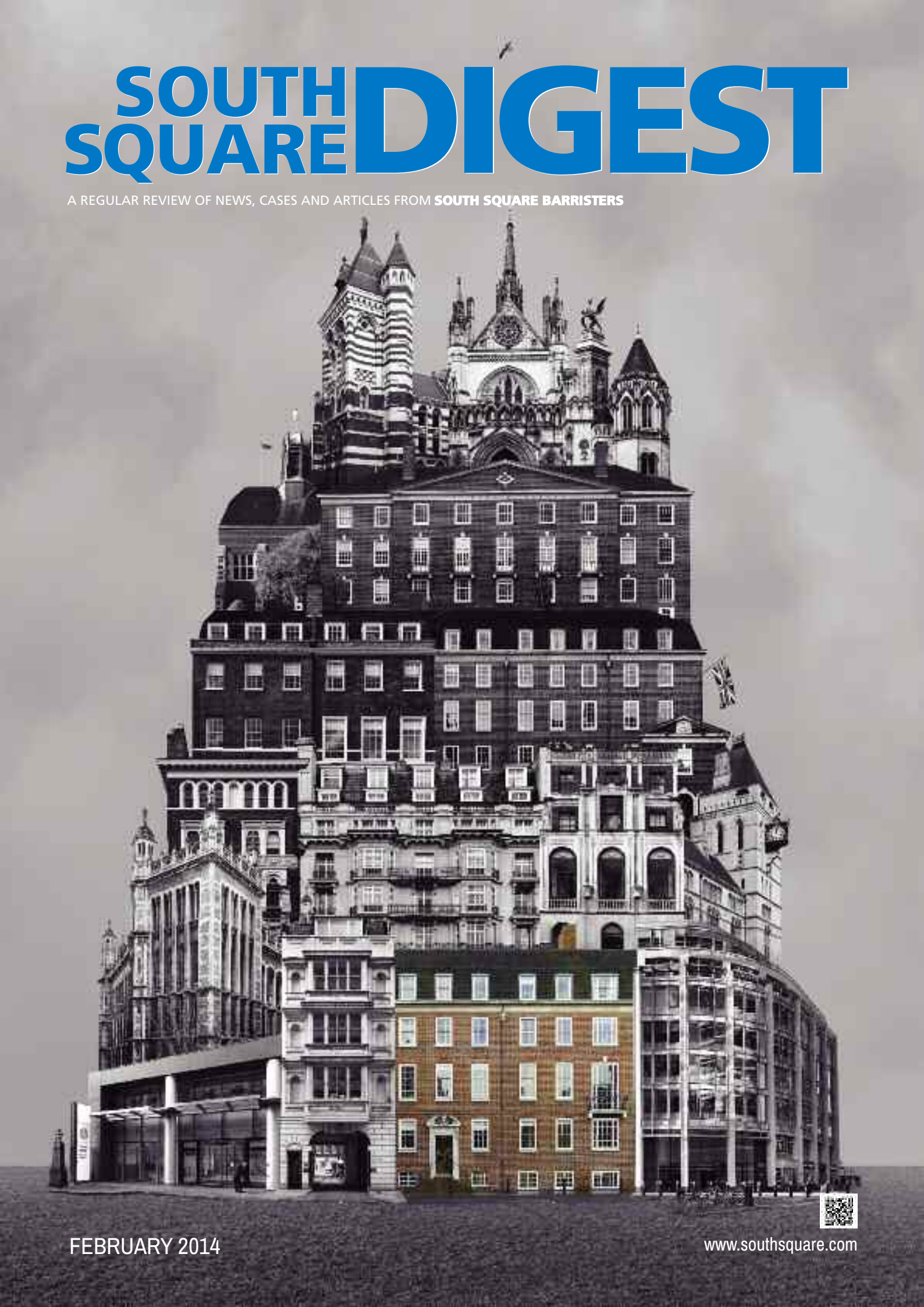
# SOUTH SQUARE DIGEST

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



FEBRUARY 2014

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ARCHISCULPTURE 008

ARCHISCULPTURE 009

ARCHISCULPTURE 013

ARCHISCULPTURE 004

## ARCHISCULPTURE

Recent visitors to South Square's reception and conference suite will have noticed a series of new artworks on the walls. These photo-montages, by the Korean artist Beomsik Won, are part of the 'Archisculpture Project' he was inspired to create as a student at the Slade School of Art, when he was much taken by the eclectic variety of London architecture.

Beomsik felt that simply to photograph the buildings he admired individually would only amount to a database, when what he sought was a creative response to his experiences in the city. By collaging images together, he has created a series of fantastical architectural structures, piled high with a baroque mix of features, styles and functions. Moreover, not content with confining himself to London's architecture, Beomsik has extended his work to absorb distinctive architectural styles from other UK cities, most notably Edinburgh.

In all his collages, as you can see from some of images reproduced here and on the front page of the Digest courtesy of Beomsik Won/TAG Fine Arts 2014, Beomsik has dismantled the cityscape as we normally perceive it, and has reimagined it not as a series of independently perfected buildings but as the sum of its parts structured in a new way.

Beomsik has also designed a unique photo-montage for South Square (see the front cover of this issue of the Digest), based on a number of buildings of legal significance in London. The buildings include the High Court, the Rolls Building, Gray's Inn and 3-4 South Square.

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ARCHISCULPTURE 016 BY BEOMSIK WON. COMMISSIONED BY SOUTH SQUARE, THE WORK NOT ONLY INCLUDES SOUTH SQUARE CHAMBERS ITSELF AND THE ENTRANCE TO GRAY'S INN, BUT NUMEROUS RELEVANT EDIFICES FROM THE CAPITAL.

*Images courtesy of Beomsik Won/TAG Fine Arts 2014*

## REGULARS



SOUTH SQUARE

# FROM THE **EDITOR**

DAVID ALEXANDER QC

# Out with the Old and in with the New

Welcome to the first edition of the Digest for 2014 and, as you will see for this new year, we have a new format. For, in the drive for an ever-better production, the Digest has upgraded itself to a fully-fledged magazine. Not only that but we have new photos to replace the ones that made members of Chambers look about five (or, in some cases, ten) years younger than they actually are. In addition we have some interesting new art of which the front cover of this edition of the Digest is but one illustration. We also have another new tenant in the form of Toby Brown following the successful completion of his pupillage, and a new Business Development Manager in Jo Colton, who joined us in January. Lots of new things have therefore been happening at South Square.

So what has happened in the rest of the world since the last edition of the Digest came out in November 2013? Well the remainder of it passed and with it went one of the world's greatest statesmen, Nelson Mandela. With it also went the Ashes to a resurgent Australian team (gosh it was embarrassing to lose so fast and so badly – it certainly gave a whole new meaning to "late night horror show"). Christmas and New Year then came and went with some of the retailers doing really well – and some of them not doing so well. And from the start of 2014 the news was dominated by weather. Large parts of the UK were seriously flooded again. The United States had such a cold snap that the words polar vortex (the sort of thing one usually only expects to come across in a Clive Cussler novel) entered common parlance and the US side of the Niagara Falls looked frozen solid. And, at the other end of the extreme, Australia was a very hot place to play tennis in.

So what have we got to look forward to in 2014?

THE US SIDE OF NIAGRA FALLS FREEZES OVER

Starting with the financial side, if we believe everything we are told, the economy seems to be recovering. So say the Government. And so, it appears, say the IMF. And a recovering economy probably means more work for everyone than before which is always good news. And the drop in unemployment figures seems to back that up. But it probably also means that there will be an interest rate rise at some stage, although that may have been delayed by the recent better than expected inflation figures and the IMF suggesting that the UK should hold off from cutting stimulus measures. Anyway we will have to wait and see if what looks like a recovery continues. My bet is that it will, at least until after the election in May 2015. But even if it does I was pretty horrified to see that by then, despite all the so-called austerity measures, our national debt will apparently have risen (in just one Parliament) from £700 million to £1.4 trillion. Yikes. When are we ever going to be able to pay that back?

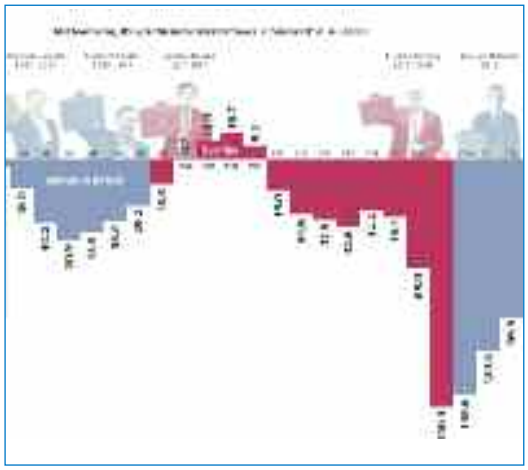
On to matters non-financial, this year has some other exciting events in it. The winter Olympics in Sochi are upon us. Then there is the World Cup in Brazil starting in June (probably not much joy there for England given that even those who run the game don't seem to think we have a scintilla of a chance). Then Wimbledon will be upon us before we know it and Andy Murray will be the defending champion (hmmm, I am not sure that lightning strikes twice but you never know). Next the Grand Depart for the Tour de France is in Yorkshire with two further stages taking place in the UK culminating in Cambridge to the Mall in London. Then there is the Commonwealth Games in Glasgow. Oh and finally, of course, on 18 September 2014 we have what to some is probably the most important event of the year: a referendum on whether Scotland should become an independent country. If the Scots vote to go it alone that will lead to something dramatically different to anything any of us have seen at first hand before. It will also provide an interesting backdrop to the attempted defence of the Ryder Cup at Gleneagles a week later.

So what is in this edition of the Digest? Well for the new-look format we have even more for you than normal. There is an article by Adam Goodison on Special Administrations in relation to investment banks following on from Hartman Capital, on 3 January 2014, becoming the sixth to be placed into special administration since regulations were put into place following the collapse of Lehman Brothers. There is an article by John Briggs on the proposed new insolvency rules. There are also articles by William Willson (on some recent English real property litigation in the context of foreign divorces), Antony Zacaroli QC and Simon Dickson of Mourant Ozannes (on the decision of the Grand Court in Cayman in Arcapita Bank), Richard Fisher and Maja Zerjal of Proskauer (on Comity, COMI and Anti-Suit Injunctions) and Toby Brown (on commercial mediation/ADR). In addition to that we have our latest offshore feature, this time on recent developments in the Cayman Islands which has been put together for us by Ross McDonough and Guy Manning of Campbells. There are also of course the usual Case Digests. And we have pieces on INSOL in Cayman in November 2013, the forthcoming INSOL event in Hong Kong in March 2014, and Gabriel Moss QC on events in Euroland. There is also a review of the recent Chambers & Partners' comments on South Square and its members as well as News in Brief and the South Square Challenge. Finally we have dates for the diary which will now appear at the back of the magazine.

I hope that everyone enjoys this new format edition of the Digest. As always if you want to be added to the Digest circulation list, either in electronic or hardcopy form (or both), please send an email to kirstendent@southsquare.com. Similarly if your contact details change please let us know so that we can ensure that you get the next edition of the Digest promptly.

*David Alexander QC - Editor*

THE GRAND DEPART BEGINS IN LEEDS THIS YEAR



UK BUDGET DEFICIT AND BORROWING

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# All that glitters is not gold...

The 2008 banking crisis precipitated some heavy casualties in the sector, betraying shortcomings in many jurisdictions. **Adam Goodison** examines developments in investment bank special administrations.

Woe betide the banker who returns home - not with the Christmas bonus - but instead with news of the imminent collapse and demise of his or her investment bank.

For the relevant husbands, no Ferrari GTO. For the relevant wives, no Hermès 30cm Matte Paille Nilo Crocodile Birkin Bag with Palladium Hardware.

London – October / November 2008 – a bit too close to the wild west for comfort. Bank collapses are dangerous.

As Lord Bingham wrote in his introductory letter to the BCCI Report[1]:-

"*The failure of any substantial company is likely to cause loss, and often hardship, to creditors, employees and shareholders. But when the company is a bank these results are magnified, because banks deal in other people's money and the creditors will include the bank's depositors and customers, who may lose almost everything they have.*"

Only three years later the Board of Banking Supervision found itself publishing a report on the collapse of Barings. They wrote:-

"*Barings' collapse was due to the unauthorised and ultimately catastrophic activities of, it appears, one individual (Leeson) that went undetected as a consequence of a failure of management and other internal controls of the most basic kind. Management failed at various levels and in a variety of ways, described in the earlier sections of this report, to institute a proper system of internal controls, to enforce accountability for all profits, risks and operations, and adequately to follow up on a number of warning signals over a prolonged period. Neither the external auditors nor the regulators discovered Leeson's unauthorised activities.*"[2]

Some bankers were not to be deterred.

ABN Amro, which became the owner of the US arm of Barings, itself became a more than central actor in the crisis which engulfed the financial world from October 2008.

Barclays in its bid for ABN Amro managed to fail (and in turn perhaps save itself) by being outbid by Royal Bank of Scotland who won the poisoned chalice. Some bankers are lucky – some unlucky. Judging by the property prices in London and Paris, and taking account of the large property positions which Lehmans was risking itself upon through 2008, if QE had arrived in time Dick Fuld might still be motivating his troops with videos of how to deal with the enemy. History may decide Mr Fuld was an unlucky general.

It was in response to the banking and investment bank meltdown experienced in the UK from 2008 that the Government enacted the Investment Bank Special Administration Regulations 2011, which came into force on 8 February 2011 ("**the Special Regulations**"),[3] and the Investment Bank Special Administration (England and Wales) Rules 2011, which came into force on 30 June 2011 ("**the Special Rules**").[4]

These regulations have allowed the English Courts to deal rapidly and effectively with investment bank insolvencies by way of special administrations, usually making orders on very short notice and out of UK market hours.[5]

An "*investment bank*" is defined by section 232 of the Banking Act 2009, and to be such the entity must satisfy three conditions referred to in the section. Condition 1 is that the institution has permission under Part 4A of the Financial Services and Markets Act 2000 to carry on the regulated activity of (a) safeguarding and administering investments, (b) dealing in investments as principal, or (c) dealing in investments as agent.[6] Condition 2 is that the institution holds client assets[7] (client assets are defined in section 232 (4) of the

*1/. Inquiry into the Supervision of the Bank of Credit and Commerce International July 1992.*
*2/. Report of the Board of Banking Supervision: Inquiry into the Circumstances of the Collapse of Barings July 1995, para 14.1.*
*3/. SI 2011 / 245, regulation 1.*
*4/. SI 2011 / 1301, rule 2.*
*5/. Thus in MF Global, the first special administration granted under the Special Regulations, the order was granted on Monday 31 October 2011 (with MF Global represented by Martin Pascoe QC and Daniel Bayfield of South Square). In Worldspreads Ltd the special administration order was granted at 17.30 on Sunday 18 March 2012 by Hildyard J (with Worldspreads Ltd represented by Glen Davis QC and Jeremy Goldring of South Square). In City Equities Ltd the special administration order was granted by Roth J at 17.24pm on Friday 11 October 2013 (with City Equities represented by Adam Goodison of South Square). In Hartmann Capital Ltd the special administration order was granted by David Richards J at 17.35pm on Friday 3 January 2014 (with Hartmann represented by Adam Goodison of South Square).*
*6/. Banking Act 2009, section 232 (2).*
*7/. Banking Act 2009, section 232 (3).*

Banking Act 2009 as meaning assets which an institution has undertaken to hold for a client whether or not on trust and whether or not the undertaking has been complied with). Condition 3 is that the institution is incorporated in, or formed under the law of any part of, the United Kingdom.[8] (Insurance mediation activities are excluded by section 232 (5A) of the Banking Act 2009.)

By section 233 of the Banking Act 2009, the Treasury was authorised by regulations (to be named "*investment bank insolvency regulations*") to modify the law of insolvency in its application to investment banks, and establish a new procedure for investment banks where they are unable, or are likely to become unable, to pay their debts (within the meaning of section 93 (4) of the Banking Act 2009[9]), or their winding up would be fair (within the meaning of section 93 (8) of the Banking Act 2009[10]).[11]

Section 233 (2) of the Banking Act 2009 provides that the investment bank insolvency regulations (made by the Treasury) "*may, in particular – (a) apply or replicate (with or without modifications) or make provision similar to provision made by or under the Insolvency Act 1986 or Part 2 or 3 of this Act; (b) establish a new procedure either (i) to operate for investment banks in place of liquidation or administration (under the Insolvency Act 1986, or (ii) to operate alongside liquidation or administration in respect of a particular part of the business or affairs of investment banks.*" Section 233 (3) of the Banking Act 2009 provides that in making investment bank insolvency regulations the Treasury shall have regard to the desirability of (a) identifying, protecting, and facilitating the return of, client assets, (b) protecting creditors' rights, (c) ensuring certainty for investment banks, creditors, clients, liquidators and administrators, (d) minimising the disruption of business and markets, and (e) maximising the efficiency and effectiveness of the financial services industry in the United Kingdom. By section 233 (4) a reference to returning client assets includes a reference to (a) transferring assets to another institution, and (b) returning or transferring assets equivalent to those which an institution undertook to hold for clients.

ADAM GOODISON

The Special Regulations themselves clearly set out in Special Regulation 3 the new procedure of investment bank special administration. It provides that "*the main features of special administration are that – (a) an investment bank enters the procedure by court order; (b) the order appoints an administrator; (c) the administrator is to pursue the special administration objectives in*

**London - October/November 2008 - a bit too close to the wild west for comfort.**

*8/. Banking Act 2009, section 232 (5).*
*9/. Section 93 (4) provides: "For the purposes of a reference in this Part to inability to pay debts – (a) a bank that is in default of an obligations to pay a sum due and payable under an agreement, is to be treated as unable to pay its debts, and (b) section 123 of the Insolvency Act 1986 (inability to pay debts) also applies; and for the purposes of paragraph (a) "agreement" means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the bank."*
*10/. Section 93 (8) provides "The expression "fair" is used in this Part as a shorter modern equivalent of the expression "just and equitable" (and is not therefore intended to exclude the application of any judicial or other practice relating to the construction and application of that expression)."*
*11/. Banking Act 2009, section 233 (1)(b).*

*accordance with the statement of proposals approved by the meeting of creditors and clients and, in certain circumstances the FCA; and (d) in other respects the procedure is the same as for Schedule B1 administration under the Insolvency Act, subject to specific modifications, and the inclusion of certain liquidation provisions of the Insolvency Act."*

If the investment bank is a deposit taking bank with eligible depositors (within the meaning of section 93 (3) of the Banking Act 2009, which are defined as "*depositors who are eligible for compensation under the FSCS"*) then Special Regulations 4 to 8 do not apply, and instead, in addition to insolvency procedures established under Parts 2 and 3 of the Banking Act 2009, the Bank of England, or the FCA, may apply for an order to put the bank into special administration (bank insolvency) as set out in Schedule 1 to the Special Regulations, or special administration (bank administration) as set out in Schedule 2 to the Special Regulations.[12]

If the applicants for the order are the directors of the investment bank[13] then those required to be notified are provided by Special Regulation 5 (4) and Special Rules 10 and 12, the most practically relevant person for these purposes likely to be the Financial Conduct Authority ("**the FCA**") who will be the regulator of the investment bank. Recognising the urgency often required in these cases, the Special Rules provide for the application to be served "*as soon as reasonably practicable before the hearing"* [14] (rather than the 14 day service period specified in Insolvency Rules 1986, rule 7.4 (5)). The Special Rules also expressly provide for the desirability of an application to be heard as soon as is reasonably practicable, thus again recognising the desirability of moving quickly when a market trading entity is facing financial difficulties.[15] If the investment bank is a deposit taking bank but has no eligible depositors, the investment bank must not be put into special administration (bank insolvency) but instead may be put into either

ABN AMRO BECAME A CENTRAL ACTOR IN THE CRISIS OF 2008

## Bank collapses are dangerous...

special administration (bank administration) or investment bank special administration.[16]

Special Regulation 4 (1) and (2) provide that an investment bank special administration order is an order appointing a person as the investment bank administrator of an investment bank, and the proposed special administrator must be qualified to act as an insolvency practitioner.

The applicants for a special investment bank administration order are specified by Special Regulation 5 and are listed as (a) the investment bank; (b) the directors of the investment bank; (c) one or more creditors of the investment bank; (d) the designated officer for a magistrates' court in the exercise of the power conferred by section 87A of the Magistrates' Courts Act 1980 (fines imposed on companies); (e) subject to Special Regulation 5 (7), a contributory of the investment bank; (f) a combination of the above; (g) the Secretary of State; (h) the FCA.

If the FCA is not the applicant, then the FCA must be notified of the hearing,[17] and is entitled to be heard at the hearing.[18]

Interestingly, a qualified floating charge holder is not listed as a person who is required to be notified of the application.[19] Further, Special Regulation 8 which allows for certain other insolvency procedures, does not include within the "*preliminary steps taken in respect of an insolvency procedure"* any appointment by a QFC holder.[20] Thus, it seems to have been a deliberate policy decision to require a QFC holder to apply, if at all, for a special administration order or an administration order (if Special Regulation 7 can be satisfied) as a creditor of the investment bank. It cannot

*12/. SI 2011 / 245, regulation 3 (3).*
*13/. SI 2011 / 245, regulation 5 (1)(b).*
*14/. SI 2011 / 1301, rule 10 (3) and 12.*
*15/. SI 2011 / 1301, rule 9 (3)(a).*
*16/. SI 2011 / 245, regulation 3 (4).*
*17/. SI 2011 / 1301, rule 12 (c).*
*18/. SI 2011 / 245, regulation 5 (2)(a).*
*19/. See SI 2011 / 245, regulation 5 (4), and SI 2011 / 1301, rules 10 and 12.*
*20/. See SI 2011 / 245, regulation 8 (8).*

appoint out of court in the normal way appears to be the policy decision and the structure of the Special Regulations and Special Rules.

If an application for a special administration order is made by the investment bank, the directors, one or more creditors, the designated magistrates' officer, or a contributory, or the FCA, then the court may make a special administration order if it is satisfied that the company is an investment bank and that Ground A or Ground B in Special Regulation 6 is satisfied.

Ground A is that the investment bank is, or is likely to become, unable to pay its debts. Ground B is that it would be fair to put the investment bank into special administration.[21]

If the Secretary of State is the applicant, then the court may make a special administration order if satisfied that the company is an investment bank and if satisfied that Grounds B and C in Special Regulation 6 are satisfied. Ground C is that it is expedient in the public interest to put the investment bank into special administration.[22]

It is not a requirement to show to the court that there is a real prospect of achieving one of the purposes of special administration. Instead the objectives for special administration only become relevant if the court makes an order on the basis of Grounds A, B, or C.

If the court grants a special administration order in respect of a participant in a designated system (which an investment bank normally would be) the court is required to forthwith notify both the system operator of that designated system and the designating authority that such an order has been made.[23] "*Designating authority*" means (a) in the case of a system which is, or the operator of which is, a recognised investment exchange for the purposes of the Financial Services and Markets Act 2000, the FCA; (b) in any other case, the Bank of England.[24]

Council Regulation (EC) No 1346 / 2000 on Insolvency Proceedings will not normally apply to an investment bank special administration,

**Banks deal in other people's money and the creditors will include the bank's depositors and customers, who may lose almost everything they have.**

because Article 1 (2) provides: "*This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.*"[25] Therefore any applicant may want to consider potential recognition available under any relevant foreign applicable UNCITRAL Model Law on Cross Border Insolvency[26]

As regards the objectives of special administration if a special administration is made, these objectives are provided by Special Regulation 10. Objective 1 is to ensure the return of client assets as soon as is reasonably practicable.

Objective 2 is to ensure timely engagement with market insfrastructure bodies and the Authorities pursuant to Special Regulation 13. Objective 3 is to either rescue the investment bank as a going concern, or to wind it up in the best interests of the creditors. The administrator is entitled to deal with and return client assets in whatever order the administrator thinks best achieves Objective 1. The order in which the special administration objectives are listed in the Special Regulations is not significant and subject to Special Regulation 16 (FCA direction) the administrator must commence work on each objective immediately after appointment, prioritising the order of work on each objective as the administrator thinks fit, in order to achieve the best result overall for clients and creditors and set out in the statement of proposals the order in which the administrator intends to pursue the objectives once the statement has been approved.[27]

The interim moratorium and moratorium as provided by Schedule B1, paragraphs 43 and 44 of the Insolvency Act 1986 apply (applied by Special Regulation 15 (3) and (4) and Table 1), but in addition a further moratorium is imposed as regards certain supplies by Special Regulation 14. However, this "*supply*" moratorium only applies *after the commencement of special administration* (meaning the making of the special administration order),[28] ie there is no interim moratorium provision with regard to "*supply*" (unless the relevant supply can fall within one of the provisions of Schedule B1, paragraphs 44 and 43 eg goods in the company's possession under a hire purchase agreement which might include computers or other chattel items).

A *"supply"* under Special Regulation 14 means a supply of (a) computer hardware or software or other hardware used by the investment bank in connection with the trading of securities or derivatives; (b) financial data; (c) infrastructure permitting electronic communication services; (d) data processing; (e) secure data networks provided by an accredited network provider; or (f) access to a relevant system by a sponsoring system participant; but does not include any services provided for in the contract between the investment bank and the supplier beyond the provision of the supply.

As regards the relevant supply, after the commencement of special administration, the supplier shall not terminate a supply unless any charges in respect of the supply, being

*21/. SI 2011 / 245, regulation 6 (1).*
*22/. SI 2011 / 245, regulation 6 (1)(c).*
*23/. Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999 / 2979, reg 22.*
*24/. Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999 / 2979, reg 2.*
*25/. Cf Byers v Yacht Bull Corp 2010 EWHC 133 (Ch) (the exclusion specified in Art 1 (2) is not applicable to investment undertakings generally, but only to those who (as the Art states) hold funds or securities for third parties.)*
*26/. See Re Worldspreads Ltd 2012 EWHC 1263 (Ch) (paras 37 to 39).*
*27/. SI 2011 / 245, regulation 10 (2) and (3).*
*28/. SI 2011 / 245, regulation 14 (2) and (6).*

THE CITY OF LONDON NOW HAS WELL SET OUT JURISDICTION FOR DEALING WITH INVESTMENT BANK INSOLVENCIES

charges for a supply given after the commencement of special administration, remain unpaid for more than 28 days. By Special Regulation 14 (5) any expenses incurred by the investment bank on the provision of a supply after the commencement of special administration are to be treated as necessary disbursements in the course of the special administration.

Commencement of the special administration also causes any right to terminate the supply to lapse.[29] Special Regulation 14 (3) provides that where, before the commencement of special administration, a contractual right to terminate a supply has arisen but has not been exercised, then, for the purposes of Special Regulation 14, the commencement of special administration shall cause that right to lapse and the supply shall only be terminated if a ground in Special Regulation 14 (2)(a) applies. As seen above, Special Regulation 14 (2)(a)(i) provides for a supply to continue in any event to the administrator unless remaining unpaid for more than 28 days. This provision, and Special Regulation 14 (5) providing for the expense of the provision of the supply being a necessary disbursement will allow the administrator to control when the supply contract can be terminated by the supplier. Further help is given to the special administration by Special Regulation 14 (4) which provides that any provision in a contract between the investment bank and the supplier that purports to terminate the agreement if any action is taken to put the investment bank into special administration is void, and by Special Regulation 14 (2)(b) which provides that the supplier shall not make it a condition of a supply, or do anything which has the effect of making it a condition of the giving of a supply, that any outstanding charges in respect of the supply, being charges for a supply given before the commencement of special administration, are paid.

The supplier may otherwise terminate if the administrator consents to the termination, or if the supplier has the permission of the court, which may be given if the supplier can show that the continued provision of the supply shall cause the supplier to suffer hardship.[30]

Special Regulation 15 provides for which parts of Schedule B1, and other provisions of the Insolvency Act 1986 (whether modified or not) are to apply to investment bank special administrations, and these are set out in Tables 1 and 2 (inserted between Special Regulations 15 and 16).

Much of the recent caselaw on investment bank special administrations has concerned judgments of the presiding judge, David Richards J, in *M F Global* and the finer details of client money entitlements or client asset

*29/. SI 2011 / 245, regulation 14 (3).*
*30/. SI 2011 / 245, regulation 14 (2)(a)(ii) and (iii).*

entitlements. Points will now be made as regards relevant provisions concerning client assets and client monies and reference to some of these judgments concerning client entitlements, in the context of the first objective of a special administration, namely to ensure the return of client assets as soon as is reasonably practicable.

Special Regulation 11 permits the administrator, if he thinks it necessary in order to expedite the return of client assets, to set a bar date for the submission of (a) claims to the beneficial ownership, or other form of ownership, of the client assets; or (b) claims of persons in relation to a security interest asserted over, or other entitlement to, those assets. This provision as regards client assets and the setting of a bar date does not apply to client money entitlements (which is provided for by different rules). Special Rule 138 ff provides various rules as regards setting a bar date, the contents of claims for client assets, and the provisions applying as regards the administrator's distribution plan for client assets (Special Regulation 144).

If, after a bar date is set, assets are returned, then in respect of the assets returned there shall be no disruption to those client assets that have already been returned, and the person to whom the assets have been returned acquires good title to them as against any late claiming claimant.[31] However, the distribution can be upset if the client assets were returned to a person by the administrator in bad faith in which that person was complicit, or if that person is later found to have made a false claim to those assets.[32] Special Regulation 12 provides for pro rata distribution in the event of a shortfall.

Special Rule 135 provides that expenses properly incurred by the administrator in pursuing Objective 1, necessary disbursements or remuneration specific to the achievement of Objective 1, and the administrator's remuneration in respect of work done in pursuance of Objective 1 are to be paid out of the client assets held by the investment bank (in the order of priority specified in Special Rule 135).

## Management failed at various levels and in a variety of ways.

Client money is more problematic in that there are no equivalent provisions under the Special Rules (equivalent to the provisions contained in the Special Rules regarding client assets). As David Richards J observed in *MF Global UK Ltd (in special administration)(as Trustees of the Client Money Trust)* [2013] EWHC 1655 (Ch):-[33]

*"4 The FSA was empowered by section 139 (1) of the Financial Services and Markets Act 2000 to make rules providing for clients' money to be held on trust in accordance with the rules. The relevant rules are contained in chapters 7 and 7A (CASS 7 and 7A) of the Client Assets Sourcebook section of the Financial Services Authority Handbook. ….*

*5 Client money must be segregated from an investment firm's own money by being paid into and held in "an account or accounts identified separately from any accounts used to hold money belonging to the firm" (CASS 7.4.11R) The trust of client money is created by CASS 7.7.2R which provides, so far as relevant that:*

*"A firm receives and holds client money as trustee … on the following terms: (1) for the purposes of and on the terms of the client money rules and the client money distribution rules; (2) subject to (4) for the clients ….. for whom that money is held, according to their respective interests in it; …. (4) on failure of the firm, for the payment of the costs properly attributable to the distribution of the client money in accordance with (2); and (5) after all valid claims and costs under (2) and (4) have been met, for the firm itself."*

*CASS 7.6 requires a firm to keep records and accounts so as to enable it to distinguish client money held for one client from client money held for any other client and from its own money.*

*6 CASS 7A contains the client money distribution rules, applicable on the occurrence of "primary pooling event", which includes the appointment of administrators or other insolvency proceedings in respect of the firm. In that event, client money held in each client money account of the firm is treated as pooled and it must be distributed by the firm in accordance with CASS 7.7.2R "so that each client receives a sum which is rateable to the client money entitlement calculated in accordance with CASS 7A.5R (CASS 7A.2.4R). It is unnecessary to refer in detail to CASS 7A.2.5R which makes provision for set off.*

*7 The overall purpose of CASS 7A is, as explained in CASS 7.A.1.2G, to ensure the timely return of client money to clients following a primary pooling event.*

*8 By these rules, a trust is created, with identifiable trust property and, following the majority decision of the Supreme Court in Lehman Brothers International (Europe) v CRC Credit Fund Ltd [2012] Buss LR 667[34], identifiable beneficial interests. There are however no provisions setting out a procedure whereby claims to client money can be made and adjudicated or a process whereby client money can be distributed among those entitled to it. There is nothing, for example, equivalent to the procedure in the Insolvency Rules for the submission, adjudication of claims, and distribution In respect of proofs of debt, where distributions can safely be made on the basis of proofs submitted prior to a specific date, with late comers being prevented from disturbing prior distributions. Nor is there anything equivalent to the bar date mechanism under the Special Administration Rules relating to the distribution of assets of investment banks. The absence of such provisions is surprising, given that an investment bank is likely to have dealt with a large number of clients who may, but equally may not, have claims to share in the*

*31/. SI 2011 / 245, regulation 11 (5).*
*32/. SI 2011 / 245, regulation 11 (6).*
*33/. In which Antony Zacaroli QC and Adam Al-Attar of South Square represented the special administrators of MF Global.*
*34/. Numerous members of South Square were involved in this case through the High Court, the Court of Appeal, and the Supreme Court, including Antony Zacaroli QC, Robin Knowles QC, Felicity Toube QC and David Allison.*

## It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant.

*distribution of client money. In many cases, they will have alternative or additional claims as unsecured creditors of the investment bank."*

The MF Global administrators requested the court to authorise and apply an administrator devised Client Money Distribution Procedure (which contained provisions adapted from the Special Rules dealing with the submission and adjudication of claims by creditors).

David Richards J had no doubt that it would be in the best interests of the proper administration of the client money trust and in the best interests of the clients that the order should be made and the Client Money Distribution Procedure adopted, but he questioned whether the court had jurisdiction to make the order sought. He quoted Lord Walker in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 that it is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust. David Richards J observed that the inherent jurisdiction of the court did not enable the court to vary beneficial interests in trust property, but as part of the jurisdiction to supervise and administer trusts, it permits the court to give directions to trustees to distribute trust property on particular bases when the court is satisfied that it is just and convenient to do so, and he gave the well established example of the exercise of the jurisdiction in this respect in the making of *Re Benjamin* orders. A *Benjamin* order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities.[35]

David Richards J was satisfied that he had jurisdiction under *Re Benjamin* as regards all possible claimants of whom they were unaware, and the judge was satisfied by the evidence that the administrators had taken all reasonable steps to identify or notify potential client money claimants.

However, the judge observed he could not rely on the jurisdiction in *Re Benjamin* as regards that part of the proposed order which would permit the administrators to distribute the client money held by them without providing for those claims which were going to be rejected in whole or in part (and in respect of which no appeal to the court would be made). This was because the jurisdiction in *Re Benjamin* permitted the trustee to act on a presumed fact in circumstances where it is impossible or impracticable to establish the fact one way or the other. However, in the case of rejected claims, there was no doubt that the claim and the claimant existed and that claims were made which would not be determined finally by agreement, withdrawal or decision of the court. The basis of the distribution plan proposed was so that the administrator should be permitted to proceed with the distribution of client money on a presumption that the only good or potentially good claims were those which had been agreed and those whose rejection was the subject of an appeal to court.

The judge concluded that there was, nevertheless, an inherent jurisdiction to grant this sort of relief to trustees. He observed that the fact that the proposed order did not neatly fit within the *Benjamin* jurisdiction did not mean it fell outside the scope of the inherent jurisdiction of the court, and as support for this proposition he referred to *Finers v Miro* [1991] 1 WLR 35 and he quoted (with approval) *Lewin on Trusts* (18th ed) (para 27.34):-

*"It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant. But the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from third parties. That will not have the effect of destroying a proprietary right of third parties, but may afford protection against personal claims against the trustees by third parties."*

The judge was satisfied the order was appropriate in circumstances where the purpose of the client money trust established by the CASS rules is to protect the position of clients and to facilitate the timely return of client money in the event of the failure of the firm. He observed that such purposes would not be well served by long delays while at considerable expense claims, which had been made but not pursued, were finally determined through court proceedings. He considered it was sufficient that the distribution proposals permitted such claimants to lodge an application with the court, in which event full provision would be made for their claims while they were litigated. In David Richards J's judgment, the proposals as put forward by the administrators properly balanced both the interests of established clients to a timely return of their money and the interests of persons with serious but unresolved claims to be treated as clients.

This judgment is welcome news to trustees of client fixed trusts, as it establishes that a distribution process similar to an insolvency type distribution process can be followed, which is likely in most cases to resolve the proper identification of those properly entitled and ensure the return of trust property to those properly entitled. It also provides a practicable mechanism and process which ought to protect the relevant trustees from breach of trust claims (in the event that mistaken payments are made).

David Richards J delivered another judgment in the *MF Global* saga in *Heis, Pink, Fleming (joint administrators of MF Global UK Ltd) v Attestor Value Master Fund LP* [2013] EWHC 2556 (Ch)[36], where the judge, following on from his earlier "*hindsight judgment"* (in which he had decided that claims to the client

*35/. The jurisdiction as set out in Re Benjamin had been used in Re O T Computers (as authorised by Pumfrey J) to distribute the monies held in a fixed trust according to a list of the beneficiaries prepared from the books and records of the company but where there were still possible difficulties in establishing the existence of all possible beneficiaries. The relief granted contained a claims processing procedure and bar date for added protection of the trustees. David Richards J in MF Global refers to other examples of the use of the jurisdiction being Re Gess 1942 Ch 37 and Capita ATL Pension Trustees Ltd v Gellately 2011 EWHC 485 (Ch).*

*36/. In which case, again, Antony Zacaroli QC and Adam Al-Attar of South Square represented the special administrators.*


MF GLOBAL: THE FIRST INVESTMENT BANK TO GO INTO SPECIAL ADMINISTRATION UNDER THE SPECIAL REGULATIONS

money pool had to be valued at the date of the pooling event, rather than at the later date (if applicable) when the actual positions were closed out: see [2013] EWHC 92 (Ch), [2013] Bus LR 1030) decided that clients whose positions were closed out subsequent to the time of special administration should give credit for the sums paid to them from the client money trust against their full contractual claim against the company (rather than be permitted to take the client money trust sums due to them and also prove for the "mirror" contractual claim as well).

The ongoing trading book, and derivative positions, or CFD's often produce difficult challenges for the special administrator, and/or the investment bank in the run up to a special administration order. It is likely that the FCA in the exercise of its supervisory powers will limit the permissions of the investment bank, or require the investment bank to endeavour to use its best endeavours to terminate any derivative contracts to which it is a party and run down its book. However, it is not unknown for clients with profitable positions to threaten to take proceedings against the FCA if their long positions are closed against their will, and if the relevant contract does not permit termination then the special administrator may not wish to be accused of inducing a breach of contract and risking a potential expense type claim.

Further complications may arise if the FCA in its supervisory power serves notices imposing a primary pooling event prior to the special administration order (so as to protect client monies). Unless the books and records of the investment bank can be re-created as at the moment of the notional pooling event, the trading book positions may take considerable work to unravel.

The complications faced in investment bank insolvencies are often also not helped by the possibility that the investment bank itself may have few if any funds, because often it will have incurred loss making trading and salary bills meaning there are no monies available to the insolvency practitioner to fund the "house estate". In a recent case, an insolvency practitioner refused to accept appointment at the last possible moment before the court was meant to grant a special administration order because the practitioner realised that there were no funds in the house estate to fund the insolvency estate work.

London at least now has a well set out jurisdiction in the Special Regulations and Special Rules for resolving the particular difficulties faced in investment bank insolvencies, and there have been successful instances where the trading book of an investment bank has been rapidly transferred to a new brokerage house, with the blessing of the FCA, which can allow for both appropriate client protection (along with the relevant client trusts applicable), and protection of London's reputation as an international financial trading centre. Delboy would be proud, albeit he might find his relationship with the FCA something he would want to talk to Rodney about.

*For the next edition of the Digest Hilary Stonefrost will write on insolvency procedures for deposit taking banks*

# Case Digests


LLOYD TAMLYN

**Points of interest from cases digested in this issue include Re Magyar Telecom BV, David Richards J deciding there was a sufficient connection between this jurisdiction and a Netherlands incorporated company seeking, primarily, to compromise liabilities governed by New York law, for a scheme of arrangement to be sanctioned. The Judge also suggested that the independence of expert evidence of foreign law might be enhanced if filed by persons other than the advisers acting for the company.**

**In Hunt v Hosking, the Court of Appeal has decided (against a most unusual background) that under section 238 of the Insolvency Act 1986 (transactions at an undervalue entered into by a company), the company must, indeed, have entered into the impugned transaction if the section is to apply. BAT Industries v Windward confirms the flexibility and utility of the remedy of court-appointed receivers, in that case at the instigation of a contingent creditor of the respondent company and for the sole purpose of issuing proceedings on the respondent company's behalf before a limitation period expired. Taurus Petroleum confirms that a debt owed jointly to more than one promisee is unavailable for execution at the suit of a judgment creditor only of the promisees. Madoff Securities International Limited v Raven is the latest English decision stemming from Mr Madoff's activities: after a detailed discussion of the law relating to directors' duties, unlawful distribution of capital, causation, limitation and the Duomatic principle, Mr Justice Popplewell dismissed all claims against all of the directors.**

## BANKING AND FINANCIAL SERVICES

Digested by WILLIAM WILLSON


HENRYPHILLIPS


WILLIAM WILLSON

### Alfano & Ors v National Westminster Bank Plc [2013] EWCA Civ 1703 (Richards LJ, Pitchford LJ, McFarlane LJ), 20 December 2013

*Guarantees – delivery of deeds – conditionality - appeal on facts – failure to give adequate reasons*

The Appellants had provided personal guarantees to the respondent bank ("the Bank") in respect of the liabilities of a food distribution company. The guarantees had been signed in a public house and were left undated, contrary to the Bank's written procedure. The dates were subsequently inserted into the guarantees. The company was placed into liquidation and the Bank sought to enforce the guarantees. At trial the Appellants contended that the guarantees had been left undated to reflect an oral agreement that they would not be enforceable unless and until the Bank took a second debenture over the company's assets. It was alleged that the guarantees had not been delivered and / or were subject to an unsatisfied condition precedent. The trial judge entered judgment for the Bank, holding that the guarantees had been left undated for convenience. On appeal, the Appellants contended that the Judge failed to take proper advantage of the witnesses, failed to make determinations of material fact, failed to give adequate reasons for preferring the Bank's witnesses over those of the Appellants and failed

properly to address or acknowledge contradictory explanations provided by the Bank's witnesses. The Court of Appeal upheld the judgment. The judge's decision did not depend on his judgment of the performance of witnesses or on a close textual analysis of what they said. The judge was entitled to consider the issue by examining the commercial reality in which the personal guarantees were sought by the Bank along with the terms of the guarantees (which made no reference to the alleged conditionality) and the fact that the principal defence relied on at first instance had not been raised at an early stage of the proceedings. In the absence of credible evidence that the guarantees were conditional on the Bank obtaining a second debenture, the Judge was not required to analyse the contradictions in the evidence of the Bank's witnesses. **[David Alexander QC; Henry Phillips]**

### Bank of India v Svizera Holdings BV [2013] EWHC 4097 (Comm) (Hamblen J), 20 December 2013

*Conditions precedent - Contract terms - Currency swaps*

The claimant bank ("B") alleged that the defendant company ("S") owed it a sum under a restructured interest-rate swap. B granted a term-loan facility to S, with S being obliged to pay interest at a floating rate. B maintained that B and S entered into an interest-rate swap, which was subsequently restructured. The swap protected S if interest rates rose beyond a certain point, when B would effectively meet S's interest-rate obligations under the facility and in return S would pay B at a fixed rate. B alleged that certain payments from S had fallen due under the restructured swap but had remained unpaid. It purported to close out the restructured swap. However, S contended that the restructured swap had never become binding and claimed that the facility and the original and restructured swaps were subject to a condition precedent that the arranging bank ("X") would enter a dollar-rupee swap with S. Entering judgment for the claimant, held that S's evidence had fallen well short of proving the alleged condition precedent. It had provided no particulars of X's alleged currency-swap agreement. It had not explained why there were no documents relating to the alleged currency swap. A dollar-rupee currency swap was unlikely because S was a non-Indian company. Moreover, in the contemporaneous documents evidencing the discussions between S and B over the unpaid amounts under the interest-rate swap, S did not mention the absence of any dollar-rupee currency-swap. There was ample evidence of both parties treating the original interest-rate swap and the restructured swap as valid and binding agreements. Indeed the whole premise of the negotiations and agreement for the restructured swap was that there was a binding swap agreement in place.

## CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD

### PGF II SA v OMFS Co [2013] EWCA Civ 1288 (Maurice Kay LJ, Beatson LJ, Briggs LJ), 23 October 2013


ALEXANDER RIDDIFORD

*Alternative dispute resolution – costs orders – Part 36 offers*

The Appellant, who had brought proceedings against the Respondent for alleged breaches of tenant's repairing covenants, appealed against a decision that it could not recover some of its costs following the late acceptance of its Part 36 offer by the Respondent, because it had failed to respond to the Respondent's invitation to mediate. The Appellant made a Part 36 offer of £700,000 which the Respondent accepted, after a long delay, shortly before trial. Upon acceptance of the offer the Respondent would ordinarily have been obliged to pay the Appellant's costs. However, the Judge considered *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and concluded that the Appellant had unreasonably refused to participate in mediation and therefore (i) that the Appellant should be deprived of its costs for the relevant period under CPR r.36.10, but (ii) the Appellant should not pay the Respondent's costs. The Appellant appealed against (i) and the Respondent cross-appealed against (ii). The Court of Appeal dismissed both the appeal and the cross-appeal. Endorsing and following the advice given by Blake et al. in the *ADR Handbook*, the Court held that as a general rule silence in the face of an invitation to participate in ADR was in itself unreasonable, notwithstanding that the refusal to engage in ADR might have been justified. The Court of Appeal also held (inter alia) that there was no recognition in Halsey that the Court might go further and order the otherwise successful party to pay all or part of the unsuccessful party's costs and that whilst in principle the Court did have that power, such a draconian sanction should be reserved for only the most serious failures to engage with ADR invitations.

## Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 (Dyson MR, Richards LJ, Elias LJ, 27 November 2013

*Case management – costs budgets – relief – CPR rr. 3.9 and 3.14*

Mitchell was the Claimant in defamation proceedings. The Claimant appealed against (i) a sanction imposed for his failure to file his costs budget on time and (ii) against a refusal to grant relief from that sanction under CPR r.3.9. In breach of CPR Practice Direction 51D, which provides that a costs budget is to be lodged seven days in advance of the case management conference, the Claimant's solicitors lodged the costs budget the day before that case management conference. The absence of any pre-filing discussion with the other side was also a breach of the Practice Direction. CPR r.3.9 did not stipulate a sanction for breach and so the Master approached the issue by analogy with CPR r.3.14, ordering that Mitchell was to be treated as having filed a budget limited only to the court fees.

The Court of Appeal, taking into account the context of the Jackson reforms and the general requirement that Courts adopt a more robust approach to granting relief against parties who default on Court rules, dismissed the appeals holding, inter alia, that the Master had been entitled to apply CPR r.3.14 by analogy and that it accorded with the overriding objective for the sanction to be imposed.

## Chandra v Brooke North (A Firm) [2013] EWCA Civ 1559 (Laws LJ, Jackson LJ, Macfarlane LJ), 5 December 2013

*Particulars of claim – amendments – additional claims*

The Claimants, a married couple, had applied successfully to amend their particulars of claim in an action against a firm of solicitors so as to include new claims. The Solicitors appealed against the Court's decision refusing their application to set aside an order allowing the Claimants to amend. The Court of Appeal, allowing the appeal, held: (1) that the Court below had been wrong to conduct a trial of the Defendants' objection that the new claims were statute-barred without ordering that to be determined as a preliminary issue; and (2) that the amendments could not be justified on the basis that they fell within the scope of the original claim form, since the Court ought to have compared the proposed amendments against the original particulars of claim rather than against the original claim form.

## CBS Butler Ltd v Brown [2013] EWHC 3944 (QB) (Tugendhat J), 16 December 2013

*Inspection – electronic disclosure – concealment of evidence*

The Claimants had alleged that the Defendants had misused information confidential to the Claimants and obtained a search order during which a computer expert had access to various files in the Defendants' homes and office in order to make an image of them. The Claimants applied for a specific form of disclosure to be made in relation to files copied during the execution of the search order against the Defendants, whereby the Claimant's computer expert (rather than the Defendants themselves) would search the documents and compile a list of those documents that contained terms that were on a "blacklist" (a list of keywords aimed at identifying relevant materials). In determining the test to be applied as to whether to permit inspection, the starting point was Lock International Plc v Beswick [1989] 1 W.L.R. 1268. It was apparent from this authority that, where a search order was made, it did not necessarily follow that there should subsequently be an order that deprived the defendants of the opportunity of considering whether they would make any disclosure, contrary to the normal rule on disclosure. The Court noted that an order that the Defendants' disclosure should be carried out by the Claimant's expert, rather than by the Defendants, was an intrusive one that could only be made in circumstances where there was a paramount need to prevent a denial of justice to the Claimant. In particular, it was not sufficient for the Claimant to show that the Defendants had misused confidential information, rather the Claimant had to show a substantial reason for believing that the Defendant intended to destroy documents in breach of its disclosure obligations. The Court held that Lock applied and dismissed the application.

# COMMERCIAL LITIGATION & ARBITRATION

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

## London Steam Ship Owners Mutual Insurance Association v Spain (The Prestige) [2013] EWHC 3188 (Comm) (Hamblen J), 22 October 2013

*Arbitration – Insurance – Shipping – State immunity*

A protection and indemnity club (A) had insured a vessel which had sunk causing an oil spillage and polluting the coasts of Spain and France. Spain and France brought claims against the vessel's owners and against A. A commenced arbitration proceedings in London arguing that Spain and France were bound by the terms of the contract of insurance to bring certain of their claims by way of arbitration in London under English law. The tribunal made an award in A's favour. A then made an application pursuant to section 66 of the Arbitration Act 1996 to enforce that award. On that application Spain and France argued that the arbitration tribunal had no jurisdiction as they had state immunity. The Court held that Spain and France had lost their state immunity as section 9(1) of the State Immunity Act 1978 applied, that section providing that where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. When a third party makes a claim under an insurance policy containing an arbitration clause, the third party claims under or through a party to that agreement and is therefore a party to the arbitration agreement for the purposes of section 9(1).

## British American Insurance (Kenya) Ltd v Matelec SAL [2013] EWHC 3278 (Comm) (Walker J), 29 October 2013

*Insurance – Reinsurance – Arbitration*

The Claimant was an insurance company carrying on business in Kenya and the Defendants were contractors in relation to the building of a power plant in Kenya. B insured the project cargo against various risks, with the policy originally including a Kenyan law and jurisdiction clause. The policy also included a reinsurance contract. Reinsurers required disputes to be settled by arbitration in London under English law and the policy was subsequently amended by endorsement. When a dispute arose as to whether B was liable for damage to the project cargo the Court was called on to determine whether there was a binding agreement to arbitrate in London. The Court held that there was such an agreement. The policy dealt with two contracts at once and there was no good reason for wanting to have different procedures for resolving disputes applicable to disputes between insured and insurer and between insurer and reinsurer, nor was there any compelling reason for wanting disputes resolved in Kenya, whereas London had commercial advantages. As such a reasonable person in the position of the parties would have considered that the exclusive jurisdiction clause was not intended to prevent the amended arbitration clause from being effective in either the insurance or the reinsurance contract.

## Rathbone Brothers Plc v Novae Corporate Underwriting [2013] EWHC 3457 (Burton J), 8 November 2013

*Insurance – Policy wording*

A (a trust company) and B (an individual who worked for A) sought an indemnity under an insurance policy issued to A by the defendant insurance company, C. B had been an employee of A (or A's predecessors) until 2007 and since then had been a consultant. The policy stated that cover was provided in respect of professional services performed "by or on behalf of an insured company pursuant to an agreement with a third party", with an "insured person" being defined as a "paid employee…working under the direct control and supervision of A". Cover was denied on the grounds that B was an "independent representative remunerated on a sales or commission basis" and that the terms of his engagement did not constitute an agreement with a third party "by the insured company". It was held that B had been acting on behalf of A even after he ceased to be an employee and that there was no requirement that the "agreement with a third party" had to be by the "insured company"; it was sufficient that there was an agreement between B and the third party. Further, on a proper construction of the Policy,

B was a "paid employee" both before and after 2007 and, on the evidence, he had been working under the direct control and supervision of A. Accordingly B was an "insured person".

### Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq [2013] EWHC 3494 (Field J), 18 November 2013

*Third party debt orders - Arbitration award – State immunity*

A, an Iraqi company responsible for marketing Iraq's oil, applied to set aside a third party debt order against C and the appointment of a receiver relating to a final arbitration award in favour of B. The receiver had been appointed to receive monies payable in respect of A's interest as beneficiary in two letters of credit issued by C.
A argued that the third party debt order should be set aside. It was held that C's obligation to pay under the letters of credit was owed not just to A but also to the Central Bank of Iraq and therefore that the debt could not be attached by a third party debt order as that would deprive the joint promisee of his interest in the debt.
Notwithstanding this conclusion, the Court went on to consider whether the third party debt order should be set aside on the basis that the situs of the debt was New York and only debts within the jurisdiction could be the subject of a third party debt order, but concluded that the debts were situated in London. Finally the Court considered A's argument that the debts were immune from execution under section 13(2)(b) of the State Immunity Act 1978, concluding that sovereign immunity was not applicable as A was a separate judicial entity from the Iraqi state and the presumption that its separate status should be respected had not been rebutted.

### Excalibur Ventures LLC v Texas Keystone Inc [2013] EWHC 3936 (Comm) (Christopher Clarke J), 13 December 2013

*Collaboration agreement – Specific performance*

C sought specific performance of a collaboration agreement entered into with D1, which was said to entitle it to an interest in a production sharing contract ("the PSC") relating to a petroleum block in Kurdistan or, alternatively, damages from breach of contract. The agreement stated that C would have a 30% interest, and D1 a 70% interest, in any consortium bid for the PSC made pursuant to the agreement. Under the agreement D1 reserved the right to introduce D2 as a party to the agreement, alternatively, as a participant in any consortium bid for the PSC made pursuant to the agreement. A bid for the PSC was made by D1 and D2, but not C, C having declined to be a party to the PSC. D3 was also a party to the PSC. C argued that it was entitled to a 30% interest in the rights acquired by D1 and D2 in the PSC. It was held that on the correct construction of the collaboration agreement a party declining to be a party to the PSC did not participate in the consortium bid and there was therefore no obligation on D1 or D2 to recognise or give effect to any indirect interest of C. In any event, C would not have been able to raise the capital necessary to avoid forfeiting any interest. C's alternative claim for damages was also dismissed; a claim for fraudulent misrepresentation as to C's ability to participate in a consortium bid for the PSC was not made out and there was no good claim against D2 for tortious interference, conspiracy or unjust enrichment.

## COMPANY

Digested by GEORGINA PETERS


GEORGINA PETERS

### Madoff Securities International Ltd (in liquidation) v Steven Raven & Ors [2013] EWHC 3147 (Comm) (Popplewell J), 18 October 2013

*Fraud – Directors' powers and duties – Sham transactions – Duomatic defence – Companies Act 2006, ss. 171-174*

The Court dismissed all claims brought by the liquidators of a London investment firm associated with the Ponzi scheme perpetrated by Bernard Madoff, against the former directors of the London firm and an Austrian businesswoman, Mrs. Kohn. The principal claim related to payments made to the latter by the London firm for introductions and research, founding claims for dishonest assistance, for knowing receipt, in common law restitution and for proprietary receipt. The claims required at least one director to have acted in breach of a fiduciary duty. The liquidators claimed that the defendants were in breach of duty because the

payments to Mrs Kohn were really for introducing investors' money into the US Madoff business, and not for the research which she provided, alleged to be a sham. The Court found, on the particular facts of the case, that none of the directors was in breach of his duty to act in good faith in the interests of the London firm. Further, as all the voting shares were owned by Bernard Madoff and his brother, the directors had a defence under the principle in *Re Duomatic Ltd* [1969] 2 Ch 365. Even had any of the directors been in breach of fiduciary duty, such a breach gave rise to no loss because the payments to Mrs Kohn had been refunded by the US Madoff business, such that a claim against Mrs. Kohn for assisting such breaches of duties could not succeed.

## R v (1) Jayson Wayne Hollier (2) Andrew Patterson Booth [2013] EWCA Crim 2041 (Macur LJ, Royce J, Judge Wait), 14 November 2013

*Fraud – Directors' Powers and Duties – Fraudulent Trading – Companies Act 1985, section 458*

The Court of Appeal refused applications for permission to appeal against convictions on two counts of fraudulent trading contrary to the Companies Act 1985, section 458 by the former owner of two insurance companies and their financial controller. The relevant count was based on an allegation that the former owner's purported sale of the companies to their financial controller was a sham, being a device to disguise the former owner's role in the ownership and control of the companies, following disqualification proceedings brought against him. It was further alleged that falsified documents had been created subsequently in that connection. The finding of fraudulent trading was based solely on what was referred to as the "second limb" of section 458, being carrying on business "for any fraudulent purpose". The Court treated carrying on business for a fraudulent purpose entirely separately from the requirement to carry on business with intent to defraud creditors. It appeared to infer that the requisite dishonest intention was to "gain commercial advantage" from counterparties which would otherwise refuse to contract with the companies.

## Bat Industries Plc v Windward Prospects Ltd [2013] EWHC 3612 (Comm) (Hamblen J), 21 November 2013

*Court-appointed receivers – Directors' powers and duties – Dividends – Appointment of receivers to issue protective proceedings*

The Court granted an application to appoint a receiver to commence protective proceedings in relation to claims of overpayment of dividends to shareholders which arguably left the company with insufficient assets to pay potential liabilities, and where there was a real risk of the limitation period expiring. The applicant claimed to be entitled to be indemnified by the company in respect of certain environmental liability obligations. The company denied liability, but for the purposes of the application, did not dispute that the applicant had a good arguable case. The applicant claimed that there were assets of the company which required protection, being dividend claims which it alleged the company had against its former shareholder, in circumstances where the company's board had paid to him substantially all of the company's assets in breach of their duties as directors. The Court held that although the figures concerning the company's assets and its potential liabilities might be more nuanced and there might be other evidence to be considered, it had been established that the dividend claim was a viable claim that had real prospects of success. It was found that justice and convenience required the appointment of a receiver, for which it was appropriate to exercise the Court's discretion. The Court took into account the fact that the dividend claims were substantial and had a real prospect of success, and there was a risk that the right to pursue those claims would be lost if no protective proceedings were issued. The company had elected not to provide an undertaking to issue the proceedings itself, and the interference of the receivers, whose appointment would be limited to ensuring that the proceedings were issued, would be minimal in circumstances where the company was no longer trading.

### Re Magyar Telecom BV [2013] EWHC 3800 (Ch) (Richards J), 3 December 2013


DANIEL BAYFIELD

*Scheme of Arrangement – Companies Act 2006, section 899 – Foreign company – Notes governed by New York law – COMI – Judgments Regulation*

A company incorporated and registered in the Netherlands sought and obtained an order under section 899 of the Companies Act 2006 sanctioning a scheme of arrangement with its Note Creditors, whose claims arose under an issue of €345 million 9.5% notes due 2016 governed by New York law and subject to the non-exclusive jurisdiction of the courts of the State of New York. The Note Creditors, being persons with a beneficial interest as principal in the notes and having a right to the notes being registered in their names, were held to be contingent creditors of the company for the purposes of section 899. The scheme provided for the existing notes to be exchanged for new notes to be issued by the company with an aggregate nominal value of €155 million, and an indirect interest in the main (Hungarian) operating company of the group of which the company was part. The company had moved its centre of main interests from the Netherlands to England, such that any formal insolvency process, in the absence of the scheme, would proceed under English law. The Court found the significance of this to lie in providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law. There was considered to be a sufficient connection to the English jurisdiction for the purposes of the court exercising its jurisdiction in relation to the scheme.

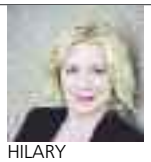
In considering whether the scheme was likely to have a useful effect, the Court had regard to expert evidence that the scheme would be recognised and enforced in the US, the Netherlands and Hungary. The scheme was held to be entitled to recognition and enforcement under Chapter III of the Judgments Regulation, which the Court found applied to schemes of arrangement with insolvent companies not subject to insolvency proceedings. A number of the creditors were domiciled in England and others were domiciled in other member states. If Chapter II of the Judgments Regulation applied, on the basis that the application to sanction the scheme involved persons domiciled in a member state being "sued" (which was recognised to be open question), the company relied on the exception enabling a person domiciled in a member state to be sued in the court of the jurisdiction where any of the other defendants are domiciled.

**[Daniel Bayfield]**

## CORPORATE INSOLVENCY

Digested by **ADAM AL-ATTAR**

### Hosking and Jackson v Slaughter and May (unreported, 12 November 2013) (Registrar Jones)


HILARY STONEFROST


ADAM AL-ATTAR

*Application to assess disbursements – disbursements paid by administrator and challenged by subsequent liquidator – payments in accordance with agreed retainer – no claim that retainer improperly agreed by administrator*

Slauughter and May had acted for the administrators of Hellas, which went into administration in 2009. Hellas went from administration to liquidation. Messrs. Hosking and Jackson, the liquidators, asked the Court to order detailed assessment of 13 of Slaughter and May's invoices that had been agreed and paid by the former administrators. The application was, ultimately, made pursuant to rule 7.34(4) of the Insolvency Rules 1986 and the inherent jurisdiction of the Court. Rule 7.34(4) confers discretion on the court to order detailed assessment in "any proceedings before the court, including proceedings on a petition". The liquidators argued that the administration proceedings remained before the court even after the company had ceased to be in administration. The Registrar concluded on the construction of the rule and from the rule's history that this rule only governs the costs of litigation and the administration was not a "proceeding before the court". Only the last invoice was for the costs of proceedings before the Court (the exit from administration). So far as that invoice was concerned, the Registrar accepted that a detailed assessment could only take place pursuant to rule 7.34(4) when there is no agreement between the responsible insolvency practitioner and the person entitled to be paid. There had been such an agreement in this case.

On inherent jurisdiction, the liquidators argued: first, the court could order detailed assessment on an application for directions by the liquidators; and second, such an order could be made by reason of the court's inherent jurisdiction to control insolvencies. The Registrar accepted that the legislature had conferred the power to decide whether to agree the fees or to have

them subject to detailed assessment on the officeholder, that the court should not interfere and that if administrators have incorrectly exercised a power there are other remedies.

The Registrar gave the liquidators permission to appeal. He considered that his extensive criticisms of the retainer were such that there was a real prospect of success on appeal and that there was a compelling reason for permission because the Judge hearing an appeal could provide guidance on retainers entered into by officeholders.

**[Hilary Stonefrost]**

## Hunt v Hosking [2013] EWCA Civ 1408 (Elias LJ, Kitchin LJ, McCombe LJ), 15 November 2013

ANTONY ZACAROLI QC

*Transaction at undervalue – meaning of transaction – payment – payment by company's accountant – requirement for company to participate in transaction*

The defendant had been appointed joint liquidator of two connected companies (the Companies), which owed another company (Ovenden) over £1.3 million. Ovenden entered into a fee agreement with its accountant, authorising its accountant to receive and hold any distributions from the liquidation of the Companies in a client account to the order of Ovenden, and to transfer the accountant's fees to his own account. The agreement was later varied, increasing the level of fees payable to the accountant. Sums were paid to Ovenden from the Companies and were paid into a client account by the accountant. The accountant made a series of payments to the defendant. Ovenden later went into liquidation. Its liquidator claimed that the accountant had provided no consideration for the fee agreement and was not entitled to any fees, and that the defendant had to have known that the accountant was not entitled to make the payments to him. He maintained that the payments made by the defendant to the defendant constituted transactions at an undervalue. The liquidator contended that the accountant had misappropriated the funds he held on trust for Ovenden as he had no right to take the monies and to make the payments to the defendant. He further contended that, if the accountant had been entitled to make the payments, they had been made for inadequate consideration. Peter Smith J found that the payments were not transactions entered into by Ovenden and struck out the liquidator's claim.

The Court of Appeal held:

(1) that the requirement that the company had itself entered into a transaction was an essential part of any claim under s.238 of the Insolvency Act 1986 and comprised two inter-related elements:

a. that there was a transaction; and

b. that the transaction was something which the company had itself "entered into".

(2) that "transaction" was broad enough to encompass a payment made by a company or its agent;

(3) that to focus unduly on the term "transaction" risked obscuring the need for the second and vital element: the expression "entered into" connoted the taking of some step or act of participation by the company, which required either the company to make the gift or arrangement or in some other way be party to or be involved in the transaction in issue so that it could properly be said to have entered into it; and

(4) that the payments in the present case lacked that essential second element.

**[Antony Zacaroli QC, Stephen Robins]**

## Isis Investments Ltd v Oscatello Investments Ltd [2013] EWCA Civ 1493 (Longmore LJ, Jackson LJ, Vos LJ), 27 November 2013

*Foreign credit institution – proceedings in UK – defendant obtained permission to bring new Pt 20 claims – whether jurisdiction to bring new Pt 20 claims – Directive 2001/24 on the Reorganisation and Winding Up of Credit Institutions – "pending lawsuit"*

The issue was whether the court had jurisdiction to allow the new Pt 20 claims in the light of the provisions of article 32 of Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions. The issue turned on the proper meaning of "pending lawsuit".

The Court of Appeal held:

(1) that the term "pending lawsuit" in article 32 (and the term "lawsuit pending" in article 32(2)(e)) referred to the entirety of the proceedings in question, and not just a part of it;

(2) that Pt 20 regards an "additional claim", once allowed, as part and parcel of the existing proceedings;

(3) that the new Pt 20 claims are were part of a "pending lawsuit" under art 32; and

(4) that, accordingly, the judge had discretion to permit the new Pt 20 claims.

## Re The Co-operative Bank plc [2013] EWHC 4072 (Ch); [2013] EWHC 4074 (Ch) (Hildyard J), 4 December 2013


MARK PHILLIPS QC


RICHARD FISHER

*Scheme of arrangement – recapitalisation of bank – order to convene meeting to consider proposal – trading in the market on the basis of that proposal – application to put a modified scheme – liberty to put modified scheme*

The Court ordered a meeting to be convened to consider a scheme of arrangement to facilitate the recapitalisation of The Cooperative Bank (the Bank), whose Tier 2 capital was less than the required ratio and which, failing a recapitalisation, faced the prospect of resolution under the Banking Act 2009. In the circumstances, resolution would likely have entailed a winding up and consequential total loss of value to preferential and ordinary shareholders and to the holders of subordinated notes issued by the Bank.

The convening order was made on 18 November 2013. A revised scheme was then proposed in response to a division of larger holdings of subordinated notes, and the acquisition of small holdings in such notes, in order to take advantage of the minimum allocation of 50,000 additional new ordinary shares in a share offer collateral to the proposed scheme. The right to participate in the offer of additional new ordinary shares formed part of the scheme consideration, and the shares were to be offered at a substantial discount to the price implied by the restructuring. The minimum allocation had been decided upon to avoid the need for a prospectus under the Prospectus Directive, which would have impeded a restructuring by the year-end, which date was required by the PRA. The consequence of the division of larger holdings was that larger holders of subordinated notes were less likely to receive a share of the scheme consideration proportionate to the subordinated debt to be released by the scheme. In considering whether or not permit a modified scheme to be put which, in essence, reduced the discounted price of the additional new ordinary shares, Hildyard J invited submissions as to whether any principle of law precluded the proposal of a modified scheme in circumstances in which creditors and third parties had transacted on the basis of the original scheme. Hildyard J held that there was no such principle. He rejected the suggestion that there was a tortious, fiduciary, equitable or implied contractual duty which fettered the power of the company to modify a proposal for a compromise or arrangement. In so holding, he relied heavily on the reservations in the scheme document as to the possibility of a modification. He considered that it was ultimately a question of how to exercise his discretion, and that it was appropriate to convene a meeting to consider the revised proposal because, amongst other things, the revised proposal better secured a pro rata allocation as between the holders of subordinated notes.

**[Mark Phillips QC, Antony Zacaroli QC, Richard Fisher, Adam Al-Attar]**

## Re Quiet Moments Ltd [2013] EWHC 3806 (Ch) (Stephen Jourdan QC, sitting as a deputy High Court judge), 4 December 2013

*Winding up – allocation of shares – dispute arising between parties regarding allocation of shares– whether company should be wound up*

The Court refused to make a winding up order in response to the dispute as to the allocation of shares. The allotment of shares was not sufficient in the circumstances to warrant a finding of a breakdown in trust and confidence. There was no basis for a just and equitable winding up. The judge instead decided who was entitled to the allotted shares.

## Alexander and Law Ltd v Coveside (21BPR) Ltd [2013] EWHC 3949 (TCC) (Coulson J), 12 December 2013

*Adjudicator's award – winding-up petition presented against defendant – enforcement of award*

The existence of a winding-up petition against a company, which winding-up petition may or may not be successful, should not be a reason not to enter judgment to enforce an adjudicator's decision.

## Re London Scottish Finance Ltd [2013] EWHC 4047 (Ch) (Etherton C), 17 December 2013


FELICITY TOUBE QC

*Lender – improperly executed loan agreements – enforceability – right to reimbursement – Consumer Credit Act 1974 ss. 106(d), 140 and 142(1)*

1,700 loans had been offered through a credit broker. The broker's fee was stated in the wrong box on the standard form and the agreements were unenforceable under the Consumer Credit Act 1974 (the Act). The legal consequences of unenforceability differed according to whether the agreements were executed before 6 April 2007 (the relevant date). The first and second respondents had taken a loan after the relevant date. The loan was enforceable only if an "enforcement order" was granted under s.127 of the Act. The third and fourth respondents had borrowed prior to the relevant dated and the loan was simply unenforceable.

The issues, inter alia, were (i) whether the respondents were entitled to an order under s.140B of the Act to repayments, the applications for which had been prompted by threats that they could lose their homes if arrears were not satisfied; and (ii) whether the respondents had a claim in unjust enrichment under the principle in ex parte James or otherwise.

It was held:

(1) that, with respect to the first and second respondents, misstating a credit figure in loan documentation was not enough to constitute an unfair relationship, nor was a request for payment of arrears;

(2) that, by contrast, the threat to the third and fourth respondents was untrue because the finance company could never have obtained an enforcement order or taken action resulting in them losing their home;

(3) that, accordingly, if the third and fourth respondents' payments had in any way been prompted by that threat, an unfair relationship existed and s.140B(1)(a) would support an order for repayment plus interest; and

(4) that the rule in ex parte James was not engaged because a mistake based upon a broker's fee being stated in the wrong box was not sufficient to engage the principle. **[Felicity Toube QC]**

## Re Storm Funding [2013] EWHC 4019 (Ch) (David Richards J), 18 December 2013


MARK ARNOLD QC

*Pension Act 2004 – contribution notices – notices to more than one qualifying target – aggregate of notices in excess of shortfall sum*

Contribution notices may be issued under section 47 of the Pension Act 2004 to more than one qualifying target which in aggregate specify a sum in excess of the maximum shortfall sum, as defined in section 48(2). There may be recovered under such contribution notices an aggregate sum in excess of the shortfall sum. **[Mark Arnold QC, Daniel Bayfield]**

## Re A|Wear UK Limited (in administration); Bristol Alliance Nominee (No.1) Ltd v Bennett [2013] EWCA Civ 1626 (Rimer LJ, Kitchin LJ and Christopher Clarke LJ), 18 December 2013

*Administration – stakeholders – specific performance – pari passu*

Prior to the administration of a clothing retailer, the Appellant landlords had entered into agreements with the company whereby the rent under two leases was reduced to a turnover rent, and the company was, on the written request of the landlord, to surrender the leases on payment of a premium by the company. The amount of the premium, net of VAT, was in each case paid into an escrow account in the names of the landlords' solicitors, the payment to be released either (to the landlords) on completion of the surrender or (to the company) on expiry of the lease term. The company subsequently entered administration, and the landlords requested completion of the surrenders and thus the release of the sums held in escrow. The administrators refused to complete the surrenders, but applied for directions as to the manner in which the escrow amounts were held and whether the landlords should be permitted to bring proceedings for specific performance of the contracts for surrender. At first instance David Donaldson QC (sitting as a deputy judge) held that since the company retained a contingent interest in the sums paid into escrow, an order for specific performance would offend the *pari passu* principle and so refused permission to bring proceedings for specific performance.

The Court of Appeal allowed the landlords' appeal, ordered that the contracts for surrender be specifically enforced and directed that the sums in escrow be paid forthwith upon completion of the surrenders to the landlords. The sums in escrow were held by the solicitors as stakeholders, and thus did not belong to the company in administration, so that there was no interference with the *pari passu* principle. The insolvent company's sole interest in the escrow amounts was a contingent contractual interest: *Manzanilla Ltd v Corton Property* (unreported, 13 November 1996, CA) applied. The contracts to surrender the leases would have been specifically enforced prior to the insolvency of the company (thus triggering the landlords' rights to the release of the sums held in escrow) and the contracts had created a proprietary interest in the leases in favour of the landlords. The insolvency of the company made no difference to the enforceability of the contracts of surrender (In *re Bastable* [1901] 2 KB 518 (CA) applied), and the mere fact that the company would, if specific performance were refused, eventually acquire a right to the release of the escrow amounts provided no good reason not to order specific performance.

**[Lloyd Tamlyn]**

# PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM

MATTHEW ABRAHAM

## Blemain Finance Ltd v Goulding [2013] EWCA Civ 1630 (Sullivan LJ, Lloyd-Jones LJ and Warren J), 26 February 2013

*Section 283-306 of the Insolvency Act - Land Registration Act 2002*

The applicant, Mr Goulding, was the former registered proprietor of a property in Gloucestershire (the "Property"). A bankruptcy petition was presented against Mr Goulding on 24 October 2002 while he was the registered proprietor of the Property. On 12 February 2003 he transferred the Property to Mr Cugley. Mr Goulding's trustee in bankruptcy was only appointed on 17 June 2003, after the transfer. Mr Cugley, on 27 July 2007, granted a second legal charge to Blemain Finance Ltd ("Blemain") in relation to the Property. Mr Goulding was an occupier of the Property at the date that Blemain's charge was granted. Blemain brought proceedings for possession of the Property on 20 January 2009 and possession was ordered by 17 February 2009. Possession was not given, and Mr Goulding applied to be added as a defendant to Blemain's claim with a view to arguing for the setting aside of the possession order.

Mr Goulding's case was that his disposition of the Property to Mr Cugley was avoided by s.284 of the Insolvency Act 1986 ("IA"), with the consequence that Mr Cugley was stripped of his title to the Property which in fact vested in Mr Goulding's trustee in bankruptcy under ss.283 and 306 IA. Mr Goulding claimed that he was occupying the Property as his sole or principal residence at the date of his bankruptcy and that upon the lapse of three years since then the property ceased to be vested in the trustee and vested in him pursuant to s.283A IA. In the alternative, Mr Goulding argued that if the trustee in bankruptcy was unaware of his claimed interest in and occupation of the Property, the three year period began to run when the trustee first learnt of these things and so he had a prospective revisionary interest in the property.

Mr Goulding's application was dismissed by an order of 3 June 2013. The Recorder found that Mr Goulding was an unreliable witness and that he was not occupying the property as his sole or principal residence in 2003 and only began to do so in 2005. Mr Goulding sought permission to appeal from the Court of Appeal. Permission was refused on paper and so the matter came before the Court of Appeal as a renewed application for permission to appeal.

As a result of the Recorder's factual findings the Court of Appeal found the only live issue was whether or not Blemain's title as a chargee was a nullity and that the only person with a title to the property was the trustee in bankruptcy such that Mr Goulding was entitled to assert the trustee's better title in answer to Blemain's possession claim based on a void title.

The Court of Appeal held that regardless of the precise effect of ss.283 and 306 IA in relation to property, the title to which is registered, it is not seriously arguable that those sections can undo the effect of ss.23 and 58 of the Land Registration Act 2002 ("LRA"). Rimer LJ held that the scheme of the LRA contemplates that a trustee in bankruptcy may and will apply to be registered as the proprietor of property that vests in him and it would be odd if the trustee's omission to do that could mean that a registered proprietor cannot make a registered disposition of it under which the transferee will take a title. It was found that Blemain gave valuable consideration for the grant of

the charge and that they had acted in good faith as they had no notice of the bankruptcy. The Court of Appeal therefore held that Blemain acquired good title as against the trustee in bankruptcy and so the trustee's title was void against Blemain, with Mr Goulding having no title to occupy the Property at all.

## Official Receiver v Baker (Unreported) Chancery Division, 29 November 2013

*Income Payment Orders - s.310 of the Insolvency Act 1986*

This was an appeal of the dismissal of an application for an Income Payment Order ("IPO") made by the Official Receiver pursuant to s.310 of the Insolvency Act 1986 ("IA").
After the Official Receiver was appointed as the trustee in bankruptcy information was provided by the Bankrupt's bank in relation to accounts held by the Bankrupt. The Bankrupt's bank confirmed that there were accounts in the Bankrupt's name that were in credit. The Bankrupt claimed that the money in these accounts represented professional gambling winnings. Based on this information the Official Receiver applied for an IPO. The judge dismissed the application on the basis that s. 310 IA only covered income received by the Bankrupt after an IPO was made. Since the money in the Bankrupt's accounts had already accrued, an IPO could not be made in respect of it. The Official Receiver appealed. On appeal the court found that there was no policy reason why income arising after the making of a bankruptcy order but prior to an IPO should not be capable of being made subject to an IPO. The judge's construction of s.310 IA would create a lacuna in the provisions, particularly where income arose between the making of the bankruptcy order and the IPO and so would not be recoverable pursuant to s.310 IA as income or s.307 IA as property. The court further held that there was no rational reason why one-off payments should be excluded from IPOs.

## Power v Godfrey (Unreported) Chancery Division, 05 December 2013

*Bankruptcy Petition - Bona fide counterclaim*

Mr Power and Mr Godfrey were involved in extensive litigation the result of which was that Mr Power had a default judgment against Mr Godfrey and Mr Godfrey had an order for costs against Mr Power. The default judgment against Mr Godfrey outstripped, in value, the order for costs against Mr Power. On the basis of the order for costs Mr Godfrey issued a statutory demand and following a contested hearing the registrar made a bankruptcy order against Mr Power. The registrar reasoned that although Mr Power had secured a default judgment in his favour he did not have a real underlying claim and the default judgment was so obviously tainted that it would be set aside if Mr Godfrey were to challenge it. Mr Power was subsequently given permission to appeal out of time and at the date of the appeal Mr Godfrey had yet to apply to set aside Mr Power's default judgment.
Morgan J hearing the appeal found that the registrar had erred in making a bankruptcy order against Mr Power and so dismissed the bankruptcy order. In considering whether a bankruptcy order might be made the court proceeded on the basis that it was settled practice to ask whether the alleged debtor had a bona fide counterclaim put forward on substantial grounds. The court held that, where Mr Power had a judgment in his favour, the bona fide issue related to whether he could rely on the judgment rather than the bona fides of the underlying claim. Morgan J found that Mr Power had every right to enforce the judgment and deploy it as a counterclaim to the petition debt. Given that Mr Power had substantial grounds for saying that he was owed the judgment debt the court held that the bankruptcy order ought not to have been made. Morgan J also stated that wholly missing from the registrar's assessment was whether Mr Godfrey would apply to set aside the judgment and how he would fare especially since Mr Godfrey had so far made no attempt to set aside the judgment and a considerable period of time had lapsed. In relation to costs the court held that Mr Godfrey had been justified in continuing with the petition for a period of 21 days after becoming aware of the default judgment against him in order to consider his overall position. As a result Mr Power was liable for costs up to that period; and Mr Godfrey was liable for Mr Power's costs thereafter.

# PROPERTY & TRUSTS

Digested by STEPHEN ROBINS


STEPHEN ROBINS

## Agarwala v Agarwala [2013] EWCA Civ 1763 (Hallett LJ, Sullivan LJ, Arnold J), 19 December 2013

*Property – trusts – beneficial ownership*

The appellant ("J") appealed against a decision that she held a property on trust for the respondent ("S"). J contended that the judge had erred in: (1) giving no or insufficient weight to the presumption of the beneficial interest coinciding with the legal interest; (2) wrongly placing the burden of proof on her by requiring her to give her evidence first; (3) giving insufficient weight to the fact that, since the mortgage was in her name, she was liable for it; (4) failing to give due weight to two letters between S and his solicitor in which he had referred to his "acting for my sister-in-law" and two emails in which he had described J as "owner" of the property; (5) placing improper weight on the forged trust deed; (6) failing to find whether S had acted upon a common agreement to his detriment. The Court of Appeal dismissed the appeal, holding: (1) The judge given proper weight to the presumption of the beneficial interest coinciding with the legal interest; *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 considered. (2) Both parties had given evidence and the order in which it was given did not matter. The judge had correctly placed the burden on S, in light of the presumption, to establish his claim on the balance of probabilities. (3) J's liability for the mortgage was of little evidential help, as S was simply the conduit of the mortgage payments from the business venture; *Laskar v Laskar* [2008] EWCA Civ 347, [2008] 1 WLR 2695 distinguished. (4) The judge had referred to the two letters and emails in his judgment as supporting J's case, but had been entitled to conclude that the contemporaneous emails considered as a whole supported S's version of the agreement. (5) It was plain that the judge had placed no weight on the forged trust deed: he had given weight only to its relevance in assessing S's credibility. (6) The judge had recognised that merely having a common understanding was not enough for S to demonstrate beneficial ownership: he had to have relied on the agreement to his detriment. The money and work put in by S in finding, converting, setting up and running the business was to his detriment. J had made no financial contribution to the property before she and her husband took over the business. Whilst an explicit reference to detriment later in his judgment would have been desirable, the judge had set out the detriment claimed by S and was not required to repeat it later; he had implicitly accepted that part of S's case. Consequently, the judge had been entitled to find that J held the property on trust for S.

## Tchenguiz-Imerman v Imerman [2013] EWHC 3627 (Fam) (Moylan J), 22 November 2013

*Discretionary trusts – disclosure of information – comity*

The wife ("W") applied for a disclosure order in contested financial remedy proceedings. Key issues in the remedy proceedings were whether the trusts were "nuptial settlements" for the purposes of s.24 of the Matrimonial Causes Act 1973 and whether the trust assets were financial resources available to the husband ("H") within the meaning of s.25(2)(a). The trustees, who were non-resident in England and Wales, had been joined as parties to the proceedings, but had declined to participate or to provide information sought by W. The Royal Court of Jersey gave permission for the beneficiaries to disclose information and documents if the English court made an order to that effect, but expressed concerns regarding such disclosure and said that it would normally have refused permission but for the "very unusual circumstances" of the case. The material consisted of privileged, "sensitive" and "other" material. Permission was not given, and no order was sought, for disclosure of the privileged material.

Moylan J held that very considerable weight had to be given to the concerns expressed by the Royal Court, as the interests of comity had a powerful place in cases involving offshore trusts, when the English court would often depend on the trusts' home courts, not least for enforcement purposes. However, the material's potential relevance and importance, including in particular the sensitive material, was such that its disclosure had to be ordered, notwithstanding the strong judgment of the Royal Court and the demands of comity. Further, such evidence was not likely to be forthcoming from any other source. The beneficiaries were therefore ordered to disclose the "sensitive" and "other" material. *RK v RK (Financial*

*Resources: Trust Assets)* [2011] EWHC 3910 (Fam) and Thomas v Thomas [1995] 2 FLR 668 applied. Given the circumstances of the instant case, such an order should not impede or undermine the interests of comity. It was hoped that co-operation between the English court and other courts, including the Royal Court of Jersey, in cases in which wealth was held in trusts or similar vehicles, would continue to develop. Such co-operation should not undermine legitimate wealth protection, but, in the context of financial remedy proceedings, would assist the interests of justice not only for spouses and civil partners but also for trusts and beneficiaries.

# SPORT

Digested by MARCUS HAYWOOD


MARCUS HAYWOOD

## England and Wales Cricket Board Ltd v Danish Kaneria [2013] EWHC 1074 (Comm) QBD (Commercial Court) (Cooke J), 21 March 2013

Appeal proceedings held under the disciplinary regulations of the England and Wales Cricket Board bore all the hallmarks of arbitration set out in *Walkinshaw v Diniz* [2000] 2 All E.R. (Comm) 237 and were therefore arbitral proceedings. The Court so held on an application for a witness summons under the Arbitration Act 1996 s.43, in connection with proceedings before the appeal panel of the applicant cricket board ("the ECB"). The respondent cricketer argued that the disciplinary nature of the proceedings indicated that they were not arbitral, and that characterising the proceedings as arbitral led to a reduction in standards of fairness. Rejecting the submissions on behalf of the cricketer the Court held that the ECB's appeal procedures bore all the hallmarks of arbitration set out in *Walkinshaw*. Although the *Walkinshaw* criteria were obiter, they outlined the kind of factors which were plainly material to whether proceedings were truly arbitral in nature. The fact that the proceedings were disciplinary and had a charge made by a "prosecutor" against an "accused" did not mean that they could not readily be the subject of arbitration. Many sporting bodies adopted arbitration processes for disciplinary offences and there was no reason in principle against arbitration in such circumstances. Nor did the characterisation of the appeal proceedings as arbitral result in any reduction in standards of fairness or in recourse to law. As the witness in question was a central witness, whose presence was desirable for justice to be done, the witness summons would be issued.

## Force India Formula One Team Ltd v Aerolab SrL [2013] EWCA Civ 780 Court of Appeal (Civ Div) (Lewison LJ, Briggs LJ, Sir Stanley Burnton), 3 July 2013

The appellant (F) appealed against a decision ([2012] EWHC 616 (Ch) that it was in breach of contract and owed the respondent aerodynamic design consultants (X) unpaid fees due under the contract. In 2008, F, who designed and built Formula 1 cars, entered into a contract with X to provide wind tunnel aerodynamic testing on its cars. The contract included terms that X would deal with F in the utmost good faith, that intellectual property created or developed by X became F's sole property, and that X and its employees were under a duty of confidentiality and an obligation of non-disclosure. X experienced difficulties in obtaining payment for its work from F. On 31 July 2009, F informed X that it was unable to pay and would discuss the matter after a two-week shutdown. On the first day of the shutdown, X disabled F's connection to X's servers. F discovered the severance on its return to work after the shutdown and was subsequently informed that X had stopped work because of F's failure to pay. X then began work for another Formula 1 team (Lotus). F alleged that there was a plan to copy the design of its car using its CAD files and brought a claim for breach of contract, misuse of confidential information and copyright infringement. X made a cross-claim in respect of the unpaid debt. The Judge at first instance found that X was entitled to work for Lotus because it had accepted F's repudiatory breach of the contract on 31 July 2009, but that in some respects X was in breach of contract because some of its employees had copied confidential material belonging to F. He found that the CAD files were in the nature of trade secrets. He assessed damages at £25,000 which was to be set off against the £846,230 F owed X in fees due under the contract. Dismissing F appeal the Court of Appeal held that (1) The judge was wrong to find that the disabling of the server connection had retrospective effect. For acceptance of a repudiation, there had to be a clear, unequivocal communication to the party in default. A demand for future instalments of periodical payments due under a contract was not consistent with an unequivocal communication that the contract was at an end. Neither was disabling the server connection

during a shutdown. However, the communication to F that X had stopped work for F and would be working for someone else would reasonably have been understood as treating the contract as being at an end. (2) The judge had been wrong to find that if the CAD files contained a precise dimension that was memorable then that dimension could be regarded as part of X's employees' skill, knowledge and experience. An identified piece of confidential information did not cease to be confidential simply because it was memorable. (3) However, the Judge's finding that X had not copied or taken the aerodynamic system of F's car which was a finding he was entitled to make. It was not possible for the Court of Appeal to interfere with his primary findings of fact on the basis of a highly selective exposure to only some of the materials that were before the judge. (4) Any disagreements with the Judge's reasoning did not affect the overall outcome of the case.

### Football Association Premier League v British Sky Broadcasting Ltd [2013] EWHC 2058 (Ch) (Arnold J), 16 July 2013

The owner of copyright in recordings of television footage of all English Premier League football matches was entitled to an injunction under the Copyright, Designs and Patents Act 1988 s.97A requiring United Kingdom internet service providers to take measures to block or impede access by their customers to a website which streamed broadcasts of Premier League matches in breach of copyright. The Court so held on the application of the Football Association ("the FA") for an injunction under the Copyright, Designs and Patents Act 1988 s.97A, which implemented Directive 2001/29 art.8, requiring the defendants to take measures to block or impede access by their customers to a website.

The FA, as the governing body of the English Premier Football League, owned the copyright in recording of television footage of all Premier League matches, and in artistic works appearing within that footage. The defendants were the main retail internet services providers (ISPs) in the United Kingdom. The relevant website operated a portal to streamed broadcasts of sporting events, in particular Premier League matches, without the FA's permission. The FA was unable to establish the identity of the website's operators and where they were, since the website had been registered under many different domain names using false details. The terms of the order the FA sought were agreed with the defendants who did not oppose the injunction. It fell to be determined whether the court had jurisdiction to make the injunction. The Court held that it did, the defendants were service providers within the meaning of s.97A of the Copyright, Designs and Patents Act 1988. Any retransmission of a terrestrial television broadcast via the internet would constitute a communication to the public. That communication was in the UK since the website's use of English language and the fact that the advertising was for UK companies evidenced an intention to target the UK public. Accordingly, the website thereby infringed FA's copyright and the injunction should be granted.

## OTHER CASES

Digested by **HENRY PHILLIPS**


WILLIAM TROWER QC


DAVID ALLISON

### Rawlinson and Hunter Trustees and ors v (1) Stephen John Akers (2) Mark MacDonald [2013] EWHC 2297 (QB) (Eder J), 26 July 2013

*Third Party Disclosure – Privilege – loss of confidentiality*

The Respondents were the joint liquidators of the Oscatello Group of companies, which operated under the umbrella of a trust in favour of Robert Tchenguiz and his children and remoter issue.

The Oscatello Group of companies held positions in valuable assets by way of direct equity / debt investments and participated in large-scale derivatives and futures trading. Their investment activities were largely funded by Kaupthing hf.

The Serious Fraud Office ("SFO") launched an investigation into the involvement of Robert and Victor Tchenguiz in Kaupthing's collapse. During the course of the SFO's investigations, the Respondents gave the SFO permission to read (but not take copies of) a number of reports which had been produced at the Respondents' request (the "Reports"). The Tchenguiz brothers were arrested in March 2009. On the same day, the SFO executed search warrants obtained in respect of properties used by the Tchenguiz brothers. The Reports had been relied upon by the police in order to obtain the search warrants. Notes of the contents of the Reports, but not the Reports themselves, had been exhibited to a witness statement produced for that purpose. As is now notorious, those search warrants were subsequently quashed in judicial

review proceedings and the SFO ceased its investigation into the Tchenguiz brothers. The Tchenguiz brothers subsequently commenced proceedings against the Director of the Serious Fraud Office, alleging that the effect of the searches, arrests and investigation surrounding them was to cause extensive financial losses and reputational harm. The basis of those claims is that the SFO did not have reasonable grounds to suspect the Tchenguiz brothers of having committed a crime. During the course of the proceedings brought against the SFO, the Tchenguiz brothers made an application seeking third party disclosure of the Reports from the Respondents under CPR rule 31.17(3). The Respondents opposed the application on three main grounds i.e. (i) necessity/relevance (ii) litigation privilege; and (iii) discretion.

The Judge held that the Reports were clearly necessary and relevant to the proceedings. As to litigation privilege, the Applicants contended that if the Reports had been subject to litigation privilege, the right to assert it had been lost because confidentiality no longer attached to the Reports as notes of their contents had been exhibited to a witness statement. The Judge was not satisfied on the evidence before him that the Reports had been produced for the dominant purpose of aiding actual or contemplated litigation, as opposed to having been produced for the purpose of assisting the Respondents in discharging their statutory duties as joint liquidators of the Oscatello companies. As to loss of confidentiality, even on the assumption that there was a loss of confidentiality in respect of the information contained in the notes of the Reports, it did not follow that there was a loss of confidentiality in the Reports themselves. The Judge held that the Reports were not in the public domain and that confidentiality still attached to them. However, the point was academic as the Reports had not, in any event, been created for the dominant purpose of aiding actual or contemplated litigation. The Judge exercised his discretion in favour of disclosure.

**[William Trower QC, David Allison, Henry Phillips]**

## Parvalorem SA v Oliveira & ors [2103] EWHC 4195 (Ch) (Warren J), 2 October 2013


BEN VALENTIN

*Freezing injunctions – interim relief in aid of foreign proceedings – business and legal expenses exceptions*

In order to be allowed to spend monies subject to a freezing injunction, a respondent must satisfy the court that he has no other assets which he can use. It followed that an interim freezing injunction in aid of civil proceedings in Portugal, granted over sale proceeds from an auction of classic cars in England, should not contain the usual exception to allow payments in the ordinary course of business, where the court was able to infer on the existing evidence that there were sufficient free assets elsewhere from which those payments could be made. The usual exception for payment of legal expenses would also be omitted unless the respondent provided satisfactory evidence on affidavit that it had insufficient free assets elsewhere. **[Ben Valentin]**

## R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport [2014] UKSC 3 (Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Sumption, Lord Reed and Lord Carnwath), 22 January 2014

The appeals arose out of the Government's decision to promote the high speed rail link from London to the north (commonly known as "HS2"). The decision was announced in a command paper in January 2012 ("the Paper"). In April 2012 the Appellants commenced judicial review proceedings. The claim was upheld in relation to certain aspects of the consultation process (but not the matters relevant to the appeal to the Supreme Court). The Appellants appealed to the Court of Appeal. The Court of Appeal dismissed the appeal in July 2013. There were two main issues before the Supreme Court. Firstly, whether the Paper should have been preceded by an environmental assessment under Directive 2001/42/EC. Secondly, whether the proposed hybrid bill procedure would comply with procedural requirements of Directive 2011/92/EU. The Supreme Court did not favour the arguments of the Appellants and unanimously dismissed the appeal.

# Spotlight on the Cayman Islands

**Ross McDonough** and **Guy Manning** of Campbells review recent developments in the Cayman Islands

## Insolvency: Cross Border Issues

Interesting issues have arisen and are likely to continue to arise as a result of the decision of the Chief Justice to wind up three Cayman Islands hedge funds, (collectively "the Soundview Funds"), Cause Nos. FSD 111, 112 and 113 of 2013. Winding up petitions were presented by disgruntled investors in respect of unpaid redemptions in August 2013[1] and petitions were listed for hearing on 24 September 2013. On the morning of 24 September 2013 (and before the commencement of the hearing in Cayman), management of the Soundview Funds presented petitions under Chapter 11 of the United States Bankruptcy Code in the Southern District of New York and those filings caused the automatic stay provisions under Chapter 11 to be invoked. At the hearing of the of winding up petitions in Cayman, the Soundview Funds' Counsel submitted that the Cayman Court could not then order the winding up of the Soundview Funds because to do so would violate the automatic stay under Chapter 11. That submission together with the further argument that the Chapter 11 filing would inevitably operate to render the Cayman Islands winding up proceedings as futile was given short shrift by the Chief Justice and he made winding up orders. In his ruling dated 13 December 2013 he expressed the view that in the circumstances of this case, comity dictated that there would be a need for recognition of the Cayman Court appointed liquidators by the United States Court.

The issue of whether the Chapter 11 proceedings are to be allowed to be continued has been argued before the United States Court and at the time of writing a decision on the various issues argued is still awaited.

In *Irving H Picard (as Trustee for the Liquidation of the Business of Bernard L. Madoff Investment Securities LLC) (In Securities Investor Protector Act Liquidation) and Bernard L. Madoff Investment Securities LLC (In Securities Investor Protection Act Liquidation) v. Primeo Fund (In Official Liquidation),* Grand Court of the Cayman Islands (Financial Services Division) (Cause No. FSD 275 of 2010), Jones, J., 14 January 2013 the Grand Court had to consider whether a foreign liquidator or bankruptcy trustee appointed by a foreign court in respect of a foreign company would, once recognised by the Grand Court, be permitted to bring statutory avoidance proceedings available to liquidators of Cayman companies under the Cayman Companies law.

In this case, Irving Picard had been appointed as Bankruptcy Trustee by the New York Court over the New York company that Bernard Madoff used to carry out his now notorious Ponzi scheme. An investment fund, Primeo, was an investor in Madoff's Ponzi scheme and received substantial sums prior to the fraud being discovered. Primeo did not know about the fraud. The Trustee sought to recover those sums from Primeo in the Cayman Islands. Primeo was a Cayman company that had only one connection with the USA, its investment in Madoff's Ponzi scheme. Three years previously the Trustee's appointment had been recognised by the Grand Court and he now sought the Grand Court's assistance in recovery of payments made to Primeo before the fraud was discovered.

The Court held that whilst the statutory powers contained in the Cayman statutes were for the exclusive

*1/. If winding up orders were made on the petitions the winding up would be considered to have been commenced on that date.*

CAYMAN JURISDICTION BECAME AN ISSUE IN FUND WINDING UP PETITIONS

benefit of Liquidators appointed by the Grand Court, nevertheless the Grand Court could assist the Trustee by granting him a direct cause of action in identical terms to the statutory powers. The Grand Court did this by extending established principles of recognition and assistance available to foreign office holders at common law, to include granting foreign office holders powers in Cayman that they do not enjoy under statute. This is a significant development. Previously, the limits of common law assistance that could be offered to foreign office holders had not been extended that far. Jurists generally agree that the local court should give assistance under common law comity principles to a foreign office holder to the extent that he or she should be recognised and permitted to take control of the foreign company's assets located in the Cayman Islands, able to require relevant people to give information about the company's dealings, and also able to obtain a stay of any Cayman proceedings against the company. However, granting direct causes of action in identical terms to statutory avoidance claims available to a Cayman Islands Liquidator, based on the principle of giving assistance to a foreign court (in this case the New York Court that appointed the Trustee), is quite a different thing altogether and represents a significant development in the common law of the Cayman Islands. The Judge said that his decision was made "not without some hesitation". An appeal has been heard and the decision of the Court of Appeal is awaited with interest.

## Companies Winding Up: Striking Out

The Grand Court recently considered an application to strike out a winding up petition presented on the just and equitable ground on the ground that a fair offer had been made for the Petitioners' shares and that therefore the Petitioners had an adequate alternative remedy (in the matter of *Trikona Advisors Limited* [2012 (2) CILR Note 7]). Each of the petitioners owned

## The Grand Court

**The Grand Court was created as a court of special limited jurisdiction by statute in 1877. In its present modern form, the Grand Court was established by the Grand Court Law of 1975 and enshrined as a Constitutional Court in 1975. The Chief Justice, who has responsibility for "all matters arising in the judicature" is Honourable Anthony Smellie QC, JP**

**The Financial Services Division of the Grand Court was created in 2009 recognising the need for special procedures and skills in dealing with the more complex civil cases that arise out of the financial sector in the Cayman Islands**

**The current Financial Services Division judges are:**

- **The Chief Justice**
- **Hon. Angus Foster QC**
- **Hon. Alexander Henderson**
- **Hon. Andrew J. Jones QC**
- **Hon. Charles Quin QC**
- **Hon. Richard N Williams**
- **Sir Peter Creswell, DL**

25% of the company, and the respondent the remaining 50%. Since 2009 the petitioners had been represented on the board of directors by C and the respondent by K. Due to disputes between the parties there was no prospect of any new business. Both C and K had been accused of breaches of fiduciary duty (in actions pending in Connecticut and New York), and K had removed C from the board of directors at a meeting of which C was not given notice. K wished to use the company's money to fund both the US proceedings against C and the defence of the winding up petition. The petitioners therefore applied to have provisional liquidators appointed (which would prevent K from using the company's funds in this way). The respondent applied to have the petition struck out on the grounds that the petitioners had an adequate alternative remedy or, alternatively, because the petition was being pursued for an improper purpose. In distinguishing certain of the principles set out by the House of Lords in *O'Neill v Philips* [1999] 2 All ER 961, the Grand Court held that the offer was not an adequate alternative remedy for four reasons:

1/. The proposed mechanism for determining the fair value was unnecessary and inappropriate because the company had no business or goodwill to value.

2/. The proposed payment for the shares was to be deferred until certain proceedings in the United States were concluded, which would have left the petitioners as subordinated creditors reliant on the future solvency of the company, which would have been jeopardized by the funding of the litigation.

3/. It was proposed that payment for the petitioners' shares would be set off against any judgment obtained against C (a former director who had a financial interest in the petitioners) or the companies alleged to be beneficiaries of C's alleged breaches of fiduciary duty (including the petitioners). However, C denied that the petitioners were his alter ego, with the result that the petitioners would have surrendered their right to have the liquidator prove any mutuality before a set off applied and;

4/. The offer to buy the shares was conditional on the failure of a claim for an order for the petitioners' shares to be forfeited which was asserted in the US proceedings. However the Judge held that any such order (for forfeiture) would not necessarily be recognised in the Cayman Islands.

The application was therefore dismissed and the winding up petition allowed to proceed to trial.[2]

### Companies Winding Up: Segregated Portfolio Companies

In *ABC Company (SPC) v J & Co Ltd*, Court of Appeal of the Cayman Islands, May 2012[3] the Court of Appeal of the Cayman Islands was called upon to determine whether it was arguable that it would be just and equitable to wind up a segregated portfolio company ("SPC"), ABC, on the basis that, as a consequence of the suspension of NAV calculation in relation to one of the company's segregated portfolios (which had the effect of suspending subscription for and the redemption of shares in that portfolio), it was no longer possible for the company to meet its objectives, its substratum having thereby been lost.

ABC had many segregated portfolios which were all, in some way or another, involved in property investment. One of those segregated portfolios (the "German Fund") had suspended NAV calculation and the subscription and redemption of shares. The shareholder petitioned to wind up the entire company on the grounds of loss of substratum, notwithstanding that many other segregated portfolios were functioning normally.

The company brought an application to strike out the petition on the grounds that the shareholder had no realistic prospect of establishing that it was just and equitable to wind up the entire company. The strike out application was refused at first

*2/. After a trial in January 2013, the Grand Court made an order for the winding up of the company.*

*3/. The parties' names were anonymised so as to avoid value destruction of the underlying portfolio assets, because the court was satisfied that if the company's name was published then potential purchasers might endeavor to force down the prices they pay for the assets upon the basis that the company was distressed.*

instance and the company appealed.

The Court of Appeal held that under the terms of the recently amended offering documents (which had received the required 75% minimum vote from the German Fund's shareholders) the shareholders' reasonable expectation must have been that the suspension of the calculation of NAV could continue for some time, and therefore the objects of the company could not be said to have failed. Having come to that conclusion, the court held that the petition had no prospect of success[4].

While section 224 of the Companies Law provides an alternative to winding up for an insolvent segregated portfolio, namely the making of a receivership order over that portfolio, this option was not available to the petitioners because it could not be said that the segregated portfolio was insolvent.

The Court of Appeal observed that if an SPC company were the subject of a winding up petition on the basis of issues relating to a particular portfolio (and it was not possible to obtain a receivership order over that portfolio because it was not insolvent) then, provided that the court was satisfied that it *would* be just and equitable to wind up the company as a whole, an alternative order could be made under section 95(3) of the Companies Law which avoided a winding up order against the company but enabled the assets of the particular portfolio to be realised and distributed as if the portfolio were itself in liquidation (i.e. the equivalent to the making of a receivership order in respect of an insolvent portfolio pursuant to section 224 of the Companies Law).

In JP SPC4, Cause No. FSD 165 of 2012-AJEF, Foster J., 15 April 2013, a segregated portfolio company placed investments through one of its segregated portfolio in the form of loans to certain UK law firms for onward investment. The investments were lost and the Grand Court appointed receivers to the Segregated Portfolio. Upon appointment, the Receivers identified causes of action against the UK law firms who had received the investment monies. However, due to the fact that there is no concept of SPCs in English law, the Receivers were concerned that the English Courts might not render them assistance in pursuing the segregated portfolios' causes of action in England against the law firms. The Receivers sought the Grand Court's assistance in the form of a certificate for presentation to the English Courts confirming that their appointment was akin to that of a liquidator, and also requested the Grand Court to issue a letter of request for assistance to the English Courts. The Grand Court acceded to both requests.

## Hedge Fund Issues: Side Letters

The Grand Court had considered the issue of enforceability of side letters in two cases in 2012, namely *Medley Opportunity Fund Ltd. v. Fintan Master Fund Ltd & Nautical Nominees Ltd* 2012 (1) CILR360 and *Lansdowne Limited & Silex Trust Company Limited v. Matador Investments Limited (In Liquidation) & Ors*. 2012 (2) CILR 81.

In summary it was held in both these cases that for a side letter to be enforceable the directors of a fund must have power, under the articles of association, to enter into side letters with investors, and that the side letter must be between the registered

J. ROSS MCDONOUGH

**Court of Appeal of the Cayman Islands**

**The President of the Court of Appeal of the Cayman Islands is Rt. Honourable Sir John Chadwick. The other Justices of the Court of Appeal are:**

- Hon Dr Abdulai Conteh
- Justice E Mottley
- Rt Honourable Sir Anthony Campbell
- Hon Sir Richard Ground
- Rt Honourable Sir Bernard Rix
- Honourable Sir George Newman
- John Martin QC

*4/. There are currently conflicting decisions of the Caribbean courts as to when it can be said that a company has lost its substratum (i.e. when it can no longer do the thing that it was created for so that it should be put out of existence). In the Cayman Islands, the court has held that an open-ended mutual investment fund's substratum will be lost if the circumstances are such that it has become impractical, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon the representations contained in its offering document. This notion was rejected by the BVI court which preferred the more traditional formulation that so long as the company can comply with some of its stated objects, in accordance with its bargain with its shareholders, then substratum will not have been lost. This issue is currently of considerable importance to the Caribbean investment fund industry and it was hoped that the present case would clarify the position in the Cayman Islands. Unfortunately it did not. While the appeal court made certain passing observations on the substratum issue and the differences in opinion on it between the Cayman court and the BVI court, it decided that this issue did not need to be determined on the appeal.*

GUY MANNING

**Members of Chambers who have appeared in Court in Cayman in the last 2 years.**

Michael Crystal QC
Gabriel Moss QC
Richard Sheldon QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Antony Zacaroli QC
Felicity Toube QC
Ben Valentin
Tom Smith
Stephen Robins
Marcus Haywood
William Willson
Adam Al-Attar
Henry Phillips

shareholder and the fund.

In 2013, two further cases concerning the enforceability of side letters came before the Grand Court in quick succession. In *Swiss-Asia Genghis Hedge Fund v. Maoming Fund*, Cause No. FSD 12 of 2013, the Court was asked to enforce a side letter which the fund had entered into with the beneficial owner, rather than the registered holder, of certain of its shares. The fund had sought to argue, relying on the Medley decision, that it was not bound by the terms of the side letter and was free to disregard it. In his judgment dated 24 July 2013, the Hon Justice Jones distinguished the Medley case, and held that the commercial reality of the typical situation where the investor's shares in a fund are held by a nominee cloaked the investor with authority to bind the nominee when executing side letters and held that, in any event, the fund was "estopped by convention" from denying the enforceability of the side letter as the fund had partially performed certain of its terms. The judge explained that in reality the decision in Medley was that the side letter concerned was executed prior to the subscription agreement, which made no mention of it, and therefore the contract for subscription did not incorporate it. Although an appeal was filed in Swiss-Asia, it was not pursued.

After the trial in Swiss-Asia, but before Mr Justice Jones' decision was handed down, the Mr Justice Quin heard an appeal against a rejection of a proof of debt, the issue in which was again the enforceability of a side letter which had not been executed by the registered shareholder, but rather by the beneficial owner of the shares[5], *KBC Investments v Lancelot Investors Fund Ltd*, Cause No. FSD 87 of 2011. In his judgment dated 12 August 2013, Mr Justice Quin followed his own reasoning in Medley and Matador, and held again that only the registered shareholder (or his assignee) could enforce rights under the articles, notwithstanding the existence of a side letter. The judge was provided with a copy of Justice Jones' decision in Swiss-Asia, but did not refer to it in his judgment. This judgment is under appeal and the appeal is expected to be heard in March or April 2014.

## Hedge Fund Issues: Sufficiency of a distribution in specie.

The Cayman Islands' Court of Appeal has now delivered its judgment in the case involving the winding up of FIA Leveraged Fund ("FIA"). FIA had appealed against a winding up order made on a creditors' petition by redeeming investors whom FIA had purported to pay by way of an in specie transfer of assets, rather than in cash. The Court of Appeal held that based on (fairly typical) wording in FIA's offering documents, an in specie distribution could only be made using assets from FIA's portfolio that were held by FIA at the time when the investor was entitled to be paid its redemption monies. Further, even though FIA's documents stated that its directors had a complete discretion as to the value of the assets to be distributed to investors, that discretion is still limited as a matter of necessary implication by concepts of honesty, good faith and genuineness and a need for the absence of arbitrariness, capriciousness, perversity and irrationality.

The Court of Appeal upheld the decision of the Grand Court in ordering the winding up of FIA, and found that there had not been a valid in specie distribution to the investors because the asset purportedly distributed did not exist in the FIA's portfolio at the time the investors were entitled to be paid their redemption monies, and was not of a sufficient value because the directors

*5/. The side letter in this case had not been executed by the fund either but rather by the fund's Investment Manager purportedly on behalf of the fund.*

had not acted rationally when valuing the asset.
*Campbells acted for the successful petitioners.*

## Liquidation Funding: Conditional Fee Agreements ("CFAs")

Despite the fact that there are no statutory provisions expressly providing for the legality of CFAs, the Grand Court has held in the past that the competing public interest of ensuring access to justice for persons otherwise unable to fund litigation outweighed the risk of any improper incentive on the part of attorneys to succeed, and held that conditional fee agreements were, subject to considerations of reasonableness, legal in the Cayman Islands (*Quayum v. Hexagon Trust* [2002 CILR 161]). In a judgment dated 23 October 2013 in the matter of *DD Growth Premium II X Fund* (Cause No. FSD 0050 of 2009), the Chief Justice applied and extend the principles set out in *Quayum* and gave sanction to liquidators to enter into a conditional fee agreement relating to litigation to recover redemption payments made by a failed hedge fund to one of its investors prior to the hedge fund being wound up[6].

In considering whether the proposed uplift in the CFA was reasonable, the Grand Court followed English authorities on the subject, most notably *Spiralstem Ltd v Marks & Spencer plc* [2007] EWHC 90084 and *Callery v Gray* [2002] 1 WLR 2000, when calculating the "risk element" and followed the table set out in Cook on Costs to calculate the "postponement element". The Court stressed that under the present regime in Cayman there can be no question of an unsuccessful defendant being required to pay the uplift or success fee. Indeed the Court even alluded to the possibility that, because of various provisions of the practice direction which deals with taxation of costs on an inter-partes basis, the unsuccessful defendant may not be liable for the costs of the successful plaintiff at all.

The Chief Justice expressed the view that legislative intervention was necessary in this area to provide certainty and clarification. At the date of writing, the authors are unaware of any initiatives in this regard, but should the Chief Justice's invitation to the law revision commission be taken up it is also reasonable to assume that consideration will be given to legalising the entry into of damages based or contingency fee agreements.

## Costs

In *Renova Resources Private Equity Limited* v. *Gilbertson et al* Grand Court of the Cayman Islands (Financial Services Division), Cause No. FSD 61 of 2011-AJEF, Foster J., 26 October 2012, the parties returned to Court after trial and delivery of the judgment to deal with ancillary issues including costs orders. The successful plaintiff had established that the defendant had breached its fiduciary duty but had failed to establish that it suffered any loss as a consequence of the breach. The judge observed that the parties had each experienced victories and defeats over the four years of the litigation as they conducted the interlocutory stages of the pre-trial litigation process. Also, the plaintiff's conduct with regard to disclosure had fallen short of the standards expected of a litigant and had caused increased costs and delays in the matter. The judge took into account the plaintiff's conduct and decided, notwithstanding the plaintiff's limited success, that the parties would each have to bear their own costs.

## Possible future developments

The Cayman Islands Law Reform Commission has recently issued a consultation paper on the question of whether statutory codification of directors' duties is required or would be beneficial in the Cayman Islands. At the time of writing it is not known when the consultation process will be concluded.

### Members of Chambers who have advised in relation to cases in Cayman in the last 2 years.

Michael Crystal QC
Gabriel Moss QC
Simon Mortimore QC
Richard Sheldon QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
David Alexander QC
Antony Zacaroli QC
Barry Isaacs QC
Felicity Toube QC
Mark Aronld QC
Jeremy Goldring QC
Lucy Frazer QC
Adam Goodison
Ben Valentin
David Allison
Daniel Bayfield
Tom Smith
Richard Fisher
Stephen Robins
Marcus Haywood
William Willson
Adam Al-Attar
Henry Phillips
Charlotte Cooke

*6/. The cause of action asserted by the liquidators is interesting (and so far untested) being a claim to recover payments made at a time when the fund was allegedly unable to pay its debts as they fell due in contravention of sections 34(2) and/or 37(6) of the Cayman Companies Law (2013 Revision).*

# Recognition of foreign restructuring proceedings: Arcapita Bank

**Antony Zacaroli QC** and **Simon Dickson** examine why the "golden thread" of modified universalism is alive and well in the Caribbean

The decision by the Supreme Court in *Rubin v Eurofinance*[1] to overrule the Privy Council in *Cambridge Gas*[2] has caused much consternation and debate in the common law world. Attention has focused in particular on the extent to which the 'golden thread' of modified universalism survives, whether in England or (given potentially differing views of the precedential value of Supreme Court and Privy Council decisions) in offshore jurisdictions. In this article we take an in-depth view of one particular post offshore post-Rubin case, involving the restructuring of Arcapita Bank, and see how the desire to co-operate in a cross-border context by recognising and giving effect to a foreign insolvency restructuring plan is alive and well in Cayman.

## The Background

Arcapita Bank BSC was incorporated in Bahrain, and regulated by the Central Bank of Bahrain. It was one of the leading international investment banks in the Gulf Cooperation Council region, providing Shari'ah compliant banking and investment facilities to a large number of high net worth individuals. Its business was international, operating out of four offices, in Bahrain, Atlanta, London and Singapore. The Bank's principal source of finance was a $1.1 billion unsecured syndicated Murabaha facility (the "Murabaha Facility"), due for repayment in March 2012. The facility was governed by English law.

The assets of the Arcapita Group were mostly held through its Cayman subsidiary, Arcapita Investment Holdings Limited ("AIHL"). The assets of AIHL consisted of minority interests in further (mostly Cayman) subsidiary companies. The investment model adopted by the group was as follows. AIHL would incorporate a new transaction company to acquire each new investment opportunity. The equity in that investment would then be syndicated out to third party investors, such that AIHL was left with an indirect minority equity interest. The investments were managed by Arcapita group companies pursuant to agreements with the third party investors. The upshot was that AIHL's assets were particularly illiquid and their value was to a large extent dependent upon maintaining smooth relations with the third party investors. AIHL had guaranteed the Murabaha Facility, pursuant to a guarantee governed by English law.

As March 2012 approached, in the wake of the global downturn, it became apparent that the Bank would be unable to repay the $1.1 billion facility. A substantial proportion of the lenders were willing to consider some form of restructuring, but a minority were pressing for repayment. The immediate problem, in March 2012, was how to protect the Bank and AIHL from precipitous action by creditors.

## Which Jurisdiction?

The first issue was to identify the appropriate jurisdiction or jurisdictions in which to seek protection given that the Bank was in Bahrain, its assets were held through a Cayman subsidiary, the underlying investments were spread throughout the world, and the key debt and guarantee instruments were governed by English law.

## Chapter 11 Bankruptcy Code: United States

Perhaps counterintuitively, given the lack of any obvious predominant connecting factor with it, the United

1/. *[2013] 1 AC 236.*

2/. *[2001] AC 508.*

ANTONY ZACAROLI QC

States was chosen as the principal restructuring jurisdiction. Chapter 11 filings were made both for the Bank and AIHL (as well as certain other key subsidiary companies in the group).

While the Bank itself had some substantive connection with the United States, AIHL did not, so jurisdiction, so far as AIHL was concerned, was founded on the opening of a bank account within the jurisdiction of the New York court. Nevertheless, Chapter 11 offered substantial advantages, including the fact that a Plan could be approved with support of only two-thirds (by value) of the creditors (as opposed to the requirement for there to be 75% by value support under a scheme of arrangement in England) and the fact that the estates of the Bank and its key subsidiaries, including AIHL, could be restructured more efficiently through a consolidated process (albeit not one which involved substantial consolidation of the different estates) effected in a single jurisdiction

## The Appointment of Provisional Liquidators: Cayman Islands

The second issue was to ensure that AIHL was itself protected from hostile creditor action in Cayman, in light of the fact that AIHL had guaranteed the debt, and that it was the holding company for the group's assets. While the stay on creditor actions imposed under the Chapter 11 proceedings might be effective to deter creditors who had a presence in or substantial connection with the United States from taking action in Cayman, it was unlikely to have any effect in Cayman in relation to other creditors.

In these circumstances, application was made to the Grand Court in Cayman to appoint joint provisional liquidators. For a number of reasons, including so as to ensure that AIHL maintained its status as "debtor in possession" for the purposes of the US Chapter 11 proceedings, it was important that the appointment of joint provisional liquidators in Cayman did not deprive the directors of AIHL of their management functions, including their ability to direct AIHL's participation in the Chapter 11 proceedings. The appointment of joint provisional liquidators was sought, therefore, on the basis that they would be appointed for the limited purposes of monitoring and overseeing the continuing exercise of management powers by the directors, and reporting periodically to the Cayman court.

Under section 104(3) of the Cayman Companies law, the court could appoint provisional liquidators if, first, the company was or was likely to become, unable to pay its debts and, secondly, the company intended to present a compromise or arrangement to its creditors. The first requirement was clearly satisfied.

The second requirement raised two particular concerns. First, whether it was appropriate for the Cayman court to appoint provisional liquidators whose functions would be limited to an oversight role, leaving AIHL in the

hands of its existing management in order to pursue restructuring proceedings in another jurisdiction, and secondly, whether the intention to present an arrangement to creditors was intended to refer only to an arrangement under Cayman law, or whether it could extend to an intended restructuring under Chapter 11 of the US Bankruptcy Code.

In respect of the first issue, there was a precedent for a "soft touch" type of provisional liquidation in Cayman, and other offshore jurisdictions, where the provisional liquidators had only a monitoring and reporting role. This approach, for example, had been adopted previously in the Cayman Islands in *Fruit of the Loom Ltd* (in 1999) and in *Apex Silver Mines Ltd* (in 2009), albeit without any reasoned judgment being reported in either case. Further support was found in the Bermudian decision in *Re ICO Global Communications (Holdings) Limited*[3], where provisional liquidators were appointed in Bermuda over a Bermuda incorporated company.

In respect of the second issue, the decision in *Re ICO Global* was clear authority that, in Bermuda at least, the appointment of provisional liquidators in similar circumstances could extend to an intended restructuring under Chapter 11 as opposed to an arrangement under Bermudian law. In a judgment notable for its pragmatic and co-operative response to the problems generated by cross-border insolvencies of companies incorporated in offshore jurisdictions, Ward CJ said "*I do not accept that because the company is a Bermuda registered company therefore the Bermuda court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a US Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously … Under such circumstances this Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction so much as harmonisation of effort*."

**Recognition of foreign proceedings "is not a question of surrendering jurisdiction so much as harmonisation of effort"**

In the event, the Cayman court accepted at the time of the application, that it was not directly concerned with the second issue and accordingly whether, and if so in what circumstances, it would recognise and give effect to any Chapter 11 Plan that might be promulgated in due course. No Plan had as yet been formulated, and the extent to which the Cayman court might subsequently be required to give effect to such Plan was unclear. At that stage, for example, it was unclear whether the Plan would seek to modify contractual rights of creditors under the Murabaha facility, and related guarantee, leaving the Bank and AIHL to continue as going concerns, or whether the Plan would simply involve (as it turned out) a controlled long-term wind-down. Moreover, it was at least possible that a parallel scheme under Cayman law might in due course be presented to creditors of AIHL. The Court did not need, therefore, to grapple with the more difficult questions surrounding recognition in considering whether provisional liquidators should be appointed.

### The Chapter 11 Plan

Those questions came back before the Cayman court, however, in May 2013, once the Chapter 11 Plan had been negotiated. By this time, the possibility of a restructuring which enabled the Bank and AIHL to survive as going concerns had been abandoned. The Plan involved, instead, a long-term wind-down, with the intention of enabling maximum value to be realised from the group's assets. Given the particular nature of those assets – largely minority interest in investments with management agreements in place with the majority investors – it was believed that a formal liquidation would lead to significant loss of value.

So far as AIHL was concerned, the Plan involved the following elements: (1) the incorporation of a new corporate structure for the purpose of holding the investment interests currently owned by the group; (2) the transfer of AIHL's assets to a subsidiary company in the new group, in return for equity and debt interests in the holding company of the new group, and the settlement of a variety of inter-company disputes; (3) the distribution of the new equity and debt instruments, in specie, to AIHL's creditors; (4) the controlled wind-down of the assets held by the new group, so that the cash realised would eventually be paid to AIHL's creditors pursuant to the new debt and equity instruments now held by them; and (5) the discharge of the creditors rights against AIHL.

However for the Plan to succeed, the

*3/. [1999] Bda LR 69.*

Cayman Court would need to recognise and give effect to it.

## Rubin v Eurofinance

In the intervening period between the appointment of provisional liquidators and the presentation of the Plan, the Supreme Court had given judgment in *Rubin v Eurofinance*. This had two particular consequences so far as recognition of the Plan in Cayman was concerned.

## The First Consequence

First, Rubin confirmed that approval of the Plan in the US would suffice in practice to bind all creditors of AIHL who had a presence in the US or who had submitted to the jurisdiction of the US court. Following Lord Collins' judgment in *Rubin*, it was at least arguable (in order to recognise the binding effect of the Plan as against a particular creditor of AIHL) that certain creditors had participated in the Chapter 11 proceedings, for example by participating in hearings relating to the substantive merits of the Plan, or even filing a notice of appearance.

Lord Collins noted (at paragraph 161 of his judgment) that the characterisation of whether there had been a submission to the foreign court depends on English law (or in this case Cayman Law), which will take into account all the facts, including whether the relevant steps would have amounted to submission under the law of the foreign jurisdiction. He went on to hold that in English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation, on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In the case cited for that proposition, *Ex p Robertson, In re Morton* (1875) LR 20 Eq 733, the creditor had proved *and received a dividend* in the liquidation. However, Lord Collins' statement of the relevant principle made no mention of the requirement to have received a dividend. Moreover, in *Rubin*, in considering whether New Cap had submitted to the jurisdiction of the Australian Court, Lord Collins relied particularly on the fact of submission of proofs of debt and participation in creditors' meetings (see paragraph 158) and, in commenting that it was "certainly arguable" that Eurofinance SA had submitted to the jurisdiction of the US court, Lord Collins (at paragraph 168) relied (in addition to actions taken by Eurofinance before the UK court) on the fact that it had filed a notice of appearance in the Chapter 11 proceedings.

However, while the *Rubin* decision thus appeared to have broadened the scope for arguing that particular creditors of AIHL had submitted to the jurisdiction of the US court, there was no certainty that all creditors had submitted. Accordingly, it remained important to consider whether and, if so to what extent, the Grand court could recognise and give effect to the Plan in Cayman.

SIMON DICKSON OF MOURANT OZANNES IN CAYMAN

## The Second Consequence

This led to the second consequence of *Rubin*. Rubins closed off an argument that may have been available, based on *Cambridge Gas*, that the variation of creditors' rights against AIHL effected by the Plan (although those rights were governed by English law) should be recognised in Cayman in circumstances where AIHL itself had submitted to the jurisdiction of the US Court. It was clear, following *Rubin*, that such an

**Approval of the US Plan would bind all creditors with a presence in the US or who had submitted to the jurisdiction of the US court**

## A "straightforward and common sense" reading of Rubin makes it impossible to conclude that Lord Hoffmann's observations in Cambridge Gas are in any way diminished

argument was unavailable. This meant that the fifth feature of the Plan noted above (namely, the discharge of creditors' rights as against AIHL) could not be recognised and given effect to in Cayman.

### The Effect on the Plan

In practice, however, the inability to recognise the discharge of creditors rights under the Plan was immaterial, provided that the other aspects of the Plan could be recognised. This was because the transactions contemplated by the Plan would leave AIHL as a shell company, all its assets having been transferred to the new group, and all the consideration received for those new assets having been distributed to its creditors. Even if that distribution was not made in return for the discharge of creditors' rights against it, there would in practice be no risk to the transactions to be effected pursuant to the Plan, provided that creditors could be prevented from winding-up AIHL until after completion of those transactions, and a future liquidator could not successfully reverse those transactions insofar as they affected AIHL.

The first of the two key aspects of the Plan (the transfer of the assets to the new group in consideration for the issue of shares in the new group's holding company) was straightforward, irrespective of any cross-border considerations, provided that full value was received by AIHL in consideration for the transfer. Under s.99 of the Companies Law, the Court could validate any disposition of the company's property notwithstanding the presentation of a winding-up petition, provided there is no prejudice to creditors of the estate because full value is being received for the assets: see, for example, *Re Gray's Inn Construction* [1980] 1 WLR 711.

The second of the two key aspects – distribution to creditors in specie of the debt and equity instruments received in consideration for the transfer of AIHL's assets – was less straightforward as a matter of Cayman domestic law. Although O.18, R.5(2) of the Companies Winding-Up Rules 2008 enables an official liquidator to apply to the Court for a direction authorising him to divide the whole or part of the company's assets amongst the creditors, a court would be highly unlikely to make such an order, in a purely domestic case, prior to the winding up of the company, and it would be necessary to show either that the property in question could not be readily or advantageously sold, or that there was some other special reason why it would be advantageous to creditors for the property in question to be distributed in specie.

However, the two steps in combination could be justified under established principles of cross-border recognition. In substance, the steps amounted to (i) a sale of AIHL's assets, with (ii) the consideration being remitted to the US to be dealt with pursuant to the terms of the Chapter 11 Plan.

Whatever else the Supreme Court in *Rubin* decided, it undoubtedly confirmed the existence of the Court's jurisdiction to give assistance by ordering the remittal of assets to a foreign liquidation. At paragraph 29 of his judgment, Lord Collins said "*at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element*", and at paragraph 31 he noted that "*the common law assistance cases have been concerned with such matters as vesting of English assets in a foreign office holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for remittal of assets to a foreign liquidation…*".

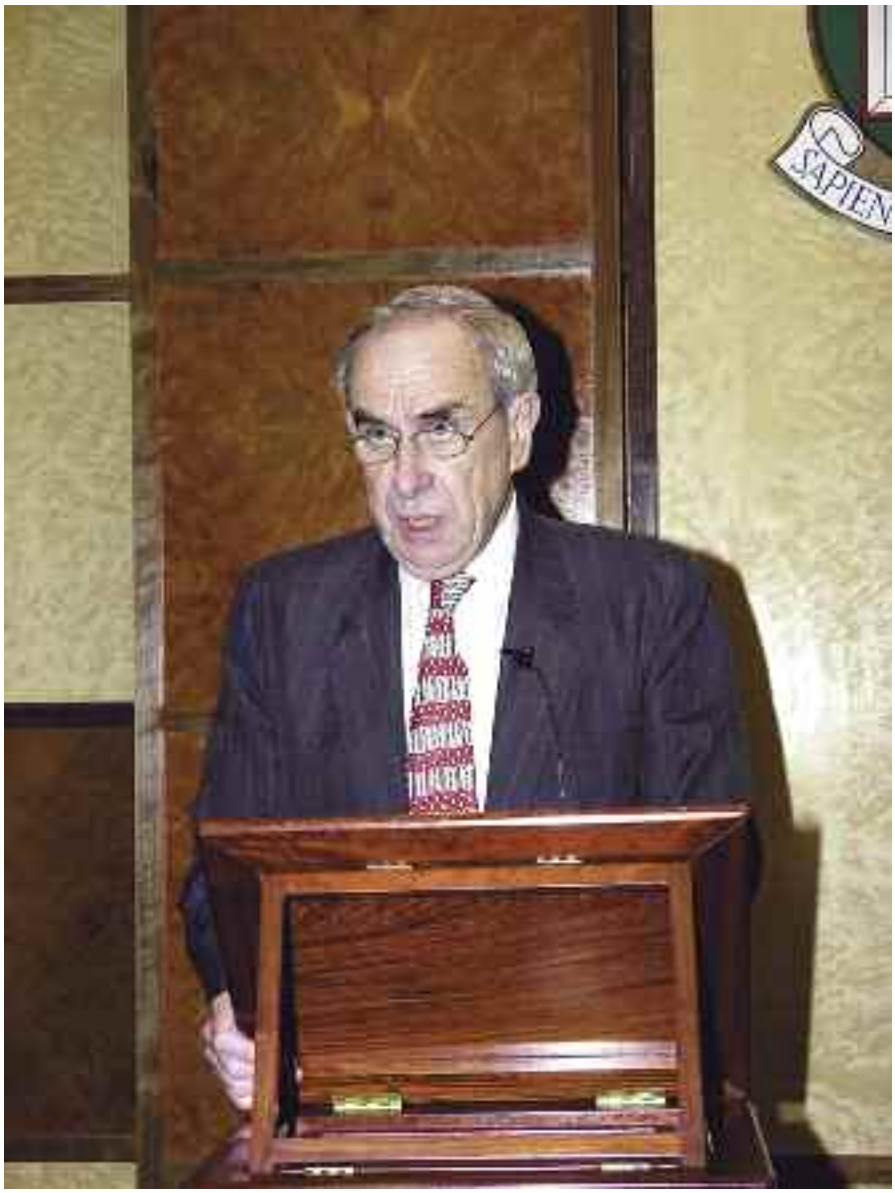
The continued existence of the power to give assistance to foreign insolvency proceedings, post-*Rubin*, had been confirmed in cases at first instance in both Cayman and Bermuda. In *Picard v Bernard L Madoff Investment Securities LLC*[4] Jones J in the Grand Court concluded that the Supreme Court (while overruling *Cambridge Gas*) "*did not reject the underlying proposition that recognition at common law 'carries with it the active assistance of the court'. They only rejected the proposition that 'active assistance' extended to enforcement of in personam judgments made in bankruptcy proceedings which would not otherwise be enforceable in accordance with the established conflicts of laws rules…*". In *Re Saad Investments Company Limited*,[5] Kawaley CJ in the Supreme Court of Bermuda held that "*I find that reading Rubin in a straightforward and common sense way makes it impossible to conclude that Lord Hoffmann's*

*4/. FSD 275 of 2010*
*5/. [2013] SC (Bda) 28 Com (15 April 2013)*

*observations in Cambridge Gas about the scope of common law judicial assistance generally are in any way of diminished binding and/or persuasive force*".[6]

The power to give assistance by way of remitting assets to a foreign insolvency proceeding was specifically highlighted in Rubin and is one of the forms of 'traditional' assistance. The power of the court to give such assistance at common law was confirmed in the House of Lords decision in *HIH Insurance Ltd*[7]. Although the court was split on whether the jurisdiction extended to remission of assets to a jurisdiction which would have distributed the assets otherwise than on the same pari passu basis recognised in England, the existence of the jurisdiction *per se* was not doubted. This was confirmed by David Richards J in *Swissair Schweizerische Luftverkehr-Aktiengesellschaft*[8] (at paragraph 10): "*In my judgment, there is nothing in the speeches in Re HIH which calls into question the long-established principle that the court possesses the power to order the remittal of assets to a foreign liquidation where the local law provides for a pari passu distribution*."

It followed that assuming the Court was prepared, pursuant to s.99 Companies Law to validate the sale of the assets, all the Court was being asked to do was to give the assistance required and order the remittal of the proceeds of the sale of AIHL's assets to the foreign liquidation. Decisions both in Cayman and Bermuda confirmed the continued existence of the power to give assistance and crucially, the US Plan treated all unsecured creditors equally, and gave all such creditors an equal opportunity to participate in the distribution of AIHL's assets.



LORD HOFFMANN: DO THE PRINCIPLES IN CAMBRIDGE GAS SURVIVE RUBIN?"

There was, however, one important difference from the previous authorities allowing the remittal of assets to a foreign liquidation. In cases such as *HIH* the relevant company was incorporated in the foreign jurisdiction to which the assets were to be remitted. England was properly to be regarded as the ancillary jurisdiction, and as being ancillary to the very jurisdiction to which the assets were to be remitted. AIHL, in contrast, was incorporated in Cayman and had no substantial connection with the US.

*6/. Lord Hoffmann's observations, to which Kawaley CJ was referring, included (at paragraph 19) that "the underlying principle of universality is of equal application and this is given effect to by recognising the person who is empowered under the foreign bankruptcy to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of In re African Farms Ltd [1906] TS 73, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England 'recognition carries with it the active assistance of the court'. He went on to say that active assistance could include: 'A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws.'"*
*7/. [2008] 1 WLR 852*
*8/. [2010] BCC 667*

ARCAPITA'S HEADQUARTERS IN BAHRAIN

Absent the Chapter 11 proceedings themselves (which were by now far advanced) there would be no basis on which the US could be described as the main jurisdiction, or on which Cayman could be regarded as ancillary to it.

There were, nevertheless, compelling reasons for exercising the common law power to remit assets notwithstanding the lack of any prior connection to the US. First, AIHL had submitted to the jurisdiction of the US Court. Sheldon on Cross-Border Insolvency, at paras 6.69 and 6.70, suggests this is a sufficient jurisdictional basis for recognition of a foreign insolvency proceeding and, according to Lord Hoffmann in *Cambridge Gas*, submission to the jurisdiction of the foreign court is sufficient for the purposes of recognising the vesting of assets in a foreign bankruptcy trustee.

Second, although incorporated in Cayman, AIHL had no actual presence there: it carried on no business in Cayman; it had no office there; it had no employees there; and it had no creditors there. AIHL was, on the other hand, an integral part of the wider Arcapita group, whose businesses was international, and the restructuring of AIHL's debt was a critical aspect of the restructuring of the wider Arcapita group.

Third, the principal of universalism favoured a single insolvency or restructuring proceeding taking precedence over multiple proceedings.

Fourth, the concept of an offshore jurisdiction affording primacy to US Chapter 11 proceedings even in the case of a company incorporated in the court asked to grant recognition had judicial support in the decision of Ward CJ in the Supreme Court of Bermuda in *Re ICO Global Communications (Holdings) Limited* (in the passage quoted above).

Fifth, the court was not being asked to do anything which it had no jurisdiction to do under its domestic laws. The fact that, in order for the Cayman court to direct the distribution of assets in specie the company would have to be in winding-up was irrelevant. As Lord Hoffmann pointed out in *Cambridge Gas*, "*the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency …. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel proceedings and to give them the remedies which they would have been entitled to if the equivalent proceedings had taken place in the domestic forum.*"

Sixth, there was no question of any

prejudice to the creditors of AIHL pursuant to the Plan, since the Plan respected the rights of AIHL's creditors to receive the same *pari passu* distribution that they would have received in a Cayman liquidation, and the value of the consideration received by creditors pursuant to the Plan would be no worse, and likely considerably greater, than the value they would have received in a liquidation.

Taking into account these circumstances, the Grand Court was prepared to treat the Cayman provisional liquidation as ancillary to the Chapter 11 proceedings, and recognise and give effect to the Plan by directing the sale of AIHL's assets, and the remission of the consideration to be dealt with in accordance with the Chapter 11 Plan.

## Potential Implications

The US Plan in respect of AIHL involved, as we have noted above, a straightforward alternative to liquidation, which was designed to return value (ultimately in the form of cash following a controlled realisation of assets) to creditors on the same *pari passu* basis which would have applied had AIHL been liquidated in Cayman. It was in those circumstances that the Cayman court was prepared to recognise the primacy of the Chapter 11 proceedings, and was ultimately unconcerned with matters such as the lack of prior substantive connection between AIHL and the US, and the different voting thresholds as between Chapter 11 (two thirds by value of each class, subject to the possibility of cram-down) and a Cayman scheme of arrangement (three-quarters by value of each class).

Moreover, the fact that the company had little, if any, substantive connection with Cayman, other than the fact that it was incorporated there, was an important factor in persuading the Court to make the order. That feature (lack of substantial connection with the home jurisdiction) may well be replicated in other offshore jurisdictions, but is less likely to be the case for companies incorporated in onshore jurisdictions, where the decision is accordingly likely to have less impact.

**It remains open whether the same approach would be taken where the main focus was modification of creditors' rights**

It remains open whether a similar approach could be taken where the main focus of the restructuring was, instead of a controlled realistation process, the modification of creditors' rights. Take, for example, the same basic facts, but altered in one crucial respect: the transfer of the company's assets to Newco, and the distribution of equity in Newco to the company's creditors, not so as to replicate a controlled wind-down, but with the intention of Newco continuing the company's business as a going concern. The result would be materially similar to a straightforward debt for equity swap. Following *Rubin*[9], assuming that the debt was governed by a law other than US law, there would be no basis for recognising the discharge of the debt pursuant to the US Plan. On the basis of the reasoning in the AIHL case, however, it would be possible to achieve a similar result in practice. While the receipt of equity in Newco would not replace creditors' debt claims against AIHL, which would remain intact, those rights would be worthless, because AIHL would be left as a shell company. The business, meanwhile, would trade on in Newco, with the benefit of all assets previously owned by AIHL, freed from its historic debt burden. If this could be done, then it would provide a neat side-step around the core problem created by *Rubin* and *Gibbs*: a restructuring pursuant to a Chapter 11 Plan could be used to enable the underlying business to convert its debt burden into equity, without having to grapple with the difficulty of recognising a discharge of English law governed debt by reference to a foreign insolvency process. Whether a court would go this far would depend upon all the circumstances of the case, including the relative strength of the connection between the company on the one hand and the home court or the US on the other, the extent to which the court could be satisfied that the foreign process was fair to all creditors, compared with their rights under available procedures under the laws of the home court, and the extent to which success of the restructuring was dependent upon the fact that the voting thresholds in the foreign court were more relaxed than those in the home court. If, for example, it was a blatant attempt to force a modification of contractual rights on creditors whose debt was governed by (say) English law, through recognition of a US Plan achieved with the support of only 67%, by value, of creditors, in circumstances where the company had no prior connection with the US, then there would be serious arguments against application of the arguments that succeeded in the case of AIHL.

*Antony Zacaroli QC, South Square, and Simon Dickson, Mourant Ozannes, Cayman Islands appeared for AIHL before the Cayman Grand Court*

*7/. And in accordance with the current law that a discharge of a debt pursuant to a foreign insolvency proceedings in a jurisdiction other than that whose law governs the relevant debt will not be recognised in England: Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399.*

# Insol International Caribbean conference

**William Willson** reports on South Square's presence at the INSOL Cayman Islands conference

Recent editions of the Digest have highlighted the long-standing links between Chambers and the Caribbean jurisdictions. Many of us have forged close professional relationships in the Cayman Islands, the British Virgin Islands and Bermuda and continue to both act and appear there in a range of insolvency/restructuring, commercial and company law matters. So it was perhaps unsurprising that one-fifth of our membership travelled the 5000 miles to Grand Cayman for November's one-day INSOL Caribbean seminar.

As seminar Chair Hugh Dickson (of Grant Thornton) reminded delegates at the start of the conference, many of the most interesting insolvency/restructuring cases in the last 5 years have involved one or more of the Caribbean's offshore financial centres. It was therefore fitting that the conference should play out against the backdrop of the appeal in *Picard v Primeo*, which was being heard by the Cayman Islands Court of Appeal that very same day (and in which three more of us, Michael Crystal QC, Gabriel Moss QC and Stephen Robins, were appearing).

Chambers remains proud of its close relationship with INSOL, and was one of the event's Gold Sponsors. Thanks also to our friends at Campbells, Conyers, Dill and Pearman, Grant Thornton and Ogier for acting as Platinum Sponsors.

This year saw a record attendance of 240 delegates (a 50% increase on the previous conference), with representatives from the legal, accountancy and financial professions of different ages and from multiple jurisdictions.

For many of us the week started on Tuesday with a whirl of social and networking events. First up were Tuesday's drinks at the Ritz Carlton, followed by RISA's Wednesday reception at Camana Bay's stylish Abacus bar and a drinks/dinner party hosted by Brown Rudnick/KRyS Global on the 'Island' to the mellow chimes of steel drum band.

The conference proper took place on Thursday in the cavernous space of the Marriott Hotel. This year's programme started with "Offshore restructuring in the region", chaired by Ogier's Richard de Lacy QC. This useful session highlighted the nuances of the various restructuring regimes in Bermuda, the BVI, Cayman and the UK, as well providing an interesting comparative law analysis of the different approaches to "look through" to beneficial owners in those jurisdictions. There were also talks on "Directors and insolvency proceedings" chaired by Michael Pearson, "ISDA and the lessons learned from Lehman", chaired by Richard Millett QC (including an interesting intervention by New York's Judge Peck on the US' ipso facto rule and the UK's anti-deprivation principle). The afternoon session saw a talk on "Law enforcement and insolvency" Verill's Hugh Dickson and Chadbourne and Park's John Verrill, as well as an "X-Factor" series of presentations by rising stars of the Caribbean restructuring community (deservedly won by Sedgwick Chudleigh's Alex Potts with his "10 steps to recovery" from a self-professed addiction to insolvency law).

The evening saw a gala dinner at Luca restaurant, kindly sponsored by our friends at Ernst & Young and Harneys. After dinner the more active delegates decamped to the Lone Star bar.

Friday saw more hospitality for members courtesy of Harneys (breakfast), Campbells (lunch) and Walkers/KPMG (dinner). The last remaining delegates watched the "Pirate Week" fireworks from the veranda of the Havana Club.

From an internal Chambers' perspective many thanks must go to our senior Practice Managers, Dylan Playfoot and Michael Killick, for their assistance in renewing old ties and making new acquaintances.

As a Chambers we continue to value our relationship with INSOL. We are already looking forward to the 2014 annual conference in Hong Kong (which 11 members will be attending). We hope to see as many of you there as possible! The following members of Chambers attended the INSOL Caribbean conference: Richard Hacker QC, David Alexander QC, Glen Davis QC, Felicity Toube QC, Hilary Stonefrost, Marcus Haywood and William Willson.

BLUES BROTHERS? NO! SOUTH SQUARE PRACTICE MANAGERS MIKE KILLICK (LEFT) AND DYLAN PLAYFOOT

# Welcome to HK (欢迎到香港)

**Glen Davis QC** looks ahead to Insol's regional conference at Kowloon, Hong Kong.

The global INSOL caravan moves on, next stop Hong Kong for the 2014 Annual Regional Conference at the Shangri-La Hotel, Kowloon on 24-25 March.

And, continuing our long-standing support of INSOL International, South Square will be very much in evidence, as sponsors of the Offshore Ancillary meeting on Sunday 23 March and of a breakfast at the main conference and as conference participants.

As a Chambers, we have seen a substantial number of instructions in recent years with a Hong Kong or other Far Eastern dimension, including aspects of major shipping insolvencies and cases with both a Far Eastern and a Caribbean aspect.

With the shift of the world's economic centre of gravity eastwards, that is a trend we expect to continue in the years to come, and we are beginning to form personal and professional relationships with Mainland Chinese lawyers.

So INSOL in Hong Kong will be an ideal opportunity to view the insolvency landscape from a regional perspective.

The main conference is a sell-out. There will be more than 500 delegates for a full and varied programme of plenary and breakout sessions, with particular highlights likely to be the session on Maritime insolvency, the working lunch and plenary session on fraud (a subject close to our hearts here) under the title "Fifty shades greedier", and the address of the keynote speaker, Mike Smith, who is the CEO of ANZ Bank in Australia.

Fidelis Oditah QC, who practices both in the UK and in Nigeria, will be chairing a timely panel "It's not all about the USA" looking at issues in emerging and developing countries.

The Offshore Ancillary meetings have come to be an increasingly important forum attracting particularly expert participants. More than 100 delegates are expected in Hong Kong, including important local players and lawyers and practitioners flying in from Cayman, BVI and elsewhere. I have been privileged to be part of the organising committee which has put together a programme approaching offshore issues from the three perspectives; lawyers, insolvency practitioners and the bench.

The lawyers' session will look at the key issues facing private equity investors looking to exit from troubled investment vehicles under the laws of Bermuda, BVI and the Cayman Islands. The practitioners' session will look at the practical challenges facing those seeking to implement PRC- and Indonesian-based restructurings, with contributions from office-holders in a number of major recent cases. I have the honour of chairing the Judges' question time under the heading "Assistance, Reciprocity and Recognition: comity and modified universalism from the Caribbean to Asia", with a panel of judges from BVI, Cayman, Bermuda, Singapore, Hong Kong and the PRC.

As usual for an INSOL regional conference, there will be an Academics' Colloquium, chaired by our very own Academic Member, Ian Fletcher QC (Hon), who recently received an INSOL lifetime award.

We are also looking forward to seeing our Associate Member, Roxanne Ismail SC. Roxanne practised in London as a member of Chambers from 1994 until 2001, when she moved to Hong Kong, where she now has a successful career as a member of Temple Chambers and the Hong Kong Bar.

The members of South Square who will be in Hong Kong for INSOL are: Michael Crystal QC, Martin Pascoe QC, Fidelis Oditah QC, David Alexander QC, Antony Zacaroli QC, Glen Davis QC, Hilary Stonefrost, Tom Smith, Marcus Haywood, William Willson and Matthew Abraham.

All of us are very much looking forward to renewing old INSOL friendships and making new ones.

INSOL HITS HK

# From Russia... without love

**William Willson** reports on the tale of two recent Russian divorces

## Introduction

Cases involving parties from Russia and the former states of the Soviet Union have become increasingly familiar to practitioners at the commercial and commercial chancery Bar in recent years. The long-running Tajik Aluminium dispute, the various incarnations of *Berezovksy v Abramovich* and the Ablyazov litigation are but a few examples of this.

This article considers a new wave of Russian/CIS litigation, this time in the context of matrimonial law and beneficial interests in real property located in the United Kingdom. Though London's matrimonial courts have long been considered a Mecca for so-called 'divorce tourism', the increasingly international nature of property ownership has been keeping the Chancery division busy too.

## A Tale of Two Cases

In 2013 two high-profile real property cases came before the English courts both arising out of Russian divorces.

### *Slutsker v Haron Investments Ltd & Or*

In the first, *Vladimir Iosifovich Slutsker v (1) Haron Investments Limited (2) Summit Trustees (Cayman) Limited* [2013] EWCA Civ 430 the Court of Appeal (Lloyd, Patten, Black LLJ) considered an appeal from a decision[1] of Mr Justice Underhill (as he then was) concerning the beneficial ownership of a £6 million property located in The Boltons, Fulham.

The property had been purchased as a family home for the wife and children of a wealthy Russian couple who were married and subsequently divorced under Russian law. The husband had been a senator in the Russian Duma from 2002-2010. The first defendant company purchased the property as nominee for the wife. A Cayman Islands-law trust was then established, for which the second defendant was appointed as trustee, and which held the beneficial interest in the property on a discretionary basis for husband, wife and their children. The purchase price for the property had been paid into the solicitor's client account from a bank account belonging to the wife.

Mr and Mrs Slutsker subsequently divorced and Mr Slutsker was excluded from an interest in the property pursuant to the trustee executing a deed purporting to exclude him as a trust beneficiary in accordance with the powers of appointment under the trust deed. He argued that, as the money used to purchase the property belonged to the couple in equal shares under the Russian Family Code's 'communal property regime', half of the interest in the property was held by the trustee on a resulting trust for him as a tenant in common as a matter of English law.

Applying English conflict of law rules, the Court of Appeal held that Russian law, as the law of the matrimonial domicile, should be applied throughout in determining each party's interest in the property at each stage of the transaction and that it was wrong to translate those rights into English law rights at the point when the property was held in the client account. As such, the validity and effect of the wife's dealings with anything that was joint family property under the Russian matrimonial property regime must be determined by reference to Russian law alone (notwithstanding that the current claim related to property in England).

Further, under Article 35 of the Russian Family Code one spouse could dispose of matrimonial property if the other spouse consented to the disposition or if, in the absence of such consent, the other spouse did not bring proceedings to have the disposition

*1/. See Vladimir Iosifovich Slutsker v (1) Haron Investments Limited (2) Summit Trustees (Cayman) Limited [2013] EWHC 2539 (Ch).*

declared invalid within the relevant time limit. The Court of Appeal concluded that Mr Slutsker knew that a structure had been created which was inconsistent with the matrimonial property regime under Russian law and had given his consent to the transaction as a whole. He had not challenged the transfer of the property into the Cayman law trust. Accordingly as a matter of Russian law Mr Slutsker had no interest in the property at the point it was held beneficially for the trustee of the Cayman law trust and the resulting trust argument therefore failed.

However (and significantly) Lloyd LJ, in his leading judgment ([37]), explained that, as a matter of conflict of laws, English law regarding real property rights was not clear as between the law of the matrimonial domicile (in this case Russia) and the *lex situs* (in this case England). Though the trial judge had concluded (albeit as an *obiter dictum*) that the law of the matrimonial domicile should apply on the basis of the decision of Kekewich J in *Re De Nicols (No 2)* [1900] 2 Ch 410, Lloyd LJ left the question open, concluding that "*I leave open for decision, in the case in which it matters, the debate as between the law of the matrimonial domicile and the lex situs*".

***Mirimskaya v Golubovich***

In the second set of proceedings, issued in May of last year, Olga Mirimskaya, a prominent Russian businesswoman, sought declaratory relief in the Chancery Division as to the beneficial interests in a £6 million property in Hammersmith. Her husband, Mr Golubovich, was formerly head of strategy planning at Yukos (the Russian petroleum company which until 2003 was controlled by the recently released Mikhail Khodorkovsky – but was subsequently taken over by the Kremlin). The property had been purchased as part of a sophisticated off-shore transaction in 2004, and the registered title had changed hands several times between the parties. They had subsequently divorced in Moscow in 2012.

In this case the wife claimed a 100% interest in the property on the basis that her husband held it on bare trust and/or as nominee for her. Further or alternatively she contended that, contrary to the *Slutsker* decision, it was English law applied that to the determination of the parties' respective interests in the property, and she had a resulting/constructive trust interest through a *Stack v Dowden* claim. To this end the wife relied on the House of Lords decision of *Welch v Tennent* [1891] AC 639, in which Lord Herschell had held (c.f. *Re De Nicols* (No 2) [1900] 2 Ch 410) that "*the rights of [divorced spouses] in relation to a heritable estate are governed by the law of the place where it was situated*". As a further alternative, Ms Mirimskaya relied upon Article 33 ff. of the Russian Family Code, thereby asserting that the property was 'joint matrimonial property' for the purposes of that code and was held equally for both her and her husband.

## Observations

The *Mirimskaya* proceedings settled before trial. However, a number of related issues are still open for debate.

For example, as the editors of *Dicey, Morris & Collins* point out, the reasoning in *Re De Nicols (No 2)* (namely that under French law, where a couple do not make an express marriage contract, they are deemed to have entered into an implied contract in favour of community property) is "*highly unsatisfactory*" and "*both impractical and contrary to principle*".

Further, as Professor Trevor Hartley[2] has observed, even if the outcome in *Re De Nicols (No 2)* is to be preferred to *Welch v Tennent* as between former spouses in relation to both movable and immovable property, the *lex situs* should apply where the rights of third parties are involved.

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This ongoing debate again underlines the conflict and incompatibility of civil law and common law systems (especially in the context of the former's non-recognition of trusts/beneficial interests and the latter's non-imposition of a communal property regime).

This is only likely to feature more frequently on commercial chancery practitioners' radars as more and more wealthy international couples married in civil law jurisdictions either purchase property or set up trusts in the UK.

*William Willson acted and appeared in the Chancery proceedings in Mirimskaya v Golubovich. He has a particular interest in cases arising out of Russia and the states of the former Soviet Union.*

*2/. See "Matrimonial Property Rights in Conflict of Laws: a Reconsideration" in Reform and Development of Private International Law – Essays in Honour of Sir Peter North (OUP, 2002).*

# You're fired!

Comity, comi and anti-suit injunctions: Kemsley before the English and US courts. **Richard Fisher** and **Maja Zerjal,** associate at Proskauer, New York.

## Kemsley: Background

The personal bankruptcy of a once-prominent English businessman, and former interviewer for Sir Alan Sugar on 'The Apprentice' paved the way for two decisions showing the interplay of the English and US courts in considerations of comity, the UNCITRAL Model Law on Cross-Border Insolvency, and centre of main interests ('COMI').

Paul Zeital Kemsley ('Kemsley') moved to the US with his family in 2009 after the collapse of his business. The family resided in Boca Raton, Beverly Hills, and New York, until Kemsley's wife moved back to the UK with their children in June 2012. Kemsley filed for bankruptcy in London (the 'English Proceeding') under the Insolvency Act 1986 ('IA 1986') on 13 January 2012. Kemsley's bankruptcy petition was based on his physical presence in England at that time, and on having had a place of residence in England within three years of presentation. The High Court of Justice (the 'English Court') declared Kemsley bankrupt on 26 March 2012, and shortly thereafter, two trustees were appointed in the English Proceeding. Barclays Bank PLC ('Barclays'), a major creditor in the English Proceeding, sued Kemsley on 1 March 2012 in state court in New York and Florida, broadly seeking relief and remedies relating to a breach of a loan agreement to collect on a personal loan of GBP 5 million advanced to Kemsley. In response, Kemsley sought to stop Barclays on two fronts. First, on 21 August 2012, Kemsley's bankruptcy trustee (the 'Foreign Representative') filed a Chapter 15 petition with the United States Bankruptcy Court for the Southern District of New York (the 'US Court'), seeking recognition as foreign main proceeding, and, in the alternative, as foreign non-main proceeding. The Chapter 15 case was filed, in part, to stay Barclays' proceedings against Kemsley in the US. Second, after the filing of the Chapter 15 petition but before recognition, Kemsley sought an anti-suit injunction against Barclays in the English Proceeding.

The decisions of the English Court and the US Court were issued on 8 and 11 March and 22 March 2013 respectively.

## II. Kemsley: The English Perspective

The decision of Mr Justice Roth in *Kemsley v Barclays Bank plc* [2013] EWHC 1274 (Ch) is useful from an English perspective in two principal regards: it confirms the general 'comity' or 'deference' principle which now appears to be the primary regulating factor relating to the grant of anti-suit injunctions (at least in relation to insolvency proceedings), and provides (for the first time) consideration of the role and relevance of COMI and the Model Law to the grant of anti-suit relief.

### The Comity Principle

When should an English Court grant an anti-suit injunction so as to restrict a creditor from taking steps in a foreign forum which are inconsistent, or potentially inconsistent, with the English insolvency regime commenced by or against a debtor? The answer, according to Mr Justice Roth, and consistent with prior jurisprudence, is rarely if ever.

Mr Kemsley sought injunctive relief against Barclays on two bases. First, that Barclays, if it continued proceedings in the US, would obtain an advantage over other creditors as compared to the equitable *pari passu* distribution of assets contemplated by the English bankruptcy process. Second, that Barclays (if it obtained a US judgment which would remain enforceable for 20 years) would avoid and undermine the operation of the debtor's discharge from liability, which discharge was said to be a core element of the English bankruptcy regime.

Barclays conceded at the hearing that it would transfer any recoveries to the bankruptcy estate, subject to deduction of costs and expenses, such that the first basis for the application fell away. The second, therefore, became the principal focus for the application.

It was common ground between the parties that any stay imposed on proceedings commenced against a bankrupt when a bankruptcy petition was pending, or after the opening of bankruptcy proceedings, by virtue of Section 285 of the IA 1986 did not apply to foreign proceedings and enforcement measures. As such, relief could only be justified under the Court's general power to grant injunctions contained in Section 37 of

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the Supreme Courts Act 1981.

There is long-standing authority for the proposition that such a power could, in principle, be used to grant an injunction where an estate is being administered in England, or bankruptcy or winding-up proceedings have been commenced in England, and it was necessary to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of foreign assets falling in the estate. In such a case, the injunction is granted to protect the jurisdiction of the English court[1]. But it must be shown that the bringing or continuation of the foreign proceedings is vexatious or oppressive. The mere fact that England might be the natural forum for such proceedings, or that collective proceedings are underway in England, is not enough.

So what makes a case vexatious or oppressive? In this context, if and to the extent that inconsistency with English proceedings can and will be raised with the foreign court, something more than merely bringing the proceedings in breach of the collective process contemplated by the English process is required. Wrongful conduct will need to be established which requires the Court to intervene[2] and that, in practice, is likely to require some rather extreme or exceptional facts[3].

The principal consideration in the insolvency context now appears to be the comity principle[4]: if there is a process for consideration in the foreign court of the objections being raised, comity and common sense suggest that it is the foreign judge who is best placed to decide whether the proceedings in his own court should continue[5]. *"Comity requires a policy of non-intervention"*: *Mitchell v Carter* [1997] 1 BCLC 673.

There is undoubtedly greater support for the grant of an injunction against a creditor who is resident in the English jurisdiction rather than abroad, or who has proved or otherwise participated in the English process (see the Kemsley judgment at [26] to [28]). But this may simply be a consequence of a need, in most cases, to establish personal jurisdiction over the creditor in order to satisfy the Court that relief granted will be effective.

What will need to be shown in every case is a good reason why the decision to stop the foreign process should be made in England rather than abroad (see the Kemsley judgment at [29]). What will amount to a good or sufficient reason cannot be definitely stated. But we can ascertain from cases where injunctions have been granted or refused what might be a good or sufficient reason. In this regard, the Court of Appeal decision in *Bloom v Harms Offshore GmbH & Co* [2010] Ch 187 is illustrative of the reluctance of the English court to intervene by way of anti-suit injunction to protect insolvency proceedings. In *Bloom*, *ex parte* maritime attachment proceedings were commenced by two German creditors in New York following the commencement of an administration, with the effect that monies paid by the administrators (who were unaware of the attachment) to a

*1/. Society Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 at 892E.*
*2/. Turner v Grovit [20002] 1 WLR 107 at [24]; British Airways Board v Laker Airways Ltd [1985] AC 58 at 95.*
*3/. Midland Bank plc v Laker [1986] QB 689 at 700.*
*4/. There are echoes here of the stronger concept of comity advocated by the Supreme Court of Canada in its decision in Amchem v Workers Compensation Board (1993) 102 DLR (4th) 96, and perhaps now embodied in Rix LJ's description of the general relevance of comity to the grant of general anti-suit injunctions as set out in Star Reefers Pool Inc v JFC Group Co Ltd [2012] EWCA Civ 14. Comity increasingly regulates the court's discretion to grant anti-suit injunction relief for fear of acusations of unnecessary "egoistic paternalism".*
*5/. Barclays Bank plc v Homan [1993] BCLC 680 at 687.*

post-administration supplier of services were subject to attachment in New York. The Court of Appeal upheld the grant of an injunction, but for very limited reasons. By itself, the commencement of proceedings in New York did not appear to justify the grant of relief. What was objectionable, and moved the application into the realms of vexatious or oppressive behaviour, was the conduct of the creditors. In particular, the creditors commenced the US process without informing the US court that an administration order had been made and provided what was described as '*a very misleading picture*' to the US court. The attachment was aimed at interfering with the process of the administration, and did not fasten on any pre-administration property. The creditors only informed the administrators of the attachment once it had succeeded in attaching sufficient funds and, in all the circumstances, were described as having set a trap for the administrators. As such, Stanley Burton LJ concluded at [29] that the case fell into the '*exceptional category*' where considerations of comity would be outweighed notwithstanding the fact that the administrators could and had applied in New York to discharge the attachment. Sir John Chadwick agreed on the basis that it was the setting of a trap that obstructed the discharge of functions for which the English court had appointed the administrators that was key.

## COMI and the UNCITRAL Model Law

Both England (as part of Great Britain) and the US have implemented the substance (with local variations) of the UNICTRAL Model Law on Cross-Border Insolvency via, respectively, the Cross-Border Insolvency Regulations 2006 and Chapter 15 of the US Bankruptcy Code. The existence of these provisions, and the reciprocal recognition of insolvency proceedings, was considered by Roth J to provide '*an important consideration for the present application*' (see [39]) and is likely to do so in many future cases.

The English court approached matters on the basis that, in circumstances where Kemsley's COMI was either in England or the US (a question which would be considered by the US Court as part of the extant Chapter 15 recognition application), the need for an anti-suit injunction would only arise in circumstances where Kemsley's COMI was found to be in the US (see [40]). That was because, if his COMI was located in England, the bankruptcy proceedings would be regarded as main proceedings and lead to an automatic stay of proceedings in the US upon recognition.

If COMI was located in the US, and the English bankruptcy was recognised as foreign non-main proceedings, then it would be open for the Trustees to apply to the US Court for a stay in support of those proceedings. But if that application was refused, would there be any scope for an anti-suit injunction?

On the facts of the case before him[6], and in light of the availability of Chapter 15 relief, Roth J concluded that there was not. At [45], he noted that, even if Kemsley's COMI was located in the USA, '*I do not see how it can be regarded as oppressive or unfair or in any way improper for the question whether Barclays should be allowed to maintain its action in the NY Court on an English debt or whether those proceedings should be stayed or dismissed on the basis that Mr Kemsley had become discharged from his debts under the British statute, or indeed whether there should be any restriction on enforcement on post-discharge assets, to be determined by the NY Court. It is not for the English Court to intervene by preventing Barclays from pursuing its case there.*' The conduct of Barclays could not be described as "*underhand*" as in the case of *Bloom* (see [47]).

Roth J noted that it was perfectly proper for different bankruptcy regimes to approach the question of release of bankruptcy debts differently, and that the Model Law was focused on procedure not substance ([48]). It could not be suggested, particularly if COMI was located in the US, that a refusal to apply the approach of the English statute would be contrary to English public policy or some international law principle.

Roth J elected not to comment more widely on the relevance of the US having adopted the Model Law to the question of the availability of anti-suit injunctive relief generally to protect insolvency proceedings (for example, where COMI was located in a third jurisdiction: see [49]). It is, however, at least arguable that legislative intervention both in England and abroad aimed at

*6/. Roth J, in a postscript to his judgment, highlighted the following aspects of Judge Peck's subsequent decision in the US Court, which perhaps further explain his reluctance to grant relief:*

> *"52 It is perhaps material to the position of Barclays in seeking to pursue the NY Proceedings that Judge Peck noted in his judgment:*
> *"… Mr. Kemsley is a bankrupt who does not live like one. Since leaving his debts behind and coming to the United States, his financial difficulties have not diminished his high standard of living. He earns personal income from certain business activities (he has worked for Planet Hollywood and currently represents the iconic Brazilian soccer star Pele through a marketing business with offices in New York known as Legends 10) and rather conveniently also has ready access to abundant free cash (principally in the form of loans or gifts from generous friends) enabling him to live very well."*
> *53 Further, although he made clear that there was no suggestion that Mr Fry was not acting in good faith, Judge Peck observed:*
> *"…it should be noted that [Mr Kemsley], with the aid of surrogates, has been providing indirect financial support to Mr. Fry to cover the trustee's legal expenses in pursuing recognition under chapter 15…. This financial support may indicate that the trustee's petition for recognition is an aspect of a coordinated trans-Atlantic litigation strategy orchestrated by Mr. Kemsley and his advisers to shield [Mr Kemsley's] assets from enforcement actions by Barclays (notably his Florida real estate)….*
> *And noting that the granting of the Trustee's application for recognition would benefit Mr Kemsley by stopping the NY Proceedings brought by Barclays, he added:*
> *"The working arrangement between the trustee and Mr Kemsley is an unlikely one. These are parties who would ordinarily be opposed to each other with respect to claims to recover [Mr Kemsley's] assets located in the United States for the benefit of UK-based creditors. [Mr Kemsley] and the trustee have formed what amounts to a joint venture – with funding from sources loyal to [Mr Kemsley] – to achieve a result that is adverse to the interests of one of its major creditors."*

implementing the Model Law renders reliance on the anti-suit jurisdiction even more inappropriate in the vast majority of cases. If the foreign jurisdiction has set out a process for recognition of foreign insolvency proceedings, which parallels that implemented in England, such a process should be the primary method of regulating litigation commenced before the foreign court. If the officeholder cannot obtain recognition and a stay before the foreign court under legislation which implements the Model Law, which is patently a question for the foreign court, it is increasingly difficult (absent extreme urgency) to envisage circumstances in which the comity principle ought ever to be outweighed by the wrongful conduct of a creditor in a particular case.

## A US View on Anti-Suit Injunctions

In contrast with the UK approach, the automatic stay imposed in plenary proceedings under the US Bankruptcy Code is expressed as having extraterritorial reach. The bankruptcy estate created under the US Bankruptcy Code includes all of the legal and equitable interests of the debtor, wherever located, held as of the filing date. The automatic stay protects the debtor's property by staying any action aimed at obtaining the property of the estate, and US bankruptcy courts have *in rem* jurisdiction extraterritorially – but only by way of *in personam* jurisdiction over entities violating the automatic stay.

Generally, US courts agree that they have ample authority and jurisdiction to issue an anti-suit injunction against parties pursuing litigation in a separate forum, but disagree on the circumstances under which such injunctions are appropriate. Under the 'conservative approach',[7] the court will issue an anti-suit injunction if it is demonstrated that '(1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity'[8] While comity appears to be at the centre of the conservative approach, the minority 'liberal approach'[9] seems to place a more modest emphasis on comity. Under the latter approach, an injunction is based on equitable factors, such as vexatiousness and oppressiveness of the foreign proceeding. None of the factors are mandatory, but the injunction should not threaten international relations.[10]

The US bankruptcy courts' power to issue an injunction with extraterritorial effect is based on the US Bankruptcy Code, which provides that a court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the US Bankruptcy Code.[11] At least one court held that based on this independent authority, the anti-suit injunction threshold required under the conservative approach (as applicable in that matter) was irrelevant due to the exclusive jurisdiction of the US bankruptcy courts.[12]

Notably, Chapter 15 is different than plenary cases under the US Bankruptcy Code in that the proceeding is ancillary in nature, the definition of 'debtor' is limited and specialised, and recognition does not create an estate under the Bankruptcy Code. Accordingly, and in view of international aspects of Chapter 15, the automatic stay does not afford broad anti-suit injunctive relief to a Chapter 15 debtor and applies outside the US only to the extent that such actions affect property of the debtor that is within the territorial jurisdiction of the US. [13]

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## III. Kemsley: The US Proceedings

In *Kemsley*,[14] the United States Bankruptcy Court for the Southern District of New York ruled on its first contested petition for recognition of a foreign proceeding for an individual debtor. Whilst recognising that the many personal moves of the individual in the past years made the decision a difficult one, the US Court concluded the English Proceeding could not be recognized as either main or non-main because the UK was neither the debtor's COMI nor a place of establishment, and, accordingly, the requirements for recognition were not met. Notably, as discussed below, the decision adopted an approach to the timing of determination of COMI that was rejected by a higher court shortly thereafter, but the decision is nevertheless relevant for its discussion

*7/. This approach is followed by the First, Second, Third, Sixth, Eighth, and D.C. Circuits.*
*8/. See Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 359 (8th Cir. 2007); see also Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004); Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 161 (3d Cir. 2001); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35-37 (2d Cir. 1987).*
*9/. This approach is followed by the Fifth, Seventh, and Ninth Circuits.*
*10/. See Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996).*
*11/. U.S.C. § 105(a).*
*12/. Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC, 474 B.R. 76, 86 (S.D.N.Y. 2012) (internal citations omitted).*
*13/. In re JSC BTA Bank, 434 B.R. 334, 337 (Bankr. S.D.N.Y. 2010).*
*14/. In re Kemsley, 489 B.R. 346 (Bankr. S.D.N.Y. 2013).*

## ‘Habitual residence includes an element of permanence and stability and is comparable to domicile’

of an individual’s COMI.

In *Kemsley*, the Foreign Representative sought an order recognising the English Proceeding as foreign main or non-main proceeding,[15] based on the premise that Kemsley’s COMI or at least establishment was in the UK because (i) he never intended to live indefinitely in the USA and, thus, his COMI did not move with him when he became a resident of the USA; and (ii) his COMI remained in the UK where the English Proceeding was administered, where his children were, and where he had ongoing personal and business interest. Among other things, the Foreign Representative claimed that the ability to use a spare office in London during business trips and his secondary employment with a UK company should prove an establishment, and, accordingly, allow recognition of the English Proceeding at least as foreign non-main proceeding. Barclays objected to the recognition, stating that Kemsley did not meet the statutory requirements for recognition because his residence was in the US, where he had continuously resided for three and a half years, and the UK was neither his COMI nor establishment.

The circumstances of the Chapter 15 filing presented a rather unusual set of facts. In contrast with many other Chapter 15 cases, in which the foreign debtors sought protection against creditors to prevent them from obtaining an unfair privilege and bypass the foreign insolvency proceeding and its creditors by seizing the debtors’ assets in the US, Barclays was willing to cooperate with the UK trustees for the benefit of all creditors with valid claims in the UK and ratably to share any net recoveries realised in Barclays’ lawsuits against Kemsley in the US. The motivation for Barclays’ actions can be seen from the passage of the judgment cited at footnote 5 above. Nevertheless, the Foreign Representative failed to reach an agreement with Barclays and, instead, formed an unusual coalition with the debtor - Kemsley, who was also providing indirect financial support to the Foreign Representative to cover his expenses related to the Chapter 15 petition. The US Court noted that these facts may indicate that the Chapter 15 petition was ‘an aspect of a coordinated trans-Atlantic strategy orchestrated by Mr. Kemsley and his advisers to shield [his] assets from enforcement actions by Barclays’.[16] Even though such enforcement actions could have benefitted all creditors in the English Proceeding (based on Barclays’ assurances) and the Foreign Representative’s actions raised potential conflict issues, these facts were ultimately not directly related to whether the English Proceeding could be recognised under Chapter 15 – or, in other words, where Kemsley’s COMI or establishment was located.

In the case of an individual, the habitual residence is presumed to be the debtor’s COMI in the absence of evidence to the contrary.[17] Habitual residence is not defined, but has been interpreted as the place where an individual resides with the intention of remaining for an indefinite period of time.[18] Judge Peck noted that ‘*habitual residence includes an element of permanence and stability and is comparable to domicile; it connotes a meaningful connection to a jurisdiction, a home base where an individual lives, raises a family, works and has ties to the community*’.[19]

Kemsley’s moves from the UK to the US and then within the US required an analysis of not only the place where an individual lives, but the ongoing personal intentions to stay in a certain location for the foreseeable future until a significant change occurs – including one involving the person’s family members.[20] Struggling with Kemsley’s ‘unsettled’[21] life, the US Court found two possible conclusions: (i) that Kemsley may have lived in the US without the intention of establishing a habitual residence; and (ii) any of Kemsley’s residences in the US became habitual the moment he decided to stay there indefinitely. Any determination based on these premises would be highly subjective, but the US Court relied on a constant theme in Kemsley’s testimony: the central role of Kemsley’s children and his interest to reside with them. Accordingly, the US Court recognised Kemsley’s COMI shifted when he sold his house in the UK and moved to the US with his family in 2009. Next, the US Court found Kemsley’s children’s move to the UK to be a significant change that affected any commitment Kemsley may have had to remaining in the US indefinitely.

Having established two significant points in time, the US Court considered the relevant time to determine a foreign debtor’s COMI and sided with a line of cases ruling that the date of commencement of a foreign proceeding

*15/. The key difference among the two is that in a foreign main proceeding, certain relief (including the automatic stay) is granted automatically. Relief that is available automatically upon recognition of a main proceeding under Bankruptcy Code section 1520 may be granted at the discretion of the court in a nonmain proceeding if the requirements of Bankruptcy Code sections 1521 or 1507, as applicable, are satisfied.*
*16/. In re Kemsley, 489 B.R. at 351-352.*
*17/. 11 U.S.C. § 1516(c).*
*18/. In re Ran, 607 F.3d 1017, 1022 (5th Cir. 2010).*
*19/. In re Kemsley, 489 B.R. at 353.*
*20/. Id. at 353.*
*21/. Id. at 355.*

is the proper date to determine the foreign debtor's COMI. Kemsley's English Proceeding commenced in 2012, when Kemsley had been residing in the US with his children for over two years. Therefore, the US Court found that Kemsley's COMI at the relevant time was in the US, and not in the UK, and the English Proceeding did not meet requirements for recognition as foreign main proceeding.

The requirements for foreign non-main proceeding were also not met. The US Court found the evidence supporting Kemsley's establishment in the UK inconclusive and insufficient. Specifically, his secondary employment with a UK company, owned and operated by Kemsley's close friend, was based solely on an 'informal arrangement between friends',[22] and any money received was rather an advance than compensation for actual work. In addition, the office space Kemsley purportedly had available during his trips to London was not assigned to him based on a regular schedule, and the US Court found that insufficient to establish that he used it to carry out non-transitory economic activity.[23]

It is notable that the decision in Kemsley was decided before the ruling, on 16 April 2013, of the United States Court of Appeals for the Second Circuit (its decisions are binding for the US Court) in *Fairfield Sentry*. That ruling resolved a split among decisions and concluded that, for the purposes of recognition under Chapter 15, the time of filing of the Chapter 15 petition is the relevant time for COMI consideration.[24] Judge Peck had noted in *Kemsley* that the approach adopted and result might have been different if COMI were tested as of the filing date of the Chapter 15 petition, when Kemsley was living in New York, separated from his children, and testified that he wanted to relocate to London to be closer to his children.

PAUL KEMSLEY: 'A BANKRUPT WHO DOESN'T LIVE LIKE ONE,' ACCORDING TO JUDGE PECK.

## An English view on the recognition proceedings

Testing COMI (as Judge Peck did) as the time of the opening of the foreign proceedings is a familiar approach to English advisors: in England, both for the purpose of the provisions implementing the Model Law, and the EC Regulation on Insolvency Proceedings, the Courts have concluded (or proceeded on the basis) that COMI is tested at the time that the foreign proceedings are '*opened*': see *Re Stamford* [2011] Ch 33 at [30]. This is the case, even though it has been noted that the purpose of the two sets of regulations differ (the former dealing with procedural rules of recognition, the latter substantive rules of jurisdiction) such that the approach to timing could differ[25].

The US Court of Appeals decision in *Fairfield Sentry* has generally been welcomed in the common law world of off-shore insolvency as providing a sensible method for obtaining US recognition of insolvency proceedings commenced in the place of incorporation even if, prior to the liquidation, the place of incorporation could not be regarded as the location of the entity's COMI. But the application of the *Fairfield Sentry* approach to timing (i.e. assessing COMI at the point when the Chapter 15 application is made) is likely to give rise to further issues in the context of personal insolvency where the debtor will continue to run his post-bankruptcy affairs separate from (and potentially in a different location from) the administration of the bankruptcy estate. For example, if an English bankruptcy is opened when the debtor's COMI is clearly in England, it would be strange if the fact that the bankrupt has then moved to Australia to start a new life would impact on the ability of the trustee to obtain Chapter 15 recognition. The simple answer may be that, as in *Fairfield Sentry*, the focus of the analysis will take into account all factors including the COMI of the estate and administration thereof, which may outweigh (in the context of personal insolvency) the post-bankruptcy conduct of the bankrupt.

*22/. Id. at 363.*
*23/. A 'foreign nonmain proceeding' is a foreign proceeding, other than a foreign main proceeding, pending in the country where the debtor has an establishment, which is any place of operations where the debtor carries out a nontransitory economic activity. See 11 U.S.C. §§ 1502(2), 1502(5), 1517(b)(2).*
*24/. Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127 (3d Cir. 2013).*
*25/. See Moss, "The Chapter 15 timing issue – the mist has cleared" [2013] Insol. Int 122.*

# Refusing to mediate: *pour encourager les autres*

**Toby Brown**, a CEDR-accredited mediator, discusses the Court of Appeal's recent decision in PGF II SA v OMFS Company 1 Ltd and the backdrop of increasingly strong support from the judiciary and from major businesses for the use of alternative dispute resolution.

The Court of Appeal has sent out a robust message that civil litigants must engage with a serious invitation to participate in ADR and a failure to do so even where there are reasons to refuse ADR (alternative dispute resolution) may lead to a costs sanction so strong it displaces the normal costs consequences of Part 36 of the CPR. So was held in an unanimous judgment handed down by Lord Justice Briggs in *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288. As we will see, the decision fits into an increasing desire of both the courts and businesses to increase the use of mediation to resolve disputes and so reduce the cost of litigating.

### The Catalyst

To understand the decision it is necessary to see the case in the context of the gradual warming over the last two decades of the English and Welsh judiciary towards ADR. Lord Woolf's final report on Access to Justice in 1996 is acknowledged by many to have been a catalyst for the development of ADR in this jurisdiction. One of his important messages was the need for courts to encourage greater use of ADR, both to resolve disputes before issue of proceedings and to promote settlement as early as possible post-issue. The CPR accordingly introduced the overriding objective obliging courts to deal with cases justly (and now at proportionate cost) by actively managing cases including by "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure" (rule 1.4(2)(e)).

Following the introduction of the CPR, there was early support for ADR from the Court of Appeal in *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 WLR 2434. Another sign of judicial support was the development of court-based mediation schemes around England and Wales, following the example led by the Central London County Court in 1996, albeit the schemes were previously described by Lord Justice Dyson, now Master of the Rolls, as operating with varying degrees of success. The virtues of mediation also became recognised in the specialist court guides, with the Admiralty and Commercial Court Guide containing an entire chapter on ADR and appending the draft "ADR order" which Commercial Court judges now routinely make.

### Halsey: The First Guidelines

It was not until 2004 that the Court of Appeal addressed as a matter of principle the extent to which it was appropriate for courts to use their powers to encourage parties to civil litigation to settle their disputes otherwise than by trial. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002 Dyson LJ handed down the following guidelines:

- The court should not compel parties to mediate even were it within its power to do so. This would risk contravening article 6 of the European Convention on Human Rights, and would conflict with a perception that the voluntary nature of most ADR procedures is a key to their effectiveness.
- Nonetheless the court may need to encourage the parties to embark upon ADR in appropriate cases, and that encouragement may be robust.
- The court's power to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes power to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to

ADR.

- For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of ADR.

The Court of Appeal also adopted a non-exhaustive list of factors likely to be relevant to the question of whether a party had unreasonably refused ADR:

- The nature of the dispute.
- The merits of the case.
- The extent to which other settlement methods have been attempted.
- Whether the costs of the ADR would be disproportionately high.
- Whether any delay in setting up and attending the ADR would have been prejudicial.
- Whether the ADR had any reasonable prospect of success.

### The Jackson Review

Fast forward to the Jackson review on civil litigation costs of 2010 in which Lord Justice Jackson (having shifted from some of his preliminary views about ADR expressed in 2009) extolled the potential benefits of mediation and concluded these were still "not fully appreciated" including by some judges, solicitors and counsel. Whilst adopting the Law Society's submission that mediation is not a universal panacea (to which one might add, nor are the courts) he suggested mediation had "a significantly greater role to play in the civil justice than is currently recognised". A "culture change" was accordingly needed.

In addition to recommending the production of an ADR handbook (which he hoped perhaps ambitiously that most judges and litigators would have on their bookshelves), he emphasised that courts must encourage in "appropriate cases" parties to mediate, including by directing the parties to meet or discuss mediation and requiring an explanation if a party declines mediation, with possible penalties in costs for those parties which unreasonably refuse to mediate. These specific suggestions for judicial intervention align with Jackson LJ's overall emphasis on the need for more robust case management to make the costs of litigation more proportionate.

### PGF II SA

This leads us onto *PGF II SA v OMFS Company 1 Ltd* which concerned a dilapidation claim for just over £1.9 million by the claimant landlord PGF under a commercial lease held by the defendant tenant OMFS. In April 2011, shortly after standard directions for expert evidence and disclosure had been made, the claimant made a second Part 36 offer that they would accept £1.25 million. At the same time they proposed mediation, suggesting possible mediators together with a timetable that would enable the defendant to review disclosure and for an exchange of information to occur between their experts, and asked for reasons if this was not agreed. Briggs LJ would later describe this as "overall, a thorough, carefully thought through and apparently sensible mediation proposal". For its part, the defendant sent the claimant a Part 36 offer of £700,000, but at no point gave a response to the invitation to mediate notwithstanding further invitations and chasing by the claimant.

On 10 January 2012, the day before the trial, the defendant indicated they would seek permission to amend their case so they could argue the air-conditioning system did not form part of the demise and therefore the £250,000 claimed by way of dilapidations for it was irrecoverable. The claimant reacted later that day by accepting the defendant's £700,000 offer (which had not been withdrawn), thereby settling the proceedings save in respect to costs. The normal consequence under Part 36 would be that the claimant would be entitled to their costs until the expiry of the date for acceptance (here 2 May 2011), but they would be obliged to pay the

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defendant's costs for the relevant period thereafter. The hearing on costs took place before Mr Recorder Furst QC sitting as a Deputy High Court Judge who, applying the Halsey guidelines, ordered that the defendant should be deprived of any costs for the relevant period from 2 May 2011 because they had unreasonably refused to mediate. Permission to appeal was given by Lord Justice Gross on the grounds that the application of *Halsey* might be of potentially wide importance.

In giving the judgment of the Court of Appeal on 23 October 2013, Briggs LJ commented that in the near decade since the *Halsey* decision "much has occurred to underline and confirm the wisdom" that many civil disputes are suitable for mediation. Against the backdrop of Jackson LJ's focus on proportionality and the constraints on public finding, an ever-increasing focus was needed to ensure that court time is proportionately directed

**Much has occurred to underline and confirm the wisdom that many civil disputes are suitable for mediation**

to those disputes that really need it "with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR, wherever that offers a reasonable prospect of producing a just settlement at proportionate cost". He therefore stated that just as a court trying a case which could have been justly settled risked wasting a court's resources, "so it is a waste of its resources to have to manage the parties towards ADR by robust encouragement, where they could and should have engaged with each other in considering its suitability, without the need for the court's active intervention".

The claimant argued that silence to a response to an invitation to participate in ADR was itself unreasonable for the purpose of the *Halsey* guidelines, regardless of whether it amounted to a refusal to ADR or whether there were reasonable grounds to refuse. It should be noted this was a novel argument based on no direct authority. Reliance was however placed on the *Jackson ADR Handbook* published in April 2013 in response to the Jackson report. At chapter 11.56 the Handbook advises on the steps the authors suggest should be considered by a party receiving a request to engage in ADR in order to avoid a costs sanction, in particular the following:

- Not ignoring an offer to engage in ADR.
- Responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based if possible on the *Halsey* guidelines.
- Raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome.
- Not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing.

Whilst one might query whether a new textbook should be the main authority for a Court of Appeal decision, the Handbook does have the highest level of endorsement imaginable. It was overseen by an expert advisory board jointly chaired by President of the Supreme Court Lord Neuberger and by former Master of the Rolls Lord Clarke, its foreword was written by Dyson LJ, and the text was endorsed by Jackson LJ, the Judicial College, the Civil Justice Council, and the Civil Mediation Council. Against this backdrop, the key conclusion of Briggs LJ should be read in full:

"…the time has now come for this court firmly to endorse the advice given in Ch.11.56 of the *ADR Handbook*, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good."

Briggs LJ described this as a modest extension of the Halsey principles (which were not in dispute on appeal) that was justified on a number of grounds. The first was a practical one, that investigating for the first time the alleged reasons for refusal to participate in ADR raises forensic difficulties for a court and an inviting party, as exemplified by the present case. The Court rejected the argument that the question of the reasonableness of a party's conduct is not decided purely objectively, since a party's own perceptions may play an important part in that analysis. Secondly (one might suggest more importantly), a failure to provide reasons for a refusal he suggested "is destructive of the real objective of the encouragement to parties to consider and discuss ADR, in short to engage with the ADR process". There are many types of reasonable objection to a particular ADR proposal which once raised are capable of being addressed, for example if mediation costs are a barrier the inviting party may be content to bear all of the mediator's fees.

**Silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable**

In respect to policy reasons, Briggs LJ stated that his conclusion served the need for proportionality, because a positive engagement with an invitation to ADR could lead to a number of alternative directions which may save the resources of the parties and the court. An invitation may simply be accepted and lead to a settlement thus saving trial costs, or might succeed only in part but still narrow the issues. Alternatively, after the discussion the parties might choose a different form of ADR or at another time.

Briggs LJ agreed with the Recorder's decision that the defendant's silence to the claimant's invitations to mediate amounted to a refusal, and that it was perverse to conclude otherwise. One of the factors set out in *Halsey* in determining whether the refusal to mediate was unreasonable was whether there was a reasonable prospect that a mediation would have been successful. The defendant argued that given the distance of some £550,000 between the parties' Part 36 offers, mediation stood no reasonable prospect of success and that the case was a "hard-nosed commercial dispute about money between parties with no continuing relationship" and was therefore not susceptible to a mediator's ability to devise solutions beyond that of a court to order.

Showing a clear understanding of how mediation can resolve even "unsettleable" commercial disputes, Briggs LJ rejected these submissions. He considered that the dispute was "eminently suited to mediation" in particular because it involved complicated matters of detail likely to cost a disproportionate amount to litigate to trial, together with attribution upon management time. It was with no small irony that the dispute did in fact settle before trial, although the defendant argued this was simply down to the claimant having a defect in their case which neither party had noticed, submitting that a fresh mind (presumably their counsel) was needed spot it. This was an unfortunate submission leapt on by the Court, since a fresh mind is exactly one of the skills that mediators bring to the table.

Notwithstanding the direction of travel of the judgment, the Court of Appeal stopped short of suggesting that refusal to accept an invitation to ADR or to even discuss ADR would produce any automatic costs penalty. Rather it was one aspect of a party's conduct to be assessed in making a decision on costs and the proper response in any particular case could range from disallowing part through to all of an otherwise successful party's costs. The Court dismissed the claimant's cross-appeal which argued that the Recorder did not got far enough and should have ordered that the defendant also pay the claimant's costs for the period after expiry for acceptance of the Part 36 offer. Briggs LJ held that the court could in principle have such a power but it was so "draconian [it] should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court had taken it upon itself to encourage the parties to do so, and its encouragement had been ignored". Although Briggs LJ would personally only have reduced a proportion of the defendant's costs for the relevant period, the Recorder's decision to disallow the whole of their was within the range of proper responses for what he described as "seriously unreasonable conduct".

**The Court stopped short of suggesting that refusal to accept or discuss an invitation to ADR would produce any automatic costs penalty**

### The Commercial View

Just 3 weeks after the decision was handed down, a clear indication was given of the prevailing view of commercial mediation from the business world, and one might therefore infer of the Court of Appeal's decision in PGF II SA. On 12 November 2013, the *21st Century ADR Pledge* was formally launched in the UK in which some of the country's biggest companies committed to the use of ADR, including Tesco, Marks & Spencer and TNT:Post, joining those already committed to the Pledge amongst which are BP, Shell, GlaxoSmithKline, Virgin Media, Microsoft and IBM. Of interest perhaps to all litigation lawyers, the Pledge states that:

"Our company believes the costs, delay and damage to relationships resulting from adversarial litigation practices have risen to levels that are unsustainable in the present day global business arena. Alternative dispute resolution (ADR) practices developed over the last 30 years have encouraged more cost-effective and collaborative solutions.

….We believe that outside counsel can be an integral part of our dispute management team and law firms schooled in ADR can better serve our legal needs…."

Of this group Shell is an interesting example because at any given time they potentially have litigation disputes in 90 jurisdictions, and they recently increased their in-house legal team to around 80 lawyers out of a global legal team of about 750. In December 2013 it was reported in *The TImes* that their litigation team have now been trained to use mediation because Shell is on record for seeing mediation as a critical component of resolving their commercial disputes. This is because not only do Shell see litigation as costly and time-consuming, but they view mediation as getting the best business outcome, whilst also maintaining business relationships and reputations. Similarly, GE Oil & Gas has opted to pursue mediation as its first resort for resolving disputes, and it was reported that following this decision the amount of litigation has reduced by over 75%. Research conducted by the Centre for Effective Dispute Resolution in 2012 suggested companies were right to hold such views, with the data reporting success rates for settlement in mediation of 70%, with an additional 20% settling shortly after the mediation.

### Concluding Words

Briggs LJ concluded his judgment by saying that the decision sent out an important message which should not be blunted that litigants must engage with a serious invitation to participate in ADR even if they have reasons which might justify a refusal or justify delaying the ADR or undertaking it in a different form. The need for courts to encourage the more proportionate conduct of civil litigation he said made it appropriate to emphasis that message by a sanction which "operates *pour encourager les autres".* His concluding words are not however as memorable as Lord Justice Ward's use of Shakespeare in *McMillan Williams v Range* [2004] EWCA Civ 294 when he refused to give either party (both solicitors) costs of the appeal because of their conduct in particular in failing to conduct a planned mediation following a recommendation for ADR by the Court, summing up his castigation as "a plague on both your houses". The encouragement from the judiciary as to the benefits of ADR is clear, but so now is their warning in respect to costs.

# Chambers & Partners 2014

As we reported in the November 2013 Digest, at the Chambers and Partners Bar Awards in October last year South Square's Barry Isaacs QC was awarded Insolvency/Corporate Reconstruction Silk of the Year. Junior of the Year in the same category was awarded to Lloyd Tamlyn. That same month, the 2014 edition of the Chambers Guide to the UK Bar was released, which highlighted South Square's depth of expertise across a diverse range of practice areas. We are delighted that, once again, clients also praise our clerking team, who are 'second to none – they are incredibly efficient'. We bring you some highlights from the guide to the UK Bar 2014 below.


ROBIN DICKER QC


STEPHEN ROBINS


TOM SMITH

## Banking and Finance

South Square is noted for its ability to deal with the steady flow of Banking and Finance litigation which stems from the global financial crisis. In addition to advising banks, hedge funds and private equity groups, members also advise bodies such as the Bank of England, the FCA and PRA and HM Treasury. Recent cases in which members of South Square have been involved include MF Global, Lehman Brothers, Harbinger Capital Partners in the Court of Appeal, and Digital Satellite Warranty Cover Ltd in the Supreme Court.

The following Members are ranked as leading practitioners:

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**Robin Dicker QC**
**Antony Zacaroli QC**
**Jeremy Goldring QC**
**Ben Valentin**
**David Allison**
**Daniel Bayfield**
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The guide remarks on the impressive breadth of expertise offered by South Square, and the strong commercial emphasis of our Members' work which attracts briefs on the most high-profile and substantial cases. Our barristers regularly appear in the Commercial Court, the Chancery Division and in other English and overseas courts.

The following Members are individually ranked in the list of leading practitioners:

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**Mark Phillips QC**
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**Felicity Toube QC**
**Jeremy Goldring QC**
**David Allison**
**Daniel Bayfield**
**Tom Smith**
**Richard Fisher**


GABRIEL MOSS QC


DAVID ALLISON


FELICITY TOUBE QC

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South Square has a strong presence in the field of commercial dispute resolution. Members have appeared in recent significant cases, including Northern Rock , Henderson PFI Secondary Fund II and Standard Chartered Bank.

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**Ben Valentin**
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JEREMY GOLDRING QC

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Members advise on a wide range of matters including schemes of arrangement, reductions of capital, shareholders' agreements, joint venture agreements, directors' duties and technical issues of statutory interpretation arising under the Companies Act 2006. Recent matters of note include Re Rodenstock, Re PrimaCom and *Smithson Ltd v Naggar*.

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South Square has a strong presence in all aspects of banking and finance work, with a particular specialisation in large scale financial disputes, derivatives and structured finance products. Our leading restructuring practice gives South Square a unique position from which to deal with credit crunch litigation and advisory work.

Recommended as leading practitioners in this issue of the guide are:

**Antony Zacaroli**
**Glen Davis**
**David Allison**
**Joanna Perkins**


GLEN DAVIS QC


JOANNA PERKINS


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BEN VALENTIN


MICHAEL CRYSTAL QC


.RICHARD HACKER QC

## Fraud

South Square's pre-eminence in the fields of both insolvency and banking inevitably leads to a significant number of instructions in cases involving civil fraud issues, with much of the work having an international dimension. Examples of recent or current instructions include substantial fraud-related litigation in various jurisdictions concerning Bernard Madoff, the Saad Group, Weavering, BTA Bank, Snoras Bank, and Banco Portugues de Negocios (BPN), as well as asset recovery issues relating to HRH Prince Jefri Bolkia.

**Ben Valentin** is recommended as a leading Junior.

## International Arbitration

The wide spread of commercial matters which Members of South Square undertake enable them to act in arbitrations spanning a range of sectors. Members and Associate Members have extensive experience as both advocates and arbitrators and conduct international commercial arbitrations under the Rules of the ICC, LCIA, UNCITRAL, ICSID, LMAA and SIAC amongst others. Several members are also accredited mediators.

**Ben Valentin** is recommended as a leading Junior for International Arbitration.

## Offshore

Members of South Square regularly appear the courts at all levels of the Bahamas, Bermuda, the British Virgin Islands, Brunei Darussalam, the Cayman Islands, Dubai, Gibraltar, Hong Kong and the Isle of Man. Work encompasses all aspects of business, commercial and financial law. Recent matters of note include Madoff, Saad Group and Sphinx. Chambers also specialises in claims in relation to offshore trusts, such as the Thyssen litigation in Bermuda, and the Tchenguiz litigation in Guernsey.

Ranked as leading practitioners in this issue are:

**Michael Crystal QC**
**Gabriel Moss QC**
**Richard Hacker QC**
**Robin Dicker QC**

## Restructuring and Insolvency

We are delighted that our clients are enthusiastic about the work we undertake both at silk and junior level in this field, with Guide sources noting that the set has a 'phenomenal offering'; and 'incredible members at the top of their game'. Our Members continue to be involved in almost every major insolvency, including Administrators of Heritable Bank plc v Winding-up Board of Landsbanki Islands HF, BNY Corporate Trustee v Eurosail, and Re Nortel GmbH, all in the Supreme Court.

**The following members are ranked as leading practitioners:**
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**Gabriel Moss QC**
**Simon Mortimore QC**
**Richard Sheldon QC**
**Robin Knowles CBE QC**
**Mark Phillips QC**
**Robin Dicker QC**
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**Martin Pascoe QC**
**David Alexander QC**
**Antony Zacaroli QC**
**Glen Davis QC**
**Barry Isaacs QC**
**Felicity Toube QC**
**Mark Arnold QC**
**Jeremy Goldring QC**
**Lucy Frazer QC**
**John Briggs**
**Adam Goodison**
**Hilary Stonefrost**
**Lloyd Tamlyn**
**David Allison**
**Daniel Bayfield**
**Tom Smith**
**Richard Fisher**
**Stephen Robins**
**Marcus Haywood**
**Adam Al-Attar**
**Hannah Thornley**


LUCY FRAZER QC


RICHARD SHELDON QC


MARTIN PASCOE QC


MARK PHILLIPS QC

## Sports Law

Recommended as a leading Silk is **Mark Phillips QC**, who handles high-profile Formula 1 cases (advising and representing Formula 1 teams and drivers in connection with competition law issues) and heavyweight football disputes. He regularly leads recommended junior **Daniel Bayfield**, who acts for the FA Premier League and the Football League.


DANIEL BAYFIELD


MARK ARNOLD QC

# Proposed new insolvency rules

**John Briggs** reports on Insolvency Service Consultation on proposals to modernise and simplify the Insolvency Rules

The Insolvency Service announced their proposals to modernise the existing Insolvency Rules in a Consultation Document published on 26 September 2013.

The Consultation includes at Annex 1, a working draft of the new Rules ("the new draft Rules") on which comments are invited by 24 January 2014.

The Executive Summary of the Consultation states that the Insolvency Rules 1986 have been extensively amended by 23 statutory instruments since 1986 in order to reflect changes in primary legislation, case law and policy. Regular additions and deletions of text at different times had resulted in legislation which has been criticised in the House of Lords as an "impenetrable thicket".

However, rather than simply consolidating the 1986 Rules, the Insolvency Service had been working to modernise and recast the 1986 Rules; taking the opportunity to reorder the whole structure on more logical and clear lines, the intention being to deliver a better product to end-users and following feedback from users who want a more streamlined structure, free of archaic language.

It is stated that the new draft Rules anticipate some of the policy changes from the Government-wide "Red Tape Challenge" proposals announced in July 2013 which were open for consultation until 10 October 2013. This Red Tape Challenge Consultation aims to reduce unnecessary regulation affecting insolvency practitioners (i.e. office-holders) ("IPs"), simplify the practice of insolvency and streamline the way IPs report on the conduct of directors.

The ambition is to make over £36m pounds-worth of savings per annum through the implementation of this Red Tape Challenge. The Red Tape Challenge comprises three main parts, namely first, proposals to remove the requirement for IPs to maintain a separate case record, allow earlier destruction of books and papers, remove the requirement to seek sanction for certain actions in liquidation and bankruptcy, and remove the requirement to time records where remuneration is not on a time-cost basis. Secondly, changes to the law governing insolvency processes, namely obviate the need for meetings of creditors where necessary, and abolish final meetings in liquidations and bankruptcies, reduce communication and creditor engagement through a reduction in unnecessary contact, and the ability to opt-out of further correspondence and increased use of websites in insolvency proceedings and improving insolvency

## Absence of Statutory Forms in new draft Rules will lead to inconvenience and uncertainty

processes for example through extending fraudulent and wrongful trading remedies to administrations, payment of dividends by transfer rather than cheque, streamlining procedures in uncontested winding up and bankruptcy proceedings. Thirdly, streamline how IPs report directors' misconduct reducing the administrative burden.

Some of these proposed changes require changes to primary and secondary legislation and, as stated in the Red Tape Challenge Consultation, will be taken forward when Parliamentary time allows.

However, insofar as possible, many of the proposals put forward in the earlier Consultation have found their way into the new draft Rules. Incorporated in the new draft Rules are also the new provisions for "Bankruptcy Applications: Determination by Adjudicators" in s.71 and Sch. 18 of the Enterprise and Regulatory Reform Act 2013 which will take the debtor petition process out of the court procedure, save for review of the adjudicator's decision on appeal to the court. Continuing the theme of reduction of cost, it is to be noted that s. 71 is one of the provisions in Part 5 of the 2013 Act headed "Reduction of Legislative Burdens".

The new draft Rules comprise 20 Parts and 8 Schedules only 5 of which have so far been drafted. In contrast, the 1986 Rules comprise 13 Parts and 5 Schedules, including Sch. 4 "Forms".

The expansion in the number of Parts in the new draft Rules is accounted for partly by the separation into separate parts of the treatment of MVL, CVL and winding up by the court, and partly by new Parts dealing with all insolvency procedures and covering the topics of Official Receivers, Claims by and Distribution to Creditors, Making Decisions: Correspondence and Meetings (Including Proxies and Corporate Representation), Creditors' Committees, Progress Reports and Remuneration, Persons at Risk of

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Violence and Non-Disclosure of Addresses, the EC Regulation and Permission to Act as Director, etc of a Company with a Prohibited Name (s.216).

The latter are Common Parts and so the provisions for these procedures are no longer located in the individual Parts, but in the appropriate "Common Part".

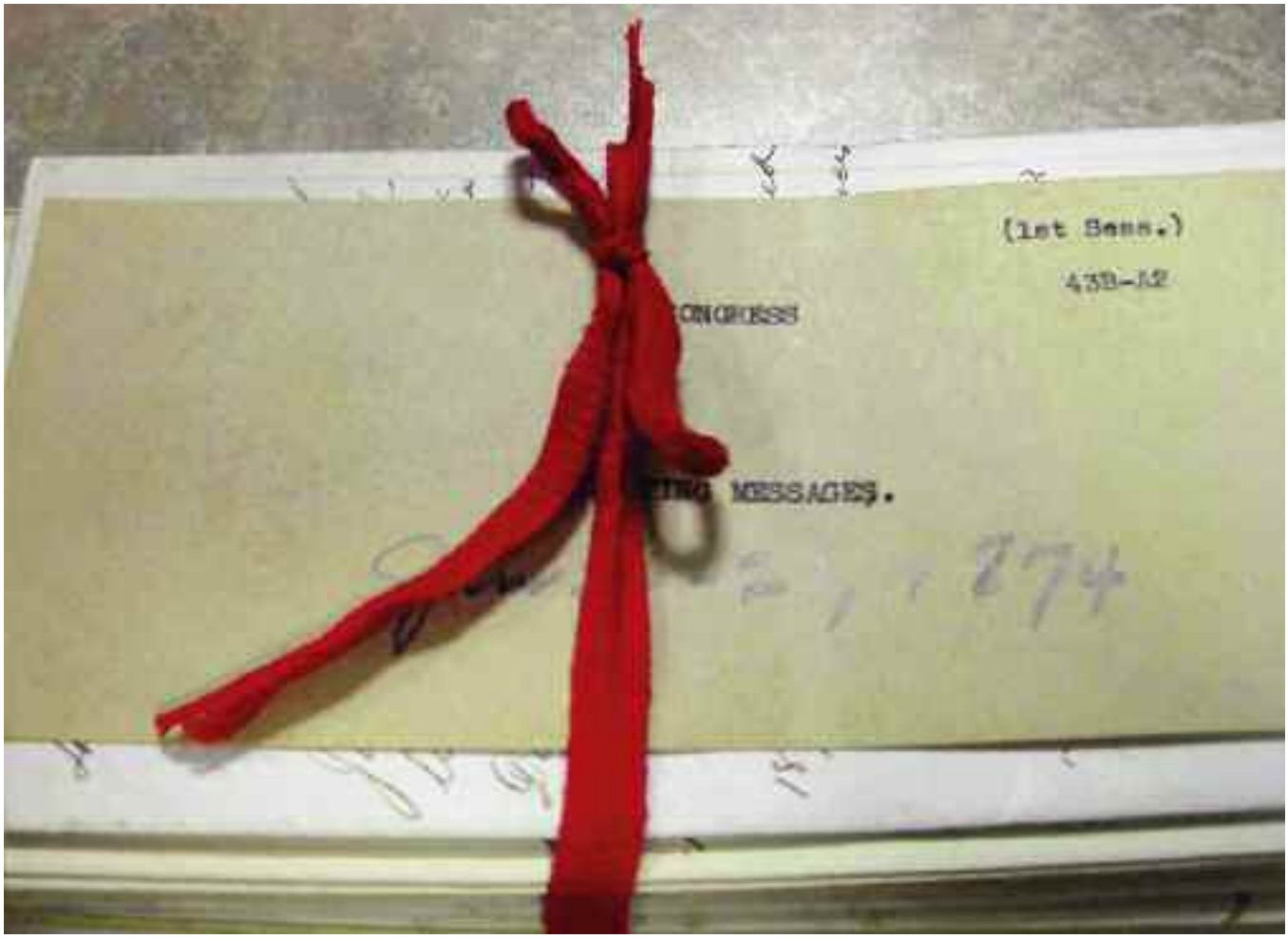
Apart from this feature of some Common Parts across all insolvency procedures, the most significant structural change in the new draft Rules is that the provisions covering MVL, CVL and winding up by the court are now written out in full in separate Parts to improve clarity and presentation of the provisions. It is explained that stakeholders find the 1986 Rules in Part 4 (Companies winding up) confusing since individual chapters, and even individual rules within chapters, are confusingly prefaced by "CVL or No CVL application".

This treatment has necessarily lengthened the new draft Rules as compared with the 1986 Rules, but in my view this is not a major concern; what is of more concern is that matters have been made worse not better by the new draft Rules setting out in detail the content requirements for all notices and court documents rather than relying to some extent on reference to a statutory form, as is currently the case.

For example, Part 1 headed "Interpretation, Time and Rules about Documents" contains elaborate provisions for the Form and content of documents (Chapter 2), Standard Contents of Gazette Notices (Chapter 3), Standard Contents of Notices Advertised otherwise in the Gazette, etc (Chapter 4), Standard Contents of Documents to be Delivered to the Registrar of Companies, etc (Chapter 5), Standard Contents of Notices for Delivery to Other Persons, etc (Chapter 6) and last but not least, in relation to Applications to the Court (Chapter 7), Standard contents and authentication of applications to the court.

In Part 10 (Bankruptcy), there are detailed provisions setting out the required contents for a statutory demand under s.268 (Rules 10.1 and 10.2), but no reference to a statutory form or forms as appropriate as under the 1986 Rules (r.6.1); nor is there even a statutory form for a creditor's petition, but merely a Rule setting out Contents of petition (Rule 10.8), Identification of debtor (Rule 10.9) and Identification of the debt (Rule 10.10). Compare r.6.6 of the 1986 Rules and statutory forms 6.7, 6.8, 6.9 and 6.10.

It is my opinion that the abolition of statutory forms would be a retrograde step since their introduction and evolution must have come about for reasons of convenience and certainty. It would be regrettable if proceedings were to be bedevilled by arguments over the valid form of notices, advertisements, demands, petitions and applications etc. This treatment is at variance with the proposed completion in electronic form of a "bankruptcy application" (currently known as a



RED TAPE CHALLENGE: IMPLEMENTATION WILL MAKE OVER £36M WORTH OF SAVINGS.

Debtor's petition), although the new draft Rules do again set out at length in Rule 10.38 and Sch. 5, the information to be provided in the bankruptcy application.

The absence of statutory forms may provide Publishers or other agencies with an opportunity to compile standard forms acceptable for all the various forms and documentation for which there will no longer be statutory forms. However, given the advent of the electronic age and electronic delivery of documents, the way forward must surely be web-forms which can be completed online and delivered online to the Companies Registrar, Court or parties or respondents. While not everyone likes a "tick box" approach, it does have advantages of simplification and certainty and obviates the need for "home-made" documentation which is liable to be defective or to be uncertain in meaning or even misleading.

The General Drafting Note that accompanies the Consultation Document explains that one of the aims is to consolidate the existing Rules and their amendments into a single set of rules and to the extent that the new Rules are consolidated and recast, they are not intended to change the law. Indeed, stakeholders are asked to comment on instances where they think the draftsman has unintentionally changed the law. However, within this context, the second approach is to modernise and simplify the language.

Some emphasis is made in the General Drafting Note on how this has been achieved. For instance the use of gender-neutral wording, e.g. "Chairman" now "Chair", and an active rather than passive drafting style, e.g. "the office-holder must deliver " instead of "a copy must be delivered by " In addition, reference to "shall" in the 1986 Rules has been replaced by "must" in the new draft Rules in accordance with modern drafting practice which uses "must" to indicate an obligation. The exception is in relation to the court where the wording has been changed from "shall" to "will" to be consistent with court rules.

On a read-through of the new draft Rules, I could discern little real change in language, save for "shall" becoming "must". Insofar as there have not been technical changes or amendments, the new draft Rules appear to replicate the 1986 Rules almost word for word.

One laudable change is that the new draft Rules use the single term "deliver"

in place of references in the 1986 Rules to "send", "notify", "give", etc. The General Drafting Note explains that they are working to use this single terminology throughout the Rules, regardless of the language in the Insolvency Act.

The Rules rely on an interpretive provision in new Rule 1.35 to provide that the different terms used in the Act are all covered by "deliver" in the Rules. However, it is also explained that the Rules make an important distinction between "delivery" and "service", with "service" being in accordance with Part 6 of the Civil Procedural Rules (CPR) and reserved for the most serious documents and applications, or where the Insolvency Act requires service.

On the topic of service, a change which I consider unsatisfactory is that while individual Parts, such as Winding up by the court and Bankruptcy are intended to be comprehensive, the rules regarding service of a creditor's petition in winding up and bankruptcy are not set out in those respective Parts (even though all other provisions are incorporated, for instance filing and verification of the petition) but are set out in the common Part 12 under Court Procedure and Practice.

As mentioned towards the beginning of this article, the Red Tape Challenge proposed a number of changes of minor, more technical matters. A number of these have been included in the new draft Rules (such as creditor consent to administrations being extended from 6 to 12 months). In my view, the most significant change, however, is the introduction in Part 15 (Making Decisions: Correspondence and Meetings (Including Proxies and Corporate Representation)) of common provisions for making decisions by correspondence for which some drafting has been done in the new draft Rules.

The thinking behind this is that the Government is considering whether there is a real need to have a meeting in all cases where meetings currently take

## Big technical changes: Dispensing with creditors' meetings and creditors' opting-out of receiving information.

place. The option remains for IPs to call a meeting where they think such a meeting is of value to the proceedings, but where the meeting is thought of no value, or likely to be simply a paper exercise, they will expect the office-holder not to call one. The Explanatory Note to Part 15 states that the exact balance between what appears in individual Parts of the new draft Rules for each individual proceeding, and what will appear in this Common Part for decision by correspondence has not yet been settled.

It is my opinion that there are certain types of meeting which must remain actual and for which the IP should not have the option of dispensing with the physical meeting in favour of other modern forms of communication. A pertinent example would be a meeting to approve an IVA or CVA. At present, the new draft Rules give the nominee the discretion whether to invite creditors to consider a proposal either by correspondence or by summoning a meeting of the creditors (Rule 8.21). In my view, this would be unacceptable and probably unworkable. There is confusion even now over multiple and sometimes conflicting proposals for modifications by creditors which it is sometimes difficult for the Chairman to resolve at or in relation to the approval meeting. Dealing with this aspect through a meeting held by correspondence would be probably impossible.

The new draft Rules are merely in draft, some aspects have not been considered and others are open for consideration. The new draft Rules are stated to be a "work in progress" which require significant further consideration and revision.

I have made a brief individual response to the Consultation and have asked to be involved in stakeholder events to discuss the new draft Rules. If any reader of this article would like to see my short Response, or would like me to see their Response, please email me at johnbriggs@southsquare.com.


THE INSOLVENCY SERVICE

EU/EEA LAW UPDATE

**Gabriel Moss QC (with assistance from one of Chambers' pupils, Robert Amey) looks at EU/EEA developments outside the UK**

# ECJ digs Iceland out of crater

In the August 2013 issue of the South Square Digest we reported that Advocate-General Villalon gave his opinion on the meaning of "reorganisation measures" and "winding up proceedings" within Article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions in the case of *Landsbanki v Kepler*.

The reference to the ECJ arose from the appeal to the Cour de Cassation from the decision of the Paris Court of Appeal, which held that a winding up proceeding commenced by statute rather than a court or administrative decision did not come within the Directive. This meant that the Icelandic law stay arising from the Landsbanki insolvency proceedings did not have to be honoured outside Iceland and a creditor could execute in France.

That Court of Appeal decision in France had been followed in England by Burton J in *Rawlinson & Hunter Trustees SA v Kaupthing Bank HF* [2011] EWHC 566 (Comm), which was in turn followed by Gloster J (as she then was) in *Lornamead Acquisitions Limited* [2011] CWHC 2611 (Comm). The Advocate-General had taken the view that a winding up proceeding opened by a legislative act could still be within the Directive as long as there was a right of individual recourse to the courts. Some EEA Member States had such rights but others did not and it was believed that Iceland had no such recourse.

The Advocate-General's approach was very difficult to square with the wording of the Directive. Thus for example in Article 3(1) it is provided that the "administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution …". Article 9(1) provided that the "administrative or judicial authorities of the home Member State which are responsible for winding up shall alone be empowered to decide on the opening of winding up proceedings concerning a credit institution …".

The ECJ itself rejected the Advocate-General's approach and found a different, ingenious way of squaring this particular circle. They held that what had appeared to everyone to be the commencement of a winding up proceeding in April 2009 by means of a legislative act was in fact no such thing. The ECJ considered that the statutory change merely brought into effect some features of winding up into the pre-existing moratorium which had been opened by the Icelandic courts. Thereafter, the winding up was itself commenced by a court decision in November 2010. This meant that both the relevant Icelandic insolvency proceedings had been commenced by court order and no question arose of a proceeding having been opened by a statutory provision.

It is important to note for the purposes of any future litigation on this subject that the arguments raised in the *Kepler* case did not challenge the idea that the original moratorium was within the Directive. This had been challenged in the *Rawlinson & Hunter* case and Burton J had stated by way of dictum that the moratorium was not within the Directive. The relevant issue here concerns the definition of "reorganisation measures" in Article 2 of the Directive. Was the Icelandic moratorium "intended to preserve or restore the financial situation" of the Icelandic bank such as Landsbanki? Recital (6) refers to reorganisation measures as being "… measures taken by … to restore to viability the credit institutions which it has authorised". The argument which found favour with the judge in the *Rawlinson & Hunter* case was that in the factual situation in which the Icelandic banks found themselves, there was no question of them being restored to viability.

# Banks at risk

In the ECJ case of Van Buggenhout v Banque Internationale a Luxembourg SA (19 Sept 2013) a Belgian property development company, shortly before going into liquidation, opened an account in Luxembourg with the defendant bank. The company ordered the bank to issue a cheque for € 1.4 million for the benefit of a creditor. The day after insolvency proceedings were opened, the bank in Luxembourg paid out € 1.4 million to the creditor on the basis of the previously issued payment order.

When sued for the money by the liquidators of the company, the bank sought to rely on Article 24 of the EC Regulation on Insolvency Proceedings 1346/2000. This provides a special statutory defence where " an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings ..." . In such a case "the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings". Where the obligation is honoured before publication of the insolvency proceedings by the liquidator in the Member State where the obligation is honoured, then there is a presumption, in the absence of proof to the contrary, that the person honouring the obligation was unaware of the opening of insolvency proceedings.

In the present case, publication prior to payment had not occurred even in Belgium, let alone Luxembourg.

The application of this statutory defence to payments to creditors was however rejected by the ECJ. The ECJ relied on Recital 30, which makes it clear that the statutory defence was meant to apply to a debtor of the company which pays the company rather than the liquidator. The defence was not intended to cover payments to creditors.

The ECJ also relied on the statutory objectives of the Regulation and considered that allowing the statutory defence for creditors would "undermine one of the principal objectives of Regulation Number 1346/2000 set out in Recital 4 in the preamble thereto, which consists in avoiding incentives for the parties to transfer assets from one Member State to another, seeking to obtain a more favourable legal position".

The ECJ is careful to point out that the unavailability of the statutory Article 24 defence does not mean that the bank will necessarily be liable: such liability depends on the law of the insolvency proceeding, which in that case was Belgian law.


THE EUROPEAN COURT OF JUSTICE IN LUXEMBOURG

## Filing claims out of time

**In Re SNP Boat Service the French Cour de Cassation on 17th December 2013 handed down a judgment relating to the late filing of claims. In that case a Dutch creditor of a French bankrupt had been aware of the need to submit a claim by the deadline in the French proceedings. His claim was, however, submitted late. On the other hand, he had not received the mandatory notification required by Article 40 of the EC Regulation on Insolvency Proceedings. Article 40 places a duty on the liquidator appointed by the court, as soon as insolvency proceedings are open, "immediately" to inform known creditors who have their habitual residencies, domiciles or registered offices in other Member States. The information provided by such a notice is required to include time limits for lodging claims amongst other things. The Dutch creditor in the present case relied on the failure to give such a mandatory notice as excusing the late filing of his claim.**

**The Cour de Cassation held that since Article 40 provided no remedy for a breach, such a remedy had to be found in the law of the insolvency proceeding, in that case French law. Under French statutory law, a judge could disapply the time bar if the lateness was not the debtor's fault, under the French commercial code Article L622-26. The Cour de Cessation considered that the late filing was not the fault of the creditor and time was thus extended.**

**This case should not be used as a licence to ignore foreign time limits for claims if such are known to a creditor. If the Cour de Cassation is correct in saying that the remedy for the breach of Article 40 is to be found in the local law of the insolvency proceeding, then knowingly filing a claim late could be taking a huge risk with the nature of such local law.**

# NEWS in brief

## Urgent applications: bankruptcy and companies court

Chief Bankruptcy Registrar, Stephen Baister, issued the following new Practice Note on 20 November 2013.

The registrars have for some time made provision for hearing urgent or time critical applications (see paragraph 9.1 of the Practice Direction – Insolvency Proceedings). A number of slots are reserved for such applications on Tuesday and Friday morning of each week and are most commonly used for time critical applications such as applications to extend administration orders, time summonses and other applications that cannot wait to be heard in the ordinary lists.

In addition, however, a registrar is available each day to hear urgent applications without an appointment (most commonly in the afternoon).

Practitioners should complete the certificate in paragraph 9 of the Practice Direction.

Court fees should be paid on the ground floor of the Rolls Building, but listing should be arranged through the registrars' clerks on the first floor.

Unless, for some exceptional reason, a registrar is not available or the application is one which for some other reason the registrar cannot hear (e.g. because the application is for an injunction) all urgent insolvency and companies applications should be made to the registrar, not to the applications judge.

## New Chairman of the Bar

**Nicholas Lavender QC is Chairman of the Bar Council for 2014. Called to the Bar in 1989 and taking silk in 2008, he has acted in a wide range of commercial disputes.**

**He is also a Deputy High Court Judge, a recorder, a Bencher of the Inner Temple, a Fellow of the Chartered Institute of Arbitrators, a CEDR-accredited mediator and an advocacy trainer.**

**He has been involved with the Bar Council since 1990 and has been a member since 1994.**

**He has served on many Bar Council committees and working parties and as Chairman of the Young Barristers' Committee (in 1996) and as Chairman of the Bar Council's Professional Practice Committee (in 2009 to 2012).**

NICHOLAS LAVENDER QC

**Sheldon: Cross Border Insolvency**
Richard Sheldon QC, Mark Arnold QC, Jeremy Goldring QC, John Briggs, Lloyd Tamlyn, Tom Smith, Richard Fisher and Adam Al-Attar have agreed to do a new 4th Edition of Sheldon on Cross Border Insolvency for Bloomsbury Professional. The new edition should be published by December 2014.

**Antony Zacaroli QC**
Antony Zacaroli QC was recently elected a bencher of Middle Temple. He has also recently been appointed as Finance Expert to the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance).

**Charlotte Cooke**
Charlotte Cooke, together with Professor Louise Gullifer (Oxford University) and Hamish Anderson (Norton Rose Fulbright LLP) has contributed a chapter on English law to a new book called *Treatment of Contracts in Insolvency*. The book, edited by Dennis Faber, Neils Vermunt, Jason Kilborn and Kathleen Van der Linde and published by OUP, provides detailed analysis of the effect of insolvency on contractual obligations and relationships in the main commercially significant jurisdictions.

**Hannah Thornley**
Hannah Thornley has returned to full-time practice in Chambers after her maternity leave.


HANNAH THORNLEY

# Financial markets and insolvency

The Companies Court has asked South Square to note that if anyone is granted a bankruptcy order, administration order or winding up order in respect of a participant in a designated system, the court should be alerted (by South Square) to its obligations under r.22 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999 / 2979), which is an obligation upon the court to forthwith notify both the system operator of that designated system and the designating authority (FCA / Bank of England) that such an order has been made.

Following receipt of the notification the FCA / Bank of England shall forthwith inform the Treasury.

# Litigant in Person Support Scheme

On 4 December 2013, the Chancery Bar Association, in collaboration with the Bar Pro Bono Unit and the RCJ Advice Bureau, launched the Chancery Bar Litigant in Person Support Scheme ("CLIPS"). CLIPS has the support of the Chancellor and the Judges of the Chancery Division, and is also supported by the Personal Support Unit and LawWorks.

CLIPS aims to provide "on the day" advice and representation for litigants in person in the Interim Applications Court.

The scheme is intended to assist litigants in presenting their cases to the court, while at the same time assisting the Interim Applications Judge to serve the interests of justice.

In this way, members of the Chancery Bar Association contribute to the Bar's efforts to ensure that access to justice is not hampered by an individuals financial means.

Early indications are the the introduction of the scheme has been very successful with it being appreciated both by the litigants and the judges who have sat in the Interim Applications Court.

# N-Busd

**A member of the music group N-Dubz has been declared bankrupt owing money to HMRC.**

**Richard Rawson (Fazer) had a bankruptcy order made against him on 4 December 2013 at the High Court.**

**In 2014, the first high-profile personal insolvency was that of Nick Griffin, British National Party leader. He was made bankrupt in the Welshpool County Court.**

CELEBRITY BANKRUPTS FAZER FROM N-DUBS AND NICK GRIFFIN OF THE BNP. THERE THE SIMILARITY ENDS.

# New arrival in Chambers

**South Square is pleased to announce that Toby Brown has become a member of Chambers following successful completion of a third-six pupillage here. He was called to the Bar in 2005 by Gray's Inn where he was the recipient of the Lord Justice Holker award, having received first class honours in Biology from Nottingham University prior to studying law. Toby has also studied negotiation at Harvard Law School and is a CEDR accredited mediator.**

**Toby initially trained in the common law, practising civil, criminal and family law. In 2008 he moved to South Square to work with Robin Knowles CBE QC supporting various UK and international charitable initiatives, Toby's roles including being legal director of African Prisons Project and executive officer of the Access to Justice Foundation. In 2009 and 2012, Toby was one of the organisers of the Qatar Law Forum in Doha, where in 2012 he co-chaired an international gathering of young lawyers on the future of the rule of law.**

**In 2012, Toby gained commercial trial experience with Robin Knowles CBE QC as the equivalent of second junior counsel in trials in the Chancery Division and the Commercial Court, and in a Supreme Court appeal. This was followed in 2013 by a third-six with Lloyd Tamlyn, Tom Smith and Ben Valentin as his supervisors. Toby is now busy developing his practice in South Square's main areas of work.**

# NEWS in brief

## R3 calls for personal insolvency reform

R3, the Association of Business Recovery Professionals, is calling for the reform of personal insolvency procedures against a backdrop of increasing personal insolvencies and consumer debt. The proposals, which aim to provide better protection to creditor and debtors alike, include:

- allowing the up-front £700 bankruptcy administration fee to be paid in instalments;
- easing access to Debt Relief Orders;
- introducing simplified Individual Voluntary Arrangements; and
- lengthening the standard bankruptcy term from one year to three years – with a maximum 15-year term for the most culpable debtors.

Under the current regime, England and Wales has an influx of 'bankruptcy tourism' (as wealthy Europeans take advantage of the current short bankruptcy term), but the R3 are concerned that many financially struggling people are left unable to afford the fee to enter bankruptcy and have too many debts and assets to enter a Debt Relief Order. In R3's most recent Personal Debt Snapshot, 2.4 million UK adults said they were in a debt management plan, and just over 100,000 entered a formal insolvency procedure. With wage growth still markedly behind inflation and a rise in interest rates likely sooner rather than later, the concern is that those figures are only set to rise.

## Criminal Bar Association out on strike

**On 6 January the Criminal Bar Association staged the first ever strike in the Bar's history. Hundreds of criminal barristers in cities across the UK including London, Birmingham, Manchester and Liverpool staged a mass walkout in protest against proposed cuts of 30% from the £2 billion annual Legal Aid budget by 2018. It was reported that under the cuts some criminal barristers could be left earning as little as £30 per day.**

STRIKING BRIEFS

## Defamation act arrives

The Defamation Act 2013 came into force on 1 January 2014. The new Act introduces a "serious harm" threshold for defamation complaints, abolishes the common law defences of justification, fair comment, Reynolds privilege and puts the new defences of truth, honest opinion and publication on a matter of public interest on a statutory footing. The Act also limits the English court's jurisdiction in defamation actions against those not domiciled in the UK.

## Conferences

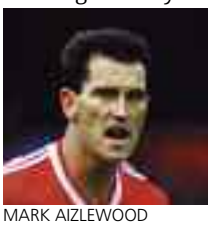
**David Alexander QC chaired the Butterworths Insolvency Litigation Conference held on 24 November 2013 at the Crowne Plaza St James Hotel in Buckingham Gate in London.**

**The other speakers and panel participants were John Verrill (Chadbourne & Parke), Jamie Leader (Eversheds), Malcolm Davis-White (XXIV Old Buildings), Craig Montgomery (Freshfields), Patrick Elliott (Brown Rudnick), Christopher Harlowe (Speechly Bircham), Mark Dawkins (Bingham McCutchen, Robin Knowles CBE QC (South Square) and Catrina Smith (Norton Rose).**

**Gabriel Moss QC will chair the Sweet & Maxwell Insolvency Law Conference to be held on 25 March 2014.**

## Own Goal

Two former professional footballers have been disqualified as company directors for failing to fulfil the funding requirements for sports apprenticeships with training company Luis Michael Training Limited (LMT). Paul Sugure, who was previously of Manchester City, and Mark Aizlewood, an ex-Wales international have been disqualified for six years each starting from September 2013 following an investigation by the Insolvency Service.


MARK AIZLEWOOD


PAUL SUGURE

# Olympic scheme appeal granted

On 20 December 2013, the Supreme Court granted the Trustees of the Olympic Airlines SA Pension & Life Insurance Scheme permission to appeal the decision of the Court of Appeal in Re Olympic Airlines SA [2013] 2 B.C.L.C. 171.

The case concerns a winding up petition presented by the Trustees against Olympic Airlines, the former Greek national airline, which is in liquidation in Greece. The primary purpose of the presentation of the petition was to ensure that the Scheme would be eligible for entry into the Pension Protection Fund. The main issue for the Supreme Court to consider on the appeal will be whether the Court of Appeal was wrong to hold that, as matter of the interpretation of the EC Regulation on Insolvency Proceedings, Olympic Airlines did not have "establishment" in England at the date of the presentation of the petition. It will be the first time the Supreme Court has had the opportunity of considering the meaning of the term "establishment" in the Insolvency Regulation (and, indeed, the provisions of the Insolvency Regulation in detail). Gabriel Moss QC and Marcus Haywood act for the Trustees.


GABRIEL MOSS QC


MARCUS HAYWOOD


OLYMPIC AIRLINES CURRENTLY IN LIQUIDATION

# Insolvency Boom?

**The Lawyer has reported that restructuring firms anticipate a boom when UK interest rates rise as well as from instructions coming from Asia. Activity is therefore expected to increase during 2014. In particular any rise in rates is expected to see more pressure applied to high street firms with more possible casualties and a short term spike in insolvencies. And more foreign firms are also expected to seek to come to the UK to take advantage of its advantageous restructuring procedures. So much so that the UK is thought to be going to become a hot-spot for restructuring of Asian companies.**

# Insurance administration first since 2009

A London based insurance firm with over 19,000 policyholders has become the first insurer to enter administration since 2009. Millburn Insurance Company Ltd voluntarily ceased writing new business following a review of its business by its regulator the Prudential Regulation Authority. It was placed into administration by the High Court on 9 December 2014.

# Minister announces series of insolvency cost cutting

On 23 January 2014 the Business Minister, Jeremy Willmot, announced a series of measures designed to reduce the cost of insolvency procedures. The new measures, part of the Government's red tape challenge launched in July 2013, are aimed at reducing the cost of insolvencies and benefiting creditors to the tune of 30 million a year. The proposed measures include allowing insolvency practitioners with creditors electronically rather than by letter, removing the requirement for office holders to obtain court orders for certain actions (e.g. extending administrations and posting information on websites) and reducing record keeping requirements.

# SOUTH SQUARE CHALLENGE

Welcome to the February 2014 South Square Challenge. It is the usual format. All you have to do is look at eight pairs of picture clues, work out what they are clues for and then identify the link between the eight answers. As usual for the winner (drawn from the wig tin if there is more than one correct entry) there will be a magnum of champagne and a South Square umbrella. Please send your answers by email to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by 7th April 2014 please! Good luck. *David Alexander QC*

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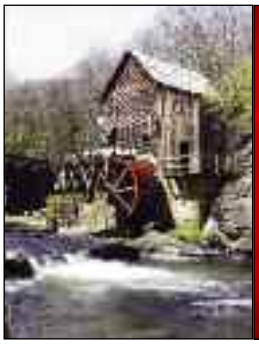

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7

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9 And the connection is?

## NOVEMBER CHALLENGE

*The correct answers to the November 2013 South Square Challenge were: (1) Sue Carr (2) Stephen Cobb (3) Vivien Rose (4) Robert Jay (5) Nicholas Green (6) Geraldine Andrews (7) Colin Birss and (8) Stephen Phillips with the connection being that they were all appointed as High Court judges in 2013. Once again there were a number of correct entries. But the winner drawn from the wig tin is Leah Alpren-Waterman of Watson, Farley & Williams. to whom we send our congratulations together with a magnum of champagne and a South Square umbrella.*

# Diary Dates

South Square members will be attending, speaking at and/or chairing the following events.
We look forward to seeing you at one or more of them.

**R3 Annual Dinner**
19 March - Lancaster London

**ILA Academic Forum 2014**
21 March - Landmark Macdonald Randolph Hotel, Oxford

**ILA Annual Conference 2014**
22 March - Landmark Macdonald Randolph Hotel, Oxford

**INSOL Annual Regional Conference 2014**
23-25 March – Kowloon, Hong Kong

**Sweet & Maxwell Insolvency Law Conference 2014**
25 March - The Hallam, London

**R3 and INSOL Europe International Restructuring Conference**
1 May - Hilton Tower Bridge, London

**R3 Annual Conference**
14-16 May - Vilamoura, Portugal

**III 14th Annual International Insolvency Conference**
9-10 June - Mexico City

**INSOL International Channel Islands One Day Seminar**
12 June - Details TBC

**INSOL Europe Annual Congress**
9-12 October - Istanbul, Turkey

South Square also runs a programme of in-house seminars and talks.
For details please check the events section of the website
www.southsquare.com.

# TULIPMANIA

Shortly to arrive in Chambers is 'Tulipmania', by Gordon Cheung, a London born contemporary artist of Hong Kong origin.

'Tulipmania' is a collection of inkjet prints with hand painting on satin paper, and South Square have chosen six out of the series of twelve. The images are based on those used in 17th century Dutch bulb catalogues, and the backgrounds are stock prices as shown in contemporary print media.

As many will know, tulip flowers appear in the spring, blooming for a week or so, after which the plant stores food in the form of new bulblets which can be lifted between June and September. Originally the Dutch tulip bulb market was confined to the months when bulbs were lifted out of the ground. In the early 17th century, a rudimentary derivatives market emerged. Initially, trades were made between aficionados. The futures market permitted traders to make a profit without having to plant a bulb; and it took little time for speculators to enter the market. Purchasers lost track of reality and pushed the price of bulbs to unprecedented highs. By 1637 prices of 10,000 florins were recorded; and 12 acres of land were offered for a Semper Augustus bulb. By comparison, the annual salary of Professor Clusius, a botanist at the University of Leiden, was 750 florins; and Rembrandt's masterpiece 'The Night Watch' sold for 1,600 florins.

Like all bubbles, the Dutch tulip bubble abruptly burst. Following a default on a contract by a buyer in Haarlem in the winter of 1636-37, sellers overwhelmed the market and buyers disappeared. Dealers refused to honour contracts. The government attempted to stem the meltdown by offering to honour contracts at 10% of their face value. This only caused the market to plunge yet further. As prices collapsed, many tulip holders went bankrupt.

Cheung says his works, some of which are featured here courtesy of Gordon Cheung/Alan Cristea Gallery, are "a metaphor perhaps for the loss of that Utopian vision of the future after the millennium bug threat, the dot com crash, the war on terror - and all before the current recession. Yet it's also meant to suggest a glimmer of hope."

TULIPMANIA 1

TULIPMANIA 3

TULIPMANIA 4

TULIPMANIA 8

# SOUTH SQUARE
## Barristers

## 'EXCELLENT IN EVERYTHING THEY DO'
Chambers & Partners 2014

Michael Crystal QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Robin Knowles CBE QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC

Antony Zacaroli QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
Lucy Frazer QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Ben Valentin
David Allison
Daniel Bayfield

Tom Smith
Richard Fisher
Stephen Robins
Joanna Perkins
Marcus Haywood
Hannah Thornley
William Willson
Georgina Peters
Adam Al-Attar
Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown


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