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General Editor: Richard Sheldon QC

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

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

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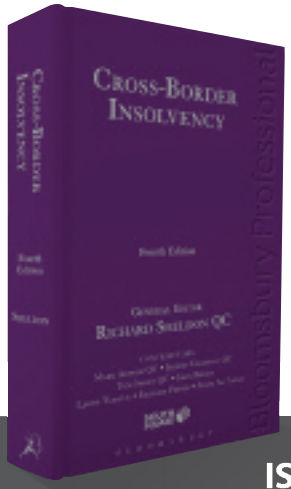
The first part describes the key statutory cross-border insolvency regimes, namely the EC Insolvency Regulation, the UNCITRAL Model Law on Cross-Border Insolvency, and section 426 of the Insolvency Act 1986. The second part focuses on the common law and specific issues in more detail, such as the court's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



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

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- Developments in offshore jurisdictions including *Primeo Fund (Cayman) and Saad Investments (Bermuda), Re C (BVI)*
- *Kelmsley* v *Barclays Bank PLC*
- *Pan Ocean Co. Ltd*
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ISBN: 9781780435541 **Pub date:** Jan 2015
Format: Hardback **Pages:** c750pp **Price:** ~~£195~~ **£146.25**

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FROM THE EDITOR

DAVID ALEXANDER QC

Je suis...

Welcome to the February 2015 edition of the Digest.

The end of 2014 and the start of 2015 have seen some pretty big events. The appalling things that happened in Paris at the start of the year, with the attacks by three gunmen at Charlie Hebdo and a supermarket in Vincennes, and which led to the subsequent proliferation of the solidarity phrase "Je Suis Charlie". The dramatic fall in the oil price (in June 2014 Brent crude was $115 a barrel – by January 2015 it had plunged by more than half). The rate of inflation in the UK plummeting to its lowest level on record (the CPI rate in December 2014 was 0.5 per cent). The electricity companies cutting their prices (well, sort of, with cuts of about 5 per cent, although consumer groups say that the cuts should be 10 per cent). The massive fall in the value of the Rouble (hit by the drop in the oil price and western sanctions). The start of QE in the Eurozone – they are effectively going to print something like Euros 1 trillion. Victory in the Greek elections for the anti-austerity party, Syriza, and the forming of a subsequent coalition opposed to Greece's international bailout terms with unknown consequences for Greece and the rest of the Eurozone. All this, and we are only just into February …

JE SUIS CHARLIE: ADOPTED BY DEMONSTRATORS AS A SYMBOL OF SOLIDARITY

ELECTION DEBATES: CLARITY OR CHAOS?

So what does the rest of the year hold for us? Well no-one can have missed the fact that 2015 is an election year here in the United Kingdom. The campaigns appear to have started long ago. What is more they are going to go all the way through until Thursday 7 May 2015 … and with lots and lots of televised debates (including some involving representatives of no less than 7 parties on the podium – the Conservatives, Labour, the Lib-Dems, UKIP, the Green Party, the SNP and Plaid Cymru - at the same time). And what happens when we get to 7 May 2015? Well, absolutely nobody has any idea. This really is probably far too close to call, at least at this distance from polling day. As matters presently stand, the odds seem to favour some form of coalition. But it is unclear how long that will take to put together, who it will be between and how long any such coalition may last. They say a week is a long time in politics. Well three months of campaigning is an

eternity. I suspect we will all be pretty fed up with it by May.

By June, however, we reach a more certain month. Two big events (to my mind) happen. On 18 June 2015 it is the 200th anniversary of the battle of Waterloo. 200 years since the Duke of Wellington (aided by the Prussian army under the command of Blucher) defeated the French army in present-day Belgium bringing an end to Napoleon's rule as Emperor of the French. The battle was decisive but it could so easily have gone the other way. As Wellington himself said "the battle was the nearest-run thing you ever saw in your life". How would life have been different if it had gone the other way? I am sure we can all think of things that might be different. But from a legal perspective, maybe even England and Wales would have ended up with a civil code …

Then on 19 June 2015, the day after the anniversary of Waterloo, it is the 800th anniversary of the signing of Magna Carta (the Great Charter, sometimes called the Great Charter of Liberties) between King John and the Barons at Runnymede near Windsor. Whilst the effects of Magna Carta may have been somewhat romanticised over the years (the original deal was about looking after the rights of a few Barons rather than the general population), the Magna Carta was nevertheless described in the 20th century by Lord Denning as "the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot". So 19 June 2015 is probably still a day to celebrate.

So what do we have for you in this edition of the Digest? As usual there are a number of articles, starting with one by Stephen Robins on cross-border transaction avoidance at common law following the Privy Council's decision in *Singularis*. There is also an article by Mark Arnold QC on directors' duties in the zone of insolvency. Then we have articles by two of our younger tenants, Matthew Abraham on what amount to the "books and records" of an LLP and Andrew Shaw on the winding up of insolvent trusts. We also have William Willson on the liability of administrators for economic torts. And we have two guest features for you. An article by Maurice Moses and Craig Lewis of Ernst & Young LLP on issues which arise following the review by Teresa Graham CBE into Pre-Pack Administration. And an update from Walkers as to what has been happening in Cayman and BVI.

IT IS NEARLY 200 YEARS SINCE THE CHARGE OF THE ROYAL SCOTS GREYS AT WATERLOO

KING JOHN SIGNED THE MAGNA CARTA AT RUNNYMEDE 800 YEARS AGO THIS JUNE, BUT NOT WITH A QUILL PEN…

As always, there are also the Case Digests, this time edited by Lloyd Tamlyn, as well as a feature on INSOL in San Francisco which is coming up in March and where South Square is sponsoring a lunch (yes, that is San Francisco on the front cover!). In addition Gabriel Moss QC is back in conjunction with Robert Amey with another edition of his updates from Euroland. And we have the usual news in brief, diary dates and the South Square Challenge. One other thing not to miss – there is an advertisement for the new edition of Richard Sheldon QC's "Cross Border Insolvency" on the inside front cover – including a decent discount for the readers of the Digest.

Finally, as always, if you find yourself reading someone else's copy of the Digest and would like to receive your own, or if your contact details have changed, please just send an email to *kirstendent@southsquare.com* and we will do our best to make sure that you receive the next edition.

SOUTH SQUARE DIGEST IS PUBLISHED BY SOUTH SQUARE, 3-4 SOUTH SQUARE, GRAY'S INN, LONDON WC1R 5HP. TEL 020 7696 9900.
PUBLICATION, PRINT AND PRODUCTION BY WENDOVER PUBLISHING LTD. TEL 01428 658697.

As one door closes, another door opens...

Stephen Robins examines cross-border transaction avoidance at common law after *Singularis*

Introduction

Before the decision of the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, a number of courts had held that it was possible to apply domestic statutory transaction avoidance provisions for the benefit of a foreign liquidator: see, for example, Proudman J in *Schmitt v Deichmann* [2012] 2 All ER 1217 and Jones J in *Picard v Primeo Fund* 2013 (1) CILR 16. The Privy Council in *Singularis* held that such an approach is impermissible, because the domestic statutory transaction avoidance provisions are not applicable to foreign liquidations. On this basis, the Privy Council held that the reasoning in *Schmitt* and *Picard* was wrong. However the majority of the Privy Council in *Singularis* held that the court could assist a foreign liquidator by exercising inherent common law powers. As explained below, the old authorities show that the court's powers to set aside preferences and transactions defrauding creditors are inherent common law powers. On this basis, the *Schmitt* and *Picard* decisions were right for the wrong reasons.

The problem of 'falling between two stools'

Every developed system of insolvency law contains provisions to avoid or reverse the effect of transactions that are prejudicial to the general body of creditors and/or disruptive of the *pari passu* distribution of realisations (e.g. preferences and transactions at an undervalue). The English courts have recognised repeatedly that such provisions are a vital and integral part of the process of the collection and distribution of assets.[1]

However, notwithstanding the importance of transaction avoidance in the insolvency context, English law has historically put two major obstacles in the way of foreign liquidators wishing to bring such claims in England. First, the foreign statutory transaction avoidance provisions would have no effect in England. Therefore a foreign liquidator or bankruptcy trustee could not rely in England on the transaction avoidance laws of the foreign jurisdiction in which the insolvency proceedings were taking place. Secondly, the English court would not permit the foreign liquidator to rely on the English

1/. See, for example, AWB Geneva SA v North America Steamships Ltd [2007] 2 Lloyd's Rep 315 at para 27 and HIH Casualty and General Insurance Ltd, McGrath v Riddell [2008] UKHL 21, [2008] 3 All ER 869 at para 19. See also Fletcher, The Law of Insolvency (4th ed.), para 26-002: "It is seen as an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors must be amendable to adjustment or avoidance".

statutory transaction avoidance provisions, because those provisions were expressly applicable only to English liquidations and bankruptcies.

Lord Loreburn summed up the traditional position of English law in *Galbraith v Grimshaw* [1910] AC 508: "*[A] foreign [insolvency] law … has no operation in England, while the English law … applies only to cases of English bankruptcy, and therefore the [foreign] trustee may find himself (as in this case) falling between two stools*". The problem of 'falling between two stools' meant that a foreign liquidator would have no means of avoiding antecedent transactions in proceedings in the English courts.

Statutory solutions applicable in certain cases

Today, of course, there are a number of statutory provisions which may come to the rescue of a foreign liquidator who wishes to bring a transaction avoidance action in England.

First, section 426 of the Insolvency Act 1986 provides that "*a request made … by a court … in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction*". This provision applies to designated countries and territories, such as Australia and New Zealand. Consequently it is possible for a liquidator from (say) Australia to come to England with a letter of request from the Australian court asking the English court to allow him to bring a transaction avoidance claim in England in accordance with the Australian (or indeed English) statutory transaction avoidance provisions. The English court has a statutory power under section 426 of the Insolvency Act 1986 to accede to such a request.

Secondly, under Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("the EC Regulation"), the laws of the Member State in which the main liquidation is taking place are applicable to transaction avoidance claims throughout the European Union[2] and the courts of the

THE PRIVY COUNCIL DISAGREED WITH THE *PICARD* DECISION IN THE CAYMAN ISLANDS

2/. See Articles 4(2)(m) and 13 of the EC Regulation.

Modern statutory cross-border provisions do not provide a solution in every case and there is a continued role for the common law

Member State in which the main liquidation is taking place have jurisdiction to hear and determine such claims.[3] The transaction avoidance judgments of the courts of the Member State in which the main liquidation is taking place must be recognised and enforced in every other Member State.[4] There are similar provisions in the Directives relating to the reorganisation and winding up of insurance undertakings and credit institutions.[5]

Thirdly, the UNCITRAL Model Law on cross-border insolvency, which has been brought into force (in a modified form) in England by the Cross-Border Insolvency Regulations 2006 ("the CBIR 2006"), enables a foreign liquidator to bring proceedings in England in reliance on English statutory transaction avoidance provisions, as if the foreign liquidation were taking place in England. Article 23(1) of Schedule 1 to the CBIR 2006 provides that the foreign representative has standing to bring proceedings in the English courts under (inter alia) section 238 of the Insolvency Act 1986 (transactions at an undervalue), section 239 of the Insolvency Act 1986 (preferences) and section 423 of the Insolvency Act 1986 (transactions defrauding creditors). Article 23(2) provides for these provisions of English insolvency law to apply in such cases "*(a) whether or not the debtor … is being wound up or is in administration, under [English] insolvency law; and (b) with the modifications set out in paragraph 3 of this Article*". Article 23(3) amends the English statutory provisions in respect of the "*relevant time*" to ensure that the vulnerability period ends with the commencement of the foreign insolvency proceedings, so that, for example, "*the onset of insolvency shall be the date of the opening of the relevant foreign proceeding*". Article 23(4) then makes clear that "*the date of the opening of the foreign proceeding shall be determined in accordance with the law of the State in which the foreign proceeding is taking place, including any rule of law by virtue of which the foreign proceeding is deemed to have opened at an earlier time*".[6]

Continued problems

However the cross-border insolvency provisions described above do not provide a solution in every case: section 426 applies only to designated countries and territories; the EC Regulation applies only where the debtor's COMI is within the European Union; and Schedule 1 to the CBIR contains a number of exceptions – for example it is expressly inapplicable in any case involving a "third country credit institution" within the meaning of regulation 36 of the Credit Institutions (Reorganisation and Winding Up) Regulations 2004.

Further, the statutory provisions available in England are not applicable in offshore jurisdictions. And, whilst some offshore jurisdictions have their own detailed statutory provisions for cross-border insolvencies (see, for example, section 241 of the Cayman Companies Law (2013 Revision) and Part 19 of the British Virgin Islands Insolvency Act 2003), other offshore jurisdictions have none (see, for example,

3/. See Seagon v Deko Marty Belgium NV (Case C-339/07) [2009] 1 WLR 2168.

4/. See Articles 16 and 17 of the EC Regulation.

5/. See Directive 2001/17/EC of 19 March 2001 on the reorganisation and winding-up of insurance undertakings and Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding-up of credit institutions.

6/. Similar provisions have been adopted by statute in Australia (see section 17(1) of the Australian Cross-Border Insolvency Act 2008), New Zealand (see Article 23(1) of Schedule 1 to the New Zealand Insolvency (Cross-Border) Act 2006) and South Africa (see section 23 of the South African Cross-Border Insolvency Act).

Bermuda).

As a consequence, cases of 'falling between two stools' continue to arise.

The common law response

In order to address the problem of falling between two stools, the courts began to develop the common law in order to provide solutions.

Initially the key development came with *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, which was in fact a restructuring case and not a transaction avoidance case. Lord Hoffmann said in para 22: "*What are the limits of the assistance which the court can give? … At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But* ***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 to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum***" (emphasis added).

In *Schmitt v Deichmann* [2012] 2 All ER 1217, Proudman J interpreted para 22 of *Cambridge Gas* to mean that the court had jurisdiction to apply English statutory transaction avoidance provisions for the benefit of a foreign office-holder, as if the foreign company were actually being wound up in England. Proudman J held that (to quote the headnote): "***The court had an inherent common law jurisdiction to permit the statutory power under section 423 of the 1986 Act to be applied to a foreign administrator not falling within the express scope of the 1986 Act*** *… as (i) there was power to use the common law to recognise and assist an administrator appointed overseas; (ii)* ***assistance included doing whatever the English court could have done in the case of a domestic insolvency****; (iii) bankruptcy proceedings were collective proceedings for the enforcement of rights for the benefit of all creditors, even when those proceedings included proceedings to set aside antecedent transactions; and (iv) proceedings to set aside antecedent*

STEPHEN ROBINS

According to the majority in *Singularis*, although domestic statutory insolvency powers are inapplicable, common law powers can apply

The key question in light of *Singularis* is therefore whether the court has common law powers to set aside preferences and transactions defrauding creditors

transactions were central to the purpose of the insolvency" (emphasis added).

The courts of the Cayman Islands adopted the same approach. In *Picard v Primeo Fund* 2013 (1) CILR 16, which involved an attempt by the U.S. trustee of Bernard L Madoff Investment Securities LLC to bring a preference claim in the Cayman Islands under Cayman Islands statutory provisions, Jones J held in para 49 that "*the Court does have a discretionary power at common law to entertain the [U.S. trustee's] preference claim based upon the application of the domestic corporate insolvency law as if BLMIS was the subject of a winding up order. The Court's power is not dependent upon establishing that there is jurisdiction under section 91(d) [of the Cayman Companies Law] to make a winding up order in respect of BLMIS*".

The decision of the Privy Council in *Singularis*

The relevant reasoning in the recent case of *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36 has two essential parts. First, the Privy Council held that domestic statutory transaction avoidance provisions cannot be applied for the benefit of a foreign liquidator, because such provisions are inapplicable in the case of a foreign winding-up. Secondly, the majority of the Privy Council (Lords Sumption, Collins and Clarke) held that the court is able to assist foreign liquidators by exercising the court's inherent common law powers.

Lord Collins summarised the majority view in para 38: "*First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy 'as if' the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case*". He continued in para 64: "*In my view to apply insolvency legislation by analogy 'as if' it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function*".

On this basis Lord Collins held that the reasoning in *Schmitt* and *Picard* was wrong because the domestic statutory transaction avoidance provisions could not be applied by extension for the benefit of a foreign liquidator. Only common law powers may be exercised by way of cross-border judicial assistance for the benefit of a foreign liquidator.

The reasoning of the majority of the Privy Council in *Singularis* therefore makes it necessary to consider whether the court has any inherent common law powers to set aside antecedent transactions in insolvency proceedings.

Avoidance of preferences at common law

Long before there was ever any statutory power to avoid preferences, it is clear that the Courts had an inherent common law power to avoid preferences. As Lord Browne-Wilkinson made clear in *Lewis v Hyde* [1997] BCC 976 at p.980C-D: "*The law of voidable (or as it used to be called, fraudulent) preference is* ***based on the common law***" (emphasis added). See also *Ex parte Wilcoxon* (1883) 23 Ch D 69 per Bowen LJ at p.74: "*Everybody knows that originally there was no express statutory enactment in regard to fraudulent preference. But from the time of Lord*

Mansfield down to 1869 ***the Courts considered that certain transfers of property were frauds upon the bankruptcy law, though there was no statutory enactment upon the subject****. Then came the Bankruptcy Act of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference*" (emphasis added).

Historically the key development came with *Worsley v De Mattos* (1758) 1 Bun 467, in which Lord Mansfield held that the court had an inherent power to invalidate any preference that had been made in contemplation of bankruptcy. Lord Mansfield said: "*Such preference is a fraud upon the whole bankrupt law, and would defeat the two main objects it has in view; to wit, the management of the bankrupt's estate; and an equal distribution among his creditors*". Lord Mansfield adopted the same approach in *Alderson v Temple* (1768) 4 Burr 2235, in which a debtor endorsed a promissory note in favour of a creditor on 7 November 1766 before committing an act of bankruptcy on 8 November 1766. The assignees commenced proceedings against the creditor to recover the promissory note. Counsel for the assignees had contended: "*Reason and equity require that all the creditors of a bankrupt should be put upon an equal foot*". Lord Mansfield accepted this argument and held that a transfer to a creditor in contemplation of bankruptcy was void as a fraudulent preference.

The importance of *Worsley* and *Alderson* lies in the fact that these two cases were decided at a time when there were no statutory provisions of English law in respect of the setting aside of preferences. Lord Mansfield set aside preferences in these two cases by relying on a common law power. In order to prevent debtors from deliberately creating an unequal distribution, he held that a transfer to a creditor in contemplation of bankruptcy was void at common law.[7] The common law power to avoid preferences was therefore based on the *pari passu* rule, which in turn arises from basic principles of equality and equity.[8] [9]

Common law avoidance of transactions defrauding creditors

There is also authority to support the view that the court's powers to set aside transactions defrauding creditors were originally common law powers. Section 423 of the Insolvency Act 1986 can be traced back to the Fraudulent Conveyances Act 1571 (also known as the Statute of Elizabeth), which

7/. The fact that the common law power to avoid preferences was based on the pari passu rule was emphasised in Linton v Bartlet (1770) 3 Wils 47; 95 ER 926, in which a debtor in insolvent circumstances assigned one third of all his effects to a creditor, who was his brother, before committing an act of bankruptcy two days later. The Court held: "Although this may be a hard case upon the brother, who is a bona fide creditor, yet the giving him the preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and say that all the creditors shall come in pari passu. There is no case where ever such a preference as this was allowed. The same spirit of equality ought to warm the Courts of Justice, which warmed the Legislature when they made the bankrupt-laws; and if we should let this deed stand, we should tear up the whole bankrupt-laws by the roots; it is a bill of sale made by a trader, at a time when he was insolvent, and (plainly) had an act of bankruptcy in contemplation; it is partial and unjust to all the other creditors. Judgment for the plaintiff and the deed is void". The common law power to avoid preferences therefore existed to enable the Court to uphold the fundamental principle of equal treatment of creditors and to implement the statutory scheme for the rateable distribution of the debtor's property.

8/. The pari passu rule has a long history. In the early part of the fourteenth century, the pari passu rule was applied in England in the winding-up of London branches of insolvent foreign banking partnerships: see Graham, "The Insolvent Italian Banks of Medieval London" (2000) 9(3) IIR 213 at pp 222-223. The pari passu rule was subsequently placed on a statutory footing in respect of domestic insolvency proceedings by the Bankrupts Act 1542 (34 & 35 Hen VIII, c. 4), which empowered the Lord Chancellor to seize assets of bankrupts and to sell them "for true satisfaction and payment of the said creditors, that is to say; to every of the said creditors a portion, rate and rate like, according to the quantity of their debt".

9/. The fundamental importance of equal treatment of creditors was explained in Smith v Mills (1584) 2 Co Rep 25; 76 ER 441, in which the Court held that a preferential transfer to a creditor after the commencement of bankruptcy was void, because it violated the pari passu principle. The facts were as follows (to quote the headnote): "A became bankrupt, and, after a commission awarded against him, sold part of his goods to one of his creditors in part satisfaction of his debt; and afterwards the commissioners by indenture sold those goods jointly to the plaintiffs". Wray CJ held that the bankrupt's purported sale of the goods to the creditor was void and that the plaintiffs had acquired good title to the goods from the commissioners. The headnote states: "A bankrupt cannot give one creditor a preference over the others". Wray CJ referred to the pari passu rule and held that the purpose of insolvency proceedings is "to relieve the creditors of the bankrupt equally" and that "there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts; so that one should not prevent the other, but all should be in aequali jure". He concluded that "there ought to be an equal distribution secundum quantitatem debitorum suorum". Wray CJ commented that, "if, after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need) and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable and a great defect in the law".

was said to be "*only declaratory of the common law*": see *Ryall v Rolle* (1749) 1 Atkyns 165 per Lee CJ.[10] In *Hamilton v Russell* (1803) 1 Cranch 309, Marshall CJ held that the Statute of Elizabeth was "*only declaratory of the principles of the common law*". Similarly, Story CJ held in *Meeker v Wilson* (1813) 1 Gall 419 that the Statute of Elizabeth was "*only an affirmance of the common law*".[11]

Common law transaction avoidance powers in cross-border context

Since it is clear that the courts did historically have inherent common law powers to set aside preferences and transactions defrauding creditors, the key questions in light of *Singularis* are: (1) whether such powers continue to exist in the modern era; and (2) whether such powers are exercisable by way of judicial assistance in cross-border insolvencies.

Dealing with the first of these issues, it might be argued that the continued survival of the common law powers is inconsistent with the enactment of legislative provisions in respect of preferences and transactions defrauding creditors (i.e. sections 239 and 423 of the Insolvency Act 1986). In general terms, however, when a particular matter is addressed by legislation, the common law in respect of that matter will continue to apply to cases falling outside the statute. See, for example, *Shiloh Spinners Ltd v Harding* [1973] AC 691, in which Lord Wilberforce held at p.723: "*In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law*".[12] Since the Privy Council held in *Singularis* that the domestic statutory transaction avoidance provisions have no application to foreign insolvency proceedings, it would seem to follow that the common law of transaction avoidance is still available in respect of foreign insolvency proceedings.[13]

Dealing with the second of these issues, it might be said that the common law powers to set aside preferences and transactions defrauding creditors were exercised historically only in respect of domestic insolvency proceedings and that it would be wrong to exercise them for the benefit of foreign liquidators. However it has long been established (and the decision of the majority in *Singularis* confirms) that the English court will act in aid of foreign insolvency proceedings. There is no obvious reason why the court's inherent powers to avoid transactions should not be applied for the benefit of a foreign liquidator.

A close analogy may be found in the case of the court's power to strike down contracts that contravene the anti-deprivation principle,[14] which is apparently available for the benefit of foreign liquidations.[15] The same is presumably true in respect of a common law power to avoid preferences, particularly in view of the common origin

10/. In Cadogan v Kennett (1776) 2 Cowp. 432, Lord Mansfield held that "[the] principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the [Statute of Elizabeth]".

11/. In his 1884 book entitled A Treatise on Fraudulent Conveyances, Frederick Wait summed up the position at page 29: "By the rules of the common law, all conveyances made in fraud of creditors were regarded as voidable". The earliest English statutory provision to avoid transactions defrauding creditors, the Statute of Elizabeth, was therefore "merely declaratory of the common law" (ibid.).

12/. See Barrow v Isaacs & Son [1891] 1 QB 417, in which Kay LJ held at p.430 that covenants against assigning, which fell outside the scope of the Conveyancing Act 1881, continued to be governed by the established principles of equity: "But it is expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession or disposing of the land leased. Forfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of Courts of Equity". See also Harrison v Tew [1990] 2 AC 523 per Lord Lowry at p.536 and Re Collins & Aikman Europa SA [2006] BCC 861 per Lindsay J at paragraphs 19 and 20.

13/. The suggestion that the common law of preferences has survived is supported by Lewis v Hyde [1997] BCC 976, in which Lord Browne-Wilkinson held at p.981A-B: "If the statute does not purport to state the whole law comprehensively, the basic common law assumption that an actual preference is necessary, which Lord Mansfield plainly thought necessary, survives in the common law". See also Ex parte Pearson, In re Mortimer (1873) LR 8 Ch App 667, in which James LJ held at pp 673-674: "I am of opinion that Lord Mansfield and the other eminent Judges who established the law as to fraudulent preferences and fraudulent assignments by the debtor would have had no difficulty in applying that law to a case like the present. I am of opinion that the power and the duty which have been exercised by our fathers have not been abdicated or repudiated by the Courts in later times, and that the Legislature, in adopting the old decisions and crystallizing them into positive enactments, have in no way abrogated the duty of this Court to apply the same principles in proper cases. I think this is a proper case for its application; and I am the more inclined to this conclusion because I can conceive a still more refined contrivance for evading the operation of the Act, which this Court ought to discountenance".

LORD MANSFIELD HELD THAT PREFERENCES WERE VOID AT COMMON LAW

and rationale of these two principles. The basis of such assistance is the principle of modified universalism, which enables the Court to provide (on a discretionary basis) support to foreign insolvency proceedings that are being conducted under a foreign statutory insolvency scheme. The reasoning of the majority in *Singularis* makes clear that the mere fact that the insolvency proceedings are being conducted under a foreign statutory scheme cannot be raised as an objection to the exercise of a common law power.

Conclusion

In light of the historic existence of a common law power to set aside preferences and transactions defrauding creditors, it may be the case that *Schmitt* and *Picard* were correct for the wrong reasons. Instead of seeking to apply the domestic statutory transaction avoidance provisions in aid of a foreign liquidation, the courts in *Schmitt* and *Picard* should have applied their inherent common law powers to avoid the transactions in question by way of cross-border judicial assistance.

However the precise scope and effect of the common law assistance doctrine remains unclear: Lord Sumption warned in *Singularis* against the "*promiscuous*" creation of common law powers. It remains to be seen precisely how far the courts are prepared to go in this regard.

14/. The anti-deprivation principle is closely related to the Court's common law power to avoid preferences, in that (i) both principles share a common origin in the principle of striking down frauds on the bankruptcy laws and (ii) they are both based on the importance of equal treatment of creditors and the scheme of pari passu distribution: see Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383 per Lord Collins at paragraphs 2, 59, 75, 76 and 78; see also Ex parte Mackay, In re Jeavons (1873) LR 7 Ch App 643 at pp 647-648.

15/. See Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd [2002] 1 WLR 1150 per Neuberger J at paras 40 to 41 and Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2009] EWHC 1912 (Ch) per Morritt C at paras 27 to 28 and 47 to 48. In this regard it should be noted that, when Perpetual reached the Supreme Court, sub nom Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383, the idea that the common law power to avoid contracts on the basis of English insolvency law could be exercised for the benefit of a foreign liquidation was not doubted by Lord Phillips, Lord Hope, Lord Walker, Baroness Hale, Lord Mance, Lord Clarke or Lord Collins.

INSOL International Annual Regional Conference San Francisco

INSOL's Annual Regional Conference is taking place between Sunday 22 March 2015 and Tuesday 24 March 2015 at The Fairmont Hotel in San Francisco. As with Hong Kong last year, members of South Square will be attending.

At present, the following plan to be in San Francisco: Michael Crystal QC, Martin Pascoe QC, David Alexander QC, Glen Davis QC, Felicity Toube QC, Tom Smith QC and Hilary Stonefrost. It is hoped that other members of Chambers will, commitments permitting, be joining them. In addition, Professor Ian Fletcher QC, is also attending and will be chairing the INSOL Academics' Colloquium being held just before the main Conference on 21 -22 March.

The Regional Conference starts on Sunday 22 March with a welcome reception and dinner. There are then two days of technical sessions on Monday 23 and Tuesday 24 March culminating with the Gala Dinner on Tuesday evening. Subjects being covered include investigations and information exchange in cross-border insolvencies, corporate group restructuring and insolvency, insolvency law reform in the EU (cutely also called hello Chapter 11 or goodbye New York and London?) and hot topics in the realm of corporate reorganisation.

Felicity Toube QC is a speaker on the first morning in a breakout session entitled "Tell me a Secret: investigations and information exchange in cross-border insolvencies".

Felicity and co-panellists (Edward Mackereth from Ogier in Jersey, Cos Borrelli from Borrelli Walsh in Hong Kong and Hugh Dickson from Grant Thornton in Cayman) will discuss how to find assets and identify claims before assets disappear and the pitfalls to be avoided.

This will include practical tools for investigation and technical tactics for following assets around the

SOUTH SQUARE IN SAN FRANCISCO. MICHAEL CRYSTAL QC, LEFT AND, RIGHT MARTIN PASCOE QC.

THE FAIRMONT HOTEL: VENUE FOR THE FIRST EVER PERFORMANCE BY TONY BENNETT OF 'I LEFT MY HEART IN SAN FRANCISCO' IN 1961. AND VENUE FOR INSOL IN 2015.

SOUTH SQUARE IN SAN FRANCISCO LEFT TO RIGHT: TOM SMITH QC, FELICITY TOUBE QC, HILARY STONEFROST

globe. And it will all be based on a case study of a Ponzi scheme company with multiple cross-border issues in a role play format with...yes...audience participation.

More than 600 delegates from all parts of the world (the UK, US, Canada, Jersey, Guernsey, Bahamas, Bermuda, the BVI, Cayman, Hong Kong, Singapore, Japan, Malaysia, the PRC, Australia, New Zealand, South Africa, Nigeria, Uganda, India, Ireland, Germany, Italy, France, The Netherlands, Denmark, Switzerland, Luxembourg, Finland, Romania, Brazil, Mexico and Argentina) are expected to attend and the South Square team is looking forward to seeing other delegates, catching up with old friends and making new contacts. South Square is sponsoring the lunch on Tuesday 24 March 2015 so make sure you catch up with members of Chambers there.

As usual, the next issue of the Digest due out in May will feature an overview and highlights of the Conference.

Friends of South Square recommend

(in no particular order...)

Restaurants

Boulevard: New American, Embarcadero
www.boulevardrestaurant.com
Gary Danko: American, Fisherman's Wharf
www.garydanko.com
NamuGaji: Korean-American, Mission District
www.namusf.com
La Colonial: French Vietnamese, Cosmo Place
www.lecolonialsf.com
Slanted Door: Modern Vietnamese, Ferry Building
www.slanteddoor.com
State Bird Provisions: Modern American, Fillmore Street
www.statebirdsf.com

STATE BIRD PROVISIONS

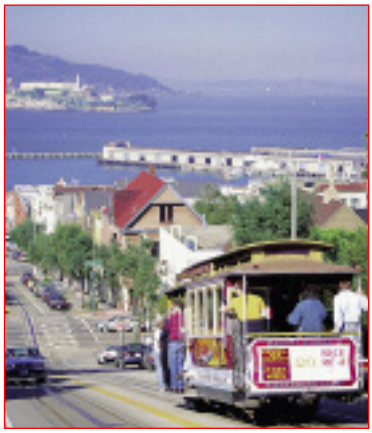
Town Hall: American/Sea Food, Howard Street
www.townhallsf.com
RN74: French, Mission Street
www.michaelmina.net/restaurants/san-francisco-bay-area/rn74
French Laundry: French, Yountville, Napa Valley
www.thomaskeller.com/tfl

Bars

The Local Edition: Subterranean cocktail bar, Market Street.
www.localeditionsf.com
Top of the Mark: Bar with 360 panoramic view located on 19th floor of the InterContinental Mark Hopkins
www.intercontinentalmarkhopkins.com/top-of-the-mark.aspx

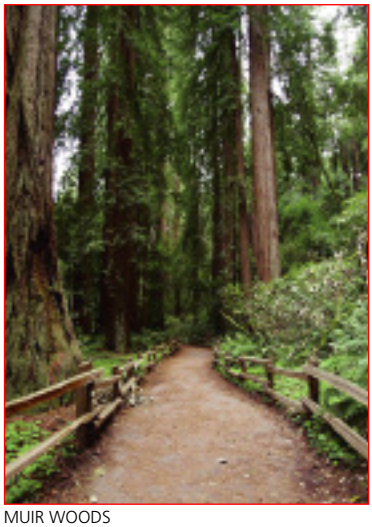
TOP OF THE MARK

Vitale Hotel: Opposite Ferry Building for pre-dinner drinks with Bay views and outside space
www.jdvhotels.com/hotels/california/san-francisco-hotels/hotel-vitale
Press Club: Wine bar and lounge, near Union Square
www.pressclubsf.com


SAN FRANCISCO CABLE CARS

ALCATRAZ

A FAMOUS SON


MUIR WOODS

History

San Francisco (Spanish for St Francis) was founded on 29 June 1776 when colonists from Spain established a fort at the Golden Gate and a mission named for St Francis of Assisi a few miles away. Upon independence from Spain in 1821, the San Francisco area became part of Mexico. At the end of the Mexican-American War in 1948, Mexico officially ceded the territory to the United States. San Francisco was still a small settlement at this time. However, the California Gold Rush brought a flood of treasure seekers and the population increased from 1,000 in 1848 to 25,000 by the end of 1949. By 1890 the population approached 300,000. San Francisco currently has a population of less than 900,000 people, making it smaller than Birmingham (the UK's second largest city) but bigger than Leeds (the UK's third largest city). San Francisco is the 14th largest city in the US behind, in order, New York, LA, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, Dallas, San Jose, Austin, Indianapolis and Jacksonville.

Famous for?

San Francisco is famous for its cool summers, fog, steep rolling hills, the 1906 earthquake and landmarks including the Golden Gate bridge (perhaps one of the most recognisable landmarks in the world which when it opened in 1937 was the world's longest span – 17 ironworkers and 38 painters constantly fight rust and renew the international orange paint on its 1.7 mile span), cable cars, the former prison (closed 1963) on Alcatraz (which means Pelican in Spanish) Island, its Chinatown district, Fisherman's Wharf, the Ferry Building and Embarcadero.

Famous people

Famous people who were born in San Francisco include Clint Eastwood, Danny Glover, Bruce Lee, Natalie Wood, Joe DiMaggio, William Randolph Hearst, Monica Lewinsky, Steve Jobs and OJ Simpson.

Outside the city

San Francisco has lots to see nearby. Prominent among them are Muir Woods, a national park on the Pacific coast with an old growth Coast Redwood forest. And of course the vineyards in Napa Valley and Sonoma County. Napa Valley has something like 400 wineries. Sonoma has about another 200.

EIGHT HAIRPINS MAKE LOMBARD ST. THE WORLD'S SECOND 'CROOKEDEST STREET'. (THE CROOKEDEST IS SNAKE ALLEY IN BURLINGTON, IOWA)

Sport

The US has two major sports that almost no other country plays. American football and baseball. The local NFL team is the San Francisco 49ers. The local baseball team is the San Francisco Giants. The 49ers (whose name comes from the name given to California gold prospectors who arrived in about 1849 during the California Gold Rush) are well known for winning five Superbowl championships between 1981 and 1994 and are tied with rivals Dallas Cowboys for the second most Superbowl wins. The Giants (who were originally called the New York Gothams and then the New York Giants and moved to San Francisco in 1958) have won the most games of any team in the history of American baseball. They have won 23 National League pennants and appeared in 20 World Series. Their eight World Championships leave them tied fourth overall (with the Boston Red Sox) in the US behind the New York Yankees, the Cardinals and the Oakland Athletics.

JOE DIMAGGIO AND MARILYN MONROE MARRIED IN SAN FRANCISCO, THE BIRTHPLACE OF THE FORTUNE COOKIE.

MULTIPLE SUPERBOWL WINNERS, THE SAN FRANCISCO 49ERS

Some San Francisco facts...

■ San Francisco was originally called "Yerba Buena", Spanish meaning "good herb" (after a mint plant that grew along the shoreline of the bay) or "good grass".

■ During the Great Depression not a single San Francisco bank failed.

■ The United Nations Charter was drafted and ratified in San Francisco in 1945.

■ The fortune cookie was invented in San Francisco.

■ Denim jeans were invented in San Francisco for the gold rush miners.

■ Marilyn Monroe got married in San Francisco.

■ San Francisco has hundreds of coffee shops – more than 300 within the boundaries of the city.

■ San Francisco is one of the richest cities in the world in terms of the number of billionaires – after New York, Moscow and London.

■ Wyatt Earp (of Gunfight at the OK Corral in Tombstone, Arizona fame) is buried in San Francisco. So are William Randolph Hearst and Joe DiMaggio.

■ San Francisco's cable cars are the only moving National Historic Landmark in the US.

Case Digests

LLOYD TAMLYN

The last quarter has seen a number of important developments, and clarifications, in corporate insolvency case law.

The Court of Appeal in *Salford Estates v Altomart* has decided that, save in the most exceptional circumstances, or where the claim is admitted, a creditor with a claim arising under an agreement containing an arbitration clause is unable to present a winding-up petition against the debtor.

In the field of cross-border insolvency, *Singularis v PwC* marks the latest attempt by the House of Lords/Supreme Court/Privy Council to reach agreement on the existence, ambit and content of a principle of "modified universalism". Despite Lord Neuberger's observation that the extent of the powers of a common law court to assist foreign liquidators is a very tricky topic on which those courts had not been conspicuously successful in giving clear or consistent guidance, some measure of agreement was reached among the five Law Lords. The power to assist does not extend to applying domestic legislation where the domestic legislation does not apply. The majority's development of a power of disclosure and examination, largely mirroring the statutory insolvency power, raises the question whether there are common law powers hitherto hidden beneath the legislation on preferences, transactions defrauding creditors, and so on, or whether such powers may be "developed". Stephen Robins discusses the issue in his article at page 6.

In *Stichting Shell v Krys*, the Privy Council has clarified that a creditor who submits a proof of debt in a foreign insolvency process thereby submits to the jurisdiction of the foreign court, whether or not the creditor benefits by the proof being subsequently admitted or paid. A submission may consist in any procedural step consistent only with acceptance of the rules under which the foreign court operate; besides which, any creditor who lodges a proof obtains an immediate benefit in the right to have the claim considered by the office-holder. The Board also commented that the global reach of the statutory trust reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets, necessarily excluding a purely territorial approach to international insolvency.

In *Rugby Football Union v Barry Lockwood* (Sport, below), the RFU Appeal Panel refused to impose a life ban on Mr Lockwood for punching the referee after he was penalised for holding on following a collapsed maul. After noting that Mr Lockwood was unable to rely by way of mitigation on the RFU's regulation 19.11.11(c) ("youth and inexperience"), the 49 year old Mr Lockwood was banned from playing the game for 20 years.

Lloyd Tamlyn

BANKING AND FINANCE

Digested by WILLIAM WILLSON

WILLIAM WILLSON

Libyan Investment Authority v Goldman Sachs International [2014] EWHC 3364 (Ch) (Rose J, 7 October 2014)

Indemnity costs

The claimant (L) sought a costs order following the withdrawal by the defendant (G) of its summary judgment application. L had brought a claim against G seeking to set aside nine trades that it had entered into with G between January and April 2008 for the purchase of long-dated options for US$1.2 billion. The instruments bought by L proved to be worthless. L alleged that the trades were procured by undue influence exercised by G. G maintained that L's claim was an example of buyer's remorse. G lodged an application for summary judgment in April 2014 which was withdrawn in August 2014. L had incurred substantial costs in drafting evidence to defend the application. L submitted that it had been clear from the start that G's application was doomed to fail and was misconceived. G contended that its application had been justified on the basis of the pleaded case served by L. Held that G was ordered to pay L's costs of the summary judgment application. Having looked at the evidence and the pleadings, G was not justified in bringing its application. Given L's pleaded case, the allegations had not come out of the blue and they were not particularly vague. The issues in the case were fact-sensitive and there were questions of law. It was never going to be possible to knock out the pleaded case on a summary judgment application. G's application was conduct out of the norm which should be marked by an award of indemnity costs.

Scott & Ors v Southern Pacific Mortgages & Ors [2014] UKSC 52 (Supreme Court), 22 October 2014)

Equity release schemes – Proprietary rights – Overriding interests

Under a "sale and rent back" scheme, S had sold her house to a purchaser, N, on the strength of N's promise that she could remain in the house indefinitely as a tenant. N bought the house with the assistance of a mortgage from M and purported to grant a leaseback to S. Exchange, completion and the execution of the mortgage took place on the same day. N did not tell M about its promise to S. N defaulted on the loan, M sought possession. The central issue for the instant court was whether S had an overriding interest. That involved determining whether (i) a prospective purchaser could grant proprietary, as opposed to merely personal, rights before completion; (ii) even if S had proprietary rights, *Abbey National v Cann* [1991] 1 AC 56 applied to prevent her from asserting an equitable right that had arisen only on completion. S's appeal was dismissed on the ground that she acquired merely personal rights against N when she agreed to sell on the basis of its promise. Her rights only became proprietary and capable of taking priority over the mortgage when N acquired the legal estate on completion, at which point the acquisition of the legal estate and the grant of the charge were one indivisible transaction. It was implicit in *Cann* that the contract, transfer and mortgage were one indivisible transaction. the instant case the contract and conveyance had been executed on the same day, but the analysis was not dependant on that. It would be unrealistic to treat the contract of sale as a divisible element.

DAVID ALEXANDER QC

DAVID ALLISON QC

LBI hf (In Winding Up Proceedings) v (1) Kevin Stanford (Defendant) (2) Landsbanki Luxembourg SA (In Liquidation) (Part 20 Defendant) [2014] EWHC 3921 (Ch) (Asplin J, 25 November 2014)

Banking and finance – Insolvency – Conflict of laws

Landsbanki Luxembourg ("LLux") loaned money to businessman Kevin Stanford ("Mr Stanford") secured by a mortgage over Mr Stanford's property in London ("the Property"). LLux went into liquidation in Luxembourg. Mr Stanford failed to repay the sums due. LLux commenced proceedings against Mr

Stanford in England for possession of the Property and a money judgment. Mr Stanford brought a counterclaim for damages for breach of contract and misrepresentation. LLux assigned the loan and the security to its Icelandic parent company, LBI hf ("LBI") (a credit institution subject to winding-up proceedings in Iceland). LLux remained in the proceedings as the Part 20 Defendant to Mr Stanford's counterclaim. Mr Stanford relied on a number of matters. First, he had pleaded that he had agreed orally with LLux that the loan would be repayable only from his share of the profits (if any) from a joint venture in India. Secondly, he said that he had a claim against LLux for damages for breach of contract, which remained available to him as a defence to the claim by the assignee, LBI. The contract on which Mr Stanford relied was an oral agreement which he claimed to have made with LLux in respect of the funding of the Indian joint venture. He said that LLux had failed to provide the agreed funding. Thirdly, he said that he had a claim against LLux for misrepresentation; that LLux had represented to him that LBI was creditworthy and that he had relied on this representation. He said that the representation was false, as LBI had in fact been insolvent at the time of the making of the representation. Fourthly, he said that the assignment by LLux to LBI was invalid. Held, there was no evidence to support Mr Stanford's contentions about an oral agreement. There had never been any contract between Mr Stanford and LLux in respect of the funding of the joint venture. Mr Stanford's claim for misrepresentation also failed. The alleged representation had never been made to Mr Stanford, nor had he relied upon it, nor had he proved it was false. The alleged representation was a representation as to LBI's creditworthiness, which was not actionable under section 6 of the Statute of Frauds Amendment Act 1828 applied. Mr Stanford could not bring it against LLux in these proceedings, as he had not lodged any proof of debt in the Luxembourg insolvency proceedings in respect of LLux. Further, his claim against LLux was not available to him by way of set-off against LBI's claim: Set-off was precluded by clause 13 of the loan agreementand by Luxembourg insolvency law. LBI could take the benefit of Luxembourg insolvency law, as the prohibition of set-off was an incident or accessory of the claim which had been assigned to LBI under Luxembourg law.

[David Alexander QC, David Allison QC, Stephen Robins]

Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz [2014] EWCA Civ 1603 (Arden LJ, Davis LJ, Sales LJ, 10 December 2014)

Banking and finance – Contracts – Third party debt orders

The appellant creditor (M) appealed against a decision discharging three interim third-party debt orders it had obtained to satisfy an English judgment obtained against the respondent company (N). M was the assignee of a Russian creditor of N, the Ukrainian national energy company, and had obtained judgment in the courts of Ukraine and in England. N was the issuer of guaranteed notes, for which the third party bank (B) was the principal paying agent. M became aware that a semi-annual interest payment was due to the noteholders and obtained an interim third party debt order against B in order to intercept the funds and satisfy its judgment debt of $21 million. M realised that the existing order would not be effective to restrain B from paying out any monies it received after the order had been served, and therefore obtained a second interim order once the money had been paid to B. Meanwhile, to avoid a default, N paid a further $75 million to B who used it to pay the noteholders in time to avoid default. That transaction was governed by a supplementary agreement between N and B. M was subsequently granted a third interim order and asked the court to make the second and third orders final. M contended that once the noteholders had been paid via the second tranche, B held the first tranche as a debt repayable on demand to N. Held, it was common ground that sums held by a bank in a current account were generally capable of being the subject of a third-party debt order. However, the effect of the crucial clause was plain. It made explicit that, notwithstanding the payment of the noteholders by the second tranche, the first tranche was to continue to be held by B under the terms of the original agency agreement, namely for the purpose of future payments to the noteholders and so was not a debt repayable to N on demand.

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD

HENRYPHILLIPS

ALEXANDER RIDDIFORD

Avonwick Holdings Ltd v Webinvest Ltd [2014] EWCA Civ 1436 (Lewison, Sharp, Burnett LJJ, 17 October 2014)

Without prejudice communications – Privileged communications – Waiver of privilege

W & S appealed against decisions as to the admissibility of evidence and in relation to disclosure. The Respondent company (C) had loaned $100million to W, an entity controlled by S, to make a loan to T. S stood as guarantor for W's obligations. W defaulted. C did not agree to the proposed terms of a rescheduling and required the provision of security. Payment was demanded by C from W and S. S alleged that there had been a collateral oral agreement that W's payment obligation was conditional on W being repaid in full by T, but T had defaulted, prompting W to commence arbitration proceedings against T that were subsequently settled. Disclosure of the correspondence leading up to settlement was ordered by the Court. The Judge had decided that S had waived privilege in certain documents, and W & S appealed this decision. A second Judge decided that correspondence leading to the abortive rescheduling, notwithstanding that it was marked "Without prejudice and subject to contract", was admissible, finding that the correspondence was not covered by the "without prejudice" privilege on the basis that there was no dispute at the relevant time as to W's liability under the loan or S's liability under the guarantee. The Court of Appeal allowed the appeal insofar as it related to the decision of the first Judge that S had waived privilege, on the basis that the words relied upon did not amount to waiver. The appeal relating to the "without prejudice" privilege issue was dismissed. Public policy and contract are the two bases on which the without prejudice rule may operate. For privilege to arise on the former basis there must be a dispute in existence (to be determined objectively), and a dispute in this sense includes the "opening shot" of a dispute. The Judge had been right that there was no dispute at the time of the correspondence in question. Further, the agreement that documents could not be used in Court proceedings could not be unilaterally imposed.

[Tom Smith QC and Henry Phillips]

Richardson v Glencore Energy UK Ltd [2014] EWHC 3990 (Comm) (Walker J, 7 November 2014)

Case management conferences – Complex cases – Oral hearings

This was a CMC for an action relating to a senior commodities trader's employment rights. During the afternoon prior to the CMC, a letter was emailed to the Court on the parties' behalf, stating that agreement had been reached on the list of issues, the pre-trial timetable and the case memorandum, which were enclosed with the letter. The parties' legal representatives asked the Court to confirm whether their attendance was required at the CMC. It was. Walker J considered that the parties' letter to the Court evidenced a failure on the part of the parties to appreciate the importance of CMCs and a failure to comply with CPR r.58.13, CPR PD 58, making special provision for case management in the Commercial Court. The general rule was that there had to be an oral CMC. A late request for the hearing to be vacated was a symptom of problems with preparation, including a failure to get to grips with the case in advance of the CMC and giving proper consideration to what the real issues were. Further, a letter such as the one sent to the Court the afternoon before the CMC was listed to be heard could cause disruption to the Court's work. Parties had to recognise that by engaging in such conduct they ran the risk of sanctions. However, the Court indicated that nothing in the judgment was intended to dissuade or criticise those who agreed that a request for a paper CMC ought to be made and who met the requirements as to the supply of documents and lodged them in good time.

Hague Plant Ltd v Hague [2014] EWCA Civ 1609 (Briggs, Clarke, Sharp LJJ, 11 December 2014)

Amendment – fundamental change

The Court of Appeal held that the Judge had been right to refuse to permit a claimant to re-amend its particulars of claim on the basis that: the proposed re-amendments recast the claim in a fundamental way; they made it five times longer than the original; and they did not contain a concise statement of the facts relied upon in support of the claim. The case was the fifth set of proceedings in a lengthy family dispute. The draft re-amended particulars altered the claimant's case so fundamentally that they would have required a complete repleading of defences. The Judge held that the proposed re-amendments were disproportionate, with the litigation causing extensive judicial time to be expended at the expense of other litigants. The Judge relied on a passage in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, which indicated that the Jackson reforms required strict compliance with rules and orders and a fair allocation of time to all litigants. Whilst no trial date had been fixed, the application was late given the time that had passed and the work that had been done. The Court of Appeal considered that the Judge had not been wrong to rely on the relevant passage of the Court of Appeal's decision in Mitchell, notwithstanding that that passage had concerned non-compliance; rather, the Judge's reliance on the passage was understandable given the burden that had already been placed on the Court by the family's litigation.

Justice Capital Ltd v Murphy [2014] All ER (D) 187 (Dec) (Registrar Jones, 11 December 2014)

Extensions of time – Remuneration – Discretionary powers

J applied to challenge under IR 2.109 the remuneration and expenses detailed in the administrators' first progress report on the ground that they were excessive. J also sought to challenge the remuneration and expenses detailed in the second progress report, which was made after the application was filed. The application had to relate to expense already incurred and so in fact a second separate application was necessary but, by the time this problem had been identified, J was out of time to file a second application. J issued the second application, notwithstanding that this was outside the 8-week time limit for the filing of such an application, and submitted that: (a) the first application sufficed for both challenges; and (b) the Court could, in any event, extend time for the second application under IR 12A.55(2). Registrar Jones granted J's application. The 8-week period within which to challenge the remuneration and expenses applied to each specific report; each report should be scrutinised and a separate decision taken before filing an application. It followed that there had to be a separate application under IR 2.109(1A) in respect of each progress report. IR 2.109(1B) did not contain an express power to extend time for an application to challenge remuneration. However, the policy behind the 8-week time limit did not prohibit the rules conferring a power to extend that time, even if it was not expressly referred to in IR 2.109. IR 2.109(1B) was a peremptory provision; no application could be brought if it was not complied with, subject to the power to extend time (equivalent to the power to grant relief from sanctions). Accordingly, *Denton v TH White Ltd* [2014] EWCA Civ 906 applied to the exercise of the Court's discretion. The extension was granted on the basis of applying the *Denton* guidance to the facts.

COMMERCIAL LITIGATION & ARBITRATION

Digested by CHARLOTTE COOKE

Ted Baker Plc v Axa Insurance UK Plc [2014] EWHC 3548 (Comm) (Eder J, 30 October 2014)

CHARLOTTE COOKE

Insurance – Employee theft – Conditions precedent

A retailer claimed for losses for business interruption under an insurance policy provided by the Defendant. The claim failed because the retailer had failed to comply with a co-operation condition to provide information reasonably required by the insurer in support of the claim. Condition 2(b)(i) of the policy

required T to provide particulars of their claim to insurers "no later than 30 days after the expiry of the indemnity period or within such further time as [insurers] might allow". Condition 2(b)(ii) required T to provide information and documents reasonably required by insurers. There had been a breach of those conditions. Further, the claim would in any event have failed as the retailer could not show that each theft had caused losses above the value of the excess. The policy was subject to an excess of £5000 for "each and every loss". The retailer therefore had to show, on the balance of probability, that the losses claimed exceeded the excess for "each and every loss", but it was impossible to quantify the number of incidents of theft in a given period and/or the value of items taken on each occasion.

Avonwick Holdings Ltd v Webinvest Ltd, Chancery Division [2014] EWHC 3661 (Ch) (Sales J, 6 November 2014)

TOM SMITH QC

Contract – Loan agreement – Default

The Claimant brought a claim for recovery of a US$100 million loan advanced pursuant to a written loan agreement to the First Defendant, and guaranteed by its beneficial owner. The Defendants alleged that the loan was subject to a collateral "pay when paid" agreement that payments would only be due to the Claimant as and when the First Defendant received corresponding payment from a third party to whom it had on lent the monies. Having heard the witnesses, the Court rejected the Defendants' case as fabricated and dishonest, and judgment was entered for the Claimant for the full amount of the loan with interest. **[Tom Smith QC]**

Toyota Tsusho Sugar Trading Ltd v Prolat S.R.L [2014] EWHC 3649 (Comm) (Cooke J, 7 November 2014)

Shipping – Arbitration – Jurisdiction

The Claimant (A) sought a declaration under s.32 of the Arbitration Act 1996 that the arbitration tribunal of the Refined Sugar Association (RSA) had jurisdiction over a dispute between A and the Defendant (B) arising out of a contract of sale of a shipment of sugar. It was not in dispute that there was a contract for the sale of approximately 10,000 MT of sugar. Shipments began under the contract whilst discussions continued in relation to an additional quantity of sugar. C, on behalf of A, sent B and D (who was assisting B and negotiated on B's behalf) an addendum to the contract, signed by A, which set out an increased price and other contract terms. Two more addenda were sent thereafter. The contract and addenda contained an arbitration clause and C's evidence was that he had stated at meetings that any dispute would be resolved under the RSA rules. A commenced an arbitration seeking payment. B issued a claim in Italy claiming A was in breach of contract. The Court granted the declaration sought. The requirements of s.32(2)(b) and s.32(3) of the 1996 Act were met as there were factual issues to be resolved in determining the jurisdiction dispute and a tribunal decision on the matter might well be followed by an appeal such that a determination of the court would likely save substantial costs. As there was evidence that the contractual terms had been agreed between A and another who had actual and ostensible authority to act as B's agent and the contract contained an arbitration clause in favour of the RSA, B was bound by the terms of the contract, even though he had not signed it.

Canyon Offshore Ltd v GDF Suez E&P Nederland BV [2014] EWHC 3810 (Comm) (Judge Mackie QC, 27 November 2014)

Contracts – Jurisdiction – Place of performance

The applicant, a Dutch company (A) sought a declaration that the English Court did not have jurisdiction to hear a claim brought against it by a Scottish company (B). A owned and operated oil and gas fields in the Dutch sector of the North Sea and had entered into three contracts with a Dutch main contractor (C) for the transportation and installation of pipelines. Those contracts contained Dutch law and jurisdiction clauses. C sub-contracted the work to B, with the sub-contract containing an English law clause as well as providing for arbitration in Rotterdam. C fell behind on payments to B and A wrote to C offering to pay B, directly on C's behalf. C informed B of the offer and B completed the work. A denied that C was authorised to act as its agent and further averred the offer was withdrawn before being

accepted, but the sub-contractor brought proceedings against A, claiming £5.5 million. A argued that the English Court did not have jurisdiction under Regulation 44/2001 because under the alleged contract it agreed to make payments to B provided that B continued to perform its obligations under the sub-contract, such performance being in the Dutch sector of the North Sea, rather than in England. The Court declined to make the declaration sought. The characteristic obligation under the alleged contract was the assumption by A of the obligation to pay B, in return for B continuing to perform under the sub-contract. The place of performance of the payment obligation was prescribed by B's invoices and was equally England or Scotland such that the English Court had jurisdiction to hear the claim.

Bank of Tokyo-Mitsubishi UFJ Ltd v Sanko Mineral [2014] EWHC 3927 (Admlty) (Teare J, 28 November 2014)

ANDREW SHAW

Caution – Time bar

The Defendant applied to strike out a caution which had been entered by a third-party in relation to the sale of a vessel owned by the Defendant. The Defendant contended that the caution had only been entered and an admiralty claim commenced after the vessel had been sold and therefore no statutory right of action in rem could arise. The Court rejected this contention, since the entry of the caution fell to be backdated to the position prior to the sale of the vessel. However, the Court held that the third party's claim was time barred since under the terms of the charterparty a claim had to be commenced by arbitration with 12 months. The Defendant was in reorganisation proceedings in Japan and the third-party had lodged a claim in those proceedings. However, this was not sufficient to prevent the time bar under the charter party from taking effect. Accordingly, the caution would be struck out but on terms that the sales proceeds were held segregated pending determination of the claim in Japan.
[Tom Smith QC, Andrew Shaw]

Atlasnavios – Navegacao, Lda v Navigators Insurance Co Ltd [2014] EWHC 4133 (Comm) (Flaux J, 8 December 2014)

Shipping – Insurance

A claimant ship-owner brought a claim against its insurers under a war risks insurance policy on the Institute War and Strikes Clauses 1/10/83 with additional perils. Drug smugglers had strapped drugs to the hull of a ship without the knowledge of the ship-owner, resulting in the ship's detention and constructive total loss. It was held that the drug smugglers were persons acting maliciously within the meaning the policy and that the policy therefore provided cover for losses caused by their actions. On the proper construction of the policy a clause excluding losses arising from detention by reason of an infringement of customs regulations did not apply where the infringement resulted from the malicious actions of third parties.

Transocean Drilling UK Ltd v Providence Resources Plc [2014] EWHC 4260 (Comm) (Popplewell J, 19 December 2014)

Contract – Oil – Delay

The Claimant, having supplied an oil rig to the Defendant, sought damages for remuneration incurred as a result of the Defendant's delays in drilling a well. The quantum of the claim was calculated using rates set out in the parties' drilling contract, which provided for different rates to apply depending on the rig's functions at the time. The Defendant claimed the delay was caused by the Claimant's breach of contract and/or misrepresentation and counterclaimed for costs wasted as a result of the delay. It was held that the delay was caused by the Claimant's breach of its contractual obligation to maintain the rig and its equipment. There was nothing in the wording of the remuneration provisions to indicate that the Claimant would be paid at the operating day rate even when the rig was not operational because of its breach. As such, the remuneration provisions did not support the Claimant's calculation of its entitlement. The Court determined the period during which the Claimant should have claimed remuneration at the repair or standby rate, rather than the operating rate. The evidence indicated that certain of the Defendant's costs would not, however, have been saved even if there had been no delay.

COMPANY LAW

Digested by ROBERT AMEY

ROBERT AMEY

Novatrust Ltd v Kea Investments Ltd [2014] EWHC 4061 (Ch) (HH Judge Pelling QC, 10 December 2014)

Derivative claims – Jurisdiction over foreign companies

Novatrust Ltd (a Jersey company) and Kea Investments Ltd (a BVI company) had incorporated a third company (Spartan Ltd) in the BVI as a joint venture investment vehicle, Novatrust and Kea each having a 50% share. The shareholders' agreement (SHA) was governed by English law and subject to the exclusive jurisdiction of the English court. The relationship between Novatrust and Kea broke down, and the latter sought a winding up of Spartan in the BVI on the ground that it would be just and equitable. Novatrust contended that this was a breach of the deadlock provisions in the SHA. Novatrust therefore brought proceedings in England on its own behalf and on Spartan's behalf as a derivative claim, and obtained permission to serve out of the jurisdiction on Kea. Kea challenged that decision, arguing that the English court's common law jurisdiction over foreign company derivative claims had been ousted by the Companies Act 2006 Part 11. Kea further argued that under BVI law, Novatrust needed the permission of the BVI court to bring derivative proceedings, and that under English law, the claims Novatrust sought to bring on its own behalf were for reflective loss, which were precluded by the decision of the House of Lords in *Johnson v Gore Wood*. The court held that the common law jurisdiction relating to derivative claims in respect of foreign companies had survived the enactment of the Companies Act 2006. However, the law governing the derivative action was the law of the BVI, where Spartan was incorporated. Under BVI law, Novatrust needed the permission of the BVI court to bring a derivative action, which it did not have. Such a requirement was substantive rather than procedural, and so would apply even where the proceedings were brought in England. The derivative claim therefore failed, as did the claims which Novatrust sought to bring on its own behalf, which were for purely reflective loss.

IT Human Resources Plc v Land [2014] EWHC 3812 (Ch) (Morgan J, 17 November 2014)

Breach of fiduciary duty – Concealment – Limitation

Mr Land, an entrepreneur and computer programmer, had been a founding director of IT Human Resources Plc. He later served as a non-executive director. While a director, he had developed a multi-user, bespoke software system designed to assist in the conduct of a recruitment business for IT technicians. Some years after Mr Land's resignation, the company discovered that Mr Land had provided the software to another recruitment agency, Nationwide Technology Recruitment Ltd, for whom Mr Land had occasionally done some work as a computer consultant. The company alleged that Mr Land had infringed the company's copyright in the software and had breached his fiduciary duties as a director. Mr Land denied that the company had owned the relevant copyright, alternatively he asserted that the company had given its consent. He further argued that the claim was statute barred. The company alleged that the limitation period was extended under the Limitation Act 1980 s.32 by reason of Mr Land's deliberate concealment of his wrongdoing. The court held that the company had owned the relevant copyright, and that Mr Land had infringed that copyright by providing a copy of the software to Nationwide. As for breach of fiduciary duty, Mr Land had a duty under the Companies Act 2006 s.172 to act in the way which he considered, in good faith, would be most likely to promote the company's success, which could include a duty to disclose his own wrongdoing. Mr Land has also been obliged under s.175 to avoid a situation in which he had or could have a direct or indirect interest that conflicted, or possibly might conflict, with the company's interests, particularly in relation to the exploitation of any property, information or opportunity. On each occasion when he had provided Nationwide with software owned by the company, he had breached his fiduciary duty. He should also have realised that disclosure of his own wrongdoing was in the company's best interests. His failure to disclose that wrongdoing was therefore a further breach of fiduciary duty. As for limitation, Mr Land had deliberately concealed his wrongdoing. The copyright

infringement itself had been deliberate. The limitation period therefore did not run until the company learned of Mr Land's conduct. The company was therefore entitled to an inquiry or an account of profits in relation to the unlawful provision of copyright material to Nationwide.

Nilon Ltd v Royal Westminster Investments SA [2015] UKPC 2 (Privy Council, 21 January 2015)

Rectification of share register

Royal Westminster Investments SA was a Panamanian company and the nominee of a Mr Mahtani, a businessman resident in Nigeria. Nilon Ltd was a BVI company incorporated in 2002 by a Mr Varma, a businessman resident in London. Mr Mahtani (along with his company and other family members – together, the "Mahtani parties") alleged that at a meeting in England in 2002, Mr Varma had agreed orally to enter into a Joint Venture Agreement with the Mahtani parties. It was allegedly agreed that Nilon Ltd would be incorporated to trade in rice, that the Mahtani parties would provide funding, and that shares in Nilon would be issued to Mr Varma and the Mahtani parties in certain proportions. The Mahtani parties alleged that they had contributed funds as agreed, and had received dividends, but that Mr Varma had failed to procure the allotment of shares in Nilon to them, or the entry of their names in its register of members, or the issue of share certificates to them. They considered themselves legal and/or beneficial owners in Nilon, and therefore claimed declarations that they were owners of the agreed proportions of the issued shares in Nilon, and an order that the share register be rectified pursuant to s.43(1)(a) of the BVI Business Companies Act 2004. The Mahtani parties sought, and obtained ex parte, permission to serve out of the jurisdiction on Mr Varma. The appeal to the Privy Council was against the granting of permission to serve out. Their Lordships were therefore required to consider whether there was a real issue between the Mahtani parties and Nilon under section 43(1) of the BVI Act (the equivalent of section 125 of the UK Companies Act 2006). The core question was whether proceedings for rectification are maintainable only if the register is presently inaccurate or whether they can be used to determine whether a defendant is in breach of a contract to procure that a company would issue shares. In *Re Hoicrest Ltd* [2000] 1 WLR 414 the English Court of Appeal had considered the same issue. 98 shares in the company had been issued to Mrs Martin. Mr Keene, who cohabited with Mrs Martin, claimed that Mrs Martin had agreed to hold 49 of these shares on trust for him pending repayment of a loan by her to fund the acquisition of a lease by the company. Mr Keene issued an application seeking rectification of Hoicrest's register of members. At first instance, the judge struck out the rectification claim on the grounds that there was no jurisdiction to rectify Hoicrest's register of members, because unless and until the dispute had been resolved and Mrs Martin had executed an instrument of transfer in Mr Keene's favour, Mr Keene had no right to be entered in Hoicrest's register of members in respect of the 49 shares which he claimed Mrs Martin held on trust for him. It would only be then that it could be said that Mr Keene's name had been omitted from the register "without sufficient cause" under what is now section 125(1). The Court of Appeal allowed Mr Keene's appeal, holding that what is now section 125(3) enabled the court to direct a trial of Mr Keene's claim to a beneficial interest in the shares. In the present proceedings, the BVI Court of Appeal considered that *Re Hoicrest Ltd* was authority for the proposition that rectification proceedings were an appropriate forum for determining breach of an agreement to convey shares. On appeal to the Privy Council, Mr Varma emphasised that a company is not obliged to have any regard to trusts or beneficial interests in its shares and is entitled to deal only with the legal owner of the shares. The result in *Re Hoicrest Ltd* was largely driven by issues of domestic case management on a differently worded statute, alternatively, *Re Hoicrest Ltd* was wrongly decided and should not have been followed by the Court of Appeal. These arguments were accepted. The Board noted that the summary nature of the rectification jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute. Although the outcome in *Re Hoicrest Ltd* was justifiable on case management grounds, the notion that rectification proceedings could be used to try a breach of contract claim was wrong in principle.

CORPORATE INSOLVENCY

Digested by ADAM AL-ATTAR

Re Comet Group Ltd (in liquidation) [2014] EWHC 3477 (Ch) (John Baldwin Q.C. sitting as a Deputy Judge, 27 October 2014)

ADAM AL-ATTAR

Section 236 – Information and documents

Whirlpool was a supplier of white goods including fridges and freezers. It supplied goods to Comet. Embraco, was a subsidiary of Whirlpool. The European Commission had held that Whirlpool and Embraco had participated in a cartel between April 2004 and October 2007. Comet's liquidators applied to the court pursuant to s 236 of the Insolvency Act 1986 for information and documents which, they contended, they required to enable them to investigate and decide whether or not to pursue a claim in damages said to arise from the fact that Embraco had supplied refrigeration compressors, at prices believed to have been inflated by the cartel activity, to entities in the Whirlpool group, who had used them in the manufacture of refrigerators, which Whirlpool had supplied to Comet. The respondents submitted that the order ought not to be granted, on grounds of jurisdiction and discretion. With regard to discretion, the respondents submitted that the information/documents sought were not reasonably required for the purposes which the liquidators contended, in that the liquidators had been clear in correspondence that they intended to issue proceedings and could not resile from that position. The Deputy Judge held that the benefit likely to be gained by the liquidators as a result of making the order substantially outweighed the burden likely to be imposed on the respondents. **[Tom Smith Q.C.]**

Re Business Environment Fleet Street Ltd (In Administration) [2014] EWHC 3540 (Ch) (David Halpern Q.C. sitting as a Deputy Judge, 28 October 2014)

FELICITY TOUBE QC

Administration – Leave to dispose of assets

The Company was the owner of long leases of properties in London. The Company granted short-term subleases of units within the properties as serviced offices. It mortgaged the properties as security for debts which were said to exceed £40m. The lenders appointed the applicants as administrators of the company. BECSL, which was in the same group of companies as the company, claimed to own the equipment at the properties which formed part of the proposed sale. The administrators accordingly applied for leave, under paragraph 72 of Schedule B1 to the Insolvency Act 1986, to dispose of the assets.
The Deputy Judge was not persuaded on the balance of probabilities that the agreement gave possession of the assets to the company. On the assumption that the assets belonged to BECSL, either BECSL had retained possession or it had transferred possession to the subtenants. The original application had been made under paragraph 72 on the basis that the assets had been in the company's possession under an agreement for bailment. That was inconsistent with the administrators thinking that the company was entitled to the assets. Had it been necessary to reach a conclusion as to whether the administrators had genuinely thought that the assets belonged to the company, the Court would not have been satisfied on the balance of probabilities. **[Felicity Toube QC]**

Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36 (Privy Council, 10 November 2014)

GABRIEL MOSS QC

Cross-border insolvency – Modified universalism

In *Singularis*, the Privy Council re-stated the principle of modified universalism and thereby constrained the scope of judicial assistance that might be given to a foreign insolvency officeholder. The application in *Singularis* concerned, essentially, an order for private examination in the form of the delivery up of documents, including PwC's working papers. The application in the Bermuda Court was by a Cayman Liquidator who said he needed the paper to trace assets, although it was also apparent that he might wish to sue PwC as auditor. There was no active winding-up in Bermuda, whose law include a wide power of private examination equivalent to Section 236 of the Insolvency Act 1986. Cayman law, by contrast, did not provide for such a power, effectively limiting the power to obtain documents to documents the property of the company. In *Cambridge Gas v Navigator* [2007] 1 AC 508, in recognising and giving effect to a New York Court order to transfer

shares in a Manx company so as to give effect to a restructuring plan sanctioned by the New York Court pursuant to Chapter 11 of the US Bankruptcy Code, Lord Hoffmann had given the principle of modified universalism its broadest judicial expression, authorising the Court to do by way of assistance whatever might be done under a local law insolvency proceeding: "[T]he underlying principle of universality is…given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company… In addition…." recognition…carries with it the active assistance of the court." What are the limits of the assistance which the court can give?...[T[he domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency."

This expression of the principle of modified universalism was derived from In re African Farms Ltd [1906] TS 373, in which the Transvaal Court, in recognising the authority of an English liquidator appointed to an English company to deal with that company's Transvaal assets, had imposed a stay of execution on the actions of a mortgagee. The Transvaal Court had ordered (at 384-385) that:

"[The English Liquidator] be declared entitled to the sole administration of all the assets of the said company in the Transvaal both moveable and immovable, subject to the following conditions: -

[A]ll questions of mortgage or preference in respect of such assets, shall be regulated by the laws of this colony, as if the company has been placed in liquidation here."

(Emphasis added.)

On this basis, the Cayman Liquidator advanced an "as if" hypothesis by which the Bermudian provisions were to be treated "as if" applicable to the Cayman winding up.

Lord Collins rejected that so-called "as if" hypothesis because it necessarily entailed that the Court should exercise a statutory power otherwise inapplicable. In African Farms, the hypothesis was only relied upon as a constraint – to prevent an execution by a mortgagee – and was not relied on to access any statutory power. Further, where the legislature has conferred a statutory jurisdiction and has determined the limits of that jurisdiction, there is no room for any residual or inherent jurisdiction on the part of the Court to apply that statutory jurisdiction beyond those limits: see *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, PC.

Lord Sumption then delivered the advice of the Board, which considered an argument not (principally) advanced by the Cayman liquidators, specifically the existence of a common law power to disclose information.

As a prelude to the consideration of whether there was such a common law power, Lord Sumption re-stated the principle of modified universalism. He said, in summary:

(1) that*African Farms* was conventional in terms of principle of private international law current at that time and prevailing today: it recognised the authority of an English liquidator to deal with the Transvaal assets of an English company;

(2) that *African Farms* was "significant" only in so far as directed the Transvaal assets to be dealt with "as if" in a liquidation in the Transvaal, although no there was no power to wind up the company in that province (at [14]).

(3) that *Cambridge Gas* was only authority for the principle of modified universalism (at [15]) and *not* for doing whatever could have been done in a domestic insolvency or for the related proposition that the power to assist is itself was a source of jurisdiction (at [15] and [18]-[19]);

(4) that (at [19]) the principle of modified universalism (so re-stated) was (further) constrained by:

(a) local law and public policy; and

(b) the limits of:

(i) statutory authority; and

(ii) the court's common law powers "including any development of the common law".

In applying the re-stated principle of modified universalism, the Privy Council identified a power to order the production of document by analogy with the power developed in *Norwich Pharmacal* to disclose information if mixed up – even if innocently and involuntarily – in a wrong (at [23]-[24]). Five specific considerations informed the development of the power to order the production of documents to assist a foreign liquidator:

(1) Power only available to assist foreign officers not voluntary liquidators.

(2) Power available by way of assistance and so constrained by what an officeholder can do under his own law.

(3) Power similarly constrained to that necessary for performance of his functions.

(4) Power also constrained by local law rules and public policy including if an order would be inconsistent with a more specific statutory scheme.

(5) The exercise of the power is also subject to the payment of the respondent's reasonable costs of compliance.

The power was not exercised on the facts of *Singularis*, firstly, because of the prospect that the Cayman Liquidator was motivated to sue PwC and, secondly, because of the whiff of (as held by the majority of the Bermudian Court of Appeal) "forum shopping". The Cayman Liquidator enjoyed no such power under Cayman law and, although Bermudian law did permit private examination, that power was confined to a Bermudian winding-up. The exercise of any common law power by the Bermudian Court would outflank the bounds set by each legislature. **[Gabriel Moss QC, Felicity Toube QC, Stephen Robins]**

Re Apcoa Parking Holdings Gmbh [2014] EWHC 3849 (Ch) (Hildyard J, 19 November 2014)

WILLIAM TROWER QC

JEREMY GOLDRING QC

ADAM GOODISON

Schemes of arrangement

The Court convened and sanctioned a scheme of arrangement in relation to a group of companies which carried on business as a car-park operator. The business was primarily based in and administered from Germany.

The scheme was opposed and so the judgment represents one of the few statements of principles for which the Court has had the benefit of argument. The essential points from the judgment can be summarised as follows:

(1) The Court has jurisdiction to sanction a scheme of arrangement in relation to a foreign company, even if its centre of main interests (COMI) is in another members state, provided that the company is *liable* to be wound up under the Insolvency Act 1986, which liability can be established on the footing of English law governed finance documents, even if the law of the finance documents has been changed for the purpose of conferring jurisdiction on the Court to sanction a scheme of arrangement.

(2) The Court (probably) does not have jurisdiction to sanction a scheme of arrangement the terms of which impose new obligations on scheme creditors, for example a new commitment to lend. In *Apcoa*, the issue arose in relation to a guarantee facility which, when rolled-over by the terms of the scheme, included not only existing guarantees but new guarantees to be written, albeit to the same facility limit. The scheme had to be amended in this respect.

(3) The Court does not have jurisdiction to sanction a scheme of arrangement the terms of which require from scheme creditors an undertaking equivalent to an anti-suit injunction restraining proceedings in another member state which would have jurisdiction under the Judgments Regulation. The scheme had to be amended in this respect also.

(4) The Court considered that the meetings had properly been convened and that the class of scheme creditors was not fractured by reason of *turnover* subordination provisions which required some creditors within a putative class to pay to other creditors the dividends received. In economic terms, the former were in the position of subordinated creditors; however, as the subordination was effected by turnover rather than by variation of the scheme company's covenant to pay, the rights *against the scheme company* were not different from creditors who had not agreed to turnover.

(5) In the light of the above conclusion on jurisdiction, the Court did not decide the issue of class manipulation, which arose because the subordination had, initially, been effected by a postponement of the scheme company's promise to pay and was only varied to a turnover arrangement after the entry into the lock-up agreements and for the purpose of removing a potential class issue. Hildyard J remarked however that the Court would be astute to observe that the classes were not "gerrymandered". As to what he meant by that is at large. If there is an analogy with vote manipulation, it would suggest something like a dishonest (i.e. non-transparent) series of steps to dilute the votes of others (e.g. steps equivalent to multiple share issuances to related or friendly parties).

(6) As a matter of fairness, the scheme in *Apcoa* was not unfair because notwithstanding the inclusion of subordinated and non-subordinated creditors in the same class, the economic straits of the scheme company were such that there was more in common than divided the scheme creditors such that the votes of the majority subordinated creditors could not be said to be non-representative of the putative class and therefore discounted in the exercise by the Court of its discretion.

[William Trower QC, Jeremy Goldring QC, David Allison QC, Adam Goodison, Daniel Bayfield, Adam Al-Attar]

Stichting Shell Pensioenfonds v Krys [2014] UKPC 41 (Privy Council, 26 November 2014)

Cross-border insolvency – Anti-suit injunctions – Submission to the jurisdiction

The issue before the Board was whether, when a company is being wound up in the jurisdiction where it is incorporated, an anti-suit injunction should issue to prevent a creditor or member from pursuing proceedings in another jurisdiction which are calculated to give him an unjustifiable priority. The Company, Fairfield Sentry, a Madoff feeder-fund, was incorporated in the BVI. The decision is of wider significance because the Board treated the law of the BVI and of the UK as the same for the purpose of the issue. The Appellant, Stichting Shell Pensioenfonds, had redeemed but had received no redemption payment from the Company. It applied in the Dutch

Court to obtain a pre-judgment garnishment of accounts of the Company held by Citco Bank. The attachment did not confer an indefeasible proprietary right but did confer upon the Amsterdam Court jurisdiction to determine the claim which, if good, would enable execution against the attached assets in due course. In considering the power to grant an anti-suit injunction, the Board, in a judgment delivered by Lord Sumption, proceeded from the premise that the trust of assets imposed on a winding up was world-wide, following from a particular application in a winding up of the general principle that only the law of a person's domicile (in the case of a company, of its incorporation) can apply to effect a universal succession of its assets. That premise (not previously articulated clearly in the reported cases) excluded a territorial approach to the assets of a company in liquidation, which might otherwise be governed by the *lex situs* rule. That rule was relevant to the question of whether a given asset was or was not within the estate. It did not determine the succession of all assets to the liquidation trust and, by the statutory regime which supplied the terms of that trust, to creditors. In support of this premise, Lord Sumption relied on the ancillary liquidation and remission cases, of which *BCCI (No 10)* and *HIH* are prominent examples, which he said, by the treatment of local assets and their remission, reflected a recognition of the universal succession effected by the principal winding-up. On this footing, because the Dutch attachment has not, in accordance with the *lex situs* rule, effected a change in the ownership of the asset, the pre-judgement attachment and the threatened claim was an interference with the statutory regime in the BVI liquidation. The only question then was as to the personal jurisdiction of the BVI Court with respect to the Appellant. If personal jurisdiction existed, there was power to restraint the interference with the statutory scheme without an order in terms that impermissible interfered with the jurisdiction of the Dutch Court. The Board held that there had been submission both by unconditional appearance in the injunction proceedings and (following from Lord Collin's judgment in *Rubin* at [161]-[165]) by proof in the BVI liquidation, irrespective of whether any dividend had been received.

Salford Estates (No.2) Limited v Altomart Limited [2014] EWCA 1575 Civ (Chancellor, Longmore LJ and Kitchin LJ, 8 December 2014)

Winding-up petitions – Stay under Arbitration Act 1996

The Court of Appeal considered whether, and in what way, the stay provisions in section 9 of the Arbitration Act 1996 applied to a petition to wind up a company on the ground of its inability to pay its debts. The Court held: (i) section 9(1) of the Arbitration Act 1996 does not apply to such a petition, so that such a petition is not subject to the mandatory stay under section 9; but (ii) the power of the court to wind-up a company under section 122(1) of the Insolvency Act 1986 is discretionary, and it was entirely appropriate that the court should, save in wholly exceptional circumstances which the Court presently found difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. Thus where a dispute in relation to a petition debt is subject to an arbitration agreement and the debt is not admitted, the petition ought ordinarily to be dismissed, or stayed, so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is disputed on substantial grounds.

PERSONAL INSOLVENCY

Digested by **TOBY BROWN**

TOBY BROWN

Re Henry [2014] EWHC 4209 (Ch) (Robert Englehart QC sitting as a Deputy High Court Judge, 17 December 2014)

Income payments orders - Uncrystallised pensions

The Trustee in bankruptcy sought an income payments order ("IPO") under s. 310 of the Insolvency Act 1986. The case raised the important question of whether the Court has power to make an IPO when a personal pension has not yet crystallised, which the only authority, *Raithatha v Williamson* [2012] EWHC 909 (Ch), had answered in the affirmative but which had been criticised including by John Briggs in (2012) 25 Insolv. Int. 65. The position since the Welfare Reform and Pensions Act 1999 has been that rights under personal pensions do not in general vest in a trustee in bankruptcy. However, there was no question that the 1999 Act protected from creditors income actually received from pensions. Here though the Court was asked by the Trustee in effect to order that the bankrupt, against his wishes, crystallise his 4 pension policies and exercise the

necessary decisions in the way desired by the Trustee to obtain the lump sum and annuity payments to be captured by the IPO. The essential question was whether a bankrupt "becomes entitled" to a payment within the meaning of s. 310(7) under an uncrystallised pension even though he would not be receiving any payments from the pension trustees and would have no enforceable claim for payment against them. The Judge decided the word "entitled" suggested a reference to a pension in payment under which definite amounts have become contractually payable. The Trustee faced the formidable problem that there is no obvious wording in s. 310 to give the Court power to decide how a bankrupt is to exercise the different elections open to him under an uncrystallised personal pension, nor is there any obvious route for a trustee to be said to have such a power. The Trustee's position was difficult to reconcile with the intention of the 1999 Act and was not supported by various commentaries such as the Act's Explanatory Notes. Accordingly, the Judge held that an IPO could not be made under s. 310 in respect of an uncrystallised pension. Since Raithatha could not be distinguished, the Judge had to conclude it had been wrongly decided. His judgment ends by saying he "hoped that the Court of Appeal will would soon have the opportunity of considering which of these first instance decisions is correct".

Re Scot Gordon Young [2014] EWHC 4315 (Ch) (Andrew Hochhauser QC sitting as a Deputy High Court Judge, 17 December 2014)

JOHN BRIGGS

Directing trustee to summon a requisitioned creditors meeting

The Bankrupt's ex-wife, Ms Young, demanded that a meeting of creditors be summoned in order to pass a resolution to remove the Joint Trustees and appoint her proposed replacements. The Joint Trustees sought directions pursuant to s. 303(2) of the Insolvency Act 1986 that they not comply. Ms Young cross-applied seeking an order that the meeting be summoned (an application issued in the Family Division resulting in its transfer to the Bankruptcy Court and a costs order against Ms Young).

The Joint Trustees had been appointed over 4 years ago but had not managed to identify any assets of the bankrupt or make any realisations. Ms Young accused them of lacking neutrality and being biased against her. She had also applied to annul and stay the bankruptcy, but the application was dismissed by consent, with Ms Young to pay the Joint Trustees' costs. High-profile ancillary relief proceedings had been on foot in the family courts for many years, in which the Bankrupt (since deceased) was found to have hidden £45 million of assets, leading to an award to Ms Young of £20 million plus costs. As a result of In re Nortel GmbH [2013] UKSC 52, Ms Young was able to prove in the bankruptcy on the basis of the unpaid judgment and thus became the majority creditor. The Judge imposed a compromise. Before the Joint Trustees should be obliged to summon the meeting, Ms Young must pay them the outstanding costs ordered in their favour. Reasons included that Ms Young had no say in the original appointment and it would be wrong to deprive her of the opportunity to put her case to other creditors. The Judge was surprised there had been no adjudication of the creditors' claims and was satisfied that Ms Young's proposed replacement trustees were suitable. Whilst he rejected any suggestion of reluctance on the Joint Trustees to recover assets, Ms Young was entitled to invite creditors to appoint "a fresh pair of eyes". The consequence, however, of Ms Young making the unnecessary and hopeless annulment and stay applications was that she should pay the costs before proceeding. The Judge did not consider that the time and cost of appointment new trustees would be dramatically inconvenient.

[John Briggs]

Skypark Limited and Ors v Andrew Ruhan [2014] (Registrar Barber , 19 December 2014)

GLEN DAVIS QC

Bankruptcy – Statutory demands – Expedited petitions

Against the background of pending proceedings in the Commercial Court in which damages are sought against Mr Ruhan based on an alleged oral joint venture agreement, a number of statutory demands and two bankruptcy petitions were served on Mr Ruhan. Mr Ruhan maintained that each of the debts on which the statutory demands and petitions were purportedly based was disputed on substantial grounds and that the statutory demands and petitions were served in order to put pressure on him to settle the Commercial Court proceedings.

The Court held that the two bankruptcy petitions, which were based on debts said to be owed pursuant to alleged oral agreements, which Mr Ruhan denied having

entered into, were disputed on substantial grounds. One petitioner sought to change the basis of its petition from an alleged contractual debt to a fiduciary duty to account, but this was not permitted. Given the draconian nature of bankruptcy proceedings, it is of the utmost importance that the debtor knows the case he has to meet. Moreover even if the petitioner had been permitted to proceed on that alternative basis, the petition would still have failed as it did not give rise to a debt in a liquidated sum. Further, presentation of the petitions on an expedited basis under section 270 of the Insolvency Act 1986 was not warranted and the petitions were also dismissed on that ground. The statutory demands were also disputed on substantial grounds and/or not based on liquidated debts and therefore set aside. As to abuse of process, the Court was troubled by the number of features of the case, but it was not necessary for the Court to decide, whether, had the debts been undisputed, it would nonetheless have been appropriate to set aside the demands and to dismiss the petitions on the grounds of abuse and/or improper purpose alone.

[Glen Davis QC; Charlotte Cooke]

PROPERTY AND TRUSTS

Digested by STEPHEN ROBINS

STEPHEN ROBINS

Crociani v Crociani [2014] UKPC 40 (Privy Council, 26 November 2014)

Trusts - Conflict of laws - Exclusive jurisdiction

In 1987, the settlor ("X") had entered into a trust deed for the benefit of her daughters ("Y"). Clause 12(6) of the deed stated that "the rights of all persons and the construction and effect of every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder". From October 2007, the trustees were based in Jersey. In 2011, the relationship between X and Y broke down and in 2012 the Jersey trustees resigned and appointed a Mauritian company as sole trustee. In 2013, Y issued proceedings in the Royal Court against X, the Jersey trustees and the company. X applied to stay the proceedings on the ground that the effect of cl.12(6) was to confer exclusive jurisdiction on the courts of the country in which any trustee was resident or incorporated, and since 2012 that country had been Mauritius. However, the Royal Court held that cl.12(6) did not confer exclusive jurisdiction on the Mauritian courts, and even if it did, the proceedings should nonetheless be permitted to proceed in Jersey. The Jersey Court of Appeal upheld that decision. X appealed. The issued for the Privy Council included: (i) whether the effect of cl.12 was to bestow exclusive jurisdiction on the courts of Mauritius; (ii) if so, whether the Jersey proceedings should nevertheless continue. The Privy Council held that cl.12(6) was not concerned with identifying which country's courts should have jurisdiction to determine disputes relating to the trust. The phrase "forum of administration" had no well-established or technical significance. In this context it referred to the place where the trust was administered, i.e. the place where its affairs were organised. If cl.12(6) had been intended to indicate the country whose courts were to determine disputes, the draftsman would have said so expressly. Further, even if the Mauritian courts did have jurisdiction as a result of the change of trustees, it was doubtful whether those courts would have exclusive jurisdiction. The reference to "exclusive jurisdiction" in cl.12(6) was properly to be construed as a reference to the exclusive application of a single law. In any event, even if cl.12(6) did confer exclusive jurisdiction on the Mauritian courts, it was not appropriate to grant a stay in respect of the proceedings in the Royal Court. Unlike the position with a contract, the court had an inherent jurisdiction to supervise the administration of a trust; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 considered. Accordingly, while a trustee was prima facie entitled to insist on and enforce an exclusive jurisdiction clause in a trust deed, the weight to be given to the existence of the clause was less than where one contracting party was seeking to enforce a contractual exclusive jurisdiction clause against another contracting party; *Donohue v Armco Inc* [2002] 1 All ER 749 applied. It was not appropriate to stay the proceedings in Jersey because: (a) there were a number of trust law issues raised by the proceedings and the great majority of those would be governed by Jersey law; (b) the trustees responsible for the administration of the trust were in Jersey at the time of the events which gave rise to three of the four claims in the proceedings and the documentation and many of the witnesses were in Jersey; (c) the evidence indicated that the parties would be content with the Jersey courts as the forum for determining the disputes; and (d) the reasons given by the appellants for preferring the Mauritian courts, such as the fact that X went on holiday there, were unimpressive.

Akers v Samba Financial Group [2014] EWCA Civ 1516 (Longmore LJ, Kitchin LJ, Vos LJ, 4 December 2014)

Conflict of laws – Trusts – Hague Convention

Saad Investment Co Ltd ("SICL") was incorporated under the laws of the Cayman Islands. Its owner, Maan Al-Sanea ("Mr Al-Sanea"), had, in six transactions, declared himself a trustee of certain Saudi Arabian shares for SICL's benefit. The first declaration stated that it was governed by Bahraini law; the second that it was governed by Saudi law. The four later declarations contained no choice of law clause. Shortly after the presentation of a winding-up petition in respect of SICL, but before the making of the winding-up order, the shares were transferred to Samba Financial Group ("Samba"). The liquidators sought to challenge the disposition under s.127 of the Insolvency Act 1986, which was potentially applicable under Article 21 of Schedule 1 to the Cross-Border Insolvency Regulations 2006. Samba argued that the shares were not owned beneficially by SICL. In order to resolve this issue, it was necessary to identify the governing law of the trusts. At first instance, the Chancellor held that the trusts were governed by Saudi law or Bahraini law (neither of which recognised the concept of a trust). The liquidators appealed contending that the trusts were governed by Cayman law and that they were therefore valid. The reasoning of the Court of Appeal focusses on Article 4 of the Hague Convention on the Law Applicable to Trusts and on their Recognition ("the Convention"), which was given statutory effect in the United Kingdom by the Recognition of Trusts Act 1987 ("the 1987 Act"). Article 4 provides: "The Convention does not apply to preliminary issues relating to the validity of … acts by virtue of which assets are transferred to the trustee". Samba argued that Article 4 excluded the preliminary question as to whether or not a trust had arisen. The Court of Appeal rejected this argument and adopted a far narrower interpretation of Article 4. According to the Court of Appeal's reasoning, Article 4 is applicable only to the validity of the transfers of property to the trustee: see, in particular, paras 39 to 51 of the decision of Vos LJ. Since the declarations of trust did not transfer anything to Mr Al-Sanea, who had always owned the shares and had merely declared that he held them beneficially for SICL. Applying the provisions of the Convention, it was arguable that declarations of trust were governed by Cayman law. As regards the later declarations, it was arguable that there was an implied choice of Cayman law. The question had to be determined considering the circumstances of the case; such an exercise could not be undertaken without full evidence as to the circumstances. The matter was less clear regarding the early transactions, but it would be undesirable to stay part of the proceedings, particularly in circumstances where the background to all transactions was likely to be related.

Plaza BV v Law Debenture Trust Corp plc [2015] EWHC 43 (Ch) (Proudman J, 16 January 2015)

Civil procedure – Trusts – Conflict of laws

The defendant (a trust corporation) applied for a stay of proceedings. The defendant was the trustee of bonds issued by an Australian company, which was in liquidation in Australia. The trust deeds were expressly governed by English law and contained a non-exclusive English jurisdiction clause. The claimant owned a substantial number of the bonds. The liquidators brought proceedings in Australia, challenging security that had been taken prior to the liquidation by senior creditors. The litigation in Australia was subsequently settled. The settlement deed conferred exclusive jurisdiction on the Western Australian court. The claimant brought proceedings in England to restrain the corporation from acting in breach of trust. The defendant applied for a stay of the English proceedings. The claimant opposed the application, arguing that the decision of the CJEU in *Owusu v Jackson* (C-281/02) [2005] QB 801 prevented the English court from staying its own proceedings on forum non conveniens grounds. The Judge held: (1) Applying *Owusu*, the English court was precluded from declining the jurisdiction conferred on it by the Brussels regime on the ground that a court of a non-contracting state would be a more appropriate forum and it was therefore not open to the defendant to argue that it would be more appropriate for the Western Australian court to resolve the dispute. (2) However, the Court could nevertheless grant a stay, either: (i) applying Article 27 of the Brussels Regulation reflexively (i.e. by analogy); or (ii) as a matter of discretion under Article 28 of the Brussels Regulation, which could also be applied reflexively, in order to avoid parallel proceedings and conflicting decisions. (3) As a matter of discretion, the

English court should grant a stay. The issues at stake in the English litigation were closely connected with the issues in the Australian litigation. There was a real risk of mutually irreconcilable decisions. (4) In any event, the English proceedings could be stayed under the English court's case management powers, applying *Reichhold Norway ASA v Goldman Sachs International* [1999] 1 All ER (Comm) 40, aff'd [2000] 1 WLR 173. **[Gabriel Moss QC]**

SPORT

Digested by MARCUS HAYWOOD

Coventry v Lawrence [2014] UKSC 13 (Supreme Court, 26 February 2014)

MARCUS HAYWOOD

Nuisance – Injunctions - Motorsport

The Supreme Court set out the correct approach when a court had to consider whether to award damages or grant an injunction in a nuisance case. The appellants appealed a decision that activities on land near their home did not constitute a nuisance. The first respondent was the operator of a stadium (built 1976), where speedway and stock-car racing had taken place. The second respondent operated a motocross track at the rear. In 2006, the appellants moved into a bungalow nearby. The Judge upheld their claim that noise from the stadium and track was a nuisance. The Judge was reversed on appeal. Allowing the appeal the Supreme Court held: (1) It was possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise. (2) It was no defence to argue that the claimant came to the nuisance, although it might well be a defence in some circumstances to argue that, as it was only because the claimant had changed the use of, or built on, his land that the defendant's pre-existing activity was claimed to have become a nuisance, the claim should fail. (3) A defendant could rely on those activities as being part of the character of the locality, but only if they were not a nuisance. Any other activity in the neighbourhood could be taken into account when assessing the character of the neighbourhood, to the extent that it was not an actionable nuisance or otherwise unlawful. (4) The mere fact that the activity which was said to be a nuisance had planning permission would normally be of no help to the defendant where a neighbour argued that the activity caused a nuisance to his land in the form of noise or other loss of amenity. It was wrong in principle that, through the grant of planning permission, a planning authority should deprive a property-owner of a right to object to what would otherwise be a nuisance, without providing him with compensation, when there was no provision in the planning legislation which suggested such a possibility. (5) The court's power to award damages in lieu of an injunction involved a classic exercise of discretion, which should not, as a matter of principle, be fettered, although the prima facie position in the case of nuisance was that an injunction should be granted. (6) The application of these principles justified the restoration of the injunction. However, under the "permission to apply" provision in the Judge's order, the Respondents would be free to argue that the injunction should be discharged and damages awarded instead.

Rugby Football Union v Barry Lockwood (Judgment of the RFU Appeal Panel (Sir James Dingemans QC, Sean Enright, Jim Sturman), 29 September 2014)

Rugby

Where a player had admitted punching a referee, the RFU Appeal Panel decided that a 10 year suspension from playing rugby was so unduly lenient as to be unreasonable. The suspension was increased to 20 years. On 7 December 2013, Ruislip RFC 2nd team were playing the HAC RFC 2nd team.. Ruislip, Mr Lockwood's team, had a line out in their 22, but were penalised. It appears that Mr Lockwood gave some limited backchat to the referee, but nothing further occurred and HAC kicked for touch and the ball went out just before the 5 yard line. HAC took the throw in and Ruislip carried out an effective defensive drive, with Mr Lockwood an important part of the drive, before the maul went to ground. Mr Lockwood was penalised for holding on. The referee called Mr Lockwood over and showed a yellow card. It then appeared as if Mr Lockwood would walk away but he turned back and punched, and felled, the referee. The referee suffered concussion, facial injuries and dental damage, requiring some £750 of treatment over a considerable period. Mr Lockwood was prosecuted for assault occasioning actual bodily harm, pleaded guilty, and was ordered to perform 80 hours of community

service, pay compensation of £2,500, a victim surcharge of £60, and costs of £85. The Disciplinary Panel noted that the usual starting point for this kind of offence should be a life ban, but reduced that starting point to 20 years on the basis of evidence that Mr Lockwood had been acting out of character due to a concussion. 20 years was then reduced to 10 by taking into account the mitigating factors set out in RFU Regulation 19.11.11. The Appeal Panel accepted that there was insufficient evidence to allow the potential concussion to constitute a mitigating factor. There had been no medical evidence before the Disciplinary Panel, and "mitigation, particularly where it is likely to be critical, should be shown in the same way as any other relevant fact." The Appeal Panel accepted that a life ban was appropriate as the usual starting point, but as Mr Lockwood had been put through the strain of both hearings, and "given his age" (49), took a starting point of 30 years instead. A 33 per cent reduction for mitigating factors was given (down from the 50% given by the Disciplinary Panel, in order properly to take into account the fact that, unknown to the Disciplinary panel, Mr Lockwood had been previously been disciplined for kicking, brawling and head butting, albeit some time ago).

R (on the application of East Meon Forge & Cricket Ground Protection Association v East Hampshire District Council & Ors [2014] EWHC 3543 (Admin) QBD (Admin) (Lang J), 31 October 2014

Planning – Cricket

Planning permission for the construction of residential accommodation above workshop premises was revoked where the planning report had rejected without adequate reasons Sport England's advice about a potential conflict between the residential use of the building and the use of an adjoining cricket ground, with particular regard to the risk of damage from cricket balls. The claimant, an association of local residents, applied for judicial review of a decision of the defendant local authority granting planning permission for alterations and additions to a former blacksmith's forge (The Forge). The Forge was a single storey industrial building which had been in use as a workshop until 2010, but had fallen into disrepair. It was a non-designated heritage asset for the purposes of the National Planning Policy Framework, was listed as an asset of community value and was situated within a conservation area. The claimant was formed with aim of protecting The Forge and the use of the adjoining cricket ground. The owners of The Forge obtained planning permission for the construction of first floor residential accommodation in order to make its restoration financially viable. The Judge held, amongst other things, that the planning report had rejected Sport England's advice about the extent of the measures needed to prevent damage from cricket balls without giving adequate reasons. Moreover, the planning officer had failed to advise the planning committee that Sport England was a statutory consultee whose views should be given considerable weight and only departed from for good reason. On the basis of Sport England's representations, the proposed development created unacceptable risks for its future occupants and for the cricket club and it followed that the planning permission had to be quashed.

Decision of the Football League in Relation to Massimo Cellino (Football League Board, 1 December 2014)

Football

On 1 December 2014 the Football League Board announced that Massimo Cellino, Leeds United Chairman, was disqualified from being a director of Leeds United and from exercising control over the Club until 18 March 2015. On 18 March 2014, a court in Cagliari, Italy, declared Mr Cellino guilty of evasion of import tax. The League was required to consider whether the Judgment of the Italian court was a conviction by a competent court having jurisdiction outside England and Wales for a like offence to an offence involving a 'Dishonest Act', within the meaning of Appendix 3 of The League's Regulations (i.e. an act that would reasonably be considered dishonest). If it did, then the Judgment constituted a 'Disqualifying Condition' until the conviction was deemed spent. Mr Cellino said he had appealed the Judgment and that it did not constitute a "final" judgment under Italian law. Therefore, he said it was not a "conviction" under the League's Regulations. Following an earlier decision of the League's Professional Conduct Committee in relation to Mr Cellino, the League rejected this on the basis that "conviction" in the Regulation was "clearly used in an English law sense" and the Italian Judgment "was a formal finding by a court of competent jurisdiction, following due process, that Mr Cellino is guilty beyond reasonable doubt of tax evasion, and that finding brings to an end the proceedings before that court."

Case updates: Cayman and BVI

It has been another busy few months in the Cayman Islands and British Virgin Islands. **Walkers Lawyers** look back at some of the more interesting highlights.

Another one bites the dust - Offshore clawback claims

NEIL LUPTON

As regular readers of the Digest will be aware, the increase in hedge fund liquidations after the global financial crisis has seen liquidators looking more closely at bringing clawback claims against investors who received redemption proceeds before a fund collapsed and ahead of other investors who did not redeem in time. Neither the Cayman Islands nor the British Virgin Islands has a specific statutory clawback regime that is specifically designed for use in hedge fund bankruptcies. This has led to liquidators attempting to use existing legislation and common law to force otherwise innocent redeemers to disgorge payments received before the onset of liquidation. To date, this has proved difficult[1], much to the relief of the offshore hedge fund industry and its investors who have been looking for certainty in this area.

The latest decision on this point by the Cayman Islands Grand Court in *RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund*[2] highlights the practical difficulties liquidators have faced in bringing such claims against investors. In DD Growth, the liquidators sought to argue that the payments made to redeeming investors were unlawful payments out of capital contrary to s.37(6)(a) of the Cayman Islands Companies Law[3] or alternatively were voidable preferences under s168 of the Companies Law. Chief Justice Smellie rejected both arguments.

The Chief Justice accepted that the fund was hopelessly insolvent but held that the payments made to redeemed shareholders were not made out of capital and therefore were not unlawful. The Chief Justice reached this conclusion by examining the capital structure of the company and decided that save for a *de minimis* amount of US$0.001 per share, the purchase price of the fund's shares represented share premium, and the redemption price of the shares represented a share premium plus (or minus) the profit (or loss) on the fund's investment. The liquidators sought to argue that capital included not only the nominal par value of the shares but also the premium but the Chief Justice rejected this argument as "stained and tortuous." The Chief Justice acknowledged that the events were *"grossly unfair to the December redeemers who were not paid, and even more so to those shareholders who had not sought to redeem their shares in the 2X Fund" but "such are the unfortunate consequences when an Investment fund becomes a Ponzi Scheme".*

The Chief Justice also rejected the preference claim on the basis that the liquidators had failed to prove that the fund had a dominant intention to prefer the redeeming investor. The Chief Justice found that the fund made the payments due to the increasing pressure being exerted by the investor and a desire to cover up the fund's catastrophic losses. The dominant intention was not to put the investor in a better position as against other investors, so whilst the fund may have known the investor would, as a matter of fact, be preferred over other investors in the event of a liquidation, the liquidators failed to show that the fund was primarily motived by a desire to achieve this end.

Neil Lupton

1/. See for in particular the Privy Council's decision in the BVI case of Fairfield Sentry Limited v Migani and others [2014] UKPC 9.
2/. Unreported, November 2014.
3/. Which provides "A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business."

Restatement of NAV in a Cayman liquidation Context: 0.12 CWR

As described above, so-called clawback claims by liquidators seeking to recover redemption payments made to former investors based on an incorrect Net Asset Value ("NAV") have proved extremely difficult to successfully pursue in offshore jurisdictions. As a result, liquidators have increasingly had occasion to consider other options with a view to ensuring equality of treatment amongst stakeholders with respect to distributions.

Whilst certainly not applicable in all cases, the regime contained in section 112 of the Cayman Islands Companies Law (2013 Revision) (as amended) ("Companies Law") and Order 12 of The Companies Winding Up Rules 2008 ("CWR"), may provide the official liquidator of a solvent Cayman Islands fund which has been exposed to a Ponzi scheme or other fraud with important powers.

Section 112(2) of the Companies Law provides:

In the case of a solvent liquidation of a company which has issued redeemable shares at prices based upon its net asset value from time to time, the liquidator shall have the power to rectify and, if necessary rectify the company's register of members, thereby adjusting the rights of members amongst themselves.

Order 12, rule 2(1) of the CWR provides further guidance as to when an official liquidator is required to exercise this power:

The official liquidator shall exercise his power to rectify the company's register of members under section 112(2) if he is satisfied that – (a) the company is or will become solvent; (b) the company has from time to time issued redeemable shares at prices based upon a mis-sated net asset value which is not binding upon the company and its members by reason of fraud or default with the result that the company has issued an excessive or inadequate number of shares in consideration for the prices paid by one or more subscribers; and/or (c) the company has redeemed shares at prices based upon a mis-stated net asset value which is not binding upon the company and its members by reason of fraud or default, with the result that the company has paid out excessive or inadequate amounts to former members in consideration for the redemption of their shares.

The rationale behind Order 12 of the CWR appears to be to require the liquidator of a solvent company or fund which has been exposed to a fraud – and issued and redeemed shares based on a mis-stated NAV as a consequence – to rectify the share register in order to adjust the rights of contributories amongst themselves. The aim appears to be for the liquidator to take account, so far as reasonably possible, of the effect of any shares issued or redeemed at a mis-stated NAV for the purposes of determining each contributory's economic interest in the company or fund and, therefore, their entitlement to share in the pool of funds which the liquidator ultimately anticipates will be available for distribution.

In addition to the clear solvency requirement, Order 12, rule 2(1) of the CWR appears to give rise to two other questions which must be answered in the affirmative before a liquidator becomes obliged, as a matter of law, to rectify the share register: (a) Did the company or fund issue or redeem shares based on a mis-stated NAV? (b) If so, was that mis-stated NAV not binding on the company or fund and its members by reason of fraud or default?

With respect to the first question, assuming the relevant entity was a typical Cayman Islands investment fund with participating redeemable shares which invested all or substantially all of its assets into a Ponzi scheme, with the benefit of hindsight, it seems reasonably clear that (a) above is likely to be answered in the affirmative by a liquidator.

With respect to (b), due to its relatively recent introduction into the CWR, the construction and interpretation of this language has not yet been the subject of any judicial determination in the Cayman Islands of which we are aware[4]. The issue does appear to have been raised before the Grand Court recently in *Re Palm Beach Offshore Ltd (In Official Liquidation)*, 25 November 2014, Jones J, unreported although the Court did not consider it necessary to deal substantively with the point[5].

Walkers are involved in a further case where the Grand Court has directed a substantive hearing in June 2015 to determine, inter alia, the proper meaning of the test described in (b) above and it is therefore anticipated that eagerly awaited judicial guidance as to the proper construction of O.12 (or at least parts thereof) will be shortly forthcoming. Members of South Square are also involved in this matter.

Assuming that O.12 does apply to a particular liquidation, other important questions then arise as to the manner in which NAV may be restated, or which other alternative rectification methodology might be deployed. Such matters have, again, not yet been the subject of any judicial consideration, however, it is to be expected that this will also occur in the short to medium term. As with the development of clawback claims, the global fund industry is awaiting this consideration with some interest.

Matthew Goucke

4/. The provision being relatively bespoke and not appearing to have any direct counterpart in England or other comparable jurisdictions.
5/. See paragraphs 12 and 13.

Cayman statutory mergers and consolidations - dissenting shareholder fair value applications

In May 2009 the Cayman Islands introduced a statutory merger regime into the Companies Law based on the Delaware statutory merger regime[6]. The Cayman merger regime is designed to provide a straightforward, non-Court driven registration based means to effect mergers[7] or consolidations[8] with respect to Cayman companies[9] and in certain circumstances, foreign companies. Given the lower voting thresholds[10], the merger regime has been a popular alternative to schemes of arrangements and squeeze outs following a takeover offer. Given the turbulent nature of the equity markets in recent years, the merger regime has been used with great success to take publicly listed Cayman companies private. Walkers assisted on the first take private merger under the Companies Law - delisting the US Depositary shares of Tongjitang Chinese Medicines Company from the New York Stock Exchange – and has been actively involved in this area of law since the introduction of the statutory merger regime.

Should the requisite statutory majorities be met, the merger or consolidation will take effect and consequently all rights and property of each of the constituent companies will immediately vest in the surviving or consolidated company and the surviving or consolidated company will assume all obligations of each of the constituent companies. The merger regime provides legal certainty with respect to effectiveness of the merger. Shareholders are entitled to object to the merger. However, in the event the merger becomes effective, the dissenting shareholder's only interest with respect to the Company will be the payment of fair value for its shares. The merger regime separates the issues of the merger's effectiveness and the price to be paid for the shares.

The merger regime contains various procedural steps to enable dissenting shareholders to claim the "fair value" for their shares. In the event that the company and the dissenting shareholder are unable to agree a fair value for the shares, the Grand Court of the Cayman Islands (the "Court") is required to determine the fair value of the shares. To date, and as compared with the high number of statutory mergers that have taken effect, Court involvement with respect to the merger regime has been very rare which is an indication of the success of the process. However, a handful of fair value petitions have been issued by dissenting shareholders. Of the fair value petitions issued to date, so far as we are aware, none has reached a judgment stage and most have been withdrawn on the basis of out of Court settlements. Walkers is currently instructed on the company side with respect to two fair value petitions that may be the first to reach a judgment stage. Mark Phillips QC of South Square is assisting in respect of one of the petitions.

The Companies Law does not provide any indication as to how the Court is to determine the fair value of the shares. However, based on recent Court experience, the Court will likely require valuation experts to be appointed effectively as officers of the Court. The experts will be required to prepare a fair value report for the Court upon which they will be cross-

6/. Delaware law with respect to the merger regime and the fair value process may be persuasive to the Court.
7/. The assets, rights, obligations and liabilities of two or more companies are assumed by one of those companies.
8/. The assets, rights, obligations and liabilities of two or more companies are assumed by a new Cayman Islands company.
9/. The merger regime does not apply to segregated portfolio companies.
10/. 66 2/3% approval or such higher threshold as specified in the articles of association of the relevant company.

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examined. All communications between the instructing parties and the experts will be disclosable in order to ensure transparency of communications with experts. The valuation process imposed by the Court is not intended to be particularly adversarial. The process is intended to be efficient and assist the Court with making a properly informed decision as to the value of the shareholder's proportionate share of the business as a going concern.

The experts will have access to the books and records of the company and will be entitled to meet with management, ideally on a joint basis, to discuss the company. Meetings with management are likely to take place where the business of the company is actually operated and should not disrupt the operation of the company. The valuation process is not intended to be a forensic exercise; much of the data necessary for the valuation will already have been through audits and, in the view of the author, unless there are serious concerns as to the underlying data, the experts should not need to look further than properly prepared accounts. The valuation exercise needs to be a proportionate exercise.

As part of the merger process, the company may have previously instructed an independent third party to provide a valuation of the company in order to provide comfort to the shareholders as to the fairness of the price offered by the company per share. However, it should be noted that whilst the valuation may be of assistance to the Court and the experts, prior valuations may not be conclusive or determinative of the issue of fair value.

The Cayman merger regime is an attractive and effective means of implementing a merger or consolidation and has been successfully deployed on countless occasions. Whilst Cayman based case law with respect to fair value petitions remain in their infancy, all indications point to an efficient, sensible and transparent Court process to determine fair value. Most importantly, disputes with respect to fair value do not affect the effectiveness of the merger itself and merged or consolidated companies are allowed to continue to operate largely uninterrupted by the fair value petition process.

Barnaby Gowrie

Strike out of company's claim as a result of official liquidators' failure to comply with unless order for costs

Caribbean Islands Development Ltd. (In Official Liquidation) v FirstCaribbean International Bank (Cayman) Limited **[16 September 2014, Unreported]**

The Plaintiff, by its Official Liquidators, brought proceedings against the Bank for an alleged breach of obligations owed to the Plaintiff when the Bank exercised its right to sell a property.

Upon the Bank's application, the Court ordered that the Plaintiff pay US$100,000 in security for the Bank's costs. The sum was ordered to be paid into Court, or secured by guarantee from a class A bank within the jurisdiction (the "Security Order"). The Plaintiff failed to comply with the Security Order and the Bank applied for the proceedings to be struck out. The Court made an Unless Order requiring compliance with the Security Order within a fixed period, failing which the Plaintiff's claim would stand struck out (the "Unless Order").

The Plaintiff also failed to comply with the Unless Order. Instead, the day before the deadline in the Unless Order, the Plaintiff offered security for costs by way of an after the event ("ATE") Insurance Policy (the "Indemnity"). The relevant points about the Indemnity are as follows: (1) the Official Liquidators had purchased the Indemnity before the offer was made; (2) the Official Liquidators refused to provide the background documents relating to the Indemnity, leaving the Bank unable to assess whether proper disclosure had been made; (3) the insurer was an English insurance company based in the UK with no assets in the Cayman Islands; (4) the Indemnity was governed by English law, with the result that the Court could not make a determination as to its efficacy; (5) and the Indemnity was subject to the exclusive jurisdiction of the English courts.

The Bank rejected this offer and applied for dismissal of the claims. The Chief Justice acceded to the Bank's application, striking out the Plaintiff's claims.

This case is a reminder to liquidators, and litigators generally, that orders of the Court must not be ignored, irrespective of the reasons for non-compliance. Compliance with orders of the Court is "*at the very core of the proper administration of justice…*" (paragraph 55 of the Judgment). If for any reason an order cannot be complied with, the correct course of action is to apply to the Court for directions at the earliest opportunity and in any event well before the deadline for compliance.

The Chief Justice noted that it was surprising that the JOL's determined to purchase the Indemnity without first seeking the approval of the Court. It was clear from the evidence that the Official Liquidators chose not to comply with the Security Order while having the means to do so.

ATE Insurance serves an important function, facilitating access to justice for parties to whom it might otherwise be unavailable for reasons of impecuniosity, but in this case the Chief Justice rejected the Plaintiff's argument that the Indemnity was sufficient security for the Defendant's costs: (1) he made clear that in the Cayman Islands the usual form of security is still a cash deposit in an escrow account under the control of the court or a class A bank guarantee from a bank within the jurisdiction; (2) he stated that security must be "amenable to direct enforcement within the jurisdiction of the Court" (paragraph 40). This was not the case in respect of the Indemnity. It was therefore impossible to assess the value to be ascribed to the Indemnity as security (a problem exacerbated by the fact that the Indemnity was governed by English law).

COLLETTE WILKINS

Colette Wilkins and Joanne Verbiesen

Sealing documents on the Grand Court's file - an issue for clarification

The question of which documents on the Court file are available to the public is a matter on which attorneys in the Cayman Islands are frequently asked to advise. It is therefore desirable to have certainty as to the applicable tests for sealing documents on the Court file . There is presently some lack of clarity in the answer to this question; which is currently subject to appeal to the Cayman Islands Court of Appeal ("CICA").

In proceedings brought for leave to enforce an arbitral award, documents containing the Defendant's confidential information were filed at Court. The relevant information was confidential pursuant to both a pre-existing contractual agreement between the parties and pursuant to the arbitration agreement.

In order to protect that confidentiality, the parties signed and submitted a consent order to seal (or close) those documents on the Court file pursuant to GCR O.63, r.3(4). In the alternative, the parties requested that the Court order that 7 days' notice be given to them of any application to inspect the Court file under O.63, r.3(5).

The Judge declined to approve the consent order. Following the hearing of the application the Court held that confidential information was found in documents on the Court file but declined to seal those documents.

The general rule is that the Court file is only accessible by the parties to those proceedings.[11] Under GCR O.63, r.3(4) parties may request that the Court seal (or close) the Court file or specific documents on the file.

The Chief Justice in *Algosaibi v. Saad Investments Company Limited* [2011] (1) CILR 326 stated:

"The principle of open justice predisposes towards the disclosure of all the records of proceedings including those taken in chambers, where the interests of justice so require. While, for reasons of the proper administration of justice, only certain aspects of a case file are routinely made publicly available under the rules of court without an order of the court, all aspects may be made available to a person who applies, including non-parties, if the interests of justice or some other public interest (such as investigative journalism) properly so require."

Shortly after that decision, the following amendment was made to GCR O.63, r3(5):

"The Court may give leave in special circumstances on application to any person not a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings."

There is no requirement in the GCR that the parties to the proceedings are given notice of a third party's application to inspect the file. There is no limit upon that party's ability to use the documents it obtains, unless the Court adds conditions to its Order.

The Chief Justice's exposition of the principle, allowing even investigative journalists access to a Court file "in the public interest", demonstrates a low hurdle for a third party to access a Court file. Now the requirement of "special circumstances" has gone, it appears that this hurdle must be even lower.

In light of that apparently low hurdle, certainty in respect of the test to seal documents on the Court file is of increased importance.

The ruling of the Chief Justice in *Algosaibi* suggests that the following criteria will suffice for documents to be sealed on the Court file : (1) the parties agree the documents should be sealed; (2) the documents "did not address any rights or interests of [any third party]"; (3) the documents were "not meant to be of benefit to [any third party] and did not concern [any third party]"; and (4) "the intention of the parties was that, along with the rest of the world, the [documents] should be kept confidential as concerns them".

The case on appeal to the CICA appears on its facts to meet the test described by the Chief Justice in *Algosaibi* – nevertheless, the Court refused to seal the confidential documents on the Court file . The reasoning of the first instance decision was that the order must be directed against an identifiable person or class of persons who would have arguable grounds for an application under Order 63, r.3(5) and that O.63, r.3(4) should not be used as a pre-emptive measure to protect confidential information on the Court file .

Arguably, this ratio is hard to reconcile with both (a) the Court's express statement in Algosaibi that inter alia an investigative journalist may access the Court file in the public interest and (b) the subsequent removal of the requirement for special circumstances from O.63, r.3(5). The question is whether it is better to allow parties to seal their confidential documents in advance of any application to inspect, especially where the parties are not entitled to notice of that application.

It is understood that the appeal will be heard by the CICA in early 2015.

Shelley White

11/. Special rules are in place in respect of Court Files for liquidations, bankruptcies and estates.

Rectification and beneficial ownership claims in the BVI

Nilon Limited and another v Royal Westminster Investments S.A. and others [2015] UKPC 2

The claimants, a company registered in Panama, and individuals variously resident in Nigeria and India, brought proceedings in the BVI against Nilon Limited ("Nilon"), a company registered in the BVI, and Manmohan Varma ("Mr Varma"), who was resident in London. The individual claimants (the "Mahtani parties") made claims against Mr Varma for breach of a contract to procure the issue of shares in Nilon to the Mahtani parties. Those claims were based on an alleged oral joint venture agreement between the Mahtani parties and Mr Varma reached in the UK (the "Joint Venture Agreement"). The Mahtani parties alleged that having fulfilled their obligations under the Joint Venture Agreement the Mahtani parties were now the joint legal and/or beneficial owners of Nilon. No shares had ever been issued by Nilon to the Mahtani parties and Mr Varma was Nilon's sole registered member.

The Mahtani parties sought declarations that they were the owners of an agreed proportion of the issued shares in Nilon and an order against Nilon that the share register be rectified pursuant to section 43 of the BVI Business Companies Act, 2004 to give effect to the Joint Venture Agreement. The Mahtani parties also sought an order against Nilon for rectification of its share register to show the Mahtani parties as registered members.

In 2010, the Mahtani parties sought an order from the BVI Commercial Court for permission to serve the proceedings out of the jurisdiction on Mr Varma. Bannister J refused to grant permission because there was no real issue between the Mahtani parties on their rectification claim as the Mahtani parties were not shareholders in Nilon and there was no allegation that Nilon itself had agreed to issue shares to them. The Court of Appeal, Eastern Caribbean Supreme Court, allowed the appeal by the Mahtani parties and in reliance on the English Court of Appeal decision in *Re Hoicrest Ltd* [2000] 1 WLR 414, decided that they had an arguable claim against Nilon to which Mr Varma was a necessary and proper party.

The application to serve Mr Varma out of the jurisdiction was made under BVI CPR 7.3(2)(a) which provided (at that time) as follows: *"(2) A claim form may be served out of the jurisdiction if a claim is made - (a) against someone on whom the claim form has been or will be served, and - (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim." This rule has subsequently been amended to use the expression "necessary or proper party" and a new head of jurisdiction has been added to allow service out of the jurisdiction if the subject matter of the claim relates to amongst other things "the ownership or control of a company incorporated within the jurisdiction"* (r.7.3(7)(b)).

The applicable principles relating to service out of the jurisdiction are set out in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804. On an application for service out of the jurisdiction, amongst other things, the claimant must satisfy the court that in all the circumstances the forum

which is being seised (in this case the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

The Board concluded that proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim. It followed that *Re Hoicrest Ltd* was wrong as a matter of principle. A claim for rectification which was dependant on a trial of the underlying facts to make out the entitlement to be registered means that the appropriate order in these circumstances is not to stay or adjourn the rectification claim but to strike it out. There was accordingly no claim against Nilon to which Mr Varma could be a necessary and proper party.

The Board went on to consider the question of forum conveniens which had arisen before the Court of Appeal. They found the reality of the matter was that, apart from the fact that the claim was that Mr Varma made a promise to allot shares in a BVI company, and that if they were successful the Mahtani parties may obtain an order that Mr Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all. There was no suggestion that there were any witnesses or documents in the BVI, or that there was any connection with the BVI other than as the place of Nilon's incorporation.

It was further held that, the recent addition of a specific gateway dealing with the ownership or control of a particular type of property within the jurisdiction did not obviate the need for a claimant to show that the BVI is clearly the appropriate forum. The Board concluded that in these circumstances the Mahtani parties could not have shown that the BVI is clearly or distinctly the appropriate forum.

Although the Board's decision turned on the facts of the particular case, the Mahtani parties' claim was far from unusual in the way in which it was framed. The implications of the Board's decision are therefore potentially far-reaching for claimants seeking to assert their beneficial ownership of shares in BVI companies.

A claimant seeking rectification must first establish that he has a right to registration by virtue of a valid transfer of legal title to the shares. He may not use rectification proceedings to assert a prospective claim which he then attempts to make good by way of trial in the BVI. The same claimant, though he now has a specific gateway to serve a claim concerning the ownership of a BVI company out of the jurisdiction, he must nevertheless also show that the BVI is clearly the appropriate forum for that claim to be heard. Given that there is often little connection between the facts underlying a claim for beneficial ownership of shares in a BVI company and the BVI as a jurisdiction, a claimant may now face considerable difficulty in trying to bring such a claim before the BVI Commercial Court.

Oliver Clifton

WALKERS BVI

Statutory demand: The clock is ticking

The Court of Appeal of the Eastern Caribbean Supreme Court has given a provisional ruling on an issue that has been perplexing lawyers in the BVI for some time. Whilst it is not a considered ruling of the Court (it is a recital to an interlocutory order) it is the clearest indication yet.

The issue is whether or not an application to set aside a statutory demand is to be considered a final order or an interlocutory order. The importance of this question cannot be overstated as the difference between the two outcomes can give rise to serious consequences. Here is why; if following an application to set aside a statutory demand the Court rules that the statutory demand should stand and the application is dismissed, then the Court must go on and make a subsequent order. Section 157 (5) of the Insolvency Act 2003 says:

"If the Court dismisses an application to set aside a statutory demand, it shall make an order authorizing the creditor to make application for the appointment of a liquidator or a bankruptcy order, as the case may be."

Therefore, once the application to set aside the statutory demand has been refused the purported creditor is given authorisation by the court to apply for the appointment of a liquidator. Needless to say, the appointment of a liquidator is likely to have dire consequences for most companies and the company will not be able to raise any dispute in answer to the liquidation application that was already raised in resisting the statutory demand. Therefore the debtor company is often left with little or no choice other than to appeal the order setting aside the statutory demand. The question then arises as to what the relevant procedure and time limits are for filing the appeal, which is governed by Part 62 of the Eastern Caribbean Supreme Court, Civil Procedure Rules, 2000 ("ECCPR").

An appeal of an interlocutory order must be made within 21 days, whereas any other appeal must be made within 42 days; a three week difference in the time allowed. Practitioners in the jurisdiction will be well aware of the inflexibility of these time limits, therefore getting it right is of vital importance.

The test for ascertaining whether an order or judgment is final or interlocutory is conducted with reference to the "application test", which is defined in ECCPR 62.1(3): (1) "A determination whether an order or judgment is final or interlocutory is made on the "application test"; (2) An order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided…"

On first consideration it would appear that in these circumstances, at a final hearing of a set aside application, whatever decision is reached by the court is a final determination as the statutory demand is either set aside or it is not, or at most, the purported debtor company is given more time to comply.

However, in the Australian case of *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* the Supreme Court of Victoria, Court of Appeal determined that a refusal to set aside a statutory demand was an interlocutory decision. In that case the Court approved an earlier decision and stated "The general rule is that an order is interlocutory unless…it 'finally determine[s] the rights of the parties in a principal cause pending between them'".

As a matter of BVI law (as is the case in other jurisdictions) the service of a statutory demand cannot properly be considered a court process, for example there is no hearing or other court process triggered by the service of a statutory demand. Further, the consequences of failing to comply with a statutory demand are determined by statute and not rules or practices of the court.

An application to set aside a statutory demand can only realistically have two outcomes, the demand is either set aside or it is not. If the applicant is given more time to pay, it still falls within one of the two possible outcomes as the demand was not set aside. Therefore it is difficult to see how, following the conclusion of an application to set aside a statutory demand (whatever the outcome), the parties rights have not been finally determined as regards the application to set aside the statutory demand itself. As discussed above, failure to set aside a statutory demand may (but not inevitably) lead to an application to appoint liquidators. However that is an entirely different application. The former relates to creating a statutory presumption of insolvency, the latter relates to actually appointing liquidators if the Court is satisfied that the company is insolvent.

Fortunately, the BVI Court of Appeal have now considered this point, albeit at an interlocutory stage, and have confirmed that on an application to set aside a statutory demand, the judgment and/or order is to be considered a final order. Therefore, the relevant time limit for an appeal is 42 days. However, practitioners would be well advised to err on the side of caution until the Court of Appeal provides a considered ruling on the point. So as to preserve the intended appellant's rights, it may be best practice to continue to simultaneously (i) apply for leave to appeal and (ii) file a Notice of Appeal within the 21 day period provided for under the ECCPR for applying for leave to appeal.

Julie Engwirda and Grant Carroll

CASE NOTE: *Alhamrani v Alhamrani & Others* [2014] UKPC 37

Sheikh Alhamrani died leaving his children entitled to his estate. A BVI company, a very successful trading arm of the estate, was the subject of a dispute between the appellant and his six brothers ("the Brothers"), the respondents to the appeal.

The trial took place in 2012 before the Honourable Justice Bannister QC. At 29 days it was the longest trial to date in the BVI. The Court of Appeal handed down judgment on 18 September 2013 and the Privy Council released its decision on 10 November 2014.

The estate was held by the children of the deceased in Sharia proportions. Differences arose between the appellant and the Brothers. As part of the mediation and conciliation process between the parties in Saudi Arabia, the differences were settled by an offer for the sale of their interests in certain jointly owned assets of the estate made by the Brothers to the appellant in April 2008 ("the Offer Letter") which the appellant accepted a few months later ("the Sale Agreement"). The appellant claimed that 75% of the shares of the BVI company was comprised in the Sale Agreement and so therefore passed to him. In addition, a Saudi court, in judgments known as "Judgment 1080" and "Judgment 1220", affirmed the existence of the Sale Agreement. The Sale Agreement was enforced in Saudi Arabia in 2009 when the sold assets were transferred to the appellant and the price was received by the Brothers.

The Brothers' interests in the BVI company were not included in the schedules or annexures to the Offer Letter. The question before their Lordships was therefore whether these interests were included in the sale. The Offer Letter and the Sale Agreement were governed by Saudi law.

Their Lordships concluded that there was little difference between the expert witnesses over the issues on which their opinions were admissible, e.g. the principle that the court must attempt to discover what the parties objectively intended to agree subject to the application of Sharia principles of good faith and fairness. The differences were on matters of interpretation and the question of the ambiguity of the agreement which were matters for the judge.

The question before their Lordships was the true construction of the Offer Letter and the Sale Agreement and the correct approach to the interpretation of contracts governed by foreign law. Under English law (and BVI law) the courts will receive expert evidence of the correct approach to interpretation and the types of evidence but it is for the English (or BVI court as the case may be) to decide for itself what the contract means. The Lordships approved the statement of law in *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed, (2012), para 9-019 that expert evidence merely proves the foreign rules of construction and then determines the meaning of the contract by the application of the foreign rules but the court makes that determination itself. It does not abdicate the role entirely to the expert witness. As their Lordships further explained at para 25 *"the evidence of the experts is relevant and admissible in order to identify what questions should be asked and what evidence is relevant to answer the questions but it is not admissible on questions of interpretation"*. The latter questions are for the court not the expert witnesses. The Lordships also cited with approval two first instance decisions of *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 347 (Comm) and *Toomey v Banco Vitalicio de Espana SA de Seguros y Reaseguros* [2003] EWHC 1102 (Comm).

Their Lordships considered the role of an appeal court in reviewing findings of fact by a court below in cases of this kind. They were of the view that the assessment by the trial judge of the evidence of expert witnesses in the interpretation of the Offer Letter and the Sales Agreement did not involve any question of the exercise of a discretion and that the advantage of the trial judge in seeing and hearing the witnesses was not so significant to cause an appeal court to be too cautious about reversing the judge's decision. The task of the judge was the application of principles of interpretation of foreign law identified by the experts and in doing this an appeal court is in as good a position as was the judge.

This decision is important in the BVI. Most litigation in the Commercial Division involves, in some way, the interpretation or enforcement of contracts governed by foreign law. Given that English decisions are not binding precedent in the BVI, an authoritative decision by the Privy Council, the BVI's final court of appeal, in an area devoid of local authority is most welcome. Walkers acted for Sheikh Abdullah, the successful party before the Privy Council.

Jack Husbands and Lucy Hannett

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Directors' duties in the zone of insolvency: recent developments[1]

Mark Arnold QC considers recent cases which cast light on the director's duty to consider or act in the interests of creditors

The director's fiduciary duty to promote the success of the company, now codified in section 172 of the Companies Act 2006, is expressly subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of the creditors of the company: section 172(3).

Relevant enactments pose little problem: obvious statutory provisions are those in the Insolvency Act 1986 relating to wrongful trading (section 214), and guidance can also be derived from those relating to preferences (section 239), transactions at an undervalue (section 238) and transactions defrauding creditors (section 423).[2]

As to the rules of law, it is clear from the case law that directors are duty-bound to take into account the interests of creditors of the company not only when the company is insolvent, but also when it is near insolvent or on the verge of insolvency (or of doubtful insolvency, or in a dangerous or precarious financial position); in other words, when the company is in the zone of insolvency.

But these are imprecise terms and, by themselves, they offer little guidance as to the scope and content of the duty. It may be difficult enough to state with certainty whether the company is insolvent; it is likely to be yet more difficult to identify when the company is on the verge of insolvency. Even if it can be identified, how is the director expected to act? Does the duty to take account of the interests of creditors mean that such interests are paramount, or is a balance to be drawn and, if so, where? The purpose of this article is to consider what guidance is to be derived from recent decisions in relation to these questions.

When is the company insolvent?

In most if not all the cases in which the director's duty to take account of the interests of creditors is considered the company is found to be actually insolvent. The seemingly obvious starting-point, therefore, is to determine whether the company is or will become actually insolvent.

When it has reached the "point of no return" might have provided a workable rule of thumb, but it was roundly rejected by the Supreme Court in *Eurosail*.[3] The current position may be summarised as follows:

- Cashflow insolvency: when the company is unable to pay debts as they fall due. This is not concerned simply with the company's ability to pay debts which are presently due, but rather all debts falling due from time to time in the "reasonably near future". What the "reasonably near future" is will depend on the circumstances and the nature of the company's business.[4] It will also be relevant to consider how the company is able to pay its debts as they fall due. If it can do so only by

1/. This article is based in part on a talk delivered by the writer at breakfast seminars on Directors' Duties in the Zone of Insolvency, organised and chaired by Jeremy Wessels and Bruce Lincoln of Mourant Ozannes, in Guernsey and Jersey on 21-22 October 2014.
2/. See Mortimore Company Directors: Duties, Liabilities and Remedies (OUP), 2nd Edition (2013) at 12.57-12.66.
3/. BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc [2013] 1 WLR 1408.
4/. Re Cheyne Finance [2008] BCC 182; BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc [2013] 1 WLR 1408.

IDENTIFYING THE INTERESTS OF CREDITORS SHOULD HELP THE DIRECTORS TO DECIDE WHEN AND HOW TO TAKE THEM INTO ACCOUNT.

taking on more debt, such that it is going deeper and deeper into the red, that will not be good enough.[5]

■ Balance sheet insolvency: when the company's liabilities (including its contingent and prospective liabilities) exceed its assets. This is the test to apply when the application of the cashflow test is merely speculative, when it is impossible to foresee with any reasonable degree of certainty what lies beyond the "reasonably near future". It requires a comparison of present assets against present and future liabilities, discounted for contingencies and deferment.[6]

■ Both tests are concerned with what is, in essence, the same question: is the company unable to pay its debts, on the balance of probabilities?[7]

With guidance from the Supreme Court and the Court of Appeal, the rules are thus relatively easily stated. Inevitably, however, their application will be fact specific in every case, and the answer to the question whether the company is actually insolvent will not always be clear. The appropriate treatment of contingent and prospective liabilities in any given case may be particularly problematic.

In any event, important as it is for the director to know when the company is insolvent, it will not be enough in this context. That is because, as the law stands, the duty to take into account the interests of creditors arises not only on insolvency but when the company is on the verge of insolvency. Knowing when a company is actually insolvent does not necessarily assist in identifying when it is instead on the verge of insolvency, such that it is necessary to take creditors' interests into account; and it does not assist at all in guiding the director how he should act or what degree of priority he should accord to their interests.

When does the duty arise? The interests of creditors

Rather than beginning with a struggle to identify whether the company is insolvent or on the verge of insolvency, therefore, it is suggested that identifying the interests of creditors seems the more appropriate starting-point. Doing so seems more

5/. Bucci v Carman (Liquidator of Casa Estates (UK) Ltd) [2014] BCC 269 (CA).
6/. BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc [2013] 1 WLR 1408.
7/. Bucci v Carman (Liquidator of Casa Estates (UK) Ltd) [2014] BCC 269 (CA).

MARK ARNOLD QC

likely to assist the director in determining both the time at which it becomes necessary for him to take those interests into account and the manner in which he should do so.

Put simply, the creditor's interest is to get paid. In order of preference, creditors are concerned: (i) to get paid in full and on time: no ifs, no buts; (ii) to get paid in full as soon as possible and anyway within a reasonable time; or (iii) to get paid, as much as possible, within a reasonable time.

It follows that creditors will be adversely affected if anything occurs which will or may compromise the company's ability to repay its debt when it is supposed to or, in other words, prejudice the creditor's entitlement and expectation to be paid. Read literally, that would suggest that the directors should consider the interests of creditors at any time when, having regard to the financial position of the company, the company's ability to pay its debts *will or may* be adversely affected by the act or decision they are proposing to take.

This is certainly justifiable where the ability to pay *will* be compromised or prejudiced. At the other end of the spectrum, however, the mere possibility that the ability to pay will be compromised or prejudiced is surely casting the net too widely, and would be likely to act as an unwelcome fetter on enterprise if interpreted too freely. Business necessarily involves risk. The practical solution would seem to be to dismiss the mere possibility of prejudice as insufficient, and to require instead a *real risk of prejudice*, using real in the sense of substantial as opposed to fanciful or remote. The inquiry then becomes whether, having regard to the financial position of the company, there is a real and not remote risk of prejudice to the company's ability to repay its creditors if a certain course of action is taken.

Real and not remote risk of prejudice to creditors' interests

That position is supported by Australian authorities in this area. It will be recalled that in *Kinsela v Russell Kinsela*,[8] Street CJ noted that "to some extent the degree of financial instability and the degree of risk to the creditors are interrelated". He went on to say that:

"the plainer it is that it is the creditors' money that is at risk, the lower may be the risk to which the directors, regardless of the unanimous support of all the shareholders, can justifiably expose the company".

In *Kalls Enterprises Pty Ltd v Baloglow*,[9] Giles JA (with whom Ipp and Basten JJA agreed) said (at [162]):

"It is sufficient for present purposes that, in accord with the reason for regard to the interests of creditors, the company need not be insolvent at the time and the

8/. (1986) 4 NSWLR 722.
9/. [2007] NSWCA 191.

directors must consider their interests if there is a real and not remote risk that they will be prejudiced by the dealing in question." (My emphasis).

In his monumental judgment in *Bell Group Ltd v Westpac Banking Corporation*,[10] Bell J agreed with Street CJ's dictum (at [4419]), and with Giles JA's formulation of the test. He went on to state (albeit strictly obiter as he concluded that the company was actually insolvent) the basic principle in the following terms (at [4445]):

"[A] decision that has adverse consequences for creditors might also be adverse to the interests of the company. Adversity might strike short of actual insolvency and might propel the company towards an insolvency administration. And that is where the interests of creditors come to the fore."

On appeal, there was no challenge to the finding of insolvency, and the appellate court endorsed Owen J's adoption of Giles JA's test.[11] The Court of Appeal (WA) also referred with approval to both Owen J's judgment in *Bell* and to Giles JA's formulation of the test in *Kalls Enterprises* in their recent decision in *Weaver v Harburn*.[12] In that case, the appellate court considered the company was "in uncertain financial and commercial circumstances in which questions of its continuing solvency could arise in the short to medium term" [107].

Recent English decisions

Since *West Mercia Safetywear v Dodd*,[13] English law in this area has been strongly influenced by developments in Australia and New Zealand,[14] and recent cases demonstrate that such influence continues. Although Giles JA's test was not directly referred to, Norris J adopted a similar approach in *Roberts v Frohlich*.[15] In that case, in considering whether the directors of a property development company acted in breach of duty in commencing and continuing the development, the Judge asked the question whether the development was speculative in the sense of being, in all the circumstances, too risky for a competent board to embark upon it. He concluded that initially it was not, but that once it became clear that further funding was required but was unavailable, it was speculative for the directors to carry on. As they did so, they acted in breach of duty (and were also found liable for wrongful trading from the same date).

In *Re HLC Environmental Projects Ltd (in liquidation): Hellard v Carvalho*,[16] John Randall QC (sitting as a deputy judge of the High Court) referred to the various different formulations of the test for when the director's duty extends to taking into account the interests of creditors, both Australian (including Giles JA's formulation in *Kalls Enterprises*) and English, and could detect no difference in principle. He went on (at [89]):

"The underlying principle is that directors are not free to take action which puts at real (as opposed to remote) risk the creditors' prospects of being paid, without first having considered their interests rather than those of the company and its shareholders. If, on the other hand, a company is going to be able to pay its creditors in any event, *ex hypothesi* there need be no such constraint on the directors."

In that case, the director caused certain payments to be made. In each case, he did so without giving any consideration to the best interests of creditors, despite the company having substantial creditors, substantial net current liabilities and overall net liabilities (ie the company was insolvent), no live projects or revenue stream, and no realistic prospect of gaining any. In those circumstances, the Judge considered whether an intelligent and honest man in the director's position could, in the circumstances, reasonably have believed that making the payments was for the benefit of creditors (adopting the approach in *Charterbridge Corp Ltd v Lloyds Bank Ltd*[17]; *Extrasure Travel Insurances Ltd v Scattergood*[18]). He concluded that an intelligent and honest man would not have so believed, and that the director had acted in breach of duty.

Directors must consider creditors' interests if there is a real and not remote risk that they will be prejudiced (*Kalls*)

10/. [2008] WASC 239.
11/. [2012] WASCA 157 at [769] (Lee AJA) and [2039]-[2040] (Drummond AJA).
12/. [2014] WASCA 227 at [77] (11 December 2014).
13/. [1988] BCLC 250 (CA).
14/. See further the discussion in Mortimore, Company Directors: Duties, Liabilities and Remedies (OUP), 2nd edition (2013) at 12.67-12.89.
15/. [2011] 2 BCLC 625.
16/. [2014] BCC 337.
17/. [1970] Ch 62, at 74E-F.
18/. [2003] 1 BCLC 598 at [138].

Directors are not free to take action which puts at real (as opposed to remote) risk the creditors' prospects of being paid (HLC)

In *Vivendi SA v Richards*,[19] decided just a few weeks later, Newey J also referred with apparent approval to the approach in *Kalls Enterprises*, as well as *Bell*. In *Vivendi* too the company was found to be actually insolvent, although the directors were not (at least initially) aware of this. According to Newey J (at [152]), that did not matter: they clearly appreciated the company's vulnerability, having large rental and other obligations and no income. The funds left in the company (£15.1m) could be expected to keep it afloat beyond the whitewash period, but were bound to be exhausted within a relatively short period unless the company's liabilities were reduced and/or new sources of income achieved, which (the Judge concluded) was never going to happen. Against this background, the directors nevertheless caused the company to make a number of significant payments, including a substantial dividend, primarily for their own benefit. The Judge concluded on the evidence that their primary reason for doing so was to extract the company's remaining cash before it failed rather than because they considered that such payments were in or compatible with the interests of creditors: [159]-[178]. They were found to have acted in breach of duty.

Rose J has adopted Newey J's approach in *Goldtrail Travel Ltd (in liquidation) v Aydin*[20] (now subject to appeal), albeit without express reference to those paragraphs of his judgment in which he cited the recent Australian cases. In that case, the Judge concluded that the director had misapplied the company's funds for his own benefit, and to the detriment of creditors, when the company was insolvent and without considering the interests of creditors when he should have done. He had, amongst other things, caused the company to make payments to third parties which it was not contractually liable to make in order to facilitate the payment by them of sums they were contractually obliged to pay the director personally. The recipients of such funds had, the Judge concluded, knowingly assisted the director in that breach of duty.

When the duty arises, are the interests of creditors paramount?

If the approaches of the English and Australian courts are in accord as to the time at which the director's duty to take into account the interests of creditors arises, there currently appears to be a divergence on the question whether, when the duty arises, the interests of creditors are paramount.

In Australia, the current position appears to be that creditors' interests may be determinative depending on the circumstances, but will not necessarily be so in every case where their interests have to be taken into account. In *Bell*, Owen J summarised the position as follows:

"I have previously mentioned that circumstances will wax and wane. It may be, therefore, that in particular circumstances the only reasonable conclusion to draw, once the interests of creditors have been taken into account, is that a contemplated transaction will be so prejudicial to creditors that it could not be in the interests of the company as a whole. But that will be because of the particular circumstances and not because a general principle has mandated that the treatment of the creditors' interests is paramount."

On appeal, Drummond AJA agreed that creditors' interests are not in all circumstances paramount to the exclusion of all other interests including those of the shareholders, but preferred to say that if the circumstances of the particular case are such that there is a real risk that the creditors of a company in an insolvency context would suffer significant prejudice if the directors undertook a certain course of action, that is sufficient to show that the contemplated course of action is not in the interests of the company.[21]

In England, some guidance (strictly

In England, it seems, creditors' interests are paramount, although the point remains open at the appellate level

19/. [2013] BCC 771, at [148]-[150]. An interesting aspect of the judgment, not considered further here, is the Judge's treatment of the question whether shadow directors owe fiduciary duties to the company and his conclusion that they do so more broadly than was considered to be the case in Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch).
20/. [2014] EWHC 1587 (Ch) at [114]. Although it is important generally in relation to the director's duty to act in good faith, in Madoff Securities International Ltd (in liquidation) v Raven & Others [2013] EWHC 3147, the scope of the duty to consider the interests of creditors was not considered in detail. Popplewell J was not satisfied that the company was insolvent or on the verge of insolvency at any relevant time.
21/. [2012] WASCA 157 at [2046].

obiter) was provided by Nourse LJ in *Brady v Brady*,[22] where he said that, where the company is insolvent or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors *alone*.[23] In *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd*,[24] Leslie Kosmin QC sitting as a deputy judge of the High Court stated the position as follows:

"When a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditors' money which is at risk the directors, when carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion."

Before what became Part 10 of the Companies Act 2006 was drafted, there was some support in this country for the proposition that directors should be required to perform a balancing exercise such that the greater the risk of insolvency in terms of probability and extent, the more directors should take account of creditors' needs and the less those of members.[25] Ultimately, however, that approach was rejected and the question was left to be worked out by the courts.

So far the English courts have adopted the *Colin Gwyer* approach. As the company was found to be actually insolvent in that case, the statement that the interests of creditors are paramount when it the company is on the verge of insolvency was strictly *obiter*. Nevertheless, this statement has been cited with apparent approval on a number of occasions since: see for example *GHLM Trading Ltd v Maroo* (Newey J)[26] and *Roberts v Frohlich* (Norris J).[27] To these may now be added *Re HLC Environmental Projects Ltd: Hellard v Carvalho* (John Randall QC);[28] *Vivendi SA v Richards* (Newey J);[29] and *Goldtrail Travel Ltd (in liquidation) v Aydin* (Rose J).[30]

WHAT GUIDANCE IS THERE FOR DIRECTORS FROM RECENT DECISIONS?

It is to be noted that these are all first instance decisions, such that the point remains open at appellate level. It is further to be noted that it is only really in the *HLC* case that the point has received any real consideration, and there the company was actually insolvent. Even taking these points into account, however, the prevailing view seems to be that the interests of creditors are to be treated as paramount when they fall to be taken into account, even (it appears) if the company is not actually insolvent but is on the verge of insolvency. Whether that is as it should be must, it seems, await consideration in due course by a higher court.

How is the director to act?

Finally, each of the *HLC*, *Vivendi* and *Goldtrail* cases concerned the misapplication of the company's funds, primarily for the personal benefit of the directors and their associates and in all cases to the prejudice of creditors. Such activity falls into the category of behaviour which is obviously inappropriate. On this question, therefore, they serve to confirm rather than add to the guidance to be derived from earlier cases.[31]

22/. (1987) BCC 535.
23/. At 552.
24/. [2003] 2 BCLC 153 at [74].
25/. CLR Final report, para 3.17.
26/. [2012] 2 BCLC 369 (another case of actual insolvency).
27/. [2011] 2 BCLC 265 at [85].
28/. [2014] BCC 337 at [92].
29/. [2013] BCC 771 at [149].
30/. [2014] EWHC 1587 (Ch) at [114].
31/. See the discussion in Mortimore Company Directors; Duties, Liabilities and Remedies (OUP), 2nd edition (2013) at 12.81-12.86.

Trust me, I'm an insolvency practitioner

Maurice Moses, Partner and **Craig Lewis**, Executive Director – Ernst & Young LLP discuss issues beyond the Graham Review to enhance insolvency practice

It is a given that licensed insolvency practitioners should be well-qualified and technically competent. They practise in a highly-regulated environment knowing that their licence to practice is granted for only 12 months, albeit renewable annually. An intrinsic part of their role is to bring independence and objectivity into every aspect of each insolvency appointment. A combination of statute, case law and professional guidance help the practitioner to meet these standards, but often issues are not clear cut and dilemmas arise where the practitioner has to rely on personal experience and professional advice in order to resolve them. Examples in respect of pre-packs and business sales include:

- Valuations – how many valuations are sufficient and have the assumptions been critically examined?
- Earlier marketing efforts by the company – how much can this be relied on?
- Alternative strategies – many options exist today, including short term funding and the sale of debt. How diligently have these been explored?
- Techniques to deliver the deal and safeguard creditors – 'stalking horse' bidders and the use of anti-embarrassment clauses are valuable tools to deliver value but rarely used.

This article seeks to explore in more detail these real world dilemmas.

Pre-packs

In June 2014 Teresa Graham CBE published her Review into Pre-pack Administration. This Review followed an extensive Government consultation undertaken by the Insolvency Service in March 2010 into pre-packs because of concern and widespread perception that the procedure was not transparent, given that negotiations for the sale take place before the company goes into Administration and often without overt marketing of the assets. In particular, unsecured creditors have concerns about their inability to have any influence on the process before the sale takes place, and the sale, particularly to the same management team, may be perceived to be at an under-value. Interestingly this consultation took place just over a year after the first version of Statement of Insolvency Practice ('SIP') 16 was published in January 2009.

The Graham Review was broadly supportive of pre-packs as a procedure but recognised the need for a number of safeguards when transacting with connected parties. These reforms are intended to increase transparency, improve the survival rates of the purchaser business and reform practices that could improve the returns to creditors. The Graham Review has been widely reported and it is not the purpose of this article to do so again save just to set out its main recommendations which are:

- *Pre-pack pool* – consisting of experienced business people be established to review pre-pack deals with connected parties before they are completed. The connected party would present the outline deal to a member of the pool who would review and provide a statement that nothing has been found to suggest that the pre-pack transaction should not proceed. Engaging with the pool would be voluntary, but whether an approach has been made and the outcome would need to be declared in the SIP 16 report which the Administrators are required to send to creditors.
- *Viability review* – the connected party should complete a viability review of the new company purchaser. This is to address concerns that businesses with unviable business models should not be allowed back to the market with a high risk of subsequent failure, a problem the Review found more prevalent in transactions with connected parties. Again compliance is voluntary and reported on in the Administrator's report to creditors.

- *Connected parties* – these are widely defined but there is an exception for secured creditors that hold security as part of their normal business activities.
- *Marketing*– all marketing of a business subject to a pre-pack comply with 'six principles of good marketing'. If marketing is not possible or likely to harm creditors' interests the Administrator should explain clearly why this is the case.
- *Valuations*– it recommends that valuations are carried out by a valuer who holds professional indemnity insurance, on the grounds that the insurers will have their own checks on the competency of the valuer which should give creditors additional comfort.

The Review included a re-draft of SIP 16 and a recommendation that the Joint Insolvency Committee (JIC) consider the redraft of the SIP. Government accepted all the recommendations in the report. The JIC has reviewed the draft contained in Teresa Graham's report and has produced a revised version of SIP 16 which is now being issued for consultation.

Why does this matter

The Introduction to the re-draft version of SIP 16 states clearly that:

'The particular nature of an insolvency practitioner's position in these circumstances renders transparency in all dealings of primary importance. Administration is a collective insolvency proceeding - creditors and other interested parties should be confident that the insolvency practitioner has acted professionally and with objectivity; failure to demonstrate this clearly may bring the practitioner and the profession into disrepute.'

Although this refers particularly to pre-pack transactions, the principle also applies to an Insolvency Practitioner's ('IP') conduct more generally – after all, the IP is not dealing with his /her own money but entrusted to do so on behalf of others.

TERESA GRAHAM CBE: THE GRAHAM REVIEW WAS BROADLY SUPPORTIVE OF PRE-PACKS

Duties and the standard of care

Paragraph 75 of Schedule B1 to the Insolvency Act 1986 provides that the Court may examine the conduct of a person who is or has been or purports to be the Administrator of a company where there has been a breach of a fiduciary or other duty in relation to a company and, that the company has suffered a loss as a result. An examination under this paragraph

THE GOVERNMENT ACCEPTED ALL RECOMMENDATIONS IN THE GRAHAM REPORT

..after all the IP is not dealing with his own money but is entrusted to do so on behalf of others

may be held on the application of an office holder, creditor or contributory of the company.

An Administrator is a creature of statute charged with managing the company's affairs, business and property and must perform his functions in the interests of creditors as a whole, unless fulfilling the third objective, in which case he must act so as not to unnecessarily harm the interests of the creditors as a whole. An Administrator is also an officer of the Court and has a statutory right to seek guidance from the Court in addition to being able to consult the general body of creditors at any time by convening a creditors' meeting.

An Administrator is also an agent of the company in respect of which he is appointed and this status gives rise to fiduciary duties.

An Administrator owes the company a duty to act with reasonable care and skill, and this duty of care is particularly important in the context of the sale by an Administrator of the company's assets. In *Re Charnley Davies Ltd*, Millet J has said the Administrator "owes a duty to a company over which he is appointed to take reasonable steps to obtain a proper price for its assets". This duty of care is equally applicable to the choice of the time at which to sell. To quote Millet J again, an Administrator "must take reasonable care in choosing the time at which to sell the company's property".

The duty of care also applies to the choice of appropriate marketing methods. In *Silven Properties Ltd v Royal Bank of Scotland plc*, Lightman J delivering the judgment in the Court of Appeal is quoted as saying an Administrator "owes a duty of care to the company…in the decision whether to take the appropriate available advantageous pre-marketing steps which are calculated to achieve the best price".

The duty to take care is not absolute but only to take *reasonable* care. An Administrator is not under any absolute duty to obtain the best price but "the best price in the circumstances as the Administrator

LORD MILLETT, WHO AS MILLET J, DECIDED RE CHARNLEY DAVIS LTD

reasonably perceives them to permit. He is not to be made liable because his perception is wrong, unless it is unreasonable" *Charnley Davis Ltd*, Millet J.

The correct approach to the standard of care was set out by Millet J in *Re Charnley Davis Ltd*:

"An Administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of a company's assets is, therefore, a complaint of professional negligence and in my judgement the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the Administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the Administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made".

In the case of licensed insolvency practitioners the Courts have emphasised that the standard of care is high because licensed insolvency practitioners are highly skilled and qualified people who accept appointments for which they receive remuneration and act as officers of the Court. Furthermore, in a case where the insolvency practitioner has any doubt as to what to do, he has the right to ask the Court for directions.

Professional standards and guidance

The Court will pay close attention to any applicable professional standards or guidance when assessing the relevant standard of care, the relevant guidance can be found in Statements of Insolvency Practice (SIPs), Insolvency Guidance Papers and the Insolvency Code of Ethics.

Statement of Insolvency Practice 13 ("SIP 13") applies to transactions with connected parties. The introduction to SIP 13 explains:

"This statement has been produced in recognition of the fact that ***the acquisition of assets of insolvent and prospectively insolvent businesses by directors may give rise to concerns that assets may have been disposed of at less than market value*** *and that those who have been prejudiced by the insolvency of the disposing company may be exposed to further risk through continued trading by those who have or may have had responsibility for the insolvency of the disposing company.* ***It recognises that***

connected party transactions may be in the best interests of creditors but requires such transactions to be conducted with the greatest degree of propriety *and with* ***disclosure to those interested as soon as reasonably practicable***" (emphasis added).

SIP 13 makes clear that it is standard practice for an administrator to take steps to market an asset for sale providing, among other things, as follows:

"***There is an overriding duty to obtain the best price for assets*** *whether sales are effected by private treaty sale, by sale by tender or at auction. While it is recognised that circumstances may arise when full exposure to the market of the availability of assets for purchase is not practicable* ***members are reminded that they should normally, unless sale by auction is the chosen means of disposal, take steps to advertise assets for sale or circularise (for example, by use of mailing lists) known prospective interested parties***" (emphasis added).

SIP 16 relates to pre-packaged sales. It was first published in January 2009 and a revised version came into effect in November 2013. The Graham Review produced a suggested draft for a new SIP 16, based on the version currently in force (November 2013) but which incorporates the recommendations of the Review. In particular it states:

1/. "An insolvency practitioner should recognise the high level interest the public and the business community have in pre-packaged sales in Administration. This interest will be heightened where the directors/owners of newco are the same, or are connected with, the directors/owners of the oldco.

2/. An insolvency practitioner should differentiate clearly the roles that are associated with an Administration that involves a pre-packaged sale (that is, the provision of advice to the company before any formal appointment and the functions and responsibilities of the Administrator). The roles are to be explained to the directors and the creditors.

MAURICE MOSES

3/. The insolvency practitioner should aim to provide creditors with sufficient information to enable them to form a reasoned view of the appropriateness of the pre-pack procedure. They should look to demonstrate that they have acted with due regard for creditor interests and to minimise any negative perceptions, particularly arising from connected party transactions."

Pre appointment considerations

SIP 16 is clear on the expectations:

- The extent of the Administrator's involvement prior to the appointment.
- The alternative courses of action that were considered by the Administrator with an explanation of possible financial outcomes.
- Whether efforts were made to consult with major creditors and the outcome of any consultations.
- Why it was not appropriate to trade the business and offer it for sale as a going concern during the Administration.
- Details of requests made to potential funders to fund working capital

requirements.

- Details of registered charges with dates of creation.

The pre-appointment period is critical in establishing a sound base from which to achieve the most favourable realisation for creditors in the circumstances. This is also a difficult period; emotions will be running high amongst the directors and those of the employees 'in the know' and the business will be under pressure from both suppliers and customers. There will be the additional pressure through the involvement of the company's lawyers and the insolvency practitioner's firm working on a number of different work streams. The insolvency practitioner needs to get to a position of having reliable information on the current financial position of the company, a legal opinion on securities granted, the company's immediate cash needs, an indicative view on the valuation of the assets and a view on where value is likely to break. Put in this way serves to simplify an often highly complex set of circumstances involving the company's supplier and customer contractual arrangements which can be even more complex still if it is part of a group structure.

Today, insolvency is much better understood by the business world. Stakeholders in the outcome are not just secured creditors and shareholders, but also suppliers and customers who have much to lose. These stakeholders are a much-neglected source of solutions, not just in terms of potentially providing funding for limited trading but also in helping to identify interested parties to buy the business. Indeed their support may indicate alternatives to keep the company alive through a restructure or a Company Voluntary Arrangement. The market for the purchase/sale of distressed debt is also well developed and there are many funds interested in buying debt and providing rescue finance to distressed companies.

CRAIG LEWIS

Throughout this intensive time the insolvency practitioner is like the conductor of an orchestra ensuring all the 'players' are playing their part, as without this chaos will reign. More than ever, insolvency practitioners will need to maintain and demonstrate their independence and objectivity as everyone they will speak to will have their own agenda – directors, funders, suppliers customers, employees etc. Where advice is sought it is absolutely essential that this is independent and with a duty of care to the IP.

Valuations

There are a number of issues here and judgements that need to be made.

Needless to say the valuer will need to establish his credentials with the IP in terms of experience in valuing assets of a particular type. Most important is that there is an engagement letter between the valuer and the IP which sets out the terms on which the valuation is to be carried out, and that the valuer owes a duty of care to the IP. There will be a temptation to use the existing valuer

instructed by the company or secured creditor(s), but at the very least there needs to be a new engagement letter setting out the different parties and duties of care. The re-drafted SIP also requires that the valuer be 'independent' and it is hoped that the consultation period will clarify who the valuer needs to be independent of – the company, the insolvency practitioner or both?

Except in the simplest of cases, one would expect at least two valuations to be available. In the event of more complex assets serious thought should be given to instructing another firm for a third valuation. Some IP firms may have the capability to undertake valuations in house, but the IP should be mindful of potential conflicts of interest. Where multiple valuations are being used, an in house valuation could be useful as a further 'data point' to get to an overall view.

Where the IP has access to multiple valuations, some of which may have pre-existed his engagement with the company, the IP should nevertheless examine these valuations, understand their differences and attempt to reconcile them for the current marketing exercise. This will include understanding the bases on which they were prepared in order to reconcile the differences with more current valuations obtained by the insolvency practitioner. In any valuation the IP should be aware of where the core information on which a valuation is based has emanated from and be satisfied that this is an objective depiction of the position.

In 2006 Michael Crystal QC and Rizwaan Mokal published a well received two part article on 'The Valuation of Distressed Companies: A Conceptual Framework.' They conclude in saying that:

'In any situation where the proposal is to keep the business together as a functioning enterprise, the value of the company is likely to be its going concern value. This should be determined using some combination of the comparable company, comparable transaction and discounted cash-flow methods. Some other method might also be appropriate on the facts, as long as it is a way of measuring enterprise (not liquidation) value.'

the courts have emphasised the standard of care is high because licensed insolvency practitioners are highly skilled people

It is important that these various valuation methodologies should be practical and understandable. Valuation is more an art than a science and often it is a consensus view of different valuations that will be the most useful to guide the IP. In 2009 the English High Court delivered its judgement in the *IMO Car Wash* case. The Court was required to decide whether or not to sanction schemes of arrangement and the senior lenders procured the following valuation exercises:

Valuing the group on a going concern basis (not a liquidation or fire sale basis), by adopting the following methodologies:

- An income approach which used a discounted cash flow basis
- A market approach, which analysed comparable companies
- A leveraged buyout analysis, which looked at debt capacity to assess the level of equity investment a potential private equity purchaser, would be prepared to make.

In addition an investment bank was instructed to pursue a third party sales process with a view to seeing if a buyer for the existing group could be found.

In the case of *IMO Car Wash* these methodologies produced a range of values well short of the secured debt due to the senior lenders. The mezzanine lenders produced an alternative valuation which also included a discounted cash flow valuation on different assumptions which derived a valuation range in excess of the amount of the secured debt. However this model was criticised by the judge, Mr Justice Mann as it used a model known as the Monte Carlo technique which he said produced a mechanistic analysis of probabilities. He went on to say that ' a proper approach to valuation….requires some real world judgements as to what is likely to happen'.

Getting to the company's 'enterprise value' will be important as in most pre-packs one would be looking at the sale of a going concern rather than a break up sale of its individual assets. Where a business has reached the end of its economic life, its break up value may well be greater than its enterprise value.

MR JUSTICE MANN DIDN'T LIKE THE MONTE CARLO VALUATION TECHNIQUE

There will also be situations where insolvency should not have a materially detrimental impact on asset value, for example a well let investment property that happens to

IF THE BUSINESS ISN'T MARKETED VIA THE INTERNET, THIS SHOULD BE JUSTIFIED BY THE ADMINISTRATOR TO CREDITORS

sit within an insolvent company. Experience has shown that these types of assets will attract their own (often vibrant) market interest, notwithstanding 'being told' by some their value has diminished.

A further complexity when dealing with groups is that some of the companies might be solvent, and it may be advantageous to sell the shares in those companies. This may not be straightforward if all group companies have signed up to guarantee group liabilities, but assuming a way can be found to sell the shares cleanly, completing an 'entity priority model' of the group showing how the share sale proceeds and amounts due from inter-company accounts flow up through the group will be a necessity.

This illustrates the extent of care, objectivity and judgement required of an IP who needs to assimilate all the relevant information and advice and use this to inform decision-making on the way forward.

Marketing for sale

The re-drafted SIP 16 included in the Graham Review contained six principles of good marketing which are set out below, and any deviation from these principles must be explained by the Administrator in the report to creditors:

- **'Broadcast rather than narrowcast** – the business should be marketed as widely as possible proportionate to the nature and size of the company – the purpose of the marketing is to make the business's availability known to the widest group of potential purchasers in the time available, via whatever media is likely to achieve this outcome.
- **Justify the media used** – the statement to creditors should not simply be a list of what marketing has been undertaken. It should fully explain the reasons underpinning the marketing and media strategy adopted.
- **Ensure independence** - where the business has been marketed by the company prior to the practitioner being instructed, this must not be used as a proxy to avoid further marketing. The practitioner should always bear in mind that he is independent of the company and must satisfy himself as to the adequacy of the marketing undertaken throughout the period under review.
- **Publicise rather than simply publish -** marketing should be undertaken for an appropriate length of time commensurate with satisfying the practitioner that the best deal has been sought. Creditors should be informed of the reason for the length of time settled upon.
- **Connectivity -** include online communication alongside other media by default. The internet offers one of the widest populations of any medium. If the business *isn't* marketed via the internet, this should be justified.
- **Comply or explain** – particularly with sales to connected parties where the level of interest by the public and

the business community is at its highest, the administrator must satisfy all creditors by explaining fully his marketing strategy to achieve the best outcome for all creditors.'

The detail wording of these six principles will be debated as part of the JIC consultation.

It is often the case that prior to the IP's engagement the board have conducted some form of M&A process and there is the temptation to rely on this. Extreme care needs to be taken to understand fully the terms on which this process was conducted, the extent of the market that the process was exposed to and reasons for the success or failure of the process. This process will be of some value to an Administrator elect, but a sale by an Administrator has quite particular features which will be valued differently in the market.

An accelerated M&A process should cast the net for potential buyers as wide as possible, beyond the more typical industry targets. But, how is one to know which buyer from outside the sector wishes to make an entrance and would be interested, or which fund is looking for just this particular opportunity? Casting the net widely takes time, and time will often be in short supply. Cash for trading may be limited, and the wider the net is cast the greater the likelihood that the company's circumstances will become public knowledge and the business further damaged as a consequence.

Stalking horses

One possible solution is to deploy a stalking horse bidder, something that is commonplace in the USA but still quite rare in the UK/Europe. If in the IP's judgement the most likely purchaser has been identified early in the process, but there could be benefit in exploring the market more widely, a compromise would be to sign a sale contract with the 'stalking horse' bidder but allow a period of time before completion for further marketing. The contract provides a guaranteed sale that underpins the business' value and will be a comfort to the IP and creditors. The period between exchange and completion (say one month) is used to explore the market further, with the possibility that an alternative party will outbid the stalking horse. The stalking horse is able to over bid too, but in the event it declines to do so, is entitled to a break fee. Typically break fees are in the range of 2-5% of total consideration, but are individually negotiated.

the stalking horse is a technique which could be deployed to assist the IP in demonstrating that the best value has been obtained in the circumstances

There are other issues, the most pressing of which will be the likely trading losses during this period and how they are funded. The stalking horse process can take place as part of a technique to consummate a pre-pack, or as an Administration sale. Either way this is a technique which could be deployed to assist the IP in demonstrating that the best value has been obtained in the circumstances.

Valuation disputes

As has been discussed above, a precise valuation of a business is not possible, but using a number of methodologies together with a marketing strategy should get the IP to the position of providing a fair value for the creditors. Life is sometimes not that straightforward, and IPs can also deploy techniques to protect themselves from subsequent attack and provide for potential upside for the creditors. As stated above, the use of the 'stalking horse' process is one way of doing so, as the IP should be able to demonstrate a wide exposure to the market whilst protecting the downside.

An alternative is to include an 'anti embarrassment' clause in the sale contract. This is primarily designed to avoid the assets being 'flipped' shortly after sale by the purchaser. It is less likely when selling a going concern trading business, but can happen when selling properties or businesses with a high property content, such as hotels. The clause is usually written to provide that in the event the asset is sold within a specified time for more than the original sale price (or the relevant debt in the event of a credit bid), a proportion of the excess is returnable to the original vendor (the IP on behalf of the insolvent company). Such clauses are based on a formula and run over a number of years, for example 100% of the excess for the first year, 50% for the second year and 20 % for the third year. This protection will have to be balanced against the cost of keeping the insolvency open for that period.

A further protection where the value break is contentious ie more junior (out of the money) creditors claim that the transaction value is too low, is to request them to then purchase the senior debt for value, and if this is declined, to clearly document this discussion.

In conclusion

We are a privileged profession who are entrusted to deal with other people's money in circumstances that are stressful and where there is personal and corporate loss. The loss is not of our making, but through transparency of action and analysis, bringing our independence and objectivity to the fore, we can return value to creditors to minimise the loss they have suffered. Perhaps then we can rightly say 'Trust me, I'm an insolvency practitioner'.

What are the 'Books and Records' of an LLP?

Matthew Abraham reviews the recent decision in *Hilton v D IV LLP* [2015] EWHC 2 (Ch) (12 January 2015).

Introduction

Since their introduction under the Limited Liability Partnerships Act 2000 ("LLPA"), limited liability partnerships ("LLPs") have become a familiar part of the legal landscape. They are often the favoured format for firms providing professional services, and are frequently nowadays used as an investment vehicle. But as with any new form of legal entity, there is often a time-lag before central technical questions are clarified by the courts. The recent decision of His Honour Judge Pelling QC, sitting as a Judge of the Chancery Division, is the first case to consider the scope of the expression "*books and records*" of an LLP as it appears in the legislation and was used in governing partnership deeds, and the related questions of when and to what extent the court will support access by ordinary members of an LLP to such books and records in order to ascertain how the affairs of the relevant LLP have been conducted.

That is obviously a point of some general significance. Access to the "*books and records*" will obviously be essential in any case where members wish to satisfy themselves that the LLPs have been or are being run in accordance with the relevant Deed, and hold accountable those who have been involved in the day-to-day management.

LLPs Generally

An LLP is a modern creature of statute. The law governing LLPs is set out in the LLPA and the Limited Liability Partnership Regulations 2001 (SI 2001/1090) (the 2001 Regulations), made pursuant to s.15 LLPA.

The key characteristics of an LLP are set out in s.1 LLPA, which makes clear that an LLP is a corporate entity with its own legal personality separate from that of its members, and with its own rights and liabilities. The members have limited liability (unlike in a conventional partnership) and are often split into designated members, who have control of the day-to-day running of the LLP, and ordinary members with a position similar in many respects to that of a company's shareholders. Despite the use of the word 'partnership' in the formulation "LLP", LLPs are in many operational respects closer to the model adopted by private limited companies than to traditional partnerships. However, they are transparent for tax purposes: members account for their share of profits and claim for their share of losses in their personal tax returns.

In general, the external structure of an LLP has been derived from the corporate model and to this extent large sections of the Companies Act 1985 and Companies Act 2006 have been brought in modified form into the

context of LLPs.[1] By s.1(5) LLPA, the law relating to partnerships does not apply to an LLP except as provided by the LLPA or other enactment.[2] In this respect, they differ from limited partnerships under the Limited Partnerships Act 1907.

The law relating to partnerships does nonetheless have a role as a result of the 2001 Regulations, which set out 11 default terms that will apply to an LLP subject to the terms of the relevant partnership agreement. These default terms are originally derived from the Partnership Act 1890.

When dealing with the rights and obligations of members in an LLP and construing its constitutional documents, it is therefore important to keep in mind provisions of both company law and partnership law, although the antecedent partnership law must be treated with some caution.

Recent decision of HHJ Pelling QC in *Hilton v D IV LLP*

Facts

The facts of this case arose from four LLPs, set up between 2002 and 2004, that were promoted as schemes for investing in the British film industry. As the Judge observed, the schemes had been a failure; HMRC had refused to grant tax allowances to the members, giving rise to a tax appeal which at the time of the hearing was stayed pending determination of criminal proceedings against certain individuals arising out of the formation and/or operation of the schemes. Against that background, certain of the ordinary members of the LLPs sought access to various documents held at the LLPs' former solicitors. Access was sought as of right based on various construction arguments under the different LLP Deeds, or alternatively through an application for Norwich Pharmacal relief against the LLPs' former solicitors who held the relevant documents. The Judge confirmed that the ordinary members were entitled to inspect a

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wide range of documents as 'books and records', accepting one of the construction arguments advanced for the Claimants.

Of relevance to this article was how the Judge approached that construction argument, based on the entitlement of ordinary members to have access to the "*books and records*" of the various LLPs pursuant to the 2001 Regulations and the wording of the LLP Deeds.

The material clause of the various LLP Deeds dealing with the access to "*books and records*" (the "Material Clause") was in the following terms: "*The books and records of the*

1/. Palmers' Limited Liability Partnership Law, 2nd Ed., [A1-03].
2/. See also F&C Alternative Investments (Holdings) Limited v. Francois Barthelemy and others [2012] 1 Ch. 613 per Sales J (as he then was) at [208].

The purpose and effect of Reg.7(7) was to create in relation to LLPs precisely the same default position that applies to limited partnerships and partnerships

LLP, the Register, the annual financial statements of the LLP and a copy of this Deed shall be maintained by the Designated Members at the above address and shall be available to the Members and their duly authorised representatives for inspection at any and all reasonable times. The LLP may maintain such other books and records and may provide such financial or other statements as the Designated Members in their sole discretion deem necessary or appropriate."

Relevant Legislative provisions

Reg. 3(1) of the 2001 Regulations, as applicable to the LLPs, applied provisions of Part VII CA85 subject to the alteration of some of the terminology used in CA85. As a result CA85 s.221-222 applied, varied to the following effect (substituting "LLP" for "company" and "member" for "officer" or "director"):

s.221(1) Every LLP shall keep accounting records which are sufficient to show and explain the LLP's transactions and are such as to (a) disclose with reasonable accuracy, at any time, the financial position of the LLP at that time, and (b) enable the members to ensure that any balance sheet and profit and loss account prepared under this Part complies with the requirements of this Act.

(2) The accounting records shall in particular contain (a) entries from day to day of all sums of money received and expended by the LLP, and the matters in respect of which the receipt and expenditure takes place, and (b) a record of the assets and liabilities of the LLP.

s.222(1) A[n] LLP's accounting records shall be kept at its registered office or such other place as the members think fit, and shall at all times be open to inspection by the LLP's members …..

(4) If a[n] LLP fails to comply with any provision of subsections (1) to (3), every member of the LLP who is in default is guilty of an offence and liable to imprisonment or a fine or both, unless he shows that he acted honestly and that in the circumstances in which the LLP's business was carried on the default was excusable.

Although CA85 has now been repealed by and replaced by the Companies Act 2006 (which contains provisions to the similar effect), it was the provisions of the CA85 which were relevant in this case as the LLPs were formed prior to 2006.

In addition to the modified provisions of CA85, reg.7(7) of the 2001 Regulations is of importance to note:

The mutual rights and duties of the members and the mutual rights and duties of the limited liability partnership and the members shall be determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement, by the following rules:

……

(7) The books and records of the limited liability partnership are to be made available for inspection at the registered office of the limited liability partnership or at such other place as the members think fit and every member of the limited liability partnership may when he thinks fit have access to and inspect and copy any of them.

Arguments raised by the parties

The Claimants' case simply put, in relation to this issue, was that the Material Clause in the LLP Deeds was to be treated as applying reg.7(7), and that the expression "*books and records*" of the limited liability partnership in reg.7(7) is to be given a wide meaning by parity of reasoning with partnership and limited partnership cases in this area: cf *Re Pickering, Pickering v Pickering* [1883] 25 Ch D 247; *Bevan v Webb* [1901] 2 Ch 59, CA; *Inversiones Frieira SL* and *anor v Colyzeo*

ACCESS TO BOOKS AND RECORDS ARE ESSENTIAL WHERE MEMBERS WISH TO SATISFY THEMSELVES LLPS ARE BEING RUN IN ACCORDANCE WITH THE RELEVANT DEED

Investors II LP [2012] Bus LR 1136.

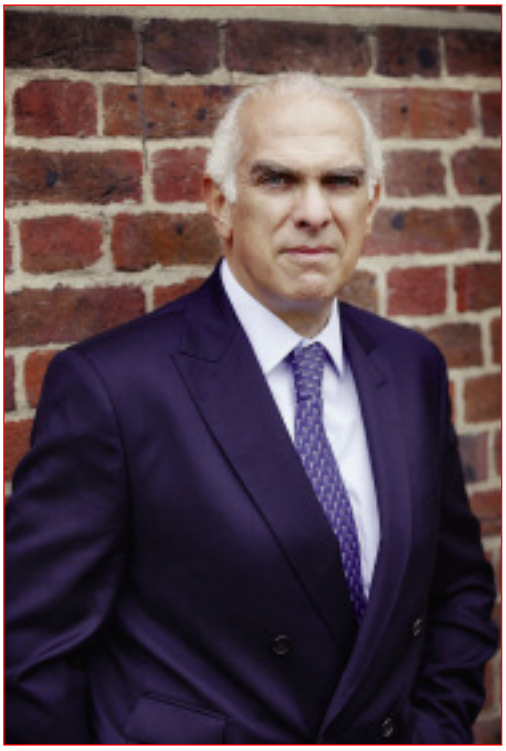
The Defendants sought to differentiate between the types of "*books and records*" to which ordinary members were entitled, due to the phrasing of the Material Clause in the LLP Deeds. It was argued that there were accounting "*books and records*" to which it was mandatory for the ordinary members to have access, as reflected by the provisions of CA85, and other books and records to which the designated members had a discretion to grant access. It was further argued by the defendants that even if certain documents were "*books and records*", the ordinary members ought not to be allowed access to inspect them: (1) because their inspection was for an improper purpose; and (2) because they were privileged.

Decision

HHJ Pelling QC accepted that reg.7(7) was the default position and that the provision was reflective of the position that applies in relation to partnerships and limited partnerships. This was the case despite the fact that s.1(5) LLPA itself creates a starting default position in which partnership law does not apply: "*There is no reason why the Regulations should not import specific rules that apply to partnerships and limited partnerships. Indeed that is what is contemplated by s.1(5) and s.5(1)(b) LPPA. The purpose and effect of Reg.7(7) was to create in relation to LLPs precisely the same default position that applies to limited partnerships and partnerships.*"[3]. The Judge also found that the Defendants were incorrect in their construction of the Material Clause of the LLP deeds and as such there was only one category of "*books and records*" which had the same meaning as given by reg.7(7).[4]

As to the meaning and effect of the words "*books and records*" used in reg.7(7), HHJ Pelling QC held that there was no "*purposive*

3/. at [34].
4/. see [37] – [43] for the full construction analysis.



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or literalist reason" for concluding that the phrase "*books and records*" used in reg.7(7) should be given any different meaning from that given to the "*…books of the firm…"* in s.6(1) of the Limited Partnerships Act 1907 ("LPA"). In particular, he stated: "*There is no proper basis for drawing fine distinctions between the meanings of such phrases in the absence of a clear purposive reason for drawing such a distinction essentially for the reasons identified by Norris J in Para. 23(i) of his judgment in Inversiones Friera SL v. Colyzeo Investors II LP [2011] EWHC 1762 (Ch) [2012] Bus LR 1136 ("Inversiones") - that is because there is no indication that the draftsman of the Regulations was " … consciously creating different categories of information to be recorded and accessed and different rights of inspection, examination and copying …" when he adopted the phrase "books and records" as opposed to the phrase used by the draftsman of the Limited Partnerships Act 1907*."

Having found that reg.7(7) had the same meaning as s.6(1) of the LPA, HHJ Pelling QC, at [35] adopted the following dicta of Norris J in *Inversiones*[5] at para 23(k): "*What is required to fulfil such a general obligation will vary from case to case depending on the nature of the partnership business and its mode of conduct and the terms of the governing documents read in the light of current business practice. There is little to be gained by looking at the decided cases to see if they establish categories of document which as a matter of law every partnership must maintain as part of its records and which every partner has a right to inspect. The test is a functional one. As a rough rule of thumb, if it would be necessary or advantageous for CIM or Capital to rely on the document or record in order to establish the rights of the Partnership as against a third party, or in order to determine or adjust the rights of the partners inter se, then it is a "book, document or record" which relates to the affairs of the Partnership, and a limited partner is entitled to see it: and if the Partnership has paid for the document that would also establish that it related to the affairs of the Partnership (for why else would a fiduciary agent … charge the Partnership for it?).*" (emphasis added).

HHJ Pelling QC further found against the Defendants in relation to their alternative argument that the Court ought not to exercise its discretion to permit the ordinary members to inspect documents constituting "*books and records*" due to the alleged improper purpose for inspecting the documents and/or privilege.

In relation to the improper purpose argument, the Judge, relying once again on the dicta of Norris J in *Inversiones*, found that "*it would be an entirely impermissible exercise of discretion to refuse orders in aid of a member's exercise of contractual rights to inspect on the basis that the member concerned was exercising those rights in the hope or expectation that he would thereby obtain material that would support a claim against the* [designated members] *of an LLP.*"[6]

As for the arguments in relation to privilege, Judge Pelling accepted the Claimants' submission that, just as shareholders are entitled to see material that

5/. Inversiones was a case that involved limited partnerships that were used as investment vehicles.
6/. at [50].

LLP: PARTNERSHIP OR CORPORATE ENTITY?

is privileged in the hands of a company of which they are a shareholder, so too are members of LLPs. The general principle as it applies to shareholders was assumed in *Woodhouse & Co v. Woodhouse* (1914) 30 TLR 559, was stated by Simonds J (as he then was) in *Dennis & Sons Limited v. West Norfolk Farmers Manure* and *Chemical Cooperative Company Limited* [1943] 1 Ch 220 at 222 and has been applied consistently ever since as was demonstrated by Evans-Lombe J in *CAS (Nominees) Limited v. Nottingham Forest plc* and others [2002] BCC 145 at [14]-[17].

Conclusion

The decision in *Hilton v D IV LLP* helpfully clarifies the law in relation to LLPs and provides that when determining what documents held by an LLP are "*books and records*" in accordance with reg.7(7) of the 2001 Regulations, a functional test ought to be applied. In general, the term "*books and records*" in an LLP deed should be construed widely unless restricted by clear words in a particular LLP agreement. Privilege will not come between a member and the LLP's documents (and will not be waived by a member being granted access to those documents).

This part of the decision is to be heralded as a step forward in relation to corporate governance issues of LLPs. This is particularly important in the context of those LLPs that are set up by designated members and are promoted as investment vehicles in which the investors with the major financial exposure are merely ordinary members excluded from day-to-day management.

Matthew Abraham appeared with Glen Davis QC for the Claimants in Hilton v D IV LLP

Grist to the mill?

William Willson asks how advantageous the justification defence remains to administrators in light of the decision in *Re Lictor Anstalt* [2014] EWHC 3316 (Ch)

Introduction

It is trite law that, in exercising his functions, an administrator is deemed to act as the company's agent and that, under paragraph 59, Schedule B1 of the Insolvency Act 1986 ("**IA86**"), an administrator may do anything necessary or expedient for the management of the affairs, business and property of the company, and a person who deals with the administrator of a company in good faith and for value need not inquire whether the administrator is acting within his powers. Similarly, it is trite fact that, in the exercise of his functions, an administrator will often cause a company to breach its obligations to third parties: some contracts will have to be broken to further the purpose of the administration, and the rights of certain counterparties sacrificed in order to maximise the interests of creditors more generally. Thus a thread of utilitarianism is woven through English insolvency law.

To deflect economic tort claims by counterparties for inducing breach of contract, administrators and third parties in restructurings have traditionally relied upon a justification defence. This defence was unsuccessful in the recent case of *Lictor Anstalt v Mir Steel UK Limited [2014] EWHC 3316 (Ch)*.

This article considers that decision and its implications for both office holders and other restructuring stakeholders.

The Facts

The claimant, Lictor Anstalt ("**Lictor**"), supplied a hot strip steel mill ("**the Mill**") to Alphasteel Limited ("**Alphasteel**") under the terms of an agreement dated 3 April 2000 ("**the Agreement**").

Following the making of the administration order, the joint administrators of Alphasteel sold the equipment to the second defendant, Libala Limited ("**Libala**"). Alphasteel and Libala agreed that the sale should be effected by means of a hive-down of the assets and business to the first defendant, Mir Steel UK Ltd ("**Mir**"), a company formed by the administrators, followed by a sale of that company to Libala.

Lictor brought a claim against Mir claiming damages for, inter alia, procuring breach of contract and conspiracy. It argued that, by virtue of the Agreement, it retained ownership of the Mill and rights over it, including the right to enter the site and remove the Mill. It contended that the sale of the site together with the Mill was a breach of the Agreement, which the defendants had knowingly procured, and that the Mill was a chattel or collection of chattels to which it retained title. Alternatively, it submitted that Alphasteel, Libala and Mir had conspired to cause it damage by the use of unlawful means.

The Summary Judgment Application

Mir applied for permission to join Alphasteel and the administrators as Part 20 defendants, and sought summary judgment against Lictor Anstalt dismissing the claims.

Mir submitted that it was entitled to summary judgment dismissing the claim for inducing a breach of contract on the grounds that the ingredients for the cause of action (set out in *OBG v Allan [2008] 1 AC 1*) were not made out on the facts.

LICTOR ANSTALT: TROUBLE AT T'MILL...

Further, it argued that a defence of justification was available where the hive-down of assets, including the equipment to Mir and the sale of Mir to Libala, was in pursuance of an exercise by the administrators of their statutory powers and functions to realise the assets of Alphasteel to the best advantage of creditors.

The administrators raised two arguments.

First, they relied on the so-called rule in *Said v Butt [1920] 3 KB 497*, which held that a director of a company who caused his company to act in breach of contract was not guilty of the tort of inducing the breach of contract provided that he acted *bona fide* in the course of his duties as a director. In *Welsh Development Agency v Export Finance Co Ltd [1992] BCLC 146*, the Court of Appeal had, by a majority, applied the decision in *Said v Butt* to a receiver appointed by a debenture holder. Though noting that Dillon and Ralph Gibson LJJ were by no means persuaded by the reasoning underlying the decision, David Richards J held that the decision is as much applicable to administrators appointed under Schedule B1 as it is to a receiver appointed by a debenture holder.

Second, the administrators relied on a defence of justification and said that it should be available in cases where administrators in pursuit of their statutory functions and purposes sell assets of the company in administration albeit in breach of contracts made by the company. They submitted that the process of administration inevitably involved breaches of contract by the company, leaving the innocent parties to a claim in damages against the company; that whilst proprietary rights and restrictions are respected in the administration process (and there are express provisions in Paragraphs 71-72 of Schedule B1 enabling the administrator to apply to the court for orders which enable him to deal with the assets of the company free from such proprietary rights) there are no similar provisions enabling the administrator to apply to court for an order enabling him to sell assets free of purely contractual restrictions; and that given the lesser status of such restrictions as against proprietary interests, it would seem altogether more likely that the legislative assumption was that the administrator had such entitlement without the need for court sanction.

Having considered these submissions, David Richards J concluded that:

"*So far as the administrators themselves are concerned, such*

contractual restrictions are of no personal concern by virtue of their protection in Said v Butt. However, the position is of great concern to the purchasers of such assets. Where the court makes an order enabling an administrator to sell an asset free of proprietary restrictions, third parties can bid for and purchase the asset from the administrators confident that they are obtaining title to those assets free of the third party rights. If an administrator is unable to sell assets without exposing purchasers to a liability in tort for inducing a breach of contract, it is likely to have a damaging effect on the ability of the administrator to obtain the best price for the assets……..The availability of a defence of justification to a party contracting with a company in administration is supported by a leading work in this area, Fletcher, Higham & Trower: Corporate Administrators and Rescue Procedures (2nd ed. 2004) at paragraphs 5.29 – 5.30…….The proper balancing of competing interests involved in administration as an insolvency process may well be achieved by providing a defence of justification to a claim in tort in respect of a sale by an administrator in circumstances where there is a purely contractual restriction on sale. The other contracting party would remain entitled to lodge a claim for damages for breach of contract".

Though (in the author's view rightly) impressed by the administrators' argument, his Lordship refused the application for summary judgment, concluding that "*a decision on whether the defence of justification is available is a decision that will have wide ramifications for the conduct of administrations……. It is in my view one of those issues of law which should not be decided without a proper opportunity for full research and submissions……I do not consider it a point…….which is susceptible of the answer that there is no real prospect of the defence failing*".

A decision on whether the defence of justification is available is a decision that will have wide ramifications for the conduct of administrations

The Trial

The trial was heard in summer 2014. The trial judge, Asplin J, held that all the elements necessary for procuring the tort of breach of contract (see *OBG v Allan [2008] 1 AC 1*) were made out[1] - and (significantly) that Lictor Anstalt's right to remove the Mill from the site under the Agreement was a proprietary (not a merely contractual) right.

On justification, Mir submitted that it was in the public interest to give effect to the intention of the legislature and, in particular, the statutory objectives stated in paragraph 3 (1), Schedule B1 of IA86; that third parties should be able to purchase assets from an administrator which are subject to purely contractual (as opposed to proprietary) restrictions without the fear of potential liability for inducing breach of contract, otherwise this may affect the ability of administrators to achieve the best price for such assets; and that if the defence of justification is not open in such circumstances it would render the hive-down process as authorised by statute as effectively useless.

In particular, Mir relied on the following passage from Lord Hodge's speech in *Joint Administrators of Rangers Football Club [2013] 2 BCLC 436*, where he said:

"*An administrator would not be acting in breach of his duty to the company if he refused to perform a contract having acted reasonably to satisfy himself that the continued performance of the contract (i) would impede his achievement of the objectives of the administration, and (ii) was not in the interests of the company's creditors as a body. If he could establish reasonable grounds for being so satisfied, I consider also that he would be likely to have the legal justification which would exclude a personal liability to the counterparty of a company's contract for inducing the company to break that contract……I do not see how an administrator could perform his statutory duties in many insolvencies if he were not able to plead justification. As the delict is an accessory liability it appears to me that a third party who contracts with the company in administration, for example in acquiring the company's assets after the administrator's repudiation of a contract, will not incur liability for inducing breach of contract if he merely responds to an invitation to treat from the administrator who is properly exercising his statutory duties*."

Having considered these submissions, her Ladyship found that the justification defence was not available to Mir. Her findings are at [280]-[282] of the judgment. In

1/. She also considered the ingredients for the tort of unlawful means conspiracy (see Digicel (St Lucia) Ltd & Ors v Cable & Wireless & Ors [2010] EWHC 774) – but held on the facts that there was no intention to cause loss.

summary, she held that:

(1) Lictor Anstalt had a proprietary right in relation to the Mill which was superior to the competing rights of the administrators/Mir.

(2) It was not necessary in order to further the objectives of the administration, nor was it in the public interest, to defeat Lictor Anstalt's rights. There were other avenues open to the administrators, including seeking the directions of the court.

(3) Even if the defence of justification could be open to the administrators, it was not open to Mir. There was no reason of public policy or otherwise why a defence available to an administrator should also be available to a purchaser from the administrator. Even if administrators have some justification, the same defence does not inure to the benefit of Mir. Mir sought to cast the public policy net far too wide.

Accordingly the judge entered judgment for the claimant.

Consequences and Comment

How severe are the consequences of the decision for administrators? Does its conclusion (as Mir submitted) render the hive-down process "*useless*" and fundamentally threaten the efficacy of English administrations?

Though the judge's conclusions are, at first blush, severe, the case turns, on reflection, on the particular facts of the proprietary nature of Lictor Anstalt's "*competing rights*" in the Mill.

On that basis it should not be treated as too serious an incursion into the ability of administrators to sell assets without exposing purchasers to a liability in tort for inducing a breach of contract in the more standard situation where the competing rights are only personal rather than proprietary.

That said, the judge's conclusion that there is "*no reason of public policy or otherwise why a defence available to an administrator should also be available to a purchaser from the administrator*" should be proscribed as a general principle – the defence of justification has no teeth if it cannot be prayed in aid by both the administrators and their transferee in an asset sale process.

WILLIAM WILLSON

It is understood that an application for permission to appeal to the Court of Appeal remains outstanding. If successful, it is hoped that the Court of Appeal can offer clarification on the competing policy arguments – and the extent to which an administrator and their counterparty in an asset sale can rely on justification, based on the administrator's duty to manage the affairs, business and property of the company for the purpose of the administration, as a defence to a claim for inducing breach of contract. As David Richards J recognised on the summary judgment application, this is an area of the law that has "*wide ramifications for the conduct of administrations*" and which would benefit hugely from appellate authority.

Winding up insolvent Trusts

Andrew Shaw considers some of the issues facing a trustee where the trust property is insufficient to meet the demands upon it

A trust is not a discrete legal entity and therefore cannot, formally, be insolvent. The liabilities of a trust are in fact personal liabilities of the trustees and it is to them that creditors must have recourse, unless security has been granted over the trust assets.

If the trustees are unable to meet their liabilities to creditors, then they can be made bankrupt or, in the case of corporate trustees, wound up. In these circumstances, the creditors in respect of liabilities incurred by the trustees in that capacity might, in certain circumstances, have recourse to the trust assets. Where those assets are insufficient to meet the liabilities of the (now insolvent) trustees, then the trust might colloquially be described as insolvent.

A similar situation can arise where any recourse the unsecured creditors have against the trustees is limited to the extent of the trust assets, but those assets are insufficient to meet the liabilities incurred by the trustees.

This article examines the approaches which trustees might take to winding up such an 'insolvent' trust.

Limiting the Trustee's Liability

In some jurisdictions, the liability of the trustee is limited to the extent of the trust assets by statute. For example, Article 32 of the Trusts (Jersey) Law 1984 provides that:

> *(1) Where a trustee is a party to any transaction or matter affecting the trust –*
>
> *(a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;*
>
> *(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).*
>
> *(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust.*

Similar provisions apply in Guernsey and the British Virgin Islands.[1]

This is not the case in England, however, where the trustee's liability may only be limited to the extent of the trust assets by agreement. Whether a trustee has succeeded in so limiting his liability will depend upon whether, on the true construction of the contract by which the liability is incurred, the

1/. Section 42 of the Trusts Law (Guernsey) 2007 and the BVI Trustee Act 1961, sections 94 – 104 respectively.

intention of the parties was that the trustee's liability would be limited. It would not be generally be enough though, for the trustee simply to state that he contracts "as trustee".[2]

Trustee's Lien

A trustee is generally entitled to be indemnified out of the trust assets in relation to those costs and expenses incurred by him while acting on behalf of the trust. In England this indemnity is now statutory, being conferred by section 31(1) of the Trustee Act 2000:

A trustee
(a) is entitled to be reimbursed from the trust funds, or
(b) may pay out of the trust funds,
expenses properly incurred by him when acting on behalf of the trust.

In jurisdictions where there is no such statutory provision, the scope of the indemnity will depend upon the terms of the trust instrument. In England too, it is possible for the scope of the indemnity to be increased beyond that specified in the Trustee Act. So, for example, the trust instrument may indemnify the trustee against any liability arising from his own negligence.

In consequence, a trustee acquires a first charge or lien over the trust property for the purpose of enforcing his right of indemnity. This right takes priority over the rights of beneficiaries and, indeed, creditors who hold a debenture over the trust assets.[3]

Creditor's Right of Subrogation

Where a trustee is able to satisfy his liabilities to creditors then no difficulties arise. The trustee will either pay the creditor directly and recoup his expenditure from the trust property, or will discharge the liability directly from the trust property.

If the trustee is unable to satisfy his liabilities either personally, or directly from the trust property, a creditor will generally be limited to enforcing his rights against the trustee, as, in the absence of the specific grant of security over the trust property, a creditor of the trustee has no right to levy execution against trust assets.[4]

In certain circumstances, a creditor may be unable to enforce the personal liability of the trustee. An obvious example is where the trustee is insolvent. Another is the scenario described above, where the liability of the trustee is limited to the trust property. In such a situation, the creditor is likely to be subrogated to the trustee's rights under his lien.[5] Provided that the trustee would have been indemnified by the trust for his liabilities to a given creditor, then the right of subrogation will enable the creditor to satisfy the liability from trust assets. Further, in the case of an insolvent trustee, the right of indemnity from the trust property does not form part of the insolvent trustee's estate.[6] Where there is more than one creditor subrogated to a trustee's lien and the assets of the trust are insufficient to

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2/. Muir v City of Glasgow Bank (1879) 4 App Cas 337, 368.
3/. Re Exhall Coal Company (1866) 55 ER 970.
4/. Jennings v Mather [1902] 1 KB 1.
5/. Re Pumfrey(1882) 22 Ch D 255, 263.
6/. Re Richardson [1911] 2 KB 705.

Where there is more than one creditor subrogated to a trustee's lien and the assets of the trust are insufficient to meet all claims in full, then the question arises as to how the claims should be treated

meet all claims in full, then the question arises as to how the claims should be treated. There are essentially two options: (i) the creditors rank in the order of time in which the personal liability of the trustee to them arose; or (ii) the creditors rank *pari passu* between themselves. There is no direct authority on this point but there are good reasons for preferring a *pari passu* distribution. As a matter of principle this is the fairest approach and is common practice in insolvencies. As a matter of practice, this approach removes any requirement to investigate the precise timing of creditors' dealings with the trustee. The *pari passu* approach is also supported by the dicta of King CJ in Re *Suco Gold Pty Ltd* (1982) 33 SASR 99, 109.[7]

Practical Considerations

The preceding paragraphs set out the basis on which unsecured creditors might be satisfied *pari passu* from the trust assets in circumstances where they have no recourse against the trustee, either by reason of the trustee's insolvency or because the trustee's liability is limited to the trust assets. There remains the practical matter of how a trustee can implement the winding up of a trust. Factors which will need to be taken into account include how the expenses of winding up the trust should be treated and what should be done about creditors who claim to have preferential claims.

The safest course for a trustee would be to apply to the court for directions under Part 64 of the Civil Procedure Rules, or the equivalent provisions in jurisdictions outside England. The question then becomes what directions should the trustee seek?

One possible solution is provided by the decision of the Jersey Royal Court in *Re Hickman* [2009] JRC 040, which concerned an application by an executor for ratification of the procedure adopted for dealing with the insolvent estate of a deceased person. No provisions for this eventuality were provided in Jersey's probate laws, so the executor had devised a procedure based on the relevant provisions of the Bankruptcy (Désastre) (Jersey) Law 1990. *Inter alia*, the procedure provided for:

1. publication of a notice requiring creditors to submit claims by a specified date;
2. forfeiture of claims not submitted by the specified time;
3. preferential claims;
4. the inspection of all claims by creditors and the ability to file oppositions to other claims;
5. the admission or rejection of creditors' claims by the executor;
6. an appeal procedure for rejected claims;
7. the executor's fees to be paid out of the insolvent estate.

The Jersey Royal Court ratified this procedure. It provides a useful template for the directions which might be sought in relation to an insolvent trust; although, clearly any analogous procedure devised for approval by an English court under CPR Pt 64 should be based as closely as possible on the provisions of the Insolvency Act 1986 and related legislation.

Where an insolvent trust has a limited number of creditors whose debts are known and undisputed, there is the possibility of the trustee avoiding a potentially expensive and time consuming application to the court under CPR Pt 64 and for a streamlined version of the procedure described in *Re Hickman* to be implemented.

As a matter of English law, the payment of a

7/. See Lewin on Trusts (19th Edn, Sweet & Maxwell, 2014) at paragraph 22-047 for other common law cases which indicate a preference for a pari passu distribution in this situation.

IN SOME JURISDICTIONS, LIKE THE BRITISH VIRGIN ISLANDS, THE LIABILITY OF THE TRUSTEE IS LIMITED TO THE EXTENT OF THE TRUST ASSETS BY STATUTE.

lesser sum does not provide good consideration for the release from a debt.[8] There is an exception to this rule though, where a creditor can reach a composition with all of his creditors.[9] It would therefore be open to the trustee to propose a *pari passu* distribution of all of the trust assets to the creditors; if the creditors unanimously agreed then a binding composition could be reached without the need for a court application.

There are a number of considerations for the trustee if he opted to pursue such a course of action. First, it would be necessary to confirm that the terms of the trust instrument permitted the trustee to reach a compromise with creditors and conduct a winding up of the trust without reference to the court. Second, if the trustee wanted any expenses incurred in winding up the trust to be paid in full, this could only be achieved with the agreement of all the creditors and the payment of such expenses from trust property would also have to be permitted by the trust instrument. Finally, there is the matter of the treatment of preferential claims.

In practical terms, the most likely reason for any preferential debt is that other creditors had contractually agreed to subordinate their debt. In this situation, it might well be very difficult to obtain the consent of the subordinated creditors to any composition based upon a *pari passu* distribution to ordinary unsecured creditors, because the subordinated creditors would be unlikely to receive anything. If unanimous agreement cannot be reached with all the creditors, the prudent course for the trustee would be to make an application for directions to the court.

Conclusion

Despite the fact that English insolvency legislation does not apply to trusts whose liabilities outstrip their assets, it does provide a useful template for the winding up of such trusts, and one which it would be possible for a trustee to implement through an application under CPR Pt 64 or, if the circumstances permit, unilaterally.

8/. Pinnell's Case(1602) 5 Co Rep 117a, affirmed by the House of Lords in Foakes v Beer (1884) 9 App Cas 605.
9/. Good v Cheesman (1831) 2 B&Ad 328.

EU/EEA LAW UPDATE

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

Changes agreed to the EU regulation on insolvency

On 4th December 2014 the European Council and the European Parliament came to what is described as a "political agreement" in relation to the proposed amendments to the Regulation on Insolvency Proceedings. A text has been agreed subject to "linguistic clean-up" and should be legislated by mid-June 2015 at the latest.

The changes have been indicated on the existing text by way of a mark-up to the current text. This is quite helpful in showing the changes.

The size of the Regulation with the proposed amendments has exploded. There are to be 83 Recitals and 91 Articles.

Scope

The agreed text proposes a much wider definition of the scope of the Regulation, to include proceedings "for the purpose of rescue, adjustment of debt, reorganisation or liquidation". This is however subject to the condition that the proceedings should be public, collective and based on a law relating to insolvency.

There is also a further condition that the proceeding has to be of one of three kinds. Either (a) the debtor must be totally or partially divested of his assets and an "insolvency practitioner" (the new phrase instead of liquidator) has to be appointed, or (b) the assets and affairs of the debtor are subject to control or supervision by a court, or (c) there is a temporary stay of individual enforcement proceedings granted by a court or by operation of law in order to allow negotiations between the debtor and his creditors, subject to such proceedings providing for suitable measures to protect the general body of creditors and are preliminary to (a) or (b) proceeding if no agreement with creditors is reached.

Moreover, where the proceedings may be commenced in situations where there is only a *likelihood* of insolvency, their purpose must be to avoid the debtor's insolvency or the cessation of his business activities.

The greatest concern and interest in the UK has been in relation to the question as to whether Schemes of Arrangement under the UK Companies Act 2006 are to be included. On the face of it, such Schemes of Arrangement, even if they are used in a situation of insolvency, appear to be excluded by the proposed requirement that the proceedings be "based on a law relating to insolvency". A recital in the agreed text clarifies that proceedings are not based on a law relating to insolvency when they are based on general company law not designed exclusively for insolvency situations. That is precisely the position of Schemes of Arrangement under the Companies Act 2006. They fall under company law and are available to completely solvent entities not subject to any financial problems.

It is also difficult to fit all corporate voluntary arrangements (CVA's) into the proposed definition. These are currently included in Annex A. However, there may not be a divestment of assets under the terms of the CVA, the assets and affairs will not normally be subject to control or supervision by a court and there is no statutory provision for a temporary stay for negotiations, although the court has a discretion under general (not insolvency) law to stay individual proceedings to protect a proposed CVA.

The existing cross-reference to Annex A is however preserved by the agreed text, which makes it clear that a proceeding listed in Annex A cannot be challenged on the basis that it is not within even the expanded definition of insolvency proceedings.

Centre of Main Interests (COMI)

The European Parliament has obtained a concession in the case of corporate insolvency to the effect that the usual presumption of the COMI being at the place of registered office only applies if the registered office has not been moved to another Member State within a period of three months prior to the request for the opening of insolvency proceedings. This appears to be a relatively harmless change and a lot better than the Parliament's previous suggestion of an arbitrary time limit on COMI shifts.

THE EUROPEAN COUNCIL AND THE EUROPEAN PARLIAMENT HAVE REACHED A 'POLITICAL AGREEMENT' IN RELATION TO THE PROPOSED AMENDMENTS TO THE REGULATION ON INSOLVENCY PROCEEDINGS

The agreed new text of Article 3 for the first time provides a presumption in the case of individuals exercising an independent business or professional activity. The presumption here will be that the COMI is the individual's principal place of business. Once again this presumption will only apply if the principal place of business has not been moved to a different Member State within a period of three months prior to the request for the opening of insolvency proceedings.

The text also contains a new presumption for individuals not exercising an independent business or professional activity based on the individual's habitual residence. This presumption will only apply if the habitual residence has not been moved to another Member State within a period of six months prior to the request for the opening of insolvency proceedings. The longer period in the case of such an individual appears to be based on the greater suspicion of "bankruptcy tourism".

All the presumptions are rebuttable and therefore it remains to be seen whether there will be much practical difference resulting from this proposed change.

The proposed text retains some important points proposed by the Council text. Thus, courts will be obliged to examine, of their own motion, whether the Centre of Main Interests is in their jurisdiction: proposed Article 4(1).

Since the scope of the Regulation is now expressly to include proceedings opened without a court order, a Member State may now entrust an insolvency practitioner to examine whether there is jurisdiction to open proceedings in that Member State.

Either the court or the insolvency practitioner coming to a conclusion in relation to jurisdiction will have to specify whether proceedings opened are main or merely territorial. This is already required for courts under English law, but has not been generally required in other EU countries.

Whilst it has been relatively easy to challenge the opening of proceedings under English law on the grounds of lack of jurisdiction, in other EU jurisdictions there is often a very tight time limit or other limitation on the ability to challenge. The proposed new Article 5 in the agreed text will expressly allow the debtor or any creditor to challenge the opening of main proceedings on the grounds of lack of international jurisdiction.

Forum Shopping

The good news is that the agreed text has accepted the difference between good and bad forum shopping. Thus the agreed new Recital (5) regards forum shopping as "seeking to obtain a more favourable legal position to the detriment of the general body of creditors …". Proposed new Recital (28) states that the Regulation "should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping".

This will make it clear that it is fraudulent or abusive forum shopping, designed to disadvantage the general body of creditors, which is disapproved of in the Regulation. Proposed Recital (30) explains that the time limits relating to the rebuttable presumptions mentioned above are designed to prevent "fraudulent or abusive forum shopping".

In England, in the case of individuals, Chief Registrar Baister has already instituted a practice whereby, if a request to open bankruptcy proceedings appears to be suspicious, he will require further evidence as to the Centre of Main Interests and/or direct that notice to be give to creditors to give them an opportunity to object. Both these points have now been adopted in the form of agreed new Recital (31).

Breadth of Jurisdiction

The agreed text proposes to legislate the case law of the Court of Justice of the European Communities under which jurisdiction to open insolvency proceedings carries with it jurisdiction to hear related actions such as avoidance actions. In addition, the agreed text proposes a useful innovation. If there is a related civil or commercial claim which is not within the scope of the insolvency proceedings themselves but could usefully be brought together with an insolvency remedy, both claims can be brought in the defendant's domicile instead of the insolvency claim having to be brought in the place where the insolvency proceedings are pending. The agreed text changes the current position, based on the ruling in the *Seagon* case [2009] 1 WLR 2168 by the Court of Justice of the European Communities to the effect that the place where insolvency proceedings are pending has exclusive jurisdiction in relation to the insolvency related claim.

Virtual Secondaries

The agreed text contains the important innovation, pioneered in England in the *Collins & Aikman* and *Nortel* cases, under which, in order to avoid the opening of secondary proceedings, the insolvency practitioner in the main proceeding can give an undertaking that assets which would belong to a secondary proceeding in a local jurisdiction would be dealt with under local law in any distribution. The agreed text makes a series of detailed provisions for this approach.

Co-operation and Co-ordination

The agreed text for the first time makes express the obligation of courts to co-operate with each other in proceedings relating to the same debtor, in addition to the obligation of insolvency practitioners to co-operate with each other and with the courts.

Electronic Register

The agreed text contains the provision of new electronic registers of insolvency proceedings, which are intended eventually to link together.

Location of Assets

The agreed text for the first time makes specific provision in relation to the deemed location of registered shares, financial instruments and cash at bank.

Dissolution

One problem which was not foreseen by the current text was the possibility that a main proceeding would be opened in a place other than the registered office, that a secondary proceeding would be opened in the place of the registered office and then that under that secondary proceeding the corporate debtor might be dissolved. This could leave the insolvency practitioner in the main proceeding running a proceeding for a non-existent debtor. In the agreed text a new Article 48(2) will keep the debtor alive in such a case.

Claims

The agreed text contains a new provision allowing claims to be lodged in any of the official languages of the EU. There is a provision that the insolvency practitioner in the other State or his court can require a translation into an official language of the State of the opening of proceedings. However, one suspects that in the case of English being used as the language in which the claim is lodged, such a request may not be necessary, at least in many cases.

Postscript

The above are just a sample of the numerous changes contained in the agreed text. There is a lot about groups, which deserve a piece on their own. Fortunately, there have been few and hopefully only innocuous concessions to the politically-driven demands of the European Parliament. The text is still largely that of the Commission and Council, guided by expert advice on the changes that were desirable and beneficial.

The language of course may change during the "linguistic clean-up". We will probably have to wait until about mid-June 2015 for the final text. There will be approximately two and a half years from now to gear up for the changes, i.e. until the amended text comes into force.

EU/EEA CASE DIGESTS

Case C-295/13: H (Liquidator of GT GmbH) v HK (ECJ)

A recent judgment of the European Court of Justice sheds light on the meaning of "*insolvency proceedings*" in the Insolvency Regulation (1346/2000). In Case C-295/13, H was the German liquidator of GT. Shortly before its insolvency, GT had made payments to a subsidiary. H sought to recover an equivalent sum from HK, GT's managing director. HK was resident in Switzerland, which is a party to the Lugano II Convention, but not the Insolvency Regulation.

Under the relevant German statute:

"The managing directors of a company are obliged to reimburse to the company payments made after the

company is declared insolvent or after it has been established that its liabilities exceed its assets. That does not apply to payments, even those made after those events, that are compatible with the care to be expected of a prudent businessman"

It was submitted by H that the Insolvency Regulation was not applicable because this provision was not "*closely connected*" to insolvency proceedings, and therefore fell outside Art.3(1) of the Insolvency Regulation. According to H, the provision simply regulates the liability of company directors, and applies even where a company is insolvent but formal insolvency proceedings have not been opened.

This submission was rejected, the court holding at para.20 that even though the relevant German cause of action could arise outside of formal insolvency proceedings, "*this fact per se does not preclude such an action being characterised as an action which derives directly from insolvency proceedings and is closely connected with them, providing that that action was actually brought in the context of insolvency proceedings*".

The court considered at para.22 that "*a provision whose application does not require insolvency proceedings to have formally been opened but does require the actual insolvency of the debtor … derogates from the common rules of civil and commercial law*". The court concluded at para.24 that

"An interpretation of Article 3(1) of Regulation No 1346/2000 to the effect that [the German law action], brought in insolvency proceedings, is not an action deriving directly from insolvency proceedings and closely connected with them, would therefore create an artificial distinction between that action and comparable actions, such as the actions to set transactions aside at issue in the cases which gave rise to the judgments in Seagon *and* F-Tex*, on the sole ground that the action … could theoretically be brought even if there were no insolvency proceedings. Such an interpretation, which has no basis in the relevant provisions of Regulation No 1346/2000, cannot be accepted."*

The court went on to hold (applying *Schmid* C-328/12) that the German court had jurisdiction, and that it did not matter that the defendant was domiciled in a Lugano II contracting state. The court did, however, note at para.25 that if the action had been brought outside the context of insolvency proceedings, it could fall outside the Insolvency Regulation and into the Judgments Regulation.

An interesting question for English insolvency practitioners is where this leaves actions under s.423 of the Insolvency Act 1986. It has been suggested that s.423 actions, even where brought by a liquidator, do not fall within the definition of "*insolvency proceedings*": see *Re Baillies Ltd* [2012] BPIR 665 [13]. However, the learned judge's reasoning in that case was based upon *Jyske Bank (Gibraltar) Ltd* v *Spjeldnaes (No 2)* [1999] 2 BCLC 101 and *TSB Bank plc* v *Katz* [1997] BPIR 147, both cases where the transferor was not in an insolvency process. It appears that following the ECJ's judgment in *H* v *HK*, a s.423 action brought by an officeholder will fall within the Insolvency Regulation and not the Judgments Regulation. This analysis is also supported by the opinion of Advocate General Ruiz-Jarabo Colomer in *Seagon* v *Deko Marty Belgium NV* [2009] 1 WLR 2168.

Re SII

This judgment of the French *Cour de cassation* (Commercial Chamber, 2 December 2014) illustrates the workings of Art.29(2) of the Insolvency Regulation. SII was already in an insolvency process in Italy.

A French creditor who was dissatisfied with the actions of the Italian officeholder sought to open secondary proceedings in France. Under French law, the creditor would have been unable to petition for winding up because its debt was disputed. However, the creditor sought to rely upon Art.27, which provides that once main proceedings have been opened, the courts of other member states shall not inquire into the debtor's solvency when determining whether to open secondary proceedings.

Even so, Art.29 provides that the opening of secondary proceedings may be requested by the liquidator in the main proceedings or "*any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested*". Under French law, creditors with disputed debts do not have standing to request the opening of insolvency proceedings.

That was therefore a bar to this particular creditor seeking the opening of secondary proceedings, even though the debtor's insolvency was not in dispute.

NEWS in brief

South Square in *The Lawyer's* Top 20

South Square was pleased to have featured in The Lawyer's Top 20 Cases of 2015, published on 19 January.

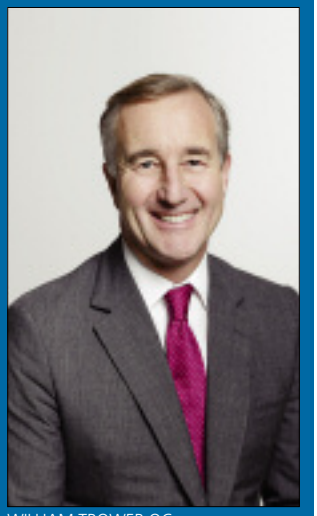
Chambers provides 12 barristers in the publication's top-ranked case, *Re Lehman Brothers International (Europe): "Waterfall II"*, filling all of the counsel spots. The following members of South Square were involved: Robin Dicker QC, William Trower QC, Antony Zacaroli QC, David Allison QC, Tom Smith QC, Daniel Bayfield, Richard Fisher, Stephen Robins, Adam Al-Attar, Henry Phillips, Alexander Riddiford and Robert Amey.

Scheduled to be heard in three stages from February-October 2015, the LBIE application raises 39 novel points of law and construction, including how statutory interest is to be calculated, how creditors with foreign currency debts should be compensated for exchange rate fluctuations, and the correct interpretation of the "cost of funding" provisions of the ISDA Master Agreement.

ROBIN DICKER QC

DANIEL BAYFIELD

RICHARD FISHER


WILLIAM TROWER QC

Vodaphoney court support

Awaiting a verdict on six defendants at Kingston Crown Court in January, Guardian journalist Lisa O'Carroll encountered problems with her Vodafone mobile.

In the course of complaining to customer services, she broadcast her phone number to the entire courtroom, which was jotted down by one of the defence lawyers.

O'Carroll promptly received a succession of texts purporting to be from Vodafone tech support, offering various compensation packages including tickets to Alton Towers, a voucher to "see otters at dusk in Norfolk" (which expired in 24 hours), and a "fun Vodafone U2 Exclusive emoticon pack containing smiley faces of Bono and The Edge".

A bemused O'Carroll tweeted details of the entire experience – addressing the real @vodafoneUK – to her 14,000 followers, before realising the entire defence team for all six men in the dock had been responsible. Her tweets were subsequently deleted.

Judge Barker CBE QC retires

A farewell tribute to Judge Brian Barker CBE QC on his retirement as Recorder of London, the most senior judge at the Old Bailey, filled the court last month. Sir Brian Leveson revealed how Barker liked to flaunt his knowledge of Roman culture, despite having failed his Latin GCE three times. On one occasion his junior clerk was tackling a crossword puzzle, when Barker jumped to the rescue. "Dog star, six letters," the clerk said. "That's easy," Barker authoritatively responded, "it's Sirius". The following morning his clerk complained of being misled. The correct answer should have been "Lassie". Barker was called to the Bar by Gray's Inn in 1969 and served as Recorder of London from February 2013, succeeding Peter Beaumont QC. He was appointed Commander of the Order of the British Empire in the 2015 New Year Honours for services to the administration of justice and to charity.

End of Insolvency Litigation Exemption

In 2012 the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) was brought in to reform UK civil litigation costs. The reforms, which had been proposed by Lord Justice Jackson, were designed to deal with legal costs that were disproportionate to the value of the claim. The reforms affected all types of civil litigation, including insolvency litigation. However, insolvency litigation was given a temporary exemption from April 2013 to April 2015. Thus, administrators, liquidators and trustees in bankruptcy could continue to bring claims and recover both the CFA uplift and ATE insurance premiums from a losing defendant. As matters presently stand, with effect from 1 April 2015, despite extensive lobbying for a permanent exemption, this practice will cease because insolvency litigation will no longer be exempt. R3 has estimated that the loss to creditors, including HMRC and small businesses, will be £160 million a year.

Fraudster "Fast Eddie" sells mansion to porn baron

The self-styled lord nicknamed "Fast Eddie", who was ordered to pay £13.9m last year having masterminded a fraud which charged advanced fees for commercial loans it never provided, has sold his Grade II-listed Georgian mansion to porn publisher David Sullivan.

'Lord' Edward Davenport parted with his London home in Portland Place, Marylebone for a knockdown price of £25m in a bid to raise funds to pay his victims. Built in 1776, the 24-bedroom property was the location for the Oscar-winning film The King's Speech.

Matthew Abraham at COMBAR in Singapore

COMBAR held its first roundtable for Honorary Overseas Members in Singapore last month.

South Square's Matthew Abraham was in attendance, joining a select contingent of COMBAR members from London seeking to develop their practices in Singapore and the surrounding regions.

Topics for discussion included bribery and common law remedies (the English perspective); problems in enforcement of awards in the context of illegality and bribery (the Singapore perspective); and issues of heavy trial management.

Matthew's report from the event will appear in the next issue of the Digest.

MATTHEW ABRAHAM

Hannah Thornley appointed to Treasury C Panel

We are delighted to announce that South Square's Hannah Thornley has been appointed to the Attorney General's Panel of Counsel to the Crown (C Panel) from 2 March 2015.

Government relies on the Panels for advice and representation and seeks candidates of the highest quality. Competition is fierce, therefore we congratulate Hannah on her success.

HANNAH THORNLEY

NEWS in brief

Time running out for Caterham

As a new F1 season draws closer, Smith & Williamson's, Finbarr O'Connell remains hopeful of finding a buyer for the beleagured Caterham F1 team, although time is running out.

"I've had people visiting the site," O'Connell says. 'We will do anything we can to make it happen, but it's really in the hands of the prospective purchasers."

As the 2014 season drew to a close, O'Connell found himself on the pitwall at the Abu Dhabi GP having orchestrated a successful crown-funding scheme that enabled the team to make it to the grid against all odds.

O'Connell found himself as the first administrator to assume the role of de facto team principal in the sport's history

CATERHAM: PURCHASER OUT THERE?

Eateries off the menu?

Time has caught up with two of London's gastromic institutions.

Simpson's-in-the-Strand may cease to exist, as owners, The Savoy, search for new operators who will have the option of consigning the Simpson's name to history, should they so wish.

Meanwhile the non-dom wasteland effect is blamed for the shock demise of Racine, one of Knightsbridge's most popular and long-standing brasseries.

This follows the 2014 closures of neighbouring eateries, the Brompton Bar & Grill, Chabrot Bistrot d'Amis and Cassis.

Cool hand South Square

At the end of January 2015, Grant Thornton kindly hosted members of South Square and Norton Rose Fulbright for a Poker Evening at the Eight Members Club. David Alexander QC, Barry Isaacs QC, Marcus Haywood and Robert Amey attended on behalf of South Square. The evening was a great success. And the hosts even let South Square members do rather well. Marcus was runner up with David winning overall. Both have donated their winnings to charity, in this case the Bar Pro Bono Unit.

Dock to go?

Lord Thomas, the Lord Chief Justice, has raised the issue of whether a dock is really necessary in criminal trials. His suggestion was that defendants could sit with their lawyers. Whilst saying that reform would not be easy, the possibility should be explored because it would cut costs. Having a dock requires old style court buildings instead of moving to cheaper buildings. It also requires security to guard the dock.

Crying Japanese politician could face fraud charges

Police in Japan are reportedly seeking fraud charges against provincial assemblyman Ryutaro Nonomura, who hit headlines around the globe last summer for sobbing at a press conference when confronted by claims he had misused public funds. Footage of the low-profile politician, shown crying uncontrollably while banging his fists against a desk, went viral last July. Nonomura's outburst followed questioning from journalists over allegations he had claimed thousands of dollars for fictional business trips. He resigned the following week.

New Eastern Caribbean Commercial Judge

Barry Leon, a litigator, arbitrator and mediator at Canadian firm Perley-Robertson, Hill & McDougall, has been appointed as a Commercial Judge of the High Court of the Eastern Caribbean Supreme Court. His three-year term will commence in March.

He succeeds English barrister Justice Edward Bannister, who has held the post since 2009. The ECSC is the superior court for the Eastern Caribbean states. They include Antigua & Barbuda, Dominica, Grenada, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Anguilla, Montserrat and the BVI.

Bogus aristocrat is jailed

A fantasist who feigned to be a German aristocrat – naming himself 'His Serene Highness Prince Oliver von Mecklenburg' – was jailed in January having stolen hundreds of thousands of pounds to fund his extravagant lifestyle.

Belgian national Oliver Trusgnach, 39, was arrested in Palma de Mallorca, Spain, after 11 years on the run. Oxford Crown Court was told how Trusgnach forged his boss's signature on cheques stolen from his employer over a period of three years while working for a prestigious Witney-based antiques dealer.

He used £115,775 of stolen cash to fuel champagne and cocaine binges and nights out in London.

The defendent had previously hit the headlines after falsely accusing a former Belgian Prime Minister of sexually abusing him as a child.

Average Debt

R3 has said that the average in-debt British adult owes £5,534 to their creditors (not including mortgage and student loans). 4% of adults apparently owe over £20,000. Taking all British adults, including those who have no debts, the average debt is apparently £3,232.

Retail Administrations Down

Retail administrations apparently dropped in 2014 by 35 per cent. In 2013 there were 183 administrations according to figures from Deloittes. In 2014 there were only 113 administrations. The total number of administrations was also down by 20 per cent to 1,302 in 2014.

Farmers more efficient than lawyers at filing tax returns

The Inland Revenue has said that farmers are apparently better at filing their tax returns on time than lawyers. Those filing returns in the agriculture, fishing and forestry industry have 109 late filers per 10,000 people. In contrast, lawyers have 219 late filers per 10,000.

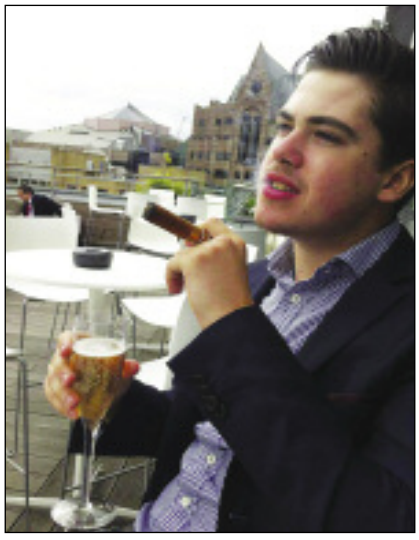
'Fox of Folkestone' gets two years

A champagne-guzzling conman dubbed the "Fox of Folkestone" was jailed in January for cheating 18 investors out of £75,000.

The 24-year-old fraudster, who modelled himself on Leonardo DiCaprio's hedonistic character in Scorsese's blockbuster The Wolf of Wall Street, boasted of being a City broker with the Midas touch in trading carbon credits, diamonds and wine. Daniel Burgoyne posted pictures to his Facebook page of flash sports cars, designer watches, piles of cash, and of him swigging champagne, smoking cigars and gambling in casinos.

In reality, he was a former butcher who lived with his mother and operated his two companies, Elite Broker Company and Elite Commodity Markets, from a business park in Folkestone.

One investor spent almost £33,000 on a diamond and was told it would increase in value by 1.9 per cent every month, but would be kept in Switzerland for tax reasons. Records showed the conman bought just one diamond at £1,481 and £2,130 worth of wine. Burgoyne admitted 18 charges of fraud. He was sentenced to two years in prison and banned from being a director of a limited company for seven years.



FOXED: DANIEL BOURGOYNE

Hedge Fund boss jailed

In January, a financier was handed one of the toughest prison sentences for white-collar crime since the financial crash, being jailed for 13 years for fraud relating to the collapse of his $600m hedge fund. Magnus Peterson, 51, forged relatives' signatures, wrote fraudulent IOUs and deceived auditors to sustain the Macro Fund, while he extracted millions from the company for personal gain. The Swedish hedge fund boss was found guilty of eight counts of fraud, forgery and false accounting linked to the 2009 collapse of Weavering Capital, which left investors with losses of $563m.

Part-time Cayman Judges

Nick Segal, a partner in the restructuring and insolvency group at Freshfields Bruckhaus &Deringer and who is based in London, has been appointed as a part-time judge to the Financial Services Division (FSD) of the Cayman Islands Grand Court with effect from 1 January 2015.

NICK SEGAL

Nigel Clifford QC, a former Appleby partner and head of litigation, was also appointed as a part-time judge of the FSD with effect from the same date.

Berezovsky insolvent

Boris Berezovsky, the deceased Russian oligarch, appears to have been insolvent when he died.

Mr Justice Morgan apparently formally declared Mr Berezovsky's estate insolvent at a hearing at the High Court having heard details of his financial position.

Mr Berezovsky was said to have owed HMRC £46 million in unpaid taxes the court was told. An insolvency administration order was made by the court in respect of Mr Berezovsky's estate.

Edward Nugee QC

It is with sadness that the Digest reports that Edward Nugee QC died at the age of 86 on 30 December 2014. He was an immense presence at the Chancery Bar. Called to the Bar by the Inner Temple in 1955, he was Head of Chambers at Wilberforce Chambers for more than 30 years. While his command of all branches of English law was encyclopaedic, he specialised in property law, including landlord and tenant cases, as well as the law of charities and other trusts. He was also an expert in the field of occupational pension schemes. Popular among colleagues and renowned for his common sense and integrity, Edward Nugee was made a Bencher of the Inner Temple in 1976 and Treasurer, the most senior position, in 1996. He also sat as a Deputy High Court Judge.

Antony Dutton

It is also with sadness that we report that Antony Dutton died suddenly at the age of 49 on 4 January 2015. Antony was at Norton Rose for many years where, among other things, he represented the trustees in the Thyssen litigation in Bermuda in the late 1990s and early 2000s. Antony moved to Dechert in 2012 and specialised in complex commercial litigation, insolvency and restructuring, international arbitration, regulatory and internal investigations. In addition he practiced as a barrister and solicitor of the High Court of New Zealand following graduation from the University of Auckland in 1998.

A year of anniversaries

2015 is not just a big anniversary for the Battle of Waterloo and the signing of Magna Carta. There are other big anniversaries too.

It is 750 years since the first English Parliament (20 January 1265). It is 600 years since the Battle of Agincourt (15 October 1415). Alice in Wonderland was first published 150 years ago (4 July 1865).

The American Civil War also ended 150 years ago (10 May 1865). It is 100 years ago since the sinking of the Lusitania (7 May 1915). It is 75 years since Neville Chamberlain resigned (10 May 1940), the Battle of Britain (summer 1940) and the first McDonalds was opened (15 May 1940). It is 70 years since Auschwitz was liberated (27 January 1945), since VE Day (8 May 1945) and the dropping of an atomic bomb by Enola Gay on Japan (6 August 1945).

The Guinness Book of Records was first published 60 years ago (27 August 1955). It is 50 years since the death of Winston Churchill (24 January 1965) and the release of the Sound of Music (29 March 1965). Fawlty Towers first aired 40 years ago (19 September 1975). It is 30 years since Eastenders first went on the TV (19 February 1985), the first dot.com was registered (15 March 1985) and the first Comic Relief took place (25 December 1985). It is 25 years since Nelson Mandela was freed (11 February 1990), the poll tax riots took place (31 March 1990) and Margaret Thatcher withdrew from the Conservative leadership election (22 November 1990).

15 years ago Ken Livingstone became the first modern Mayor of London (4 May 2000). And it is 10 years since the 7/7 bombings (7 July 2005).

CHURCHILL'S FUNERAL: ONE OF MANY SIGNIFICANT ANNIVERSARIES IN 2015

Expensive mistake

A typo at Companies House led to a well-respected and substantial Cardiff based steel fabricator, Taylor and Sons, being recorded as having gone into liquidation when it was Taylor and Son (i.e. as opposed to "Sons") which should have been wound up. Whilst the typo was apparently fixed within three days this led to the collapse of Taylor and Sons' business with suppliers and creditors suspending the company's credit.

The company subsequently went into liquidation. At a recent High Court hearing, Edis J decided that the Registrar of Companies had a common law duty of care when entering a winding-up order on the companies register to take reasonable care to ensure that the order was not registered against the wrong company.

Lawyers for Taylor & Sons told Mr Justice Edis that the business suffered "devastating" consequences as all of their credit agencies and 3,000 suppliers had revoked their services after seeing the Companies House notice claiming the firm had folded.

Taylor & Sons, which was based in Cardiff and had supplied military equipment during two world wars, had gone into administration two months after the error was made, the court also heard.

Cross Border Insolvency 4th edition

Cross-Border Insolvency, Fourth Edition has been published by Bloomsbury Professional and is the most comprehensive and up-to-date guide on all aspects of the law relating to cross-border insolvency.

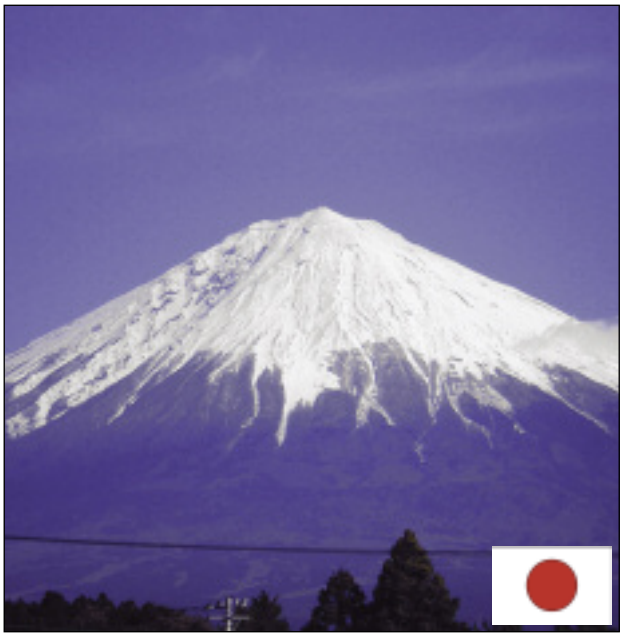
Edited by South Square's Richard Sheldon QC and including contributions from chambers' Mark Arnold QC, Jeremy Goldring QC, Tom Smith QC, John Briggs, Lloyd Tamlyn, Richard Fisher, Adam Al-Attar, the new edition is an invaluable source for lawyers and other business professionals on this complex area of insolvency law.

Full details are on this issue's inside front cover.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the February 2015 edition. With two Americans having recently completed what has long been considered the world's most difficult rock climb – a 3,000 foot vertical wall on El Capitan in Yosemite National Park – it seemed to me that a mountain theme was in order. All you have to do is name the eight mountains in the pictures and then say what the connection is between the eight countries where the mountains are located. Please send answers by email to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by Monday 5 March 2015 please. To the winner, if necessary drawn from the wig tin, will go a Magnum of Champagne and an ever so useful South Square umbrella. Good luck.

David Alexander QC



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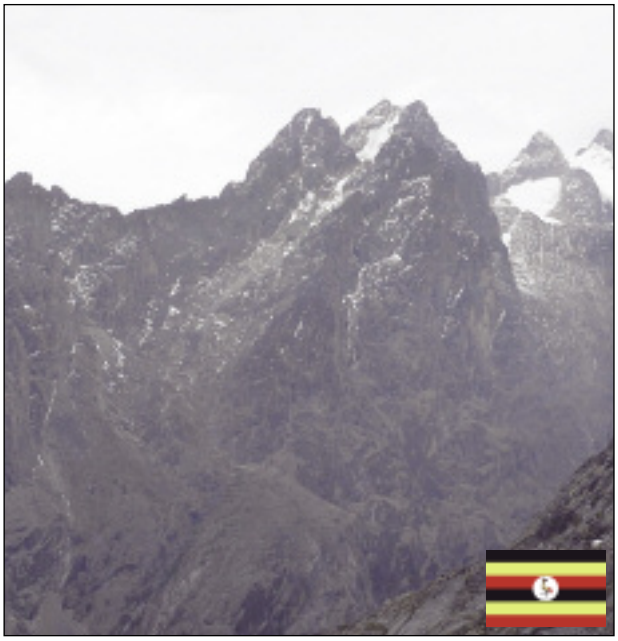

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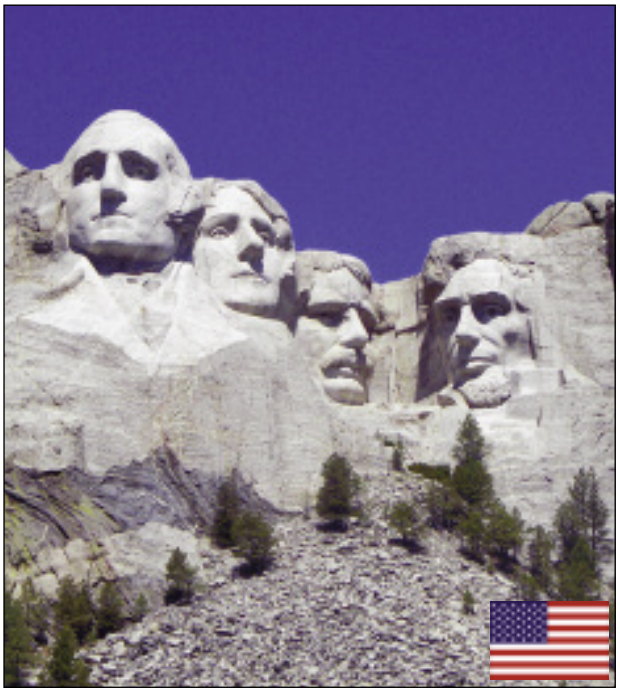

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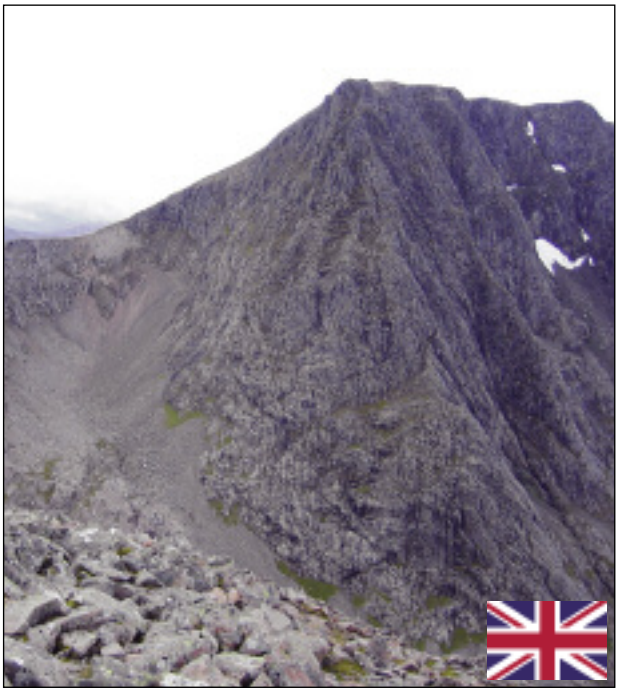

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And the connection is?

NOVEMBER CHALLENGE

The correct answers to the November 2014 South Square Challenge were (1) Chris Grayling (2) Lord Neuberger (3) Lord Thomas (4) Baroness Hale (5) Lord Dyson (6) Lord Justice Leveson (7) Lord Justice Munby and (8) Lord Justice Etherton. They are, of course, all the most senior figures in our judicial system. There were a number of correct entries. But the winner is Stuart Frith of Stephenson Harwood to whom goes our congratulations, a magnum of champagne and an unbelievably useful (particularly at this time of year) South Square umbrella.

Diary Dates

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

INSOL International Academic Group
21-22 March 2015 - The Fairmont, San Francisco

INSOL Annual Regional Conference
22-24 March 2015 - The Fairmont, San Francisco

ILA Annual Conference and Academic Forum
24-25 April 2015 - Royal College of Surgeons, London

R3 & INSOL Europe International Restructuring Conference
30 April - London

R3 25th Annual Conference
20-22 May 2015 - Grand Hyatt, Berlin

INSOL Bermuda One Day Seminar
4 June 2015 - Bermuda

INSOL Europe Annual Conference
1-4 October 2015 - Berlin

INSOL Dubai Annual Regional Conference
24-26 January 2016

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

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

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