Farid having been advised by her solicitor to register it.

Clydesdale Bank Plc v Workman [2016] EWCA 73 (Longmore, Lewison and Kitchin LJJ, 4 February 2016)

Breach of Trust – Dishonest Assistance

This was an appeal from a decision of HHJ Pelling QC that two solicitors were guilty of dishonest assistance in a breach of trust, the breach of trust in question being a mortgage fraud by which the borrower obtained all the proceeds of sale of a substantial part of the mortgaged property in fraud of the lender.
Lord Edward Developments (Beechwood) Ltd ("the Company") purchased a property known as Beechwood together with three plots of land. The purchase was funded with the assistance of a mortgage from Yorkshire Bank ("the Bank"). It was intended that the Bank's lending would be secured by way of a first legal charge over the purchased property. However, although the Bank's solicitors registered a charge with Companies House, they did not register it with the Land Registry. Accordingly, until such registration occurred the Bank's charge operated only in equity.
Subsequently the Company executed a first charge over the purchased property in favour of a Mr Hayward ("the Hayward Charge"). The Hayward Charge purportedly secured a loan of £600,000, although

it later transpired that it was a sham. Although the Hayward Charge was not registered with Companies House, it was registered with the Land Registry which, for some reason, failed to record the fact that it was not registered a Companies House. On its face, the effect of the Hayward Charge was to postpone the priority of the Bank's charge, which was at this point still unregistered.

In May 2007, the Company had instructed a firm of solicitors in connection with the sale of one of the plots of land to a Mr Davies. Mr Murphy was the solicitor dealing with this matter under the supervision of a partner, Mr Denslow. In February 2008, Mr Murphy was instructed to sell all three plots to Mr Tibbetts, who had ultimate control of the Company. Mr Murphy was informed that Mr Hayward was acting as nominee for Mr Tibbetts and the sale of the second and third plots of land was part of the consideration of the debt owed to Mr Hayward.

While carrying out the searches in connection with the sale of the first plot, Mr Murphy discovered the existence of the Hayward Charge. On completion of the sale of the first plot, Mr Murphy paid over the proceeds of sale to Mr Hayward's solicitors to be held to his order until the Hayward Charge was discharged.

Following the sale of the first plot, the Bank's solicitors informed Mr Murphy that they were arranging the registration of the Bank's charge. Mr Murphy responded that he had instructions to proceed with the sale of the second and third plots, and these sales subsequently completed. It was the Bank's case that in failing to pay the sale proceeds of the plots of land to the Bank, Mr Murphy and Mr Denslow were guilty of dishonest assistance in a breach of trust.

At first instance, HHJ Pelling QC acquitted Mr Murphy and Mr Denslow of any dishonesty in relation to the sale of the first plot but concluded that the completion of the sales of the second and third plots had defeated the legitimate interests of the Bank. The Court of Appeal disagreed, with Lewison LJ holding that the critical issue in relation to dishonesty was whether Mr Murphy and Mr Denslow believed that the Hayward Charge secured an amount greater than the aggregate value of the plots. If they did, then even with notice of the Bank's charge they would have been obliged to pay the sale proceeds of the plots to Mr Hayward.

Lewison LJ held that the trial judge had not made any findings about the Mr Murphy's and Mr Denslow's beliefs as to the amount secured by the Hayward Charge. Without making any such findings, the trial judge was not entitled to conclude that they were guilty of dishonesty. Lewison LJ held, "A finding of dishonesty, especially against a solicitor, should not be made without the most careful consideration of what the solicitor said in his own defence." Further, Lewison LJ held that it was not possible for the Court of Appeal to decide that oral evidence given by professional men as to their beliefs should not be believed when the trial judge had made no such finding. Consequently, the trial judge's findings of dishonesty could not stand and the appeal succeeded.

SPORT

Digested by **ROBERT AMEY**


ROBERT AMEY

Football Association v Jake Livermore (FA Regulatory Commission, 8 September 2015)

Doping – mandatory sanction – proportionality

Following a professional match on 25 April 2015, England and Hull City footballer Jake Livermore provided a urine sample which contained Benzoylecgonine, a metabolite of cocaine. Following a positive test of the B Sample a month later, Mr Livermore admitted an Anti-Doping Rule Violation (ADRV).

In accordance with the FA Anti-Doping Regulations, a sanction hearing was held on 2 September 2015 at Wembley Stadium. The Regulatory Commission described the facts of the case as "deeply tragic". The judgment explained how Mr Livermore became seriously depressed following the death of his first child. The evidence of a consultant psychiatrist was that Mr Livermore's cognitive functions and judgment were severely impaired at the time in question. Five pages of the judgment, setting out "the full extent of the tragedy and the impact upon Mr Livermore" were redacted. Describing the facts of the case as "exceptional and indeed unique", the Commission found that there had been no intention on the part of Mr Livermore to enhance his performance as an athlete, he had tested negative on ten previous occasions, this was a one-off incident for a man who had never used recreational drugs before, and the

ADRV had only occurred as a result of the severe impairment of Mr Livermore's cognitive functions and judgment caused by circumstances for which he was in no way at fault. FA Anti-Doping Regulations provide a mandatory 2-year suspension for a first offence involving cocaine, subject to a finding of no, or no significant, fault or negligence. Mr Livermore could not bring himself within the 'no fault or negligence' exception, since the relevant definition required that he did not know or suspect, and could not reasonably have done so, that he had used a prohibited substance. The FA did, however, accept that Mr Livermore could bring himself within the 'no significant fault or negligence' exception, which would reduce the minimum sentence to 12 months.

Mr Livermore, however, argued that it was inappropriate to impose even that reduced sentence on him, since it would violate the principle of proportionality between the breach and the sanction. The Commission noted that that the principle of proportionality is already reflected in the different minimum sanctions accorded to different types of breach, and that although minimum sanctions could sometimes appear harsh, there was a benefit to be derived from consistency.

Accordingly, there is no general discretion to depart from the sanctions set out in the World Anti-Doping Code as embodied in the FA Anti-Doping Regulations.

However, the Commission cited various decisions of the Court of Arbitration for Sport, where, in the context of unique and extreme circumstances, the CAS had departed from the minimum sanctions provided for by the Code. Noting that the circumstances of the present case were extreme and unique, and that a 12-month suspension would be "wholly unfair as well as evidently and grossly disproportionate", the Commission imposed no suspension at all.

The Commission concluded by noting that the case was not intended to set a precedent, and that it would be a very rare case which did not fall within the express sanctions provided under the Regulations and the World Anti-Doping Code.

JAKE LIVERMORE: IN EXTREME AND UNIQUE CIRCUMSTANCES THE CAS CAN DEPART FROM THE SANCTIONS PROVIDED UNDER THE FA ANTI-DOPING REGULATIONS AND THE WORLD ANTI-DOPING CODE

Recognition of foreign compromises and facilitating their effectiveness

A Cayman perspective by Barnaby Gowrie and Brett Basdeo

The Grand Court of the Cayman Islands (the "**Grand Court**") has long adopted a uniquely flexible, pragmatic and cooperative approach in cross-border insolvency matters[1]. Recognising the considerable degree of cross-border co-operation in respect of insolvency matters in the Cayman Islands, the law and judicial practice were codified pursuant to certain wholesale amendments to the Companies Law in 2007 ("**Companies Law**"). Part XVII of the Companies Law deals with international cooperation with respect to foreign bankruptcy proceedings.

Represented by Walkers (Barnaby Gowrie and Brett Basdeo), Kaupthing hf, one of Iceland's major commercial banks which fell victim to the international liquidity crisis of 2008, recently made successful applications under Part XVII effectively ensuring the integrity of the bank's Icelandic based insolvency proceeding. With the characteristic hallmarks of commercial expediency, the Grand Court provided procedural clarity which will be of assistance to local insolvency practitioners advising foreign trustees, liquidators or other officials appointed in respect of foreign companies which are the subject of a bankruptcy or liquidation proceeding.

BARNABY GOWRIE

Kaupthing, subject to winding up proceedings in Iceland with retrospective effect since April 2009 as a result of extraordinary legislative measures passed by Iceland's parliament, was undergoing an Icelandic 'composition'. This was a process not unlike a Cayman Islands scheme of arrangement, whereby the bank and a mandated majority of its creditors sought to achieve an agreement on the settlement or relinquishment of debts concluded between the bank and those creditors, to be subsequently confirmed by the Icelandic court as binding on those creditors. Failure to reach a compromise on the debt could have led to diminished returns for relevant creditors. As a crucial protective measure, Kaupthing sought to initiate proceedings in several jurisdictions, including the Cayman Islands which were home to significant assets, for declaratory orders recognising the members of its Icelandic court-appointed Winding-up Committee and for the protection of the courts of those jurisdictions from the commencement of creditor claims against the bank that might serve to derail or usurp the Icelandic

1/. Cleaver and Jones, Recognition and Cooperation in Cross-Border Insolvency Matters Report, 29 May 2002.

composition process.

Part XVII provides foreign representatives with a convenient and expeditious method of establishing their credentials and sole right to act on behalf of a foreign debtor in a way which will have universal effect within the jurisdiction, without the need to establish their right separately as against every individual counterparty.[2] A further key feature of Part XVII is the ability of the Court to grant various ancillary orders in support of the foreign proceedings, including for the purpose of enjoining the commencement or staying the continuation of legal proceedings against the foreign debtor. However, the Rules governing the Part XVII application process were procedurally unclear in certain respects and in particular as to the proper process with respect to (i) the anticipatory enjoinment of legal proceedings against a debtor; and (ii) applications being made by jointly appointed foreign representatives.

Section 241(1)(b) of the Companies Law provides as follows:

"*Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of… enjoining the commencement or staying the continuation of legal proceedings against a debtor.*"

The Foreign Bankruptcy (International Co-operation) Rules, 2008 (the "**Rules**") require that an application pursuant to Section 241(1)(b) of the Companies Law is made by originating summons. As a matter of procedure, an originating summons tends to be used where there is an identified plaintiff or defendant. However, in circumstances where the relief requested is effectively against the world (in rem), such as the enjoinment of proceedings against a debtor where there is no clearly identified plaintiff or defendant, a petition (which can require advertisement and open court hearings) is more appropriate.

Building upon the earlier observations of the Honourable Chief Justice Anthony Smellie QC in the case of *Re Straumur-Burduras Investment Bank hf*[3], Justice Andrew Jones QC provided much needed clarity on the procedural idiosyncrasies within the Rules. In particular, Justice Jones stated 'enjoining the commencement' and 'staying the continuation' of legal proceedings - were by their

BRETT BASDEO

nature different forms of relief (notwithstanding that they were both contained within Section 241(1)(b) of the Companies Law) with orders reflecting the former being 'in rem', the latter 'in personam'. Mr Justice Jones identified that the nature of anticipatory enjoinment was such that it necessitated and could be contained within the declaratory orders sought in the petition for recognition of the foreign representative, saving time and costs accordingly. Further, the learned judge clarified that an application for declaratory relief could be made by joint appointees, dispelling the artificiality of having to nominate one of their number in order to bring an academically contrary application for sole recognition.

Whilst the Rules on their face currently remain unclear, the Kaupthing case has greatly clarified the relevant procedure pursuant to Part XVII of the Companies Law. Walkers have suggested amendments to the Insolvency Rules Committee, the body responsible for the Rules, and look forward to amended versions of the Rules being published.Walkers' recommendations have been positively received and are expected to be incorporated into the Rules in due course.

2/. In re Bernard L. Madoff Investment Securities LLC [2010] 1 CILR 231 [4] (Jones J), in which Walkers acted for the petitioner.
3/. [2010] 2 CILR 146, in which Walkers acted for Straumur-Burduras Investment Bank hf.

Interrogation about assets and Black Swan

Oliver Clifton and **Jennifer Fox** discuss a recent case in the BVI in which the BVI Commercial Court has clarified the scope of a Black Swan injunction and how it cannot be used as a mechanism to obtain disclosure about assets or to obtain evidence for foreign proceedings.

Walkers has recently acted for the successful respondents in a matter which has clarified the scope of the so-called *Black Swan* jurisdiction in the British Virgin Islands ("BVI"). In particular, in the decision handed down on 3 February 2016 in *Bascuñan and others v. Elsaca and others*[1] ("*Bascuñan*"), the BVI Commercial Court found that extensive disclosure orders made on an ex parte basis in October 2015 against a number of BVI respondent companies purportedly in reliance on the Black Swan jurisdiction and on *Norwich Pharmacal/Bankers' Trust* principles, and against their registered agents on the latter basis alone could not stand and no disclosure was allowed.

The Black Swan Jurisdiction

The Black Swan jurisdiction allows the BVI Court to grant free-standing injunctions in aid of foreign proceedings. These injunctions are essentially limited to orders safeguarding the value of assets located in the BVI belonging to a defendant to foreign proceedings against whom a money judgment is sought. The jurisdiction emerged as a consequence of the decision of Bannister J in 2009 in the matter of *Black Swan Investments I.S.A v Harvest View Limited and Others*[2] ("*Black Swan*"). Prior to this decision the established view in the BVI was that, absent a statutory provision to the contrary (as in England & Wales[3]), substantive proceedings had to be brought in the BVI before a freezing order could be made. This position relied on a strict interpretation of a 1979 House of Lords decision in *The Siskina*.[4] In *Black Swan*, Bannister J distinguished *The Siskina* on the basis that the respondents in that matter had not been subject to the personal jurisdiction of the English Court whereas in *Black Swan* the BVI Court did have jurisdiction. Although without precedent, the Judge considered that he was empowered to grant the freezing order sought in reliance on section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, which permits injunctions to be made by the BVI Court in all cases in which it appears just to do so. The key question for the court was whether the sought order "should" be made in all the circumstances. Bannister J found that the order should be made notably drawing support from obvious public policy interests in the BVI being seen to take active steps to combat international fraud. The analysis was endorsed by the Eastern Caribbean Court of Appeal, in the *Yukos*[5] case, and orders are increasingly sought.

Assets capable of being frozen and ancillary disclosure

In *Osetinskaya v Usilett Properties Inc*[6] ("Osetinskaya") the BVI Commercial Court went on to find that shares in a BVI company represented assets for the purposes of a Black Swan freezing order. In

1/. BVIHC2015/0128.
2/. BVIHCV 2009/399.
3/. Section 25 of the UK Civil Jurisdiction and Judgments Act 1982.
4/. Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA [1979] 210.
5/. Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited HCVAP 2010/028.
6/. BVIH(Com) 2013/0037, 25 July 2013.


OLIVER CLIFTON

Osetinskaya the Judge (again Bannister J) noted "*it will usually also be just and convenient to prevent the shares from being rendered worthless by restraining the company from disposing of its property, whether that property is situate in the BVI or abroad*." In respect of the provision of asset disclosure by a respondent, which is disclosure ordinarily ordered when a freezing order is made so as to enable the applicant to effectively police the order, the Judge decided that this was not available under *Black Swan*. Bannister J observed, with reference to an application for disclosure by the respondent of its assets worldwide that "*the Black Swan jurisdiction applies to prevent ...defendants from disposing of identified assets which might be available to satisfy a future judgment of a foreign Court in proceedings...It does not entitle the claimant in the Black Swan proceedings in this jurisdiction to interrogate them about its assets generally. That will be the function of an order made in the foreign proceedings*." Thus *Osetinskaya* made it abundantly clear that the *Black Swan* jurisdiction cannot be used to obtain asset disclosure which ought to be sought in the foreign jurisdiction where the main proceeding is underway.

Bascuñan

In his decision in *Bascuñan*, Bannister J reasserted the finding in Osetinskaya that the Black Swan principle did not exist as an available means for litigants in foreign proceedings to interrogate BVI entities about their assets. Further, the Judge was clear in his view that the Black Swan jurisdiction is not and is not to be treated as coextensive with that available in England & Wales under the UK Civil Jurisdiction and Judgments Act 1982. This is an important finding as it clarifies that BVI litigants may not rely on English authorities themselves reliant on this statutory footing in order to expand the Black Swan jurisdiction beyond its limited bounds.

In respect of the disclosure sought from the respondents and their registered agents, the applicants had argued that they could rely on the *Norwich Phamacal/Banker's Trust* principles in support of their foreign proceedings in order to compel both the respondents and their registered agents to disclose the materials sought. These principles ordinarily allow an aggrieved person to elicit disclosure from an innocent party mixed up in the alleged wrongdoing of another only if can be established that absent the disclosure, justice would not be done. The Judge found that litigants in foreign jurisdictions could not rely on these principles to obtain such relief in the BVI to compel an alleged wrongdoer "*outside the context of legal process ...*[in the BVI]*...to assist an applicant to bring or more effectively to prosecute ...* [foreign]*... proceedings against him*." An applicant must therefore rely on the disclosure rules of the foreign jurisdiction where the main action is proceeding.

BVI litigants may not rely on English authorities themselves reliant on this statutory footing to expand the Black Swan jurisdiction beyond its limited bounds


JENNIFER FOX

The disclosure required under the ex parte order in Bascuñan was extensive. The BVI Court described the obligation on the registered agents as requiring them to "*divulge every piece of information in their possession about those of the respondents for which they acted*". It was found that it would be wrong in principle to deny the relief sought against the respondents on the basis of a lack of jurisdiction but to allow essentially identical relief "*by the back door*" against their agents, as the "*result would be to expose BVI companies to oblique intrusions into their affairs*" purely as a consequence of their statutory obligation to maintain registered agents.

Conclusion

The decision in *Bascuñan* is important given its clear guidance in both reiterating the limited scope of the Black Swan jurisdiction and in demonstrating that the *Norwich Pharmacal/Banker's Trust* principles cannot be used in the BVI for the purposes of either commencing foreign proceedings or augmenting the available evidence in such proceedings.

Spotlight on the Cayman Islands

Guy Manning and **Mark Goodman** of Campbells review recent developments in insolvency law and practice in the Cayman Islands.

Despite many economies experiencing a period of recovery from the financial crash of 2008/2009, the Cayman Islands courts continue to deal with a number of complex liquidations which have resulted in a series of recent significant decisions which go some way to clarifying the rights of creditors and the powers of liquidators.

Rights of Redeemed Investors

The decision of Jones J in *Primeo Fund (in official liquidation) v Herald Fund SPC (in official liquidation)*[1]addressed two matters of importance for investors in Cayman Islands' investment funds and Cayman Islands' insolvency practitioners: the effect of Section 37(7) of the Companies Law (2013 Revision) (the **"Law"**) on the rights of redemption creditors (particularly its application in respect of shares subject to unpaid redemption requests); and the circumstances in which a liquidator must or may rectify the register of members of a fund in respect of which the net asset value ("**NAV**") has been mis-stated.

Herald Fund SPC ("**Herald"**) and Primeo were direct or indirect victims of the Madoff Ponzi scheme. Herald had been incorporated as an open ended investment fund in March 2004, having originally invested substantially all its investments in Bernard L Madoff Investment Securities LLC. In turn, Primeo Fund ("**Primeo**") had invested substantially all of its shares in Herald.

Primeo, amongst others, had submitted redemption requests to Herald as at 1 December 2008 (the "**December Redeemers**"), substantially all of which were accepted by Herald. Subsequently, on that date, all of the December Redeemers' shares were removed from Herald's share register. However, save for one investor, none of the December Redeemers were paid their redemption proceeds before Herald went into liquidation on 23 July 2013. The Privy Council has previously confirmed that an investor's right of redemption (and a company's right to suspend redemptions) is governed by, and must be determined by reference to, a company's articles of association[2]. There remained, nonetheless, some uncertainty as to whether section 37(7)(a) of the Law affected the rights of investors who had redeemed prior to a liquidation but had not been paid their redemption proceeds as at the commencement of the winding-up.

It was accepted by all of the parties in *Herald* that the December Redeemers' shares had been redeemed on 1 December 2008[3]. Herald contended however, that because the December Redeemers had not received the proceeds of their redemptions, section 37(7)

1/. Unreported, 12 June 2015.
2/. Culross Global SPC Limited v Strategic Turnaround Partnership Limited [2010] 2 CILR 364.
3/. This was accepted in light of the Strategic Turnaround decision, supra.

THE CAYMAN ISLANDS COURTS CONTINUE TO DEAL WITH CASES WHICH CLARIFY THE RIGHTS OF CREDITORS AND THE POWERS OF LIQUIDATORS.

applied, effectively subordinating the December Redeemers' claims to the claims of any unsecured creditors of Herald under section 37(7)(b)[4].

The Court found that section 37(7) has no application at all where shares have already been redeemed as at the commencement of a company's liquidation. As a consequence, the only circumstances in which section 37(7) is likely to have any application going forward would be where a fund's articles of association require some positive step to be taken by the fund in order to effect a redemption request and where those steps have not been taken as at the commencement of the winding-up. This situation is unlikely to arise very often, if at all, given that the articles of almost all Cayman Islands' mutual funds do not prescribe any such requirement. Liquidators may need to reconsider their position in relation to redemption creditor claims which have been rejected on grounds relating to section 37(7), but where distributions are yet to be made. An appeal is pending in relation to this issue and is expected to be heard in April.

The Court had to determine two additional matters concerning the NAVs of Herald in the period 2004 to 2008 (i.e. prior to the revelation of the Madoff fraud), namely, whether the NAVs were not binding on Herald and its members by reason of "fraud or default", within the meaning of section 112 of the Law and Order 12, rule 2 of the Companies Winding Up Rules ("**CWR**"), and whether those same provisions applied to require or empower Herald's additional liquidator (the **"Additonal Liquidator"**) to rectify its register of members.

The Court held that, as a matter of contract

4/. Section 37(7)(b) of the Law provides that payments due to shareholders for redeemed shares under section 37(7)(a) rank behind unsecured creditors of the Company but have priority over its ordinary shareholders.

pursuant to Herald's articles of association, the NAVs remained binding between Herald and its members. They would only not be binding by virtue of "fraud or default" imputed to Herald itself, as opposed to Madoff, but no such allegation was made. Consequently, the Additional Liquidator had no duty under CWR Order 12, rule 2 to rectify the register of members.

The Additional Liquidator did, however, have a *power* as an officer of the Court to rectify the register of members pursuant to section 112, in order to achieve justice as amongst those recorded as members *as at the commencement of Herald's liquidation*, irrespective of whether the NAVs were binding as a matter of contract. Whether or not the Additonal Liquidator should exercise that power (and, if so, how) is to be determined at a subsequent hearing.

The decision in *Herald* benefits unpaid redemption creditors whose position has, absent any successful appeal, been significantly strengthened. The decision is less likely to be welcomed by other creditors of an insolvent fund (including, for example, unpaid service providers or judgment creditors), who are now likely to rank *pari passu* with the fund's unpaid redemption creditors.

Share Premiums for Redemption of Shares

In a decision of the Grand Court, *RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund (in official liquidation),*[5] Smellie CJ has found that redeemed shareholders are entitled to retain redemption proceeds paid to them by a fund even though the fund was cash flow insolvent at the time of the payment. The Judge found that the Companies Law (2007 Revision) (applicable at the relevant time) did not prohibit the use of share premiums for the redemption of shares when permitted by a fund's articles, even when insolvent, because by operation of section 34(2)(f) as it then stood, payments out of share premiums were not regarded as payments out of capital.

Smellie CJ rejected the liquidators' argument that a redemption payment out of share premium fell within s 37(6)(a)[6], by virtue of the deemed meaning of the phrase "*payment out of capital*" under section 37(5)(a) and (b), which included payment "*otherwise than out of its profits or the proceeds of a fresh issue of shares*".

The judge expressed the view that many Cayman investment companies operated on the basis that redemption payments were made in the ordinary course of business from profits, share premiums and the proceeds of fresh issues of shares. He further considered that the liquidators' position was inconsistent with section 34, under which a sum equal to the total value of share premiums must be transferred into a share premium account. The Judge found that section 34 was not subject to section 37 but was instead a separate regime dealing with payments out of share premium.

The purpose of the capital preservation requirement is to protect a company's creditors. At common law, company assets cannot be distributed to shareholders, unless statute provides otherwise. Such a distribution is defined as a return of capital and, as such, is unlawful.[7] Thus, the definition of capital is potentially broad but is limited by statute. On Smellie CJ's construction of the Law, the common law rule has a very narrow application in the context of Cayman funds, being confined to the (typically nominal) amount of paid up share capital. In this case, the payments were held to have been made in accordance with the articles and specific statutory provisions, and consequently, there was no breach of the capital preservation rule.

Smellie CJ's decision was recently upheld by the Court of Appeal[8] and provides welcome certainty and comfort to investors who have been paid share redemption proceeds prior to

5/. Grand Court, unreported, 17 November 2014.
6/. Section 37(6)(a) provides 'A payment out of capital by a company for the redemption or purchase of its own shares. is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary court of business.'
7/. Progress Property Co Ltd v. Moore [2010] UKSC 55.
8/. Cayman Islands Court of Appeal, unreported, 15 November 2015.

the collapse of a Cayman Islands investment fund.

Foreign Court Assistance

The Privy Council's judgments in *Saad Investments Company Limited*[9] and *Singularis Holdings Limited*[10] are noteworthy for their clarification of the ability of officeholders to obtain the assistance of Foreign Courts and the rights of 'strangers' to a liquidation to challenge a Winding Up order. Importantly, the practical ramifications of statutory limitations on liquidators' rights to production of documents, highlighted in Singularis, continue to hamper efforts by Cayman liquidators to reconstitute the state of a Company's knowledge and affairs.

Saad Investments Company Limited ("**Saad**") and Singularis Holdings Limited ("**Singularis**") are related companies which were both incorporated in the Cayman Islands and which were both ordered to be wound up by the Grand Court of the Cayman Islands. PricewaterhouseCoopers ("**PwC**"), based in Bermuda, was the auditor for both Saad and Singularis and liquidators for the companies sought to obtain documents in PwC's possession in relation to its audits of the companies.

The liquidators of Saad applied for and obtained a winding up order in the Supreme Court of Bermuda and, in turn, an order pursuant to section 195 of the Bermudian *Companies Act 1981* seeking the disclosure of information in PwC's possession.

The liquidators of Singularis sought and obtained recognition from the Supreme Court of Bermuda of the Cayman liquidation. The Bermuda court in turn issued an order, based on its "common law power" to assist the Cayman liquidation, requiring PwC to produce working papers in relation to the audits (which it appears were agreed not to be property of Singularis), which otherwise would not have been disclosed under section 195 of Bermuda's *Companies Act 1981* or the equivalent section 103 of the Law in the Cayman Islands.

PwC resisted the orders made in both cases and appealed to the Bermuda Court of Appeal. The Court of Appeal rejected PwC's appeal and upheld the Saad decision (in relation to which PwC had argued that the Supreme Court of Bermuda had no jurisdiction to order the winding up of Saad because Saad was an overseas company which did not carry on business in the jurisdiction and thus did not come within the statutory definition required to establish jurisdiction under Bermuda law). The Bermuda Court of Appeal allowed PwC's appeal and set aside the Singularis decision (in relation to which PwC had argued that the Supreme Court of Bermuda could not assist the Cayman liquidation by ordering production of information which could not have been ordered by the Cayman court itself). Further appeals of the decisions were brought to the Privy Council.

GUY MANNING

9/. PricewaterhouseCoopers v Saad Investment Co Ltd [2014] JCPC 35.
10/. Singularis Holdings Limited v PricewaterhouseCoopers [2014] JCPC 36.

MARK GOODMAN

The Saad Appeal

The Privy Council's decision in the Saad appeal was unanimous. The Board held that the Supreme Court of Bermuda did not have jurisdiction to order a winding up of Saad because the jurisdiction was wholly statutory in nature and Saad did not fall within the statutory definition of a "company" necessary to establish jurisdiction under Bermuda law. Saad's ownership of shares in a company incorporated in Bermuda was not considered sufficient to bring Saad within the definition of "company".

On a collateral issue, the Board rejected the liquidator's submission that PwC had no standing in relation to the Winding Up order, basing its decision on the extraordinary circumstances of the case. PwC had standing to contest the winding up even though it was technically a "stranger" to the proceeding based upon the fact that the entire winding up proceeding was focused on PwC and its books and records relating to its audits of Saad. Accordingly, the Board considered it just and equitable to grant PwC standing to challenge the winding up order. To deny PwC the ability to argue that the court lacked jurisdiction in the proceedings in which PwC was the target would have been a breach of natural justice.

The Singularis Appeal

The Privy Council's decision in the Singularis appeal was not unanimous and was delivered by the members of the Board in five separate judgments. The majority of the Board held that there is a common law power to assist a foreign court in insolvency proceedings and that the principle of "modified universalism" is available to assist a foreign winding up proceeding *so far as the court properly can*. The limits on a court's ability to assist the foreign proceeding are established by local law, public policy and the limits of the court's own statutory and common law powers. Accordingly, when a compelling legal policy calls for it, in the absence of a specific statutory power (in this case, to compel production of information) the court has the common law power to overcome the statutory shortfall.

In reaching that conclusion, the majority of the Board determined that the power was available to assist the officers of the court in the foreign proceeding and to overcome the problems imposed by the territorial limits of the original court's jurisdiction in relation to a winding up proceeding which involved issues extending beyond that court's territorial jurisdiction. Importantly, this power will be applied to permit the performance of officers' functions and will not extend to relief which the officers do not have under the laws by which they were appointed. Further, common law powers of this kind are not to be used as a means to obtain material for use in litigation – in relation to which other rules and powers will apply.

The majority of the Board found that the production of materials sought was not available under Cayman law because the Cayman court would have been limited to ordering production of materials '*belonging to*' Singularis under section 103 of the Law. It was apparently accepted that the audit working papers were not owned by

Singularis, although Lord Sumption and Lord Collins "*express[ed] their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property*". Accordingly, the majority of the Board declined to exercise the common law powers of the court in favour of the liquidators and the appeal was dismissed.

The Singularis decision highlights the limitations of liquidators' statutory investigatory powers under section 103 which, when enacted in 2009, put Cayman's statutory regime out of kilter with insolvency regimes in many other Commonwealth jurisdictions. Under section 103 it is only possible to obtain documents *belonging* to the company in liquidation, rather than any documents *relating to the company's affairs*. Further, orders for disclosure under section 103 may only be made against "relevant persons", as opposed to *anyone* who might have information relating to the company. The definition of "relevant persons" is quite proscribed and does not include, for example, the company's former lawyers or auditors (unless the auditors can be brought within the definition of "relevant persons" because they constitute officers of the company as a matter of construction of the company's Articles).

If information and documentation sought by liquidators is located in a Commonwealth jurisdiction where the statutory powers of examination and production are wider than the scope of section 103, one potential solution would be to commence an ancillary liquidation, as opposed to merely seeking recognition, in the relevant foreign jurisdiction. It seems fairly clear from the Board's decision in Singularis that the full suite of local statutory remedies would be available to the liquidators in an ancillary liquidation, irrespective of whether those remedies are available in the original jurisdiction.

Security for Costs

In *Dxynet Holdings Limited v Current Ventures*[11] the Court of Appeal addressed the availability of security for costs in winding up proceedings, holding that the Cayman court may order that an impecunious corporate petitioner or appellant provide security for the respondent's defence costs, irrespective of whether the petitioner/appellant is a foreign or a Cayman company.

The case was specifically concerned with the narrower question of the Cayman court's jurisdiction to order security for costs against a *foreign* company which had presented a winding up petition against a Cayman Islands company. However, as a result of the judgment, the broader state of the law on this issue appears to be that when *any* company (i) petitions the Cayman court for an order winding up another company, or (ii) appeals against the rejection of its proof of debt by liquidators appointed by the Cayman court, if the court is satisfied that the assets of the petitioning/appellant company would be insufficient to pay any costs awarded in the proceedings to the respondent company/liquidators, the court has jurisdiction to order the provision of sufficient security to meet those costs[12]. The court has an express power to do so under section 74 of the Law where the petitioning/appellant company is a Cayman Islands company[13] and an inherent jurisdiction to do so where a foreign company is involved and the Court is satisfied that the company is unable to meet an adverse costs award. It is important to note however that no such jurisdiction exists in winding up proceedings where the petitioner/appellant is an individual, irrespective of his or her country of residence or impecuniosity.

11/. Dxynet Holdings Limited v Current Ventures II Limited & another, CICA No. 33 of 2013 (unreported, 20 February 2015).

12/. The usual form of security is a cash deposit in an escrow account under the control of the court, and the security must be within the jurisdiction in any event: see Caribbean Islands Development Ltd. (in official liquidation) v First Caribbean International Bank (Cayman) Limited, FSD No. 52 of 2013, judgment of Chief Justice Smellie (unreported, 16 September 2016 at 46).

13/. In GFN SA, Artag Meridien Ltd., Caribbean Energy Company v The Liquidators of Bancredit Cayman Limited (in official liquidation) [2009] UKPC 39, the Judicial Committee of the Privy Council held that a proof of debt appeal constituted "proceedings" with the meaning of section 74 of the Companies Law.

...the principle of "modified universalism" is available to assist a foreign winding up proceeding so far as the court properly can

One important factor in the court's decision was that, by virtue of the Cayman Islands Constitution, the government and, by extension, the court must not discriminate between different classes of litigants. If the court only had jurisdiction in winding up proceedings to order security against Cayman companies, that would provide preferable treatment to foreign companies and be discriminatory against Cayman companies. Cayman and foreign litigants are therefore now to be treated on an equal footing in this respect, as in all others.

Loss of Substratum

The Grand Court recently clarified two matters concerning petitions to wind up a company on the just and equitable ground on the basis it has lost its substratum in *Re Harbinger Class PE Holdings (Cayman) Ltd*[14]. The judgment of Clifford J confirms that the applicable test for whether there has been a loss of substratum, in petitions against companies other than open-ended mutual funds, is whether it is *impossible* (as opposed to merely impractical) for the company to achieve the object for which it was formed. In applying that test to a company with an unrestricted objects clause in its memorandum of association, the court must look beyond the clause and ascertain, on the particular evidence, the principal or main object of the company in line with the reasonable expectations of its participating shareholders.

Harbinger Class PE Holdings (Cayman) Ltd ("**Harbinger**") was a special purpose vehicle established in December 2008 as part of a credit crunch restructuring of a Master-Feeder fund structure following losses arising from the collapse of Lehman Brothers. Investors in the Feeder received shares in the Company by way of an *in specie* redemption of their shares in the Feeder. A supplement to the Offering Memorandum explained the synthetic side-pocket type arrangement and stated an intention to realise the illiquid assets by the end of 2010. Although substantial realisations and distributions were made, the process was not completed. An investor presented a petition to wind up Harbinger on the "just and equitable" ground[15], arguing that there had been a loss of substratum.

The appropriate test for determining whether there had been a loss of substratum was central to the case and the enquiry comprised two parts, namely, whether the object for which the company was formed needed to have become impossible or merely impracticable and whether the company's purpose should be determined solely by reference to its constitutional documents.

The Judge reviewed the case law and found that a long line of English authority pointed to 'impossibility' as the applicable test. Recent Cayman decisions at first instance[16], had departed from this approach and applied a less stringent test of whether it had become *"impractical, if not actually impossible"* to carry out the purpose of the company. *Belmont*[17] and the cases in which it was followed all concerned open-ended corporate mutual funds. Clifford J distinguished the decision in *Belmont* on the basis that the Company was not an open-ended corporate mutual fund and followed the English authorities[18].

In ascertaining the purpose of the company, the Judge considered the unrestricted objects clause contained in the Company's memorandum of association. Clifford J held that, in the case of a wholly general objects clause, the Court must look beyond the clause and ascertain the principal or main object for

14/. Unreported, 10 November 2015.
15/. Section 92(e) of the Law.
16/. See, for example, In the Matter of Belmont Asset Based Lending Limited [2010] 1 CILR 83 per Jones J.
17/. Supra. 72. The Belmont test was considered but not followed by Bannister J in the BVI, with the English test being preferred. Bannister J considered that there was no basis for open-ended corporate mutual funds to be treated differently and rejected the concepts of practicality and viability favoured in Belmont as too uncertain.
18/. Paras 52-53 & 57-58.

which the Company was formed by reference to the evidence of participating shareholders' reasonable expectations.[19] In applying the test, the Judge considered that the object of the Company was limited to holding the relevant shares issued by the Master Fund and receiving through the redemption of those shares the net cash flow from the realisation by the Master Fund of its assets, for onward payment to the Company's own shareholders. He therefore held that the principal or main object of the Company had not become impossible.[20] The object of the Company was not, as the petitioner claimed, to realize the assets in the Master Fund and to return the proceeds to investors.

Harbinger creates a split in the applicable test when determining if a company has lost its substratum for the purpose of a winding up petition on the just and equitable ground. Open-ended mutual corporate funds may be deemed to have lost their substratum, and therefore be liable to be wound up, if the conduct of their business has become impractical or ceased to be viable, whereas the conventional test of impossibility will apply to other businesses.

Directors' Standing to Petition

On 25 November 2015, the Grand Court handed down judgment in the matter of *Re China Shanshui Cement Limited*[21] concerning the controversial question of whether, and in what circumstances, directors of Cayman Islands' companies are authorised to present a winding-up petition on behalf of the company of which they are officers. In a detailed and carefully reasoned ruling, Mangatal J declined to follow an earlier decision of Jones J in the case of *Re China Milk Products Limited* [22] and, in so doing, found that the Law does not permit directors of companies to present a winding-up petition unless expressly authorised to do so by the company's articles of association or by a resolution of the company's members.

China Shanshui Cement Limited ("**China Shanshui**") is a Cayman Islands' holding company of an international group of companies, with operating subsidiaries located in the PRC (the "**Group**"), which focused on the design, manufacturing, sale and distribution of cement, cement-related products and construction materials. Its shares are publicly listed in Hong Kong. The company's market capitalisation, based on its share price as at April 2015, was over US$2.7 billion. The company's unchallenged position however was that, although it is

THE DECISION IN *CHINA SHANSHUI* MEANS THAT THE POSITION UNDER CAYMAN ISLANDS LAW IS NOW THAT DIRECTORS CANNOT PRESENT A WINDING-UP PETITION ON THE GROUNDS OF INSOLVENCY UNLESS PERMITTED TO DO SO BY THE COMPANY'S ARTICLES OR BY A RESOLUTION OF ITS SHAREHOLDERS

19/. Para 65.
20/. Paras 83-84.
21/. (FSD 178/2015, unreported).
22/. [2011] 2 CILR 61.

Harbinger creates a split in the applicable test when determining if a company has lost its substratum for the purpose of a winding up petition on the just and equitable ground.

very much balance sheet solvent, it is deeply and incontrovertibly cash-flow insolvent.

As a result of its financial position, the Company's directors presented a winding-up petition and sought the immediate appointment of joint provisional liquidators ("**JPLs**"), so that the JPLs might propose and implement a formal restructuring plan pursuant to section 104(3) of the Law. Two of the Company's largest shareholders (who, together, held 53.27% of its issued share capital) opposed the appointment of JPLs and sought to strike out the petition on the basis that the directors had no authority to present it.

The question of whether or not directors are entitled to present a winding-up petition in the company's name was previously considered by the Grand Court in 2011 in *Re China Milk*. In *China Milk*, the Grand Court held that the scope of the directors' power to present a petition depended on whether the company was solvent and the date on which it was incorporated. Prior to *China Milk*, the Cayman Court had followed and applied the decision of Brightman J in the English case of *In re Emmadart Ltd.*[23], which confirmed that directors could not present a winding-up petition without an ordinary resolution of the company's shareholders unless its articles provided them with specific authority to do so.

In *China Milk*, Jones J found that the Law Review Committee's recommendation that directors should be entitled to present a winding up petition on the grounds of insolvency, irrespective of whether they were authorized to do so by the company's articles of association, was accepted by Government but that "*the language of what became s.94(2)*[24] *does not, by itself, come close to enacting the intention stated in the Bill*". However, construing the Law as a whole and seeking to avoid an interpretation that would produce an impractical result unintended by the legislature, he concluded that the legislature must have intended to abolish or circumscribe the rule in *Emmadart Ltd* as that rule does not *"distinguish appropriately between solvent and insolvent companies"*. Ultimately, Jones J held that the ability of directors to present a winding up petition on the ground of insolvency should not vary according to the language of its articles of association and was not dependent upon the cooperation of shareholders.

In *China Shanshui*, Mangatal J concluded that the 2007 amendments to the Companies Law did not materially change the substance of section 94 which was in place when it was decided that *Emmadart* applied in the Cayman Islands. The Honourable Judge pointed out that there was no reason to assume that the legislature's failure to address the rule in *Emmadart* when passing the Companies (Amendment) Law 2007 was not deliberate, and found that the rule in *Emmadart* did not produce unworkable results prior to *China Milk*. Mangatal J held that Jones J's decision was wrong[25] and that the company's petition should be struck out in circumstances where the presentation of a winding-up petition by its directors was neither permitted by the company's articles nor sanctioned by a resolution of its shareholders. Accordingly, notwithstanding the fact that the Company was insolvent for the purposes of section 92 of the Law, and its directors considered that it should be placed into provisional liquidation, the petition was struck out and the application to appoint

23/. [1979] Ch. 540.
24/. Section 94(2) provided that directors of a company incorporated after the commencement of the Companies (Amendment) Law, 2007 had authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting if that authority was expressly provided for in the company's articles of association.
25/. As a judge of the Grand Court Mangatal J was obliged to follow Jones J's decision unless she was convinced that his decision was wrong: Re Alibaba.com Limited [2012] (1) CILR 272.

JPLs was dismissed with costs.

The decision in *China Shanshui* means that the position under Cayman Islands law is now that directors cannot present a winding-up petition on the grounds of insolvency unless permitted to do so by the company's articles or by a resolution of its shareholders.

The decision in *Emmadart*, despite having being discredited and overruled in numerous other Commonwealth jurisdictions, and disapplied by statute in England, once again represents good law in the Cayman Islands.

Directors of insolvent companies are now potentially faced with a situation where they need to apply to put the company into provisional liquidation, to facilitate a restructuring, or into official liquidation, but are prevented from doing so by the company's shareholders (who may have no economic interest in the liquidation). Statutory amendments are urgently required.

Directors' Duties

The Cayman Islands' Court of Appeal has overturned the first instance *Weavering*[26] decision which had held a hedge fund's former non-executive directors liable for damages of $111m on the basis that they had acted with "wilful neglect and default" in failing to identify that the fund's main "assets" were fictitious swap agreements. Purportedly worth $637 million, the swap agreements had in fact been made with a related counterparty which had no assets to satisfy its liabilities under the agreements.

The Court of Appeal concluded that although the non-executive directors had acted negligently, they were not guilty of wilful default because there was no evidence that they had ever intended to breach their duties, nor that they had even suspected that they were failing to meet their obligations. The trial judge had made erroneous findings of fact in relation to the directors' actions and failings to carry out certain functions. It was also suggested that the liquidators had pleaded the allegations of breach too loosely and that critical evidence had not been put to the directors in cross-examination.

The appeal judgment gives some comfort to directors, and particularly to non-executive directors, that the common exemption provision in a hedge fund's articles, excluding liability for conduct falling short of wilful default or neglect, will apply unless any breach of duty is shown clearly to be intentional (or reckless, in the sense that the directors had been conscious that they might be acting in breach, but continued regardless).

The decision also re-affirms that the scope of directors' duties is fact sensitive in every case. In analysing the scope of the directors' duties, the Court of Appeal paid particular attention to the objectives that the directors had recorded in board minutes early in the formation of the fund. Consequently, non-executive directors should be careful to fulfil any tasks that they have previously committed to perform in their service agreements, board meeting minutes or otherwise, as well as complying with their general duty to supervise the fund's service providers.

The case also highlights the need for liquidators to take sound strategic advice before pursuing litigation to ensure that meaningful recoveries can be made for investors. In this case, if, as the Court of Appeal found, the directors were liable in negligence only, the exemption from liability would apply. Had the directors been liable for wilful default, the directors' insurance policy would almost certainly not have responded; so any recoveries could only have been sourced from the directors' own resources and would have been modest. An appeal of the decision is expected to be heard before the Privy Council in June.

Michael Crystal QC and Tom Smith QC appeared for Primeo in Primeo Fund v Herald. Tom Smith QC appeared for Harbinger in Re Harbinger.

26/. The Court of Appeal decision is: Weavering Macro Fixed Income Fund Limited (in liquidation) v (1) Stefan Peterson and (2) Hans Ekstrom CICA 10 of 2011 (unreported, 12 February 2015). The first instance decision is: Weavering Macro Fixed Income Fund Limited (in liquidation) v (1) Stefan Peterson and (2) Hans Ekstrom [2011] (2) CIRL 203.

Salford or the BVI: is there a dispute?

Mark Arnold QC explores the differences of approach adopted in England and Wales (*Salford Estates*) and in the BVI (*C-Mobile Services Limited v Huawei Technologies Co Limited and Jinpeng Group Ltd v Peak Hotels and Resorts Limited*) to the effect of arbitration clauses on winding up petitions.

The Boat Race dispute

Two men have an argument over who won the Boat Race in a particular year – but not 1877. It has been said that the fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not entail that there was therefore never any dispute between them.[1]

But is that enough when a creditor petitions for the winding up of a company on the basis of an unpaid debt arising out of an agreement by which the parties have agreed to submit their disputes to arbitration?

THE BOAT RACE DISPUTE: BECAUSE ONE SIDE IS INDISPUTABLY RIGHT AND THE OTHER WRONG DOES NOT MEAN THAT THERE WAS NO DISPUTE BETWEEN THEM

1/. *Hayter v Nelson* [1990] 2 Lloyd's rep. 265, per Saville J at 268-9; considered by the CA in *Halki Shipping Corpn. v Sopex Oils Ltd* [1998] 1 WLR.

Surprisingly, it appears the answer will differ according to whether the creditor petitions in England & Wales or in the BVI. In this article, I explore why that is so, and ask which approach is to be preferred.

Mandatory stay for arbitration

One of the general principles on which the provisions of the Arbitration Act 1996 are founded is that the parties should be free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest (s 1). Accordingly, the 1996 Act provides for a mandatory stay of legal proceedings in circumstances where the parties have chosen to submit their disputes to arbitration. S 9(1) provides that:

A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

S 9(4) then says:

On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

"*Dispute*" is widely defined to include "*any difference*" and "*legal proceedings*" means civil proceedings in the High Court or a county court: s 82(1).

It has been established that there is a dispute for the purposes of the 1996 Act when a claim is simply not admitted. Thus the mandatory stay provisions of s 9 are engaged even if, absent an arbitration agreement, the claimant could have obtained summary judgment: *Halki Shipping Corpn v Sopex Oils Ltd.*[2] Where s 9 applies, therefore, the legal proceedings will be stayed without any investigation into the underlying merits of the case, as long as the claim is not admitted such that there is a dispute to be determined by arbitration.

MARK ARNOLD QC

Private disputes

S 9 does not apply to all disputes. It applies only to disputes which the parties have agreed to submit to arbitration. Even then, however, it applies only to private disputes between them: it does not permit the parties to agree between themselves to oust what would otherwise be in the exclusive jurisdiction of the court. This distinction was highlighted by the Court of Appeal in *Fulham Football Club (1987) Ltd v Richards*.[3] In that case, the petitioner sought relief under s 994 of the Companies Act 2006 (unfair prejudice) in the form of an injunction restraining Sir David Richards from acting as an unauthorised agent or from

2/.[1998] 1WLR 726.
3/. [2012] Ch 333.

participating in any way in negotiations regarding the transfer of players. The Court of Appeal considered that the dispute was essentially a private one between the parties and that there was nothing unsuitable for determination by arbitration, and stayed the proceedings under s 9.

Non-private disputes and class remedies

Where the dispute qualifies not as a private dispute but one which is a matter within the exclusive jurisdiction of the court, however, s 9 does not apply. Thus it has no application, for example, to a petition to wind up a company on the ground that it cannot pay its debts within the meaning of s 123 of the Insolvency Act 1986.The Court of Appeal gave several reasons for this in *Salford Estates (No. 2) Ltd v Altomart Ltd* (No. 2),[4] namely:

- Such a winding up petition is not a claim for payment; rather it is a request for the court to exercise its discretion to wind up the company, which is a class remedy for the benefit of all creditors of the company.
- To read s 9 as conferring on a debtor the right to a non-discretionary stay of such a winding-up petition would strike at the heart of the court's jurisdiction and discretionary power to wind up insolvent companies in the public interest. It is highly improbable that Parliament, without expressly saying so, intended that the 1996 Act should oust the discretion of the court to wind up insolvent companies.
- This reasoning applies whether the question to be determined on the winding up petition is whether the debtor cannot pay its debts generally, or whether it cannot pay a particular debt.

Salford and the BVI: the automatic stay for arbitration does not apply to winding-up petitions…

Consistency

So far so good. There is general agreement with the proposition that the statutory automatic stay provisions in favour of arbitration do not operate to prevent a petition to wind up a company on the ground that it cannot pay its debts, which is a class remedy: see in Australia, *Community Development Proprietary Ltd v Engwirda Construction Co*;[5] in Singapore, *Re Sanpete Builders (S) Pte Ltd*;[6] in the BVI, *C-Mobile Services Ltd v Huawei Technologies Co Ltd*[7] and *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*.[8]

The exercise of the court's discretion to wind up an insolvent company

But how then is the court to exercise its discretion whether to wind up the debtor company on the basis that it cannot pay its debts? It is well-settled that, although the power to wind up is discretionary, a creditor whose debt is payable and unpaid is entitled to a winding up order *ex debito justitiae*. Conversely, it is just as well settled that the court will refuse to exercise its winding up jurisdiction when it is satisfied that the petition debt is disputed in good faith on substantial grounds.

Although long settled, these are rules of practice, to which the court adopts a flexible approach: *Re Claybridge Shipping SA*[9]. In that case (decided in 1981), Lord Denning MR also said:[10]

"I entirely agree that a petition for winding up should not be used as the means of getting in a debt which is bona fide disputed on substantial grounds – on which the company would get unconditional leave to defend. But I think the Companies Court should be able to look into the bona fides of the defence. If it is obviously a 'put-up job' – or if it is so insubstantial that a Queen's Bench master would only give conditional leave to defend – then I should think the petition to wind up should stand. In short I think that the Companies Court should keep the remedy flexible – for the sake of all creditors – so that the assets may not be disposed of or removed by the company before there is a chance of dealing with them."

Chadwick J said much the same thing, after reviewing the authorities, in *Re a Company*:[11]

"In my view those authorities, and in particular the authorities of the Court of Appeal to which I have referred, make it clear that the general rule under which this court refuses to entertain a petition founded on a disputed debt applies only where the

4/. [2015] Ch 589.
5/. (1969) 120 CLR 455.
6/. [1989] MLJ 393.
7/. Eastern Caribbean Supreme Court, Court of Appeal, 15 September 2015.
8/. Eastern Caribbean Supreme Court, Court of Appeal, 8 December 2015.
9/. [1997] 1 BCLC 572, per Oliver LJ at 578h-579f.
10/. [1997] 1 BCLC 572, at 575f-h.
11/. [1997] BCC 830.

dispute is a genuine dispute founded on substantial grounds; and does not preclude this court from determining – or entitle this court to decline to determine – the question whether or not there are substantial grounds for dispute. Indeed, in the passage from the judgment of Oliver LJ [in Claybridge] he pointed out that the court necessarily has to take a view whether on the evidence there really is substance in the dispute which is raised by the alleged debtor."

This remains the position in England & Wales: see *Tallington Lakes Ltd v Ancasta International Boat Sales Ltd*.[12]

SALFORD: IF PEOPLE AGREE TO ARBITRATE, THEY SHOULD

Salford Estates

Well, if s 9 does not apply to a creditor's winding up petition, such that the court remains in control of its discretion whether to accede to the request to wind up the company, it surely must follow that it will do so by reference to these long-established rules of practice, without further reference to the 1996 Act or the policy behind it? In other words, it will – won't it? – ask itself whether the debt is disputed in good faith on substantial grounds and, if it is not, make the winding up order.

Quite so, said Bannister J in *Alexander Jacobus de Wet v Vascom Trading Ltd*.[13] The contractual agreement requiring disputes to be referred to arbitration will apply only if the court concludes that the debt is indeed disputed in good faith on substantial grounds.

Er, no, said the English Court of Appeal in *Salford Estates*. The position is not that straightforward, as the Chancellor explained at [39]-[41]:

- The court retains its discretionary power to wind up an insolvent company (s 122(1) of the Insolvency Act 1986).
- It is entirely appropriate that the court should exercise its discretion consistently with the legislative policy embodied in the 1996 Act.
- It would be anomalous for the Companies Court to conduct a summary judgment type analysis of liability for an unadmitted debt on which the winding up petition is founded (ie to ask itself whether it is disputed in good faith on substantial grounds), when the petitioner has agreed to refer any dispute relating to that debt to arbitration.
- Otherwise, parties to an arbitration agreement would be tempted, as a standard tactic, to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition.
- That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue, and to the legislative policy of the 1996 Act.
- In exercising its discretion under s 122(1)(f) of the 1986 Act, it was right for the court to dismiss or stay the petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution *rather than* require the court to investigate whether or not the debt is disputed in good faith on substantial grounds.
- This is the position save in "*wholly exceptional circumstances*" which the Court of Appeal found it difficult to envisage, and of which they accordingly provided no examples.

In other words, the Boat Race dispute will suffice, and the petition must go.

To an interested observer, there is something illogical about the Court of Appeal's approach. On the one hand, s 9 does not apply and so there can be no automatic stay just because the parties have chosen to submit their disputes to arbitration. On the other hand, in exercising its remaining discretion whether to wind up the company on the ground it cannot pay its debts, the court should nevertheless act consistently with the policy of the 1996 Act. As explained by the Court of Appeal, that means refusing to ask itself or to decide whether the petition debt is disputed in good faith on substantial grounds, and granting a stay (or dismissing the

12/. [2014] BCC 327, per David Richards J at [39]-[41].
13/. [2011] JBVIC.

Salford: ...but the Companies Court should require the petitioner to establish its debt by arbitration

petition) save in wholly exceptional circumstances. The automatic stay under s 9 does not apply; but the discretion under s 122(1)(f), shorn of its substance, will operate instead to bring the petition to a standstill, effectively automatically.

Rather than imposing an automatic stay, the policy of the 1996 Act operates instead to achieve the same result, albeit indirectly:

- by rendering the winding-up discretion one that is exercisable in only one way (absent wholly exceptional circumstances);
- by displacing the long-established rules of practice of the Companies Court;
- by removing from the debtor company the burden of demonstrating that the debt is disputed in good faith on substantial grounds;
- by imposing on the petitioner the additional burden (which the Court of Appeal cannot envisage being discharged) of establishing *wholly exceptional circumstances* instead;
- without Parliament having expressly said so.

How can that be, one might ask, if Parliament meant to leave the court's exclusive discretionary jurisdiction to wind up insolvent companies in the public interest untouched by an agreement between the parties submitting their private disputes to arbitration?

Salford Estates has been followed at first instance (as, of course, it had to be) in *Eco Measure Market Exchange Ltd v Quantum Climate Services*,[14] but in that case it was clear anyway that the debt was disputed (and not merely not admitted). *Salford Estates* has also been referred to with approval by the Court of Appeal itself in *HMRC v Changtel Solutions Ltd*,[15] although what the CA took from it was simply that "*the fact that the parties had agreed an alternative method of dispute resolution was, as a matter of discretion, relevant to whether it was appropriate to allow the petitioner to proceed with a winding up before having it determined that the debt was due by the method that it had agreed*" without reference to the manner in which that discretion was to be exercised in the absence of wholly exceptional circumstances. So understood, the CA in *Changtel* considered *Salford Estates* supported its conclusion that the Companies Court should not have treated the existence of the tax appeal or the decision of the tax judge to extend the time for that appeal (on the basis he was not satisfied that the appeal was without merit) as conclusive in favour of dismissal of the petition, but should have considered (as usual) whether the debt was disputed in good faith on substantial grounds. The CA itself conducted that exercise, concluded it was not and wound the company up.

Whatever may be the merits of the *Salford Estates* approach, it is not one that has so far commended itself to appellate courts elsewhere in the common law world, at least not unreservedly so. Two recent decisions of the Eastern Caribbean Supreme Court, Court of Appeal call for comment.

C-Mobile Services Ltd v Huawei Technologies Co Ltd

In the *C-Mobile* case, the appellant debtor company had applied to set aside a statutory demand, but had been unsuccessful. The BVI court had refused because it was not satisfied the debt was disputed in good faith on substantial grounds. The debtor company subsequently applied to stay the creditor's application to appoint liquidators, on the basis that the agreement under which the debt arose contained an arbitration clause. At first instance, the company's application was dismissed, as the commencement of winding up proceedings did not engage the arbitration clause. The company's appeal was dismissed. As stated above, the appellate court agreed with the English Court of Appeal in *Salford Estates* that the arbitration stay did not extend to winding up proceedings.

While expressing full agreement with the sentiments expressed by the Chancellor in *Salford Estates* at [39]-[41], the appellate court noted that the BVI court had already investigated the question whether the debt was disputed in good faith on substantial grounds (on the application to set aside the statutory demand); had decided that it was not subject to such a dispute; and the appellate court agreed with that finding. Evidence of a referral to arbitration would be "*a factor*" to be considered in the exercise of the discretion whether to set aside the statutory demand, but it was not open to the debtor company to argue now that the application to wind up should be dismissed merely on the basis that the debt was not admitted, rather than disputed in good faith on substantial grounds: [15]-[16]. The appellate court drew careful attention to the separate and distinctly different tests: the test whether a stay for

14/. [2015] BCC 877.
15/. [2015] 1 WLR 3911.

arbitration should be imposed depended simply on whether the debt was disputed in fact "*irrespective of how unlikely would be [the debtor's] success in defending it*", whereas the winding up discretion involved considering whether the debt was disputed in good faith on substantial grounds: [16] and [22]. Although it was accepted an agreement to refer disputes to arbitration could be *a factor* in the exercise of the winding-up discretion, there was no suggestion that it would change the nature of that discretion or the manner in which it was to be exercised.

Jinpeng Group Ltd v Peak Hotels and Resorts Ltd

In the subsequent *Jinpeng case*, a winding up petition was presented on the just and equitable basis for the purposes of which the petitioner had to establish standing to petition as a creditor. The East Caribbean Supreme Court, Court of Appeal again considered what the Chancellor had said in paras [39]-[41] of *Salford Estates*. They noted (at [47]) that the position outlined by the Chancellor "*comes close to the automatic stay position which is now firmly a part of the learning in connection with*" the mandatory stay for arbitration. "[The Chancellor] *is saying in very clear terms that a winding up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances*."

The appellate court then roundly rejected the Chancellor's approach. A Boat Race dispute will *not* suffice:

"*However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the C-Mobile case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction [to wind up] is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds.*"

BVI:...although the arbitration agreement is relevant, the court should still decide whether the debt is disputed applying the usual test

The debt itself fell within the terms of the arbitration clause, and was being arbitrated between the parties, but it was not disputed in good faith on substantial grounds [49]. In the circumstances (including certain others which it is not necessary to mention here), the appellate court set aside the judge's order, appointed provisional liquidators and restored the winding up application for further hearing.

Conclusion

The Court of Appeal in *Salford Estates* was right to be concerned about the risk that parties would be tempted, as a standard tactic, to bypass their arbitration agreement and the 1996 Act by presenting a winding up petition instead. It is in many respects akin to the risk that over-zealous creditors will be tempted, even in the absence of an arbitration agreement, to subject the debtor company to the rigours of the winding up process rather than establishing the debt (and with it their status as creditor) in ordinary civil proceedings first.

The development of the rule of practice that the Companies Court will not wind up a company in circumstances where the petition debt is disputed in good faith on substantial grounds, with the additional penalty of an order to pay costs on the indemnity basis, has proved equal to the task of preventing, or punishing, the abuse of the process of the Companies Court.

As the recent appellate decisions from the BVI show, it is more than capable of addressing the same potential abuse in circumstances where the parties are subject to an arbitration agreement. It is not necessary to denude the winding up jurisdiction of its discretionary status by requiring that it be exercised in one way in the absence of "*wholly exceptional circumstances*": such inflexibility appears to be the very antithesis of a discretion, properly so-called. Nor is it necessary to alter in any way long-established rules of practice by which the Companies Court controls its own procedure, either by requiring the debtor company only to show that the debt is not admitted rather than that it is disputed in good faith on substantial grounds, or by requiring the petitioner to establish "*wholly exceptional circumstances*".

Which approach is to be preferred? In the real world, it depends who's asking. Debtor companies might be expected to be happy to adopt the Boat Race dispute approach clearly favoured (though not expressly mentioned) by the Court of Appeal in *Salford Estates*. Unpaid creditors will be less enthusiastic: by the time arbitration has determined there is no substance in the non-admission of the debt, the debtor's assets may be long gone, and with them the creditors' hopes of payment.

The law of financial collateral

Glen Davis QC reviews Yeowart and Parsons' *The Law of Financial Collateral*

The use of cash, financial instruments and credit claims as collateral has become central to the functioning of markets in Europe and around the world. It facilitates the clearing of a wide range of transactions through clearing houses. Once the European Markets Infrastructure Regulation (EMIR) is fully implemented, the volume of derivatives transactions cleared just in the European Union is expected to exceed €150 trillion.

The volume and continued growth of this market depends on the availability of high-quality assets as collateral, on all market participants being able to rely on a rigorous and reliable legal framework governing the effective taking and holding of collateral, and on the assurance of predictable enforcement if and when that becomes necessary.

The substantive law governing financial collateral transactions in Europe is almost entirely recent, deriving largely from the Financial Collateral Directive (Directive 2007/47/EC of June 2002), implemented in the UK by the Financial Collateral Arrangements (No 2) Regulations (FCAR). But although numerous technical points arise as to the correct construction of the Regulations and the governing Directive against rapidly changing trading practices and sometimes challenging conditions, there is as yet very little authoritative guidance on the correct interpretation of the legislative framework from case-law, either domestic or from the Court of Justice of the EU.

So there is no doubt that, as Lord Hoffmann says in his introduction, this book deals with a subject of enormous importance, covering legal rules which it is no overstatement to say are central and essential to the functioning of the City of London and the management of counterparty risk. This is the first book to deal comprehensively with the whole subject of financial collateral security, and it is a timely and welcome contribution.

It is difficult to imagine authors better qualified to address this complex topic. Geoffrey Yeowart is a former partner of, and now consultant to, the Banking and Financial Law practice at Hogan Lovells International LLP. Robin Parsons is a former partner of, and now Of Counsel to, Sidley Austin LLP. Between them they have more than 50 years' experience in this area, including distinguished service on the Financial Law Committee of the City of London Law Society. They have the additional benefit of contributions from Edward Murray, former senior partner of the Derivatives and Structured Finance practice at Allen & Overy LLP, who chairs the ISDA Financial Law Reform Committee, and from Hamish Patrick, a partner at Shepherd and Wedderburn in Edinburgh, who is particularly well-placed to articulate the significant differences which arise in Scotland.

Broadly, the book is divided into two parts. The first explains the law created by the Directive and the FCAR, looking at the steps which are required to create an effective financial collateral arrangement, and exploring features such as the disapplication of conventional insolvency law, the right of use, and the remedy of 'appropriation'. It also covers the impact on collateral of the new special resolution and 'bail in' regimes for

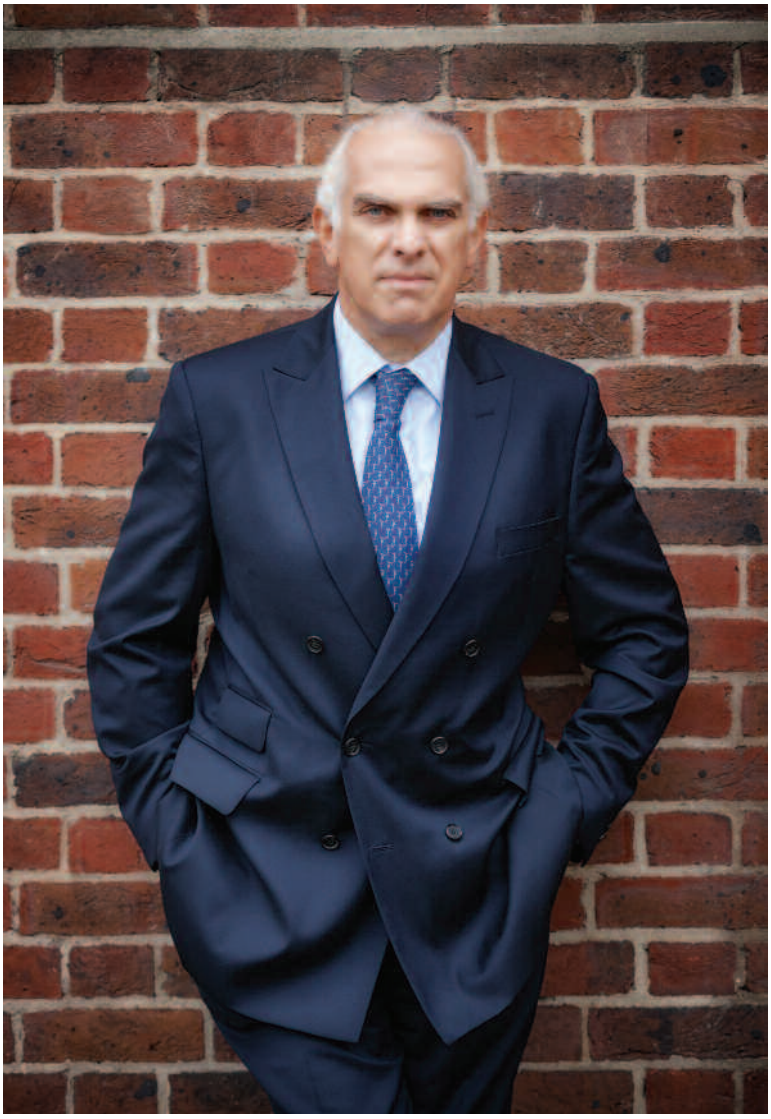
IT HAS OFTEN BEEN THE CASE THAT THERE IS A LAG BETWEEN DEVELOPMENTS IN FINANCIAL MARKETS AND CASE LAW

financial institutions. The second part considers how financial collateral has come to be used in a range of different markets, including CREST, Euroclear and Clearstream, and looks at the use of financial collateral and close-out netting in the derivatives market. There are helpful descriptions, tables and flow-charts which will offer a useful guide to anyone encountering these structures for the first time. This is an area where the jargon develops quickly and can appear impenetrable, so it is also particularly beneficial to have a table of abbreviations and glossary of terms.

It has often been the case that there is a lag between developments in financial markets and case law which considers how legislation is to be interpreted and how respective rights have been affected. There has so far been relatively little detailed consideration by the courts of the operation of the new financial collateral regime, but on the central remedy of 'appropriation' created by regulation 17 FCAR, we do have the benefit of the Cukurova test cases which originated in the BVI and have led to five hearings before the Privy Council[1]. Hogan Lovells acted for the respondent Alfa Telecom parties in this long-running litigation, so Geoffrey Yeowart is particularly well-placed to discuss the issues which fell for determination (although the authors have been careful to ensure that their treatment of the lessons to be derived from the Cukurova decisions is balanced and even-handed).

The years since 2008 have also seen a number of notable cases on other questions in this area, particularly arising from the collapses of *Lehman* and *MF Global*, and many of them involving members of South Square. Where there are principles to be derived from these recent cases which are relevant to the taking of financial collateral, the authors are meticulous in drawing them out. But numerous

1/. *Cukurova Finance International Ltd and Cukurova Holdings AS (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2009] UKPC 19, [2013] UKPC 2, [2013] UKPC 20.



GLEN DAVIS QC

points of uncertainty remain, which they helpfully discuss, and this is clearly an area in which the law is likely to develop.

One of the points of uncertainty goes to the very heart of the financial collateral regime. As is well known, while the Directive applies to financial collateral arrangements between specified types of person – essentially public bodies, central banks, central clearing houses and financial institutions we might regard as systemically significant, the UK and nine other Member States have implemented the Directive to apply more widely. The FCAR apply wherever both parties are non-natural persons, making them much more commercially-significant. In the Cukurova[2] case, there was an attempt to challenge the validity of the FCAR by judicial review on grounds that they were ultra vires. Moses LJ considered that the application was out of time, and that it was inappropriate to exercise his discretion to extend time, given that market participants had relied on the FCAR since December 2003, and a right of appropriation under the FCAR had been granted voluntarily by equitable mortgage governed by English law in return for a loan of US$1.352 billion in 2005.

As the authors point out, it might have been thought that the risk of any successful challenge was diminishing with the passage of time, but the question has been re-opened by Lord Mance in the leading judgment last year in *The United States of America v Nolan*[3]. Lord Mance said in obiter dicta that he found it difficult to see how the extension of the FCAR to arrangements between non-natural persons could be regarded as having been for the purpose of implementing or enabling the implementation of the Directive; he considered Moses LJ had 'greatly underestimated the force of Cukurova's challenge'. If these comments do encourage further challenge to the FCAR, the authors draw attention to section 255 of the Banking Act 2009 which enables HM Treasury to introduce any provision that it considers necessary or desirable to enable financial collateral arrangements to be commercially useful or effective, and for anything done in reliance on the FCARs to be treated as retrospectively effective. Whether that is sufficient deterrent to any further challenges, only time will tell.

Financial collateral is not taken in a vacuum, and there is careful consideration of the regulatory framework, both as it stands and as it is expected to operate as the technical standards implementing EMIR are gradually introduced (on latest indications, between September of this year and September 2020). There is consideration of 'client money' issues, particularly in the context of prime brokerage. Looking ahead, there is also discussion of how the international standards on providing collateral as margin for non-centrally cleared

2/. *R (Cukurova Finance International Ltd and Cukurova Holdings AS) v HM Treasury and Alfa Telecom Turkey Ltd* [2008] EWHC 2567 (Admin).
3/. [2015] UKSC 63.

derivatives, published by the Basel Committee on Banking Supervision and the International Organisation of Securities Commissioners, are expected to apply when the BCBS-IOSCO rules are implemented.

Scotland is more important in this area than those of us living in the south sometimes remember. While the FCAR are generally applicable throughout the UK, there are significant differences because Scots law does not recognise the English distinction between legal and equitable interests, and equity does not exist in Scots law. Trusts do exist, but derived from a different theoretical basis. Hamish Patrick has provided a lucid chapter considering financial collateral from a Scots perspective (and incidentally offering an admirably clear introduction to the fundamental principles of Scots property law).

As the authors make clear in their Preface, this book is intended only to provide guidance, and is not a substitute for legal advice. But the guidance is comprehensive and there will be many of us asked to advise in this area who will be grateful that we have this thorough and considered work on our shelves.

Yeowart and Parsons on THE LAW OF FINANCIAL COLLATERAL was published in February 2016 by Edward Elgar Publishing.

We are pleased to have arranged a 35% discount from the usual list price for readers of the Digest. Anyone interested can make their purchase on-line at www.e-elgar.com/shop/yeowart-and-parsons-on-the-law-of-financial-collateral and enter the discount code SOSQ35 at checkout.

COMPETITION

What is the most unusual example of taking security you have ever encountered?

Answers by email to kirstendent@southsquare.com
The best answer received by 5 May 2016 will receive a free copy of Yeowart and Parsons on THE LAW OF FINANCIAL COLLATERAL. The editor's decision is final.

Preserving the Golden Goose...

Richard Fisher identifies further guidance of the scheme practice arising from Mr Justice Snowden's decision *Indah Kiat International Finance Company B.V.* [2016] EWHC 246 (Ch)

In last summer's 2015 Digest, I described Mr Justice Snowden's decision on the VGG case [2015] EWHC 2151 (Ch) as a "*timely reminder of the degree of scrutiny that schemes may be subjected to at what are frequently unopposed or ex parte hearings, and the obligations of those who present the scheme to the Court*".

Indah Kiat is an illustration of that relatively rare phenomenon: an opposed convening hearing. Whilst the outcome of the decision was simply that the convening hearing was adjourned, the comments made by Mr Justice Snowden provide further guidance (and pause for thought) regarding scheme procedure, and the materials that should be prepared in support of any scheme of arrangement.

How much notice do I have to give?

A frequent question posed to counsel is "*What is the minimum amount of time that can be given to creditors between the circulation of the Practice Statement letter and the convening hearing?*" The only correct answer is that it depends on the facts, although most of us have been uncomfortable with a period of less than 14 days, and would prefer more.

In Indah Kiat, 14 days was the period between the Practice Statement letter being sent via an information agent to DTC, Euroclear and Clearstream for dissemination to creditors in the normal way (i.e. to account holders holding the relevant notes through their systems, and then on to underlying beneficial owners) and the convening hearing.

Having confirmed that what is adequate notice will depend on all the circumstances (Judgment at [29]), Mr Justice Snowden emphasised that the complexity or novelty of the scheme, the degree of prior consultation with creditors, and whether creditors will have a sufficient opportunity to consider the scheme and seek advice, are all matters which will inform the adequacy of the notice period (Judgment at [29] and [30]). Where there is real urgency, the period of notice may be reduced significantly, and issues which would otherwise usually be dealt with at convening will have to be considered at sanction (*ibid*). However, Mr Justice Snowden was clear in his view that, on the facts of the Indah Kiat case, 14 days was insufficient notice: Judgment at [27].

The matters that he relied upon in reaching this conclusion may suggest that 14 days would be regarded as rather short in many cases. He relied upon the complex nature of the scheme, the apparent lack of any urgency requiring a shorter period, and the potential delay that may arise by giving notice through the clearing system (i.e. that the notice has to be passed down a chain of recipients until it gets to the ultimate owner). His suggestion that greater consideration should be given to seeking a stay of enforcement of judgment

debts where such liabilities form the basis for urgency (whether in England or in the US: *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm)) might suggest that a considerably longer period needs to become the expected standard for many of the large schemes which are being put before the Court (certainly absent real urgency which justifies a shorter period). Subject to the scheme company asking for a longer period, Mr Justice Snowden indicated that he would adjourn the convening hearing for a period of 6 weeks (Judgment at [37]), thus giving 8 weeks notice between circulation of the Practice Statement letter and the convening hearing.

Evidence in support of the application

There were certain particular features of the evidence which caused difficulties to Indah Kiat, and which are unlikely to apply in many other cases (i.e. the fact that another company in the same corporate group as the scheme company had previously been found to have procured the sanction of the Bermudian court to a scheme of arrangement by relying on perjured evidence concerning the connection between the controlling shareholders of the group and those creditors who supported it: Judgment at [58]-[62]). Mr Justice Snowden emphasised the importance of clearly identifying the sources of information which are relied upon by the scheme company (Judgment at [24]-[26]), as well as "*adducing evidence of sufficient quality and credibility to persuade the court to act*" (Judgment at [40]).

However, some points of general interest can be identified.

First, if reliance is to be placed on the position of a creditor or group of creditors both as regards negotiating and supporting the scheme, and it is suggested that they are independent from the scheme company/the compromise has been negotiated at arm's length, proper disclosure needs to be given

If reliance is to be placed on the position of a creditor, proper disclosure needs to be given...

SNOWDEN J'S GUIDANCE SHOULD ASSIST IN ENSURING THAT THE MARKET'S CURRENT ENTHUSIASM FOR SCHEMES DOES NOT LEAD TO US WOUNDING OR KILLING THE GOLDEN GOOSE

It seems what Snowden J wants is a clearer description of the basis on which any advice is being given to the Company...

both as to the nature and identity of the creditor(s) so as to enable other creditors to assess whether their support is truly independent (which is potentially relevant to both classes and fairness): Judgment at [47]-[57]. In particular, Mr Justice Snowden emphasised that connections between the scheme creditors and the scheme company, whilst most likely to give rise to fairness issues for consideration at the sanction hearing, might be relevant to class issues because the connection might affect the court's assessment of (for example) the rights ultimately being conferred on that creditor under the scheme: Judgment at [64]-[68]. The general commercial reluctance of creditors to be identified may therefore have to give way to the need to provide a full explanation of the circumstances in which the Scheme is being advanced if the scheme company wishes to rely on the involvement of those creditors as a factor supporting the merits of the scheme.

THE CASE OF INDONESIAN PULP & PAPER GIANT, INDAH KIAT, IS AN ILLUSTRATION OF THAT RELATIVELY RARE PHENOMENON: AN OPPOSED CONVENING HEARING

Second, the decision in VGG made it quite clear that, in many instances, better evidence of the likely alternative to the scheme, and the financial position of the company and third parties benefitting from release absent the scheme, would be required. As I observed in relation to VGG last summer, in some instances the position will be clear and need relatively little comment/development if the evidence is being used for the sole purpose of demonstrating that the Scheme will produce a better outcome for creditors than the obvious alternative.

In other cases, much more may be required. In Indah Kiat, the scheme sought to compromise liabilities under US law governed notes with a face value of US$350 million (Judgment at [3]). The scheme company was a Dutch company which had claimed to have moved its COMI to England within the three months prior to promoting the scheme (albeit it was pointedly observed by Mr Justice Snowden that the comparator referred to a possible liquidation in Holland: Judgment at [72]). The Notes were guaranteed by the scheme company's parent, whose balance sheet recorded "a healthy surplus of in excess of US$2.5 billion" (see Judgment at [15] and [76]). The scheme required a release to be given by scheme creditors of their guarantee claims against the parent.

Perhaps understandably, the opposing creditor took issue with the fact that there was no clear analysis or evidence that the Parent itself would be forced into insolvency or would be unable to pay the full value of the notes (Judgment at [75]). The absence of such evidence was clearly material to the creditors' consideration of the merits of the scheme, and the scheme company conceded at the hearing that the draft explanatory statement and evidence did not contain a full analysis of the position.

Third, of interest is the further comment made by Mr Justice Snowden regarding the financial/fairness analysis at [78], where he said:

"I also consider that it should be made clear whether or not the authors of any fairness opinion provided to Scheme Creditors are prepared to accept responsibility to Scheme Creditors for that opinion."

In practice, there is frequently reluctance on the part of the financial advisers to agree to include their actual analysis (rather than a letter summary, or description of their advice) in the materials to be provided to the creditors. Undoubtedly it can be made clear whether there is any assumption of responsibility to creditors. One suspects that what Mr Justice Snowden wants to see is a clearer description of the basis on which any advice is being given to the Company so that creditors can assess the value of that input when considering the Scheme, rather than an express assumption of responsibility to scheme creditors.

Fourth, the vexed question of third party releases may need to be given further consideration and explanation in the supporting materials, particularly where the claim against the third party would not given rise to a "*ricochet*" claim. At [79] and [80] of the Judgment, Mr Justice Snowden accepted a criticism of the materials put forward by Indah Kiat as having failed to provide a clear explanation of the releases that would be given to persons other than the scheme company and the parent. Furthermore, he suggested that "*some assessment ought to be made of the potential financial effect (if any) of those releases upon Scheme Creditors*". The value of the wide ranging releases sought by advisers and others may in this regard be difficult to quantify, precisely because the releases are sought as belt and braces provisions/to cover unknown claims, rather than specifically identified liabilities.

Finally, it is notable that Mr Justice Snowden identified a concern in relation to recognition of the effect of the scheme abroad on foreign judgment liabilities (rather than other commercial liabilities): Judgment at [96]. Where a scheme company has material foreign judgment liabilities which it is seeking to compromise through a scheme, Mr Justice Snowden expects that express consideration will be given in the evidence that will be adduced regarding recognition in the foreign jurisdiction as to whether the foreign Courts would accept that their judgment liabilities were susceptible to being compromised by an English scheme.

RICHARD FISHER

Ultimately, practitioners in this area should take heart from the guidance being provided by Mr Justice Snowden. The importance of English schemes of arrangement to the international refinancing community is such that, if their integrity and utility is to be preserved, it is critical that the procedure adopted is beyond reproach, and that foreign courts appreciate that the role of the English Court in sanctioning a scheme is far more than a rubber stamp exercise. Mr Justice Snowden's guidance should assist in ensuring that the market's current enthusiasm for schemes does not lead to us wounding or killing the golden goose.

Litigation Forum 2015

Key developments in financial litigation and insolvency and restructuring - **Stephen Alexander** of Mourant Ozannes outlines the main points discussed

South Square and Mourant Ozannes hosted their latest Litigation Forum at Dexter House in London on 4 November 2015.

The Forum was co-chaired by South Square's Mark Phillips QC and Jeremy Wessels of Mourant Ozannes. The Forum was attended by over 200 delegates from a wide range of firms based in onshore and offshore jurisdictions.

Mr Justice David Richards (since appointed as a Court of Appeal judge, so now Lord Justice David Richards) delivered the keynote session of the Forum which focussed on some of the significant changes which have occurred to the insolvency landscape over the last decade. As the assigned judge for major administrations including T&N, MF Global and Lehman Brothers, David Richards LJ gave a retrospective of major cases over the last 12 years during which he has been a judge at the High Court – these include *Cambridge Gas, Nortel, Rubin* and *Singularis*. He discussed the impact of the Enterprise Act 2002, the advent of the Special Administration Regime, the streamlining of cross-border insolvency via the EU insolvency regulations introduced in 2002 and the 1997 UNCITRAL Model Law. David Richards LJ highlighted the introduction of the EU insolvency regulations and the 1997 UNCITRAL Model Law as progress towards greater cooperation between EU member state and international courts. He concluded by summarising the main challenges faced by courts and practitioners in dealing with cross-border insolvency and assistance, particularly in the context of the insolvency of group structures operating across multiple jurisdictions.

MARK PHILLIPS QC

The first panel session, entitled "Capital Markets Litigation in the English Courts and Overseas", featured panellists Euan Clarke of Linklaters, Professor Jeffrey Golden of P.R.I.M.E. Finance and the LSE, Jeremy Goldring QC, panel chair, and Hilary Stonefrost, both of South Square. The session centred on a case study concerning a company of doubtful solvency faced with claims brought by both noteholders in connection with purported events of default and a counterparty to certain derivative agreements on ISDA standard terms.

The panel commenced by discussing the legal process by which the counterparty could seek redress and the importance of jurisdiction provisions within such derivative agreements. The case study highlighted that where the agreements were subject to the non-exclusive jurisdiction of the New York courts, there was considerable flexibility for claimant counterparties to seek redress in the jurisdictions in which they considered would enable them to

achieve the greatest likelihood of success. Negotiation on such terms therefore could be a key strategic issue at the drafting stage of the agreements. The panel also discussed the benefits of dispute determination by the ISDA arbitration panel as opposed to court proceedings, a point reflected by the comments of the ISDA External Review Panel Determination in the February 2015 decision of *In Caesar's Entertainment Operating Company, Inc.* In particular, it was noted that parties to ISDA disputes in the U.S. frequently refer disputes to an independent, expert arbitration panel, as is permitted under the ISDA standard terms, in the expectation that it will avoid perceived large costs and delay involved in court proceedings and to enable experts specialised in these financial arrangements to deal with the disputes. Discussion then turned to issues concerning the company's capacity to enter into the derivative agreement and the means by which the company may be able to rely upon a lack of capacity as a defence to the counterparty claim. It was noted that an analysis of corporate capacity, by reference to the governing law of the derivative agreement, would be central to any judicial analysis of this issue.

The panel session concluded with debate on the cross-jurisdictional issues arising from an insolvency process triggered by the noteholder claims. Particular focus turned on the relevance of the jurisdiction and governing law clauses of the notes and the possibility of the company entering into a scheme of arrangement under English law.

The second panel session, entitled "The Duties of Directors: Protection for Investors and Creditors", was chaired by Justin Harvey-Hills of Mourant Ozannes (Jersey) with co-panellists Lynn Dunne of Ashurst, Christopher Harlowe of Mourant Ozannes (Cayman Islands), and Felicity Toube QC of South Square. The session centred on a case study concerning a unit trust structure,

LORD JUSTICE DAVID RICHARDS

involving a Jersey registered unit trust, companies registered in the Cayman Islands, England and Jersey and various unit holders based in England and elsewhere.

The panel considered questions relating to the potential claims and liabilities of trustees and trust managers, liquidators and directors of subsidiary companies respectively in circumstances where a unit trust (and related companies in its structure) enters into the realm of insolvency or doubtful solvency. One key area of discussion related to claims that unit holders could bring against the trustee and manager of the unit trust. The panel discussed one of the few examples of a unit trust dispute being the subject of judicial scrutiny, namely the recent decisions of the Royal Court of Jersey in the litigation concerning *Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* in which Mourant Ozannes acted for the plaintiff trustee in an action against the former trustee and manager.

One of the central issues discussed were the duties of the directors of the Cayman Islands, Jersey and English companies in this scenario. The common starting point across the three jurisdictions was that the directors were obliged to discharge their duties in the best interests of the company and that, where a company was solvent, the duties would equate to acting in the interests of the general body of shareholders. However, where that company entered into the realm of insolvency or doubtful solvency, the duties would equate to acting in the interests of the general body of creditors. Particular differences in the jurisdictions arose with respect to the degree to which directors could avail themselves of liability by reliance on indemnification and exculpation provisions where the Cayman Islands differs significantly from Jersey and England. The panel also raised, in this context, other liabilities that the directors may face regarding fraudulent and wrongful trading and in particular additional statutory duties on directors of UK banks.

Discussion then turned to the possible winding up of the Cayman Islands company in the structure.

L TO R: NICK SEGAL (FRESHFIELDS), SIMON DICKSON (MOURANT OZANNES), JASON KARAS (LIPMAN KARAS)

There was particular focus on whether, in view of the disagreements between the company's shareholders, the directors of the Cayman Islands company could petition the Cayman Islands Grand Court for orders that the company be wound up on the just and equitable basis.

The third panel session, "International Cooperation in Cross-Border Restructuring and Insolvency", was chaired by Mark Phillips QC of South Square who was joined by panellists Simon Dickson of Mourant Ozannes (Cayman Islands), Jason Karas of Lipman Karas (Hong Kong), and Nick Segal of Freshfields Bruckhaus Deringer LLP (Mr Segal also sits as a part-time Judge of Grand Court of the Cayman Islands, within the Financial Services Division).

The panel began by considering the Judicial Committee of the Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers*. Discussion focussed on the implications of the Privy Council's disapproval of the broad application of modified universalism as envisaged by the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* and its finding that common law assistance in foreign insolvencies is subject to local law and policy and that the domestic court can only ever act within the limits of its own powers.

The panel also addressed the continued application of the English law rule, based on the Court of Appeal case of *Gibbs & Sons v Société Industrielle et Commerciale de Métaux*, that an English law governed debt cannot be discharged by foreign insolvency arrangements. The panel reflected on several court decisions over recent years in England and elsewhere where the courts have questioned the continued operation of the rule within the modern context of modified universalism and cross-border assistance.

Another related aspect of the panel's discussion concerned the issue of establishing jurisdiction to open insolvency proceedings. The issue was discussed in the context of the recent Supreme Court decision in *Trustees of Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA*. In that decision, the Supreme Court outlined what is necessary in order for there to be an "establishment" (for the purposes of council regulation EC 1346/2000 on insolvency proceedings) entitling an English court to wind up a company which has its centre of main interests in another member state of the European Union. The Supreme Court ruled, in particular, that the existence of economic activity in England was essential and that, where the company had no subsisting business in England, a winding up would not be ordered.

The panel session concluded with a discussion on the continued importance, in the context of proceedings before U.S. courts for recognition of the powers of liquidators of Cayman Islands and British Virgin Islands companies, of the analysis of the insolvent foreign debtor's centre of main interests and the jurisdiction of its economic activities.

Delegates were able to continue the discussion and network over drinks at the end of the day.

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Litigation Forum 2016 - Save the date!

Plans are progressing for the 2016 Litigation Forum which will be held on *Wednesday 28 September at* 200 Aldersgate in London. The event will once again be a half-day conference followed by a networking reception. For more information, contact *events@southsquare.com*

STEPHEN ALEXANDER OF MOURANT OZANNES

CONFERENCE REVIEW - INSOL DUBAI

INSOL in Dubai

The INSOL caravanserai rolled into the glass and steel oasis which is Dubai. **Glen Davis QC** reports.

President Mark Robinson told us in his opening remarks that there are now more than 10,000 INSOL members from some 46 member associations. Flying in on the red-eye, it felt like a fair representative proportion of them were on the same flight, with Mark Byers of GT relaxed in his BA sleep suit to my left, and Paul Cooper of David Rubin wide awake and already raring to go just behind me. As our jumbo circled over the Gulf on approach, the towers of downtown Dubai pierced up through the early morning mist and dust like the cover artwork on a 1970s sci-fi paperback (which is probably where the architects took their inspiration).

The border officials in their impeccably-white thawbs were their usual guardedly-polite selves, and then we were through the formalities and out into the traffic (Sunday of course being a working day). A taxi-ride in already-fierce early morning sunshine took us along the new highway, past the new high-rises and the Burj Khalifa, the world's tallest building, through the open and dusty area they haven't built on yet, although the cranes are starting to appear, and finally to our destination and the centre for the conference, Madinat Jumeirah.

There have been criticisms of the somewhat prosaic accommodation at some recent INSOL conferences (I am thinking particularly of Den Haag), but INSOL Central has clearly taken them to heart.

The word 'Madinat' means 'cities' in Arabic, and when people refer to Dubai as the Disney of the Middle East, this is where they have in mind. A rambling resort created over the past 15 years, stretching over 40 hectares, intercut with gardens, canals, pools and lakes. There are two luxurious hotels, a courtyard of 29 summer houses, a Souk and more than 40 restaurants and bars. Apparently the intention was to recreate life as it used to be for those who lived along Dubai Creek, but the effect is a somewhat-sanitised pastiche of a traditional Arab style.

THE MADINAT JUMEIRAH. LIFE AS IT USED TO BE FOR THOSE WHO LIVED ALONG DUBAI CREEK

So no complaints about the accommodation this time, and no complaints either about the service levels. It took no fewer than four members of staff to welcome me, mop my brow, offer a cool sherbet and yes, run the Amex card to check me in. And I spotted almost child-like expressions of delight on a number of faces as we realised that the options to travel between hotel locations and to the conference centre would be golf buggy or one of the elegant boats that plie the canals.

Some took the opportunity before the conference proper got going to explore the Old Town of Dubai (not that much to see was the report) or go out into the desert, but I was tied into a panel rehearsal. Still, there was time for a couple of hours on the beach and a club sandwich made with veal 'bacon' to recuperate before the festivities began.

Every INSOL conference offers numerous different random paths through the agenda (although it is rumoured that some may not even attend a session in every slot).

The keynote speaker was particularly impressive and well-chosen. Mrs Maha K Al-Ghunaim is a Kuwaiti. She is Vice-Chairman and Group Chief Executive Officer of Global Investment House. Mrs Al-Ghunaim has clearly had a remarkable career.

Mrs Maha K Al-Ghunaim was uniquely well-placed to offer an overview of the changing investment climate in the region

Having run part of the Kuwaiti sovereign wealth fund in her late 20s, she co-founded Global in 1998 and built it up from a small investment house with 15 employees to a firm with US$10 billion in equity capital and US$3 billion in conventional and Islamic debt, and management of US$4 billion on behalf of clients. There have been challenges along the way, and after the 2008 crisis she was involved in a restructuring featuring an English scheme of arrangement (this was the first of a number of references to English schemes, which were something of a theme for discussion at the conference). She was uniquely well-placed to offer an overview of the changing investment climate in the region, and also to discuss the challenges for women in the modern Arab world. Even in Kuwait, her initial application to one limb of the sovereign wealth fund was met with the response that they didn't hire women (she went to work for the other one). More recently, she has had to negotiate the hurdles of trying to do business in Saudi Arabia. Nowadays, she said, you are as likely to find daughters taking an interest in their family's finances; investors are ultimately only interested in the numbers, and conditions are changing as long as you are prepared to be sensitive to local conditions.

After the keynote, there was much less of a Middle-Eastern flavour to the conference (and if I had a criticism of the programme it was that this, like other INSOL 'regional' conferences, could have done more to offer a regional perspective in the composition of panels and the tuning of presentations).

For the first break-out session, I stayed in the Joharah Ballroom for *Sovereign Debt restructuring - how does it differ from corporate debt restructuring?* This was a timely topic given the stress that recent falls in global commodity prices is putting on the finances of some producer nations. I like to think of Tim DeSieno of Morgan, Lewis and Bockius LLP as the Thin White Duke of sovereign debt, and he was joined by three equally-knowledgeable players: Sebastian Espinosa of White Oak Advisory, Hans Humes of Greenock Capital and Eric Lolo of Lazard. Tim sketched out the sovereign landscape since 2008, referring particularly to the problems of Greece and Ukraine (which are far from over). Then there was a well-planned hypothetical involving the problems of Debtlandia in negotiations with its neighbour Creditopia and a Bondholder. For Eric, as the finance minister of Debtlandia, the key question was, "Should I pay Wall St or should I pay Main Street?"

After lunch out in the sunshine on the Water Terrace, there was another well-structured break-out session: *Waving or Drowning? Financial institution recovery and resolution another year on.* This was a follow-on to the well-received session on this topic in San Francisco last year. Chris Ziplock of Hughes Hubbard & Reed LLP steered Ben Cairns of EY, Anke Heydenreich of Attestor Capital LLP, Eddie Middleton of KPMG and Eamonn White of the Bank of England through discussion of where the new regime for bank recovery and resolution has got to in Europe, bringing our knowledge up to date and looking at some of the lessons for practical implementation. We saw video clips from Jerome Dijsselbloem stressing his view that there should be the same rules for everyone and that the Euro area will benefit from clear rules.

2015 has been a year of infrastructure building. The Bank Resolution Directive has been implemented in 28 countries but there are clearly harmonisation challenges. Hong Kong has recently published its own Financial Institutions Resolution Bill, and there are signs of activity in Malaysia and Japan, but Eddie wondered whether there was really the political will to act. He couldn't imagine a Chinese bank being allowed to get anywhere near resolution.

It was suggested that in Europe there may be 10 significant resolution situations in the next 3-4 years. As Eddie pointed out, in these situations you don't get the luxury of time for creditors to negotiate a work-out, because it is impossible to keep them confidential.

There was some discussion of what has been done in Portugal with Banco Espírito Santo, which was split into two banks in August 2014. But the first attempts to sell the new entity failed to attract market support, and at the end of the year the Portuguese government decided to take US$2 billion of senior debt creditors into the 'bad bank' overnight. This was not welcomed in the market-place; the bonds fell from 90 to 10. This raises a real question about whether investors are going to be treated fairly. Eddie thought it made a mockery of the whole system. As Anke made clear, investors don't necessarily object to the idea of bail-in but there are questions about valuation and what can be done to challenge value (for example, will creditors get access to underlying documents?

Ultimately, this will be another complexity for investors and those advising them to take into account. The devil is in the detail as the fine points of the new regimes emerge, and the result of uncertainty will translate into making it more expensive for banks to finance themselves.

After coffee and 'networking', there was a change of scene to the smaller Murjaan Ballroom for *Keep the air-con on: hot topics for 2016*. This session was chaired by Patrick Ang of Rajah & Tann in Singapore, and the panel comprised Bob Rajan of Alvarez & Marsal in Munich, David Molton of Brown Rudnick in NewYork (standing in at the last minute for Jim Bromley of Cleary Gottlieb who had left later than David and been snowbound in Manhattan) and me. Questions had been canvassed in advance and delegates had voted for the ones they wanted to hear discussed. We were faced with the challenge of dealing with China, Oil, Big Data and English Schemes in a little under an hour and a quarter. On Schemes, I was able to be right up to date, mentioning both the decision in *Cordere* from December 2015 and the hearing in

The programme aimed to hit all the high notes and hot spots and for the most part succeeded

Indah Kiat (digested elsewhere in this issue) which had taken place before Snowden J at the end of the previous week. The judge himself was attending the conference.

And with that the first day was drawn to a close and as has become traditional at INSOL, there was something of a competition among the major firms as to who could lay on the most seductive Monday night entertainment. For me and many others the prize went to KPMG, who wined and dined us in the (allegedly) 7-star fantasia which is the Burj Al-Arab. Some were lured far out into the dessert for a more traditional feast (and one or two clearly haven't been reading their diversity manuals because they came back expressing surprise that, in keeping with Islamic doctrine, the event was dry). Mourant Ozannes played the smart card of laying on late night drinks in the Koubba bar at the Al Qasr hotel, which by happy convenience was where I happened to be staying. (Moslem doctrine does not extend into the 5-star resorts.) I have a vague recollection of a discussion, probably about the finer points of cross-border insolvency, with a practitioner from Halifax, Nova Scotia.

Tuesday dawned somewhat before I was ready for it. There was a G36 breakfast meeting. Then it was back into the fray for the second full day.

One of the great strengths of INSOL is the very close relationship that has been built up with judges from various jurisdictions. The first morning session was *The "art of judging" in cross-border and multinational cases*. This was chaired by recent INSOL President Jamie Sprayregen of Kirkland & Ellis and featured judges from Singapore, Germany, England and Delaware; Justices Coomeraswamy, Nietzer, Snowden and Sontchi respectively. (This was one of the points in the programme when I felt it would have been interesting to have heard also from a more local judge, whether from the DIFC Court or a national one).

Our own Snowden was characteristically modest, saying that after 9 months on the bench, in artistic terms he felt was at 'the fingerprinting stage'.

On the question of court-to-court communications, there were clear differences between the judges as to how far they would be prepared to go, but there was a great deal of common ground on what they expect from the advocates who appear before them, and as usual it was fascinating to hear from the horse's mouth how judicial decisions come to be made.

THE HOT TOPICS PANEL: PATRICK ANG, BOB RAJAN, DAVID MOLTON AND GLEN DAVIS QC (PHOTO COURTESY OF INSOL)

The next plenary session was *Europe's grand plan: will the new European Insolvency Regulation lead to harmony or more complexity*. This was a rather technical topic for a plenary session, although knowledgeably and dextrously steered by Michael Veder of RESOR, with Hélène Bourbouloux of FHB Etude d'administratuers judiciaries associés, Mark Shaw of BDO, and Dr Lars Westphal of Feshfields Bruckhaus Derringer. While the panel certainly took on the challenge of addressing the extended scope of the new European Insolvency Regulation and some of the other ideas emanating from the Commission, I'm not sure they were wholly successful in answering the question posed in the session title.

Then it was lunch, again outside on the Water Terrace, and this time proudly sponsored by South Square. This was a pleasant opportunity to catch up with my colleagues from Chambers who were at the conference, David Alexander QC, Tom Smith QC and Hilary Stonefrost. The scale of the event and the venue meant that we had hardly seen each other over the previous two days.

Back into the ballroom for the closing stretch after lunch, and the first plenary session of the afternoon was *Times are changing - evaluating new restructuring options and their impact on global practice*. Simon Appell of AlixPartners chaired a broadly-based panel well-able to deal with that subject: Mark Bloom from Greenberg Traurig, Richard Bussell from Linklaters, Christopher Hojlo of CVC Credit Partners and Ian Mann, of Harneys in Hong Kong. Ian's contribution was particularly interesting, informed by the particular perspective of Hong Kong on investment structures with capital and assets in the PRC and master-feeder investment funds or holding companies in the offshore jurisdictions, particularly in the Cayman Islands.

And then, into the final stretch, an authoritative overview of global and regional financial trends from Dr Azar Jammine, the director and Chief Economist of Econometric (Pty) Ltd, a familiar figure from a previous INSOL conference. The big picture he painted was of a world which had made massive efficiency gains through technology but taken on too much debt, and experiencing a commodity-price boom which would be affected by the slowdown in China. He identified three possible scenarios for the global economy: the possibility of a major decline, the prospect of a strong recovery, or, which he thought was most likely, something in the middle, continuing sluggish with volatility, which might be 'the new normal'.

And that was it for the formal proceedings. A full programme that had aimed to hit all the high notes and hot spots, and for the most part had succeeded.

The Gala Dinner in the Joharah Ballroom was as usual a convivial affair. I didn't win the Mont Blanc pen. There were some who stayed and drank late and braved the 2 am BA flight back to England. I took the easier route out in the morning, with thoughts already turning to Sydney next year.

RISA Conference 2015 in association with South Square

Robert Amey and Andrew Shaw summarise the panel sessions at the RISA Conference 2015

As reported in the last issue of the Digest, South Square was delighted to collaborate with the Restructuring and Insolvency Specialists Association (RISA) on a Conference held on 24 November 2015 at the Ritz-Carlton in Grand Cayman.

The half-day event attended by over 150 delegates covered key issues and developments in restructuring, directors' duties and insolvency litigation. South Square panellists Jeremy Goldring QC, Mark Arnold QC, Felicity Toube QC and Marcus Haywood were joined by members of RISA and the RISA committee. The Conference was jointly chaired by RISA Chair, Hugh Dickson of Grant Thornton, and by Felicity Toube QC.

Restructuring – schemes of arrangement and other tools

In the first panel session chair Jeremy Goldring QC discussed restructuring using schemes of arrangement with Simon Conway of PwC and Neil Lupton of Walkers. The session began with a brief review of the history of schemes of arrangement by Jeremy, who explained that the scheme of arrangement originated in the English Companies Acts of the 19th century and that this Victorian tool had proved enormously powerful and versatile. Jeremy highlighted two important characteristics that made schemes particularly useful: (i) the principle of "majority rule" meant that all those creditors without a blocking vote were forced to negotiate; and (ii) the absence of any prescription in the legislation meant that schemes were only limited by the debtors or creditors' imaginations.

Neil developed this theme, contrasting the 200-odd pages that comprised Chapter 11 of the US Bankruptcy Code with the half a page or so of legislation that provided for schemes of arrangement. That any arrangement that entailed some "give and take" between debtor and creditors could meet the statutory requirements made schemes a very flexible restructuring tool. Neil observed that in the Cayman Islands the use of provisional liquidators to complement a scheme of arrangement was relatively common, but this construct was now rarely used in England.

In Simon's view, provisional liquidators should be used in conjunction with a scheme either where a moratorium was needed or if someone was needed to negotiate a deal between various groups of creditors. He contrasted this with the approach adopted in London where these requirements were met through the use of standstill agreements and the existence of creditors' committees.

Jeremy and Neil then described the three stages of a scheme of arrangement: convening hearing, scheme meeting and sanction hearing, and the purpose of each of these stages. Jeremy observed that, in particular, it was very important to ensure that classes were properly constituted as this was a jurisdictional issue which would be considered by the court at the convening hearing. There might be a tension between the position of the debtor, which would want as few classes as possible, and the creditors who might want more classes to give themselves potentially greater negotiating leverage. Jeremy also mentioned that a small turnout in a given class might prevent a scheme being sanctioned if those that did not vote were unrepresentative.

Simon spoke about the importance of valuation of the debtor company, which was necessary to work out who actually had an economic interest in it; creditors or members who are underwater will not generally participate in the scheme. He discussed various methods of valuation and concluded that more sophisticated valuation methods might be appropriate for mines or other entities that were dependent on future commodity prices.

The session concluded with Jeremy describing recent developments in England, where there has been an increased willingness by the English courts to sanction schemes of arrangement in relation to debts owed by foreign companies. One way in which such companies could show a "sufficient connection" to England would be to convert the governing law of the debt to be schemed to English law.

Directors' Liability – is the bar too high?

The second session, chaired by Mark Arnold QC, considered whether the bar for directors' liability was set too high. Hugh Dickson of Grant Thornton and Colin McKie QC of Maples and Calder joined him on the panel.

Mark began the session by setting out the development of directors' duties in England and the extent to which the common law duties had been superseded by statutory duties under the Companies Act 2006. In essence, the codification was not (and had not been intended to be) comprehensive and had not substantially changed their content of the codified duties nor the manner of their interpretation, application or development.

Colin considered whether the Cayman Islands should follow the English approach and codify directors' duties. Following consultation on this question carried out by the Law Reform Commission, he thought that codification in the Cayman Islands was unlikely as the majority of

respondents to the consultation had no desire to see this step taken. Hence the Cayman courts would continue to follow the common law rules with reference to English case law; although, where English cases turned on policy issues unique to England then they might not be applicable. One such example might be a case that turned on the English statutory criteria relevant to the content of the duty to promote the success of the company.

Hugh turned to the question of delegation, where the starting point was the director's duty to exercise independent judgment, and that this duty applied equally to nominee directors. While a director could delegate certain functions, he could not delegate responsibility; he had a duty to supervise the discharge of the delegated functions. In this respect the practice in the Cayman Islands had changed over the last decade due to the increased corporate provision of directors' services, which intrinsically involved delegation. He was concerned by the volume of directorships held by some entities. Not only was there a risk that the adequacy of supervision was not sufficient, there was also a potential conflict with other services provided by the director's parent. He was also concerned by the adequacy of insurance cover held by some corporate providers.

Colin felt that issues of delegation were most acute in the regulated sector, particularly with respect to Cayman Islands funds. In mutual funds there were two types of delegation: (i) board to investment advisor; and (ii) delegation by a corporate services provider to junior staff. Transparency and a proper understanding of the role each entity had to play was important. While some jurisdictions, such as Ireland, set a limit on the number of directorships that may be held by one entity, Colin thought that a "one-size fits all" approach was not suitable; he contrasted the situation of a holding company and a volatility fund, with the latter needing much more supervision than the former. As to potential conflicts of interest, these were being addressed by market developments; multiple independent directors would come from different firms.

L TO R: JEREMY GOLDRING QC, PWC'S SIMON CONWAY AND WALKERS' NEIL LUPTON

Mark then turned to the question whether fixing a director with liability for breach of duty necessarily led to recovery, having regard to the *Weavering*-type clause (which exempts and/or indemnifies the director for breach of duty in the absence of wilful default). In England, such clauses now displayed as much life as was to be found in the infamous dead parrot, having been banned in 1929. That said, it was still possible for a breach of duty to be ratified in certain circumstances.

Colin explained how the situation differed in the Cayman Islands, where it was permissible for companies to release directors from liability for breaches of duty and/or to indemnify them against the same. Such clauses would apply save in the case of wilful default by a director to which the English common law test applied.

Hugh's view was that wilful default was a high threshold that required solid evidence to plead. Since wilful default could invalidate insurance, there was also a question of whether it would be commercially viable to pursue a director, even if wilful default could be made out.

Hugh and Colin then debated whether it was time for such clauses to be prohibited in the Cayman Islands. Hugh thought that they should, as they give rise to moral hazard concerns. However, Colin felt that such indemnities were important in facilitating the Cayman Islands as an offshore financial hub, which was a primary aim of the Companies Law. He also pointed out that such indemnities were allowed in other jurisdictions, such as the British Virgin Islands, Bermuda and Delaware. Mark called for a show of hands and declared that Colin had carried the day, bringing the session to a close.

FELICITY TOUBE QC

EY'S KIERAN HUTCHISON

MARK ARNOLD QC, COLIN MCKIE QC (MAPLES AND CALDER) AND RISA CHAIR HUGH DICKSON OF GT

Insolvency Litigation – obtaining information and other issues

The third and final session was a role play exploring the problems facing Cayman liquidators attempting to obtain information in foreign jurisdictions. EY's Keiran Hutchison played the part of the Cayman liquidator appointed to wind up "Shady Fund Company Limited" (SFCL), a Cayman-registered company which was audited by Bermudian auditors. SFCL, it was explained, had significant assets overseas, but the liquidators did not know their whereabouts, and were having difficulty obtaining information from the former auditors. Kobre & Kim's Rebecca Hume took up the role of the liquidator's Cayman attorney, while Felicity Toube QC and Marcus Haywood played the parts of SFCL's English lawyers, also advising on the Bermudian position.

Keiran began by explaining the practical steps available to a Cayman officeholder. Getting in SFCL's papers would be an essential first step, since a lot of information could be gleaned from details of wire transfers in bank statements. The papers would have to be secured quickly though as in an insolvency SFCL's landlord might try to assert a lien over the papers if they were left in the former offices. Keiran then discussed the practical issues which arise when seeking recognition of the Cayman liquidation in the USA under Chapter 15. Chapter 15 provides for COMI to be ascertained at the time of the application to the US court rather than at the time of the

REBECCA HUME OF KOBRE & KIM

Cayman winding up order, and the steps ordinarily taken by liquidators will ordinarily be sufficient to persuade the US court that SFCL's COMI is in Cayman. However, a challenge would be accessing the basic data required to found the Chapter 15 application, such as details of creditors.

Rebecca then discussed the possibility of obtaining information under s103 of the Cayman Companies Law, explaining that the duty to cooperate is limited to "relevant persons". Since s103 cannot be used if proceedings are already threatened (because it is not intended to be used to circumvent the rules for discovery in the course of litigation) it is important not to send a letter before action to a person from whom information is also being sought under s103.

On the subject of what relief was available in Bermuda, Felicity reminded the audience that, following the disapproval of *Cambridge Gas* by the Privy Council in *Singularis,* the Bermudian court would not apply local law on information-gathering as if SFCL was subject to winding up in Bermuda. Accordingly, the wider entitlement of a liquidator under the Bermudian Companies Act 1981 to require an auditor to "produce any books and papers in his custody or power relating to the company" was not available to the Cayman liquidator. However, the flip side of the judgment in *Singularis* was that, contrary to what had previously been understood, information contained in auditors' working papers might be obtainable under the Cayman Companies Law after all.

Finally, Marcus explained the English law of cross-border assistance. There are four main sources of cross-border insolvency law in England: the EC Insolvency Regulation, common law, s426 of the Insolvency Act 1986 and the Cross Border Insolvency Regulations 2006 (CBIR). The latter two are likely to be the most useful to a Cayman liquidator. For an application under s426, the Cayman liquidator can seek a letter of request from the Grand Court, which will then enable the English court to apply either Cayman or English law in England. Although s426 is a very powerful tool for the liquidator, it can be an expensive and time-consuming process. On the other hand, under the CBIR, there is no need for a letter of request from the Cayman court, because the Cayman officeholder can apply directly to the English court for recognition.

The Conference closed with a summing up by Hugh Dickson who then invited delegates to join him and the other panellists for a drinks reception giving them the opportunity to mingle and continue the discussion.

RISA Conference 2016 - Save the Date!

South Square will once again be collaborating with RISA on a Conference in 2016 to be held on **Tuesday 22 November at the Ritz-Carlton, Grand Cayman**. More details will be available shortly. For more information about RISA and the Conference visit www.risa.ky or contact: events@southsquare.com

Daniel Bayfield QC

Everyone at South Square is delighted that Daniel Bayfield has been appointed Queen's Counsel. His appointment was announced in early January and the ceremony took place on 22 February 2016.

Daniel read law at Magdalene College, Cambridge. He was called to the Bar in 1998, having been awarded an Inner Temple Major Scholarship, and has been a tenant at South Square since March 2000.

Daniel specialises in insolvency law, restructuring, banking law and general commercial litigation. Daniel has advised the administrators of the key UK Lehman Brothers companies since appearing on the administration applications for LBIE and others on 15 September 2008 and has appeared for LBIE's administrators on the vast majority of the landmark Lehman applications including the "RASCALS" litigation, *Firth Rixson*, the pensions application, the extended liens application and the Waterfall litigation. Other high profile cases in which Daniel has been heavily involved include: *Apcoa, LBF v Sal Oppenheim, Magyar Telecom, HMRC v The Football League, MF Global, Game Group, Rangers FC, Portsmouth FC, Woolworths, HMV, Stanford International Bank, Kaupthing, Sigma, Hellas, XL Airways, Countrywide, Cheyne Finance, Eurosail, Belmont, MG Rover, TXU, T&N, Enron* and *Cenargo*.

Daniel also specialises in sports law. He has appeared for a large number of well-known footballers, football clubs and boxers, and his clients include the FA Premier League and the Football League.

Daniel won the Chambers UK insolvency / restructuring junior barrister of the year award in October 2012 (and was shortlisted in 2009 and in 2013). In the most recent Chambers and Partners Bar Guide, Daniel is ranked in Restructuring / Insolvency (as the star individual junior); Banking & Finance; Chancery: Commercial; and Sport. He is also ranked in the Legal 500 guide in Insolvency; Banking and Finance; Commercial Litigation; Company; and Sport. Daniel has been referred to as "*undoubtedly one of the finest juniors in the market*" and "*fiendishly clever*".

DANIEL BAYFIELD QC & SONS

EU/EEA LAW UPDATE


GABRIEL MOSS QC


ROBERT AMEY

Gabriel Moss QC and Robert Amey look at EU/EEA developments including the ECJ Judgement in Nike, which clarifies the law relating to the Article 13 'double actionability' defence to claw-back actions

C-310/14 Nike European Operations Netherlands B v Sportland Oy (in liquidation)

Article 4(2)(m) of the Insolvency regulation provides that the law of the State of the opening of main insolvency proceedings shall determine "*the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors*". Article 13 of the Insolvency Regulation provides that "*Article 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*".

Sportland (based in Helsinki) sold goods produced by Nike (based in the Netherlands) under a franchising agreement. The relevant contract was governed by Dutch law, and provided for Sportland to pay Nike outstanding debts in ten separate instalments between 10 February 2009 and 20 May 2009. On 26 May 2009, the Helsingin käräjäoikeus (District Court, Helsinki) opened insolvency proceedings in respect of Sportland. Shortly afterwards, Sportland brought an action before the Helsingin käräjäoikeus seeking to claw back payments made to Nike. Nike sought to have the action dismissed, relying on Article 13 of the Insolvency Regulation.

At first instance, the Helsingin käräjäoikeus ruled in favour of Sportland, holding that Nike's Dutch law expert had not adequately addressed the issue of whether Dutch law provided for such clawback actions. Nike appealed to the Helsingin hovioikeus (Court of Appeal, Helsinki). In its response, Sportland argued that Nike had only addressed provisions of Dutch insolvency law, rather than general principles of Dutch law which might provide for clawback actions.

The Helsingin hovioikeus referred five questions to the ECJ:

1/. Is Article 13 to be interpreted to the effect that "*the act in the relevant case*" means that the act cannot be challenged after taking account of all the circumstances of the case?

2/. If the answer to the first question is yes, who has the burden of proof in respect of the relevant provision of foreign law?

3/. Who has the burden of proving that the circumstances provided for in the provision do exist in the specific case?

4/. Does the expression "*that law does not allow any means of challenging that act in the relevant case*" refer simply to insolvency law or to the general provisions and principles of the law applicable to that act?

5/. Does Article 13 require the defendant in clawback proceedings to prove that the lex causae contains no provision on the basis of which it would be possible to claw back the relevant payment in the circumstances, and if the defendant has adduced sufficient evidence, may the court require the claimant to establish the existence of a provision under which it would be possible to claw back the relevant payment in the circumstances?

The first question was answered by the ECJ in C-557/13 *Lutz* (discussed in the June 2015 South Square Digest at p.77). In short, the words "*in the relevant case*" direct an enquiry not into whether the relevant legal system provides for clawback proceedings in the abstract sense, but whether such proceedings would actually succeed on the facts of the relevant case.

In respect of the second and third questions, the ECJ noted that the language of Article 13 applies when "*the person who benefited from an act detrimental to all the creditors provides proof* **...**" and accordingly, it is for the defendant in clawback proceedings to prove that the circumstances required for a clawback action to succeed under the lex causae are not present. As for how the defendant is to prove his case, the ECJ emphasised it is a procedural

SPORTS RETAILER SPORTLAND BROUGHT AN ACTION BEFORE THE HELSINGIN KÄRÄJÄOIKEUS SEEKING TO CLAW BACK PAYMENTS MADE TO NIKE

matter for the national court before which the proceedings are pending, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).

As for the fourth question, the ECJ held, consistently with its decision in C-557/13 *Lutz,* that the words "*that law does not allow any means*" referred to general provisions of law rather than simply provisions of insolvency law.

In respect of the fifth question, the ECJ ruled that it is for the defendant to a clawback action to show that the lex causae, taken as a whole, does not allow for the relevant act to be challenged, but the national court before which such an action is taken may require the claimant to establish the existence of a provision of the lex causae on the basis of which that act can be challenged, provided that the defendant has first proven that the act at issue cannot be challenged on the basis of the lex causae.

C-594/14 Kornhaas v Dithmar

In this case, the ECJ considered the delicate issue of the inter-relationship between insolvency law and corporate law. A company, Kornhaas Montage und Dienstleistung Ltd ("KMD"), was incorporated in England, but operated primarily in Germany (it is estimated that over 10,000 English limited companies operate in Germany). It was alleged that from 1 November 2006 onwards, KMD was unable to pay its debts, and subsequently Dithmar was appointed as KMD's liquidator. Between 11 December 2006 and 23 February 2007, Kornhaas (KMD's director) caused KMD to make payments totalling over €110,000.

Dithmar sought to have the insolvent estate reconstituted, and so brought an action against Kornhaas under para.64(2)(i) of the GmbH-Gesetz (German Limited Liability Companies Act). German law places onerous duties upon directors of a company in financial difficulty. Para.64 in particular obliges directors to apply for insolvency proceedings to be opened within three weeks of the company becoming unable to pay its debts, and the directors must reimburse the company with any payments made after the company became insolvent or after it was

IN KORNHAUS V DITHMAR THE EUROPEAN COURT OF JUSTICE CONSIDERED THE INTER-RELATIONSHIP BETWEEN INSOLVENCY LAW AND CORPORATE LAW

established that the company was over-indebted.

Dithmar succeeded at first instance and on appeal, but the case ultimately reached the German Federal Court of Justice. The conflict which concerned the German Federal Court was as follows: under the Insolvency Regulation, the law of the state where main proceedings are opened generally prevails, but under EU freedom of establishment rules, one member state may not usually impose its own more onerous rules on a company incorporated in another member state.

The ECJ noted that there had been an academic debate in Germany about the right answer. The national court had considered that there was nothing in para.64(2)(i) of the GmbH-Gesetz which imposed additional conditions on a foreign company which wished to do business in Germany, and so freedom of establishment was not violated. Para.64 merely prescribed the legal consequences of wrongful conduct by directors. If there was any interference with freedom of establishment, such interference would be justified, since it was applied without discrimination, corresponded to an overriding reason in the public interest, namely to protect creditors, was suitable for preserving the assets of the insolvent estate and did not go beyond what was necessary to achieve that objective.

The ECJ agreed. First, it held that Article 3 of the Insolvency Regulation required the German court to apply German law to the claim against Kornhaas, notwithstanding that KMD was incorporated in England and therefore Kornhaas' relationship with KMD as a director was otherwise governed by English law. Para.64(2)(i) of the GmbH-Gesetz was clearly a provision of insolvency law, even though it appeared as part of a general company statute.

The ECJ then considered whether articles 49 and 54 TFEU precluded the application of German law. The court noted that national provisions requiring companies incorporated in other member states to maintain minimum capital were incompatible with the TFEU, and accordingly so too were penalties imposed on the directors of foreign companies for failure to meet those requirements. However, in the instant case, the ECJ found that there was no violation of the principle of freedom of establishment. Para.64(2)(i) of the GmbH-Gesetz did not call involve a refusal by German law to recognise companies incorporated in other member states or a fetter on their ability to do business. Accordingly, nothing in the TFEU precluded the application of para.64(2)(i) of the GmbH-Gesetz, which applied as a result of Article 3 of the Insolvency Regulation.

Re an English Bankruptcy, German Supreme Court (Bundesgerichtshof) 10 September 2015

Article 16 of the Insolvency Regulation provides that any judgment opening main insolvency proceedings must be recognised in all the other EU member states (other than Denmark). Pursuant to Article 25 of the Insolvency Regulation, the same automatic recognition is afforded to subsequent judgments and orders made by the opening court and in the course of such main insolvency proceedings. However, under Article 26 of the Insolvency Regulation, a state may refuse to recognise insolvency proceedings opened in another member state where the effects of recognition would be manifestly contrary to that state's public policy.

English bankruptcy law is generally seen as more debtor-friendly than the regimes that prevail in most other EU member states. One of the consequences of the automatic recognition of English bankruptcies throughout the EU has been a steady flow of German debtors who relocate to England, petition for their own bankruptcy, and then move back to Germany shortly after their discharge. In the eyes of many German creditors, the English court is far too willing to assume jurisdiction over the affairs of German debtors in these circumstances. See, for example, *Re Riemann* [2015] BPIR 1405, where the German debtor admitted coming to England to become bankrupt, and then immediately after his discharge moved back to his old address in Germany and resumed his life there. The English court refused to annul the bankruptcy, holding that the debtor's COMI was in England at the relevant time.

In this case, a German creditor sued the debtor in Germany, and the debtor argued that the debt had been discharged by an English bankruptcy. The creditor alleged that this was the first he had heard of any bankruptcy, that the alleged COMI-shift to England had been abusive, and that recognition of the English bankruptcy was therefore contrary to public policy, and should be refused under Article 26. Remarkably, this argument succeeded at first instance and on appeal.

The case ultimately reached the Bundesgerichtshof, which reversed the decisions below. The court held that it did not matter whether the debtor had misled the English court, or whether the English court had made some other error when assuming jurisdiction: the correct way to challenge the English bankruptcy was by application to the English court. The court confirmed that the public policy exception is only applicable in exceptional cases, not merely where the German court considers that the English court has fallen into error.

THE HEREDITARY GRAND DUKE'S PALACE IN KARLSRUHE IS ON OF FIVE BUILDINGS HOUSING THE BUNDESGERICHTSHOF

NEWS in brief

CFA success fees and ATE premiums no longer recoverable for insolvency cases

From 1 April 2016, conditional fee agreement (CFA) success fees and after the event (ATE) premiums will no longer be recoverable for insolvency cases.

The effects of this legislative change are set to hit smaller-value insolvency cases, where the damages are less than £500k and legal costs lower than £200k, the hardest.

The ratio of realistic claim value to estimated legal costs of pursuing the claim – including the premium for insuring the risk of adverse costs in order to avoid personal exposure for the insolvency practitioner – will be critical when considering whether or not to pursue litigation on behalf of the creditors.

Cases in which the recovery runs into the millions will allow more flexibility for alternative funding costs, however the legal costs are likely to be significant and the level of adverse costs cover required may be of a similar scale. As such, the difference between being able to recover the cost of the ATE premium as part of costs, as opposed to paying for the premium out of the damages or settlement, will have a significant impact on the net recovery for creditors.

Chancellor names new FCA chief executive

In January, Chancellor George Osborne announced that the Prudential Regulation Authority (PRA)

Chief Executive Andrew Bailey will take the reigns as the new permanent Chief Executive of the Financial Conduct Authority (FCA).

Bailey, who is expected to take up the FCA role in July, also holds a position of DeputyGovernor for Prudential Regulation at the Bank of England.

Following his appointment, FCA chairman John Griffith-Jones said: "I am delighted that Andrew has been appointed as the new chief executive. He brings unrivalled regulatory experience, a proven track record and an excellent reputation in the UK and internationally.

"Having been an FCA board member since 2013, he has been fully engaged with all the regulatory issues that we have faced in recent years and in setting our strategy for the future."

ANDREW BAILEY

Insolvency practitioner jailed for conspiracy

An Insolvency Practitioner has been sentenced to three and a half years' imprisonment for conspiracy to defraud nine companies between 1998 and 2007.

Kiran Kumar Mistry was sentenced on 28 January 2016, following an investigation by the Department of Business Innovation and Skills (BIS) under the name Operation Barber

The investigation found and the court heard that Mistry, as the Insolvency Practitioner involved in eight of the Operation Barber companies, had facilitated co-conspirator Demitris Bains in defrauding creditors for a considerable period of time.

Florenc Hoxha was found not guilty in relation to one count of fraudulent trading of the company Bluechip Innovations Ltd. A further defendant, David Wright, pleaded guilty to one count of fraudulent trading of the company Millstyle Limited. Wright was sentenced to 18 months' imprisonment, suspended for two years with a community punishment order of 160 hours.

Company insolvencies reach 25-year low

Company insolvencies have witnessed a steady decline in recent years, according to figures released by the Insolvency Service.

An estimated total of 14,629 companies entered into insolvency in 2015 – 10 per cent lower than the previous year and the lowest annual total since 1989, when 10,456 companies were declared insolvent.

These figures are driven by a decrease in compulsory liquidations.

The number of compulsory winding-up orders in 2015 fell by 23 per cent from the previous year to 2,874. This marks the lowest annual total in 35 years.

The number of creditors' voluntary liquidations was at its lowest since 2007. An estimated 9,981 companies entered into creditors' voluntary liquidation in 2015, a 4 per cent decrease from the previous year.

Hundreds of Gurkhas fall victim to Ponzi scheme

A suspected Ponzi scheme is believed to have cheated hundreds of Gurkhas into losing their life savings.

City of London Police investigating the activities of a company called Capital World Markets (CWM) suspect around 450 retired and serving soldiers invested £2.4 million in the scam, although the vast majority of victims have been too embarrassed to come forward. More than half of those who fell prey to the sophisticated scam – which offered a return of five per cent a month – are thought to be Gurkhas.

Information about the high yield investment opportunity is thought to have spread quickly among the tight knit Nepalese community, who until recently received a less generous military pension than their British army counterparts.

AS MANY AS 450 GURKHAS ARE THOUGHT TO HAVE LOST THEIR SAVINGS

Individual insolvencies fall to the lowest level since 2005

Statistics released by the Insolvency Service in January show that the number of individual insolvencies in 2015 fell by almost 20 per cent to 79,965 – their lowest annual level for a decade.

This marks the fifth successive annual decrease, thought to be driven by a fall in individual voluntary arrangements (IVAs), which also dropped to their lowest level in eight years.

The number of bankruptcies reached a 25-year low, having been heavily affected by the introduction of debt relief orders (DROs).

Leading lawyers conned by travelling tailor

A travelling tailor duped some of Britain's leading lawyers into handing over more than £5,000 – for bespoke suits that never materialised.

James Smith, 26, from Cardiff, targeted "eminent legal professionals" and convinced them to hand over deposits of 50 per cent for the luxury clothing.

He measured up his victims in their chambers and paid the deposits into his bank accounts, but failed to deliver the items, instead offering a series of excuses as to why they were not ready.

Appearing at Southwark Crown Court in February in one of his own bespoke suits, Smith admitted 13 charges of fraud by false representation.

John Greenan, prosecuting, said Smith landed himself in financial difficulty at the end of 2012, owing more than £9,000 to one supplier.

Smith will be sentenced on March 15th

NEWS in brief

‘King Popper’ Ponzi Playboy ordered to pay back £2.5m

A young city trader who earned himself the title “King Popper” having sprayed himself with £32,000 worth of champagne has been ordered to pay back £2.5 million from his personal account to the victims of his Ponzi scam.

Alex Hope, 26, of Canary Wharf, was jailed for seven years in January having fooled investors into paying out £5,565,620 between March 2011 and April 2012.

Southwark Crown Court heard how he splashed vast sums of cash on casinos, nightclubs and hotels around the world in a “hedonistic £2 million binge”.

Former Wembley stadium catering manager Hope reinvented himself as a currency markets expert after teaching himself economics. Promoted as a “successful and talented” trader by mentor Raj Von Badlo, 57, the duo lured would-be investors with PR stunts and smooth sales patter, hosting a conference in Slough to drum up further interest.

ALEX HOPE RECEIVED SEVEN YEARS

By the end of 2011, investors were pouring cash into the fraudulent trading scheme – some also unwittingly encouraging friends and relatives to invest.

In February, Judge Deborah Taylor accepted the advice from Financial Conduct Authority that all of Hope’s investors should receive some money.

To date just £520,796 has been recovered.

Gabriel Moss QC a distinguished friend of Oxford

Chambers are delighted to announce that Gabriel Moss QC has been nominated as a Distinguished Friend of Oxford.

The award was initiated in 1997 as a way to recognise those who have supported the University and its colleges and departments in an exceptional way.

Gabriel was nominated in recognition of his long-standing dedication and support of the University’s Law Faculty and is regarded as a highly valued friend and advisor.”

Path to the Bar could cost students up to £127,000

Students beginning university may have to spend up to £127,000 to qualify as a barrister, the new chair of the Bar Council has warned.

Chantal-Aimée Doerries QC highlighted the huge sums required for training as she voiced concerns that progress on diversity and social mobility within the profession could be thrown into reverse due to the high cost of training.

“For students starting at university this year, the cost of qualifying as a barrister could approach £127,000,” Doerries told the Guardian. “I hear from the junior bar that practising barristers paying off debts of between £40,000 to £60,000 is by no means uncommon [but] those figures are for individuals who completed their undergraduate degrees before higher tuition fees were introduced.”

As most senior judges initially worked as barristers, anything that deters the less privileged from applying is likely to have a significant impact on the future public facade of the legal system.

Fraudster who posed as Pope's banker is jailed

A fraudster who alleged he was the Pope's banker and could get returns of 1,200 per cent a year by using the pontiff's "secret trading platform" was jailed in February, having fleeced Dutch shipping company Allseas Group Ltd out of £73 million.

Luis Nobre, 49, belonged to a gang of conmen led by Marek Rejniak who posed as international financiers to dupe the company into handing over vast sums of cash. The gang claimed to have access to "secret and lucrative" trading through a platform connected to the Vatican via the Spanish royal family.

Nobre, who boasted he traded trillions of dollars for the biggest Chinese Sovereign investment fund in the world, lived at the five-star Landmark Hotel in Marylebone, before fleeing abroad and leaving his girlfriend with their new-born baby to foot a £130,000 bill.

The jury at Southwark Crown Court found Nobre guilty of one count of acquiring criminal property, five counts of transferring criminal property and three counts of possession of articles for use in fraud.

Judge Anthony Pitts sentenced him for a total of 14 years.

■ Subsequently, a solicitor, Buddika Kadurugamuwa, was spared jail for her involvement in the fraud.

Kadurugamuwa 46, transferred £111,400 into a HSBC account in her husband's name when Nobre told her he was closing down his account and needed to move the money.

Kadurugamuwa was charged with transferring criminal property after it emerged that the money came from the Nobre scam. She had transferred the money while she was on bail for a money laundering charge of which she was later acquitted.

Jurors cleared Kadurugamuwa of one count of being concerned in a money laundering arrangement but found her guilty of one count of transferring criminal property after a four-month trial alongside Nobre.

Kadurugamuwa was given a six-month suspended sentence and ordered to cimplete 125 hours of unpaid work at Southwark Crown Court.

LUIS NOBRE DEFRAUDED ALLSEAS GROUP OF £73M

Retirement of Lord Justice Richards

In February, Lord Justice Richards retired as a Lord Justice of Appeal. Sir Stephen Price Richards was called to the Bar in 1975 and elected a Bencher in 1992.

He was appointed an Assistant Recorder in 1992, a Recorder in 1996, a Judge of the High Court (Queen's Bench Division) in 1997, Presiding Judge of the Wales and Chester Circuit from 2000 to 2003 and a Lord Justice of Appeal in 2005, when he was sworn as a Privy Councillor.

He was appointed Deputy Head of Civil Justice in 2013.

Robin Dicker QC

South Square are delighted to announce that Robin Dicker QC was appointed as a Deputy High Court Judge on 15th January 2016.

NEWS in brief

Harvard Law School drops official emblem after student protest

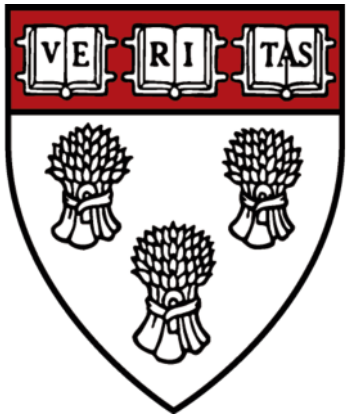
In a move increasingly familiar on University campuses, both in Europe and the US, Harvard Law School has caved in to protests from student activists, in this case to drop its coat of arms. The law school has a seal that apparently includes the crest of a notoriously brutal 18th Century slave owner.

Students have been holding protests and sit-ins calling for a change in the official emblem.

A Harvard Law School committee says the seal no longer represents the institution's values. The university also announced that it would stop using the term "Master" in academic titles, because of connotations of slavery.

Protests on campus have attacked the use of the official seal over its link with the Royall family, whose family coat of arms are incorporated in the emblem.

This reflects that in the 18th Century the Royall family funded the first professorship of law at Harvard.



HARVARD LAW SCHOOL'S OFFENDING SEAL

HMRC rated worst for debt collection practices

HMRC has been rated as the worst organisation for debt collection in a league table of best practice published by Citizens Advice.

The league table was included in a report – The State of Debt Collection – which said the charity's advisers had found HMRC to be inflexible when collecting overpayments of tax credits.

Only 12 percent of the charity's advisers thought HMRC almost always set affordable payments for tax credit collection, compared to 51 percent for debt collection agencies (DCAs) and banks.

HMRC also came out worst overall with an approval rate among advisers (for tax credit collection) of 34 percent.

Advisers had major concerns over the difficulties people face when trying to contact departments. HMRC scored particularly badly with 56 percent of advisers saying they "rarely or never" get through to someone who can help – this compared to just five percent for DCAs.

Some 48 percent of advisers reported that HMRC tax credit collections staff were rarely or never co-operative. This was 45 per cent for magistrates' courts collections – compared to just nine percent for high street banks.

Hole in one leads to a hole in golfer's finances

A golfer who won a car by hitting a hole-in-one at a charity event has been left thousands of pounds in debt after losing a bitter legal battle over his prize.

Jake Warner, a member at Haverhill Golf Club in Suffolk, was delighted when he hit a 202 yard hole in one during a £10-a-head charity event at the club. On the tee was a new top-of-the-range 1.6 TDI five-door Vauxhall Corsa with alloy wheels and bearing the slogan "Win this car if you get a hole in one". However, when Mr. Warner returned to the club a few days later to collect his prize, instead of the £14,000 model on display he was offered a basic 1.0 Corsa model worth only £6,500. Refusing to accept the inferior car or an offer of £7,000 in cash, Mr Warner took the club to court. The case turned on whether Mr. Warner had seen the car before starting his round.

The judge at Cambridge County Court found that Mr. Warner had failed to prove that he had played the charity tournament solely to win the car on display and, without any evidence of any other golfers winning that specific car, Mr. Warner lost the case.

Although Mr. Warner received an out of court settlement of £7,500 from the golf club, he was ordered to pay £10,000 in legal fees – both his own and those of the Haverhill Golf Club.

50 Cent mansion to become old folks' home

Avid readers of News in Brief will recall how, in August 2015, we reported that American rapper 50 Cent had filed for bankruptcy and was selling the vast Connecticut mansion he bought from his idol, former heavyweight boxing champion (and fellow bankrupt) Mike Tyson. We can now report that the rapper has now sold his 52-room pad for US$8 million (some $10.5 million shy of the original asking price), which will now be remodelled as a nursing and rehabilitation home. The new residents will have access to two NBA regulation size basketball courts, a private lake full of koi carp and a waterfall. 50 Cent has posted many an image of his old home on Instagram for those curious to see what the fortunate senior citizens may get to enjoy.

FIDDY'S CRIB: FROM RAP TO OAP

End of the road for Australia's youngest billionaire

Nathan Tinkler, who rode the mining boom to become Australia's youngest billionaire before losing it all when coal prices collapsed, has been declared legally bankrupt over funds owed from the sale of his private jet.

The bankruptcy order comes 10 years after the 40-year-old former mining electrician scraped together a A$1m deposit for a rundown coalmine that returned a profit of A$442m 18 months later.

At that time, coal was at the forefront of a boom in Australian mining, with rising orders from fast-industrialising Asia creating a rush of development and consolidation.

Tinkler parlayed a series of audacious deals into a fortune, far removed from his days as an apprentice at one of BHP's coalmines, where he is said to have spent much of his free time scouring share prices in newspapers.

He toyed with the idea of going to university, but, as he later told BRW magazine, he felt he would "fail uni [university] the same way I did high school, I was just not cut out for hitting the books", according to a biography written by Australian business writer Paddy Manning.

By 2012, the resources boom and Tinkler's fortune had begun to unravel, with at least three of his stable of some 50 firms facing hundreds of millions of dollars in lawsuits.

US-style 'problem-solving' courts

In February this year the prime minister announced a working group to examine how to deliver American-style "problem-solving" courts across the UK. A recent study by the Centre for Justice Innovation found that such courts were extremely cost effective, saving £2.30 for every £1 spent on them.

First set up in Miami in 1989 they offer a 'tough love' approach, designed to stop the revolving door between reoffending and prison, and aim to deal with those areas where social, human and legal problems intersect. Judge Nicholas Crichton, a founding judge of the method in the UK, said that the court was "tough but fair towards all the families it supervises. Parents are given a chance to work hard and overcome their drug and alcohol problems in order to show that they're 'good enough parents' for their children".

■ A Poll carried out by *Legal Week* has found 40pc of lawyers expect Britain to leave the EU, but only 15 percent personally support such a move.

77 percent of partners responding to the survey personally oppose Brexit, while 59 percent think that leaving the EU would have an adverse effect on their firm.

Both the Law Society and the City of London Law Society have declined to take a public position, despite the fact that research commissioned by the Law Society suggests the legal services sector would be disproportionately disadvantaged by Brexit.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the March 2016 edition. The challenge this time is to identify the subject of each picture, and then what connects them all. Please send answers by email to *kirstendent@southsquare.com* or by post to Kirsten at the address on the back page. Entries by Monday 5 May 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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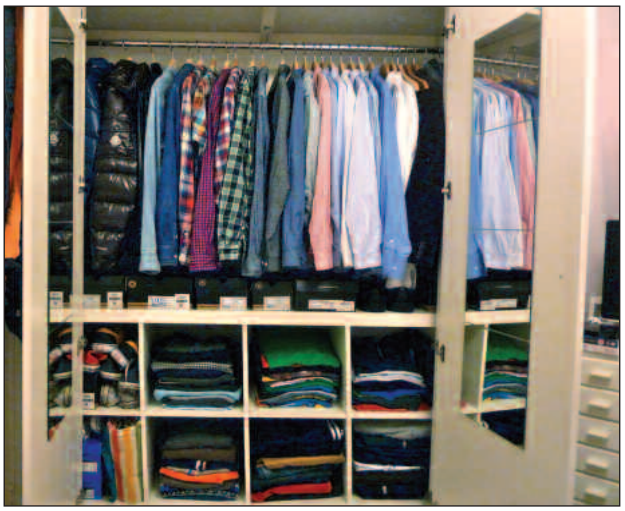

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And the connection is?

DECEMBER CHALLENGE

The answers to each of the clues were:- Harry Woolf, John Thomas, Peter Taylor, Geoffrey Lane, George Jeffreys, Rufus Isaacs, John Coleridge and Nicholas Phillips

The connection between them is that they all were (and in the case of John Thomas, are) Lord Chief Justice of England.

The winner this time around is Geraint Thomas, of Laytons Solicitors LLP to whom goes a magnum of champagne and South Square Umbrella.

Diary Dates

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

ILA Academic Forum and Conference
18-19 March 2016 – Macdonald Randolph Hotel, Oxford

Joint R3 & INSOL Europe Conference
22 April 2016 – Hilton Tower Bridge, London

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

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

INSOL International Channel Islands One Day Seminar
9 June 2016 – Radisson Blu Waterfront Hotel, Jersey

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

INSOL International BVI One Day Seminar
17 November 2016 – British Virgin Islands

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

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

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'SOUTH SQUARE PROVIDES A WORLD-CLASS SERVICE' Legal 500

SOUTH SQUARE

‘UNBELIEVABLY STRONG ON THE INSOLVENCY SIDE BUT ALSO FANTASTIC ON MORE GENERAL COMMERCIAL LITIGATION’

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