

Tom Smith KC

KC 2014, Called to the Bar 1999

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Tom specialises in commercial litigation and arbitration, banking and finance, corporate insolvency and restructuring and company law including investment funds (hedge funds and private equity) and civil fraud and asset recovery.

Tom is an experienced advocate in both court litigation and arbitrations. He has extensive experience of major commercial trials. He has also been involved in many of the major restructuring and insolvency cases in recent years, including significant Supreme Court and Privy Council decisions in the fields of banking, insolvency and restructuring and investment funds. Tom frequently appears as an advocate both in England and in other jurisdictions including the Cayman Islands, the British Virgin Islands, Dubai, Bermuda, Trinidad and Tobago and Gibraltar.

Tom is described as being very bright, quick-witted and very approachable. He is named by Chambers and Partners as a leading silk in seven areas (banking & finance, chancery: commercial, commercial dispute resolution, company, fraud: civil, restructuring/insolvency and offshore) and as a star individual in restructuring and insolvency.

Tom is Head of Chambers at South Square. He is also a member of the Financial Markets Law Committee and a Deputy High Court Judge, Chancery Division.

Insolvency and Restructuring

Major recent cases include:

- ***Carton-Kelly v Darty Holdings SAS*** [2023] EWCA Civ 1135, preference claim in relation to the sale of the Comet Group
- ***Avanti Communications Ltd*** [2023] 2 BCLC 355, distinction between fixed and floating charges
- ***Minor Hotel Group MEA DMCC v Dymott*** [2022] BCC 710, operation of the new moratorium regime under Part A1 of the Insolvency Act
- ***Re Nero Holdings Ltd*** [2022] BPIR 189, defence of the challenge to the Caffe Nero CVA
- ***Lazari Properties 2 Ltd v New Look Retailers Ltd*** [2022] 1 BCLC 557, leading case on the use of CVAs for landlord restructurings
- ***Re Debenhams Retail Ltd*** [2020] 1 BCLC 747, adoption of employment contracts in administration and effect of the Coronavirus Job Retention Scheme
- ***Lehman Brothers Australia v Lomas*** [2021] Ch 1, test for rule in *ex parte James* and unfair harm under para 74 of Schedule B1
- ***Discovery (Northampton) Ltd v Debenhams Retail Ltd*** [2020] BCC 9, successfully acting for Debenhams on the challenge to its CVA, the first decision on the validity of retail CVAs
- ***UBS AG v Fairfield Sentry*** [2019] 2 BCLC 1, power of foreign courts to apply insolvency transaction avoidance provisions and grant of anti-suit injunctions

- **BZST v Heis** [2020] 1 BCLC 649, power of court to stay proof of debt appeal proceedings
- **Zinc Hotels v Beveridge** [2018] BCC 968, power of court to appoint interim administrators and duties of administrators
- **Davey v Money** [2018] Bus LR 1903, duties of administrators as to realization of secured property and alleged intermeddling by secured creditor
- **Re Agrokor dd** [2018] BCC 18, recognition of the Agrokor extraordinary administration under the Cross-Border Insolvency Regulations
- **Shlosberg v Avonwick Holdings** [2017] Ch 210 (CA), rights of a trustee in bankruptcy to access and use documents including privileged material belonging to the bankrupt
- **Re Lehman Brothers International (Europe)** [2016] BCC 239, [2017] BCC 759, the “Waterfall II” litigation dealing with the distribution of the Lehman Brothers estate
- **Re Nortel GmbH; Bloom v The Pensions Regulator** [2014] AC 209 (SC), administration expenses and provable debts
- **Rubin v Eurofinance** [2013] 1 AC 236 (SC), recognition of foreign judgments in insolvency proceedings
- **Vietnam Shipbuilding Industry Group v Bluecrest** [2013] EWHC 1146 (Comm), stay of proceedings in support of proposed scheme of arrangement
- **Re Oilexo Northsea** [2010] Ch 187 (CA), grant of anti-suit injunctions in support of insolvency proceedings
- **Re HIH Casualty and General Insurance** [2008] 1 WLR 852 (HL), power of an English liquidator to remit assets to foreign office-holders
- **Re Collins & Aikman Europe** [2007] 1 BCLC 182, power of administrators to make distributions and payments to creditors in accordance with foreign law

Tom has advised and appeared on many of the restructuring plans under Part 26A of the Companies Act: *Deep Ocean* [2021] BCC 483, *Virgin Active* [2022] 1 All ER (Comm) 1023, *Hurricane Energy* [2021] BCC 989, *NCP* [2021] EWHC 1653 (Ch), *ED&F Man Holdings* [2022] EWHC 433 (Ch), *Smile Telecoms* [2022] BCC 808, *Hong Kong Airlines* [2023] BCC 477, *Lifeways* [2023] Bus LR 920, *Adler* [2023] EWHC 916 (Ch), *Fitness First* [2023] EWHC 1699 (Ch), *Prezzo* [2023] EWHC 1679 (Ch), *Atento* [2023] EWHC 2754 (Ch), *Project Lietzenburger Strasse Holdco* [2023] EWHC 2849 (Ch).

Tom has advised and appeared on numerous schemes of arrangement including *Sea Containers*, *Crest Nicholson*, *TI Automotive*, *Rodenstock*, *Fitness First*, *Travelodge*, *CEVA*, *Vietnam Shipbuilding Group* [2014] 1 BCLC 400, *Hibu/Yellow Pages* [2014] EWHC 370 (Ch), [2014] EWHC 1074 (Ch), *Stemcor* [2014] 2 BCLC 373, *Global Resources Lancashire*, *Endeka Ceramics*, *DTEK Finance BV* [2015] EWHC 1164 (Ch), *Torm A/S*, *Stemcor 2* [2016] BCC 194, *Avantgardco*, [2015] EWHC 4119 (Ch), *Privatbank* [2015] EWHC 3299 (Ch), *DTEK Finance plc* [2016] EWHC 1083 (Ch), *EnQuest* [2016] EWHC 3734 (Ch), *Bibby Offshore* [2017] EWHC 3402 (Ch), *Agrokor*, [2019] EWHC 2269 (Ch), *Interserve*, *Thomas Cook Group* [2019] EWHC 2441 (Ch), *Instant Cash Loans* [2019] EWHC 2759 (Ch), *Premier Oil* [2020] CSOH 39, *Hema* [2020] EWHC 2219 (Ch), *Codere* [2020] EWHC 2441 (Ch), *Petra Diamonds* [2020] EWHC 3565 (Ch), *Hertz UK* [2020] 12 WLUK 194, *PGS ASA* [2020] EWHC 3622 (Ch), *Steinhoff International* [2021] EWHC 184 (Ch), *MAB Leasing* [2021] EWHC 379 (Ch), *Port Finance* [2022] 1 BCLC 619, *Provident Financial* [2021] EWHC 1341 (Ch), *Amigo Loans* [2021] EWHC 1401 (Ch), *DTEK Energy BV* [2022] 1 BCLC 260, *Jain Trading*, *Lowenplay/Re Safari Verwaltungs* [2022] EWHC 1156 (Ch), *China Fortune* [2022] EWHC 3496 (Ch), *SGB-Smit* [2023] EWHC 2551 (Ch), *Everyday Lending* [2023] EWHC 2097 (Ch), *Link Fund Solutions* [2023] EWHC 2641 (Ch), *Lecta Paper* [2023] EWHC 2908 (Ch).

Offshore schemes of arrangement including *Evergrande* and *China Aoyuan*.

Tom has also advised on many cases involving CVAs particularly to restructure lease liabilities and involving combined financial/operational restructurings: *JJB Sports*, *Focus DIY*, *Blacks Leisure*, *Ten Pin*, *Bowlplex*, *Fitness First*, *Travelodge*, *Café Rouge*, *Mamas and Papas*, *Byron Burgers*, *Jamie's Italian*, *Prezzo*, *Mothercare*, *House of Fraser*, *Homebase*, *Paperchase*, *Snow and Rock*, *Carpetright*, *Debenhams*, *Arcadia*, *Travelodge 2*, *The Restaurant Group*, *Poundstretcher*, *All Saints*, *Buzz Group*, *Itsu*, *Wasabi*, *Pizza Express*, *Ann Summers*, *Moss Bros*, *Revolution Bars*, *LK Bennett*, *New Look*.

Banking and Finance

Recent cases include:

- ***Galapagos Bidco Sarl v Kebekus*** [2023] EWHC 1931 (Ch), interpretation of enforcement provisions of inter-creditor agreement
- ***ABT Auto Investments Ltd v AAPICO*** [2023] 2 All ER (Comm) 42, exercise of the appropriation remedy under the Financial Collateral Arrangements Regulations
- ***Bank of New York Mellon v Essar Steel*** [2018] EWHC 3177 (Ch), standing of noteholder and trustee to claim repayment of notes
- ***Re Olympia Securities*** [2017] EWHC 2807 (Ch), meaning of “financial institution” and ability to close-out under the ISDA Master Agreement where an Event of Default has occurred
- ***VR Global Partners LP v Exotix Partners LP*** [2017] EWHC 2620 (Comm), validity of exercise of unwind option under LMA debt trade
- ***African Export-Import Bank v Shebah Exploration & Production*** [2018] 1 WLR 487, validity of anti set-off clause in LMA form loan agreement and application of Unfair Contract Terms Act
- ***GSO Credit Partners v Barclays Bank*** [2017] 1 All ER (Comm) 421, construction of LMA standard terms in relation to sale of commitment under surety bonds facility
- ***Goldman Sachs International v Novo Banco*** [2016] EWCA 1092, effect of European Banking Restructuring and Resolution Directive on claims to recover lending under English loan agreements
- ***Morgan Stanley v Tael One Partners*** [2015] UKSC 12, construction of LMA standard terms for par trade transactions
- ***US Bank Trustees Ltd v Titan Europe 2007-I (NHP) Ltd*** [2014] EWHC 1189 (Ch), construction of servicing agreement in relation to CMBS securitisation transaction
- ***Grupo Hotelero Urvasco v Carey Value Added*** [2013] EWHC 1039 (Comm), alleged defaults under loan agreement including material adverse change (MAC) clauses and other default provisions
- ***Saltri III v MD Mezzanine SICAR*** [2013] 2 BCLC 217, rights and duties of security trustee and duties owed to junior lenders
- ***Assénagon Asset Management v Anglo Irish Bank*** [2013] 1 All ER 495, abuse of power in relation to consent and exchange offer for subordinated notes
- ***Mills v HSBC Trustee (CI)*** [2012] 1 AC 804 (SC), effect of the rule in *Cherry v Boulton* applicable in relation to the rights of guarantors
- ***Carey Valued Added SL v Grupo Urvasco*** [2011] 1 BCLC 352, construction of guarantee as demand guarantee/performance bond
- ***Re European Directories, HHY Luxembourg Sarl v Barclays Bank*** [2011] 1 BCLC 336 (CA), construction of release provisions in intercreditor agreement

Commercial Litigation and Arbitration

Recent cases include:

- **Primeo Fund v Bank of Bermuda** [2023] UKPC 40, contributory negligence to claims for breach of contract; deliberate concealment for limitation purposes; breach and causation in relation to claims against fund administrator and custodian
- **NMC Healthcare v Noor Capital PSC** [2022] ADGMCFI 0003, ADGM Court, grant of anti-suit injunction to restrain proceedings in breach of Deed of Company Arrangement
- **Schofield v Smith** [2023] 1 All ER 480, ability of former administrators as third parties to rely on settlement agreement release to strike out claims against them
- **Primeo Fund v Bank of Bermuda** [2022] 1 BCLC 151, Privy Council, application of reflective loss rule to claims against former fund administrator and custodian
- **Rawbank SA v Travelex Banknotes Ltd** [2020] 5 WLUK 104, whether proposed restructuring gives rise to risk of dissipation and whether a freezing order ought to be granted
- **Primeo Fund v HSBC**, [2017(2) CILR 334], claims by Madoff feeder fund against its former custodian and administrator for breach of duty and gross negligence
- **Avonwick Holdings Ltd v Castle Investment Fund** [2015] EWHC 3832 (Ch), claims under section 423 Insolvency Act and for unlawful means conspiracy
- **Ipsos SA v Dentsu Aegis Ltd** [2015] EWHC 1171 (Comm), [2015] EWHC 1726 (Comm), fraudulent misrepresentation and breach of warranty claims arising out of share purchase agreement
- **Avonwick Holdings Ltd v Webinvest Ltd** [2014] EWHC 3661 (Ch), acting for claimant in successful claim to recover US\$200m lending in face of an alleged oral agreement; and also [2014] EWCA Civ 1436, [2014] EWHC 3434 (Ch) and [2014] EWHC 3322 (Ch) regarding the disclosure of “without prejudice” material and documents produced in an arbitration
- **Constantin Medien v Ecclestone** [2014] EWHC 387 (Ch), acting for the second defendant in successful defence of claim concerning Formula One bribery allegations
- **Smithton v Naggar** [2015] 1 WLR 189, de facto/shadow director and breach of duty claims concerning operation of contracts for difference arising out of *Dawnay Day* collapse
- **Tchenguz v Director of the SFO** [2014] 1 WLR 1476, disclosure of material obtained by SFO search warrants
- **Nomihold Securities v Mobile TeleSystems Finance** [2012] 1 Lloyd’s Rep 6 (CA), scope of court’s ability to grant post judgment freezing order relief

Arbitrations under ICC, LCIA, UNCITRAL and HKIAC rules:

- HKIAC arbitration regarding consultancy agreement with Chinese football club
- I C C arbitration regarding ownership of multi-billion dollar private equity fund
- **K v P** [2019] EWHC 589 (Comm), successful challenge to LCIA Award under section 68 of the Arbitration Act
- LCIA arbitration regarding purchase of Ukrainian agri-business
- LCIA arbitration regarding Black Sea grain terminal including application for section 66 relief
- ICC arbitration regarding arms contract with Middle Eastern state
- LCIA arbitration for defence contractor regarding MoD IT project
- LCIA arbitration for defence contractor regarding MoD armoured vehicle project
- **Nomihold Securities v Mobile TeleSystems Finance** [2012] 1 Lloyd’s Rep 442, anti-suit injunction in relation to arbitration proceedings; [2011] EWHC 2143 (Comm), test for setting

aside leave to enforce an arbitration award under section 66 of the Arbitration Act 1996

- **Kernel Holding v Taman Invest** [2012] EWHC 715 (Comm), section 66 injunction in support of arbitration proceedings to restrain business sale

Offshore

Tom has extensive experience of offshore work including in particular in relation to investment funds (hedge funds and private equity). Tom has acted in relation to many of the major recent cases including Primeo Fund (for the liquidators), XiO Fund (for the receivers) and Abraaj (for the liquidators). Other recent cases include:

- **China Shanshui Cement Group Ltd v Tianrui**, Cayman Islands Court of Appeal, shareholder has no individual right of action against company for wrongful issue of shares
- **Pearson v Primeo Fund** [2021] BCC 1015, Privy Council, ability of liquidator of a fund to rectify the shareholder register and to distribute other than in accordance with registered shareholdings, also at [2018 1 CILR 329] (Court of Appeal) and [2015(1) CILR 482], [2016(2) CILR 44] (Grand Court of Cayman Islands)
- **Re BAF Latam Credit Fund**, Grand Court of Cayman Islands, No 24 of 2021, just and equitable winding up of Latin American credit fund
- **Hunt v Transworld Payment Solutions**, Supreme Court of Bermuda, No 238 of 2019, refusal of recognition of foreign liquidation where purpose was to obtain information to assist with contemplated litigation
- **Re Altair Asia Investments**, Grand Court of Cayman Islands, March 2020, stay of proceedings for winding up of investment fund, pending determination of related proceedings in Hong Kong
- **Re Adamas Asia Strategic Opportunity Fund**, Grand Court of Cayman Islands, July 2019, making of order for winding of investment fund under supervision of court when in voluntary liquidation
- **Re China Branding Group**, Grand Court of Cayman Islands, January 2019, function of court on appeals of rejection of proofs of debt
- **DD Growth Premium 2X Fund v RMF** [2018] 1 BCLC 453, Privy Council, leading case on clawback claims for redemptions made when a fund is insolvent
- **Re Herald Fund SPC** [2018(2) CILR 162], statutory interest payable on the claims on unpaid redemption creditors
- **Re Ardon Maroon Asia Master Fund** [2018(2) CILR Note 1], appeal against rejection of proof of debt is de novo adjudication
- **Pearson v Primeo Fund** [2017] BCC 552, Privy Council, leading case on the ranking of claims by redeeming investors in liquidation of Cayman corporate open-ended investment fund
- **Re Herald Fund SPC** [2015(1) CILR 482], [2016(2) CILR 44], power of liquidator to rectify fund's register of members
- **Primeo Fund v Bank of Bermuda** [2016(2) CILR 353], whether witness statements served in previous proceedings subject to litigation privilege
- **Re Primeo Fund** [2016(2) CILR 388], whether a liquidator required to obtain a letter of request for the purposes of providing discovery in proceedings
- **Primeo Fund v Pearson**, Grand Court of the Cayman Islands, February 2016, alleged invalidity of in specie subscription for shares in investment fund on grounds of mistake
- **Re Harbinger Class PE Holdings** [2015(2) CILR Note 6], ability to wind up a closed Cayman

investment fund on loss of substratum grounds

- ***Picard v Primeo Fund*** [2014(1) CILR 379], ability of foreign officeholder to bring clawback claims under domestic and foreign law
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Financial Services

Tom has extensive experience of financial services work, particularly enforcement action on behalf of regulators in the UK and abroad

- Acting for the FSA in relation to Kaupthing Singer & Friedlander
 - Acting for the FSA in relation to its intervention in respect of Landsbanki and Heritable Bank
 - Acting for Northern Rock in relation to its intervention by the FSA and subsequent nationalisation
 - Acting for the FSA on various enforcement matters
 - Acting for various overseas regulators: Dubai Financial Services Authority (in relation to Espirito Santo Bankers Dubai), the Gibraltar Financial Services Commission, the Isle of Man Financial Services Authority (in relation to Kaupthing Isle of Man) and the Central Bank of Cyprus (in relation to Bank of Cyprus and Laiki)
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Trusts and Property

- ***Crociani v Crociani*** [2017] JCA 076, claims of breach of trust and liability of trustee to reconstitute trust fund
 - ***Nolans v Minerva Trust Company*** [2014] JRC 078A, dishonest assistance claims against trust company and corporate service provider
 - ***Freeman v Ansbacher Trustees (Jersey)*** [2010] WTLR 569, standing of objects of a power to sue trustees for breach of trust and application of principle of reflective loss to trusts and nominee companies
 - ***Alhamrani v Russa Management*** [2006] WTLR 1551, circumstances in which confidential trust documents can be disclosed to a stranger to the trust
 - ***Re JC Bamford***, acting in proceedings concerning the disputed will of JC Bamford and in relation to associated actions in Jersey, Switzerland and Bermuda
 - ***Re Rothfield Investments*** [2003] WTLR 593, convening of a claimant to trust property to an application by the beneficiary for the transfer of the property
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Awards and Recommendations

Ranked in seven categories: Banking and Finance, Restructuring/Insolvency, Chancery: Commercial, Commercial Dispute Resolution, Civil Fraud, Company and Offshore.

Comments include:

"He is an intelligent and focused technical lawyer who is brilliant at handling cases involving complex financial instruments"

Chambers & Partners

"He combines the skills of a top-notch commercial litigator with those of a highly experienced insolvency lawyer"

"Tom is tactically brilliant, super clever and very good with clients"

"Quick-witted and very bright, he has a commercial, down-to-earth style which always adds value"

"He is extremely good at distilling complex issues and identifying potential pitfalls in a case"

Ranked in seven categories: Banking and Finance, Insolvency, Commercial Litigation, Civil Fraud, Company, International Arbitration and Offshore.

Legal 500

Comments include:

"User-friendly, very clever and invaluable"

"A banking litigator of choice for us, he is a great leader and team player"

"Has a heavyweight intellect and ability to command the courtroom"

Career

2023 - Appointed Deputy High Court Judge, Chancery Division

2020 - Called to the Bar of Bermuda

2019 - Called to the Bar of Trinidad and Tobago 2017 - Called to the Bar of Gibraltar

2017 - Called to the Bar of the British Virgin Islands

2014 - Appointed King's Counsel

2014 - Registered lawyer, Dubai International Financial Centre Courts

2012 - Called to the Bar of Northern Ireland (temporary admission) 1999 - Called to the Bar of England and Wales

Memberships

LCIA

Insolvency Lawyers' Association

Financial Markets Law Committee

Publications

Editor, *EC Regulation on Insolvency Proceedings* (OUP, 2023)

Editor, *Company Voluntary Arrangements* (OUP, 2022)

Contributor to *Company Directors* (OUP, 2017)

Contributor to *Cross-Border Insolvency Fourth Edition* (Sheldon, Bloomsbury, 2015)

Education and Qualifications

1998 Clare College, Cambridge University, LLM, First Class

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